

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA

CASE NO: 11868/17

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

Date: 22 February 2024

In the matter between:

R[...] M[...]

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

DE VOS AJ

- [1] The plaintiff was in a motor vehicle accident and claims damages from the RAF. The RAF's defence was struck and the matter proceeded by default. The plaintiff accepts the issue of general damages has to be postponed *sine die*. The only issue for determination is that of loss of earning capacity.
- [2] The plaintiff claims just shy of R 6 million damages from the RAF for loss of earning capacity. The hospital records show the plaintiff suffered an "abrasion on her right lumbar region" as well as a "soft tissue injury". The plaintiff suffered no fractures, required no surgery, was treated conservatively with analgesics and discharged the

same day. All the medical experts concluded that the plaintiff suffered “no serious injuries”.

- [3] On reading the papers and after hearing argument, I offered counsel an opportunity to call any witnesses, as well as an opportunity to file a further set of written submissions. The matter was stood down to a later date. Counsel for the plaintiff filed additional submissions and provided the Court with case law. The Court then permitted an additional hearing of the matter. I reserved judgment in order to consider the two sets of written submissions and case law. In what follows I set out my reasons for the conclusion I reach on the matter.

The accident

- [4] The plaintiff was in a motor vehicle accident when she was 15 years old. On 2 February 2013 she was travelling as a passenger in a taxi when it collided with another car. The incident report¹ mentions the other passengers, including a T M[...], but not the plaintiff. In other words, the accident report does not put the plaintiff in the vehicle. Fortunately, the court has both the section 19(f) affidavit and the hospital records for assistance.
- [5] The section 19(f) affidavit states that Ms M[...] was in an accident as a passenger in a taxi, when she was 15 years old. Similarly, the hospital records indicate that Ms M[...] was taken to the hospital on 2 February 2013 after a motor vehicle accident. From this, I conclude that the plaintiff was involved in an accident on 2 February 2013 after which she was taken to hospital. As the plaintiff was a passenger, the defendant is liable for 100% of the plaintiff’s proven damages.
- [6] That deals with the merits of the case. The controversy, however, lies in the issues of harm, causation and quantum.

¹ The accident report states that driver A alleged that he was driving in the right hand line and indicated to turn right, where Driver B hit him and overturned. Driver B alleges that he was driving on the right lane overtaking two vehicle sin front of him is when he hit driver A when turning into his lane. The accident report shows that a T Mohale age 3 was a passenger, but no R Mohale age 15.

The injuries

- [7] All contemporaneous notes indicate that the plaintiff suffered an abrasion and soft tissue injury. The hospital reports indicate that she “suffered an abrasion” in her lumbar region and was treated with analgesics and released the same day. There is no indication that the plaintiff suffered a loss of consciousness.
- [8] The RAF 1 form, indicates that the plaintiff suffered an abrasion and next to “Impact of the accident” is filled in “none”. There is a notable absence of any serious injury in the hospital records, clinical notes of the experts or in the RAF 1 form.
- [9] All the expert reports indicate that no serious injuries were suffered. It was in light of these reports and after hearing counsel, the Court stood the matter down to provide counsel with an additional opportunity to call witnesses, provide supplementary written submissions and additional case law.
- [10] The Court specifically requested counsel to address which injuries the plaintiff suffered and to identify the sequelae. The written submissions identified the harm and sequelae by each specialist. I consider these submissions and test them against the reports.

Orthopaedic surgeon

- [11] The submission from the supplementary submission was in relation to the orthopaedic surgeon:

“Orthopaedic Surgeon

a) Low back pains with abrasions

b) Sequelae

- Decreased hearing in right ear.

- Low back pain- made worse by lifting heavy weights.”

[12] The submission requires closer investigation.

[13] The orthopaedic surgeon, Dr Kumbirai states categorially that the plaintiff has suffered no lasting injuries. Dr Kumbirai notes the clinical and radiological exams which were undertaken at the time the plaintiff was admitted to the hospital and notes that they indicate nothing other than an abrasion in the thoracic spine.

[14] Dr Kumbirai notes that the plaintiff is healthy with “no signs of substantive disease” and carries no scars. The conclusion on the opinion of the appropriate of damages, Dr Kumbirai notes: “none”. The only future treatment is that the plaintiff may require analgesics.

[15] As for the issue of hearing, Dr Kumbirai refers to the findings of the ENT experts which conclude that the plaintiff’s hearing is normal. These findings are set out below.

[16] The report by Dr Kumbirai does not support the submission made in relation to the injury or the sequelae.

Neurosurgeon

[17] The next submission relates to the neurosurgeon, the submission lifted from the supplementary heads are:

“Neurosurgeon

c) Head injury

- The plaintiff’s head injury has been opined by the Neurosurgeon as a minor/mild concussive brain injury.

d) Abrasions over pelvic region

e) Sequelae

- Headaches
- Decreased hearing in her right ear
- Learning difficulties at school
- Right and left shoulder pain.”

[18] The submission requires closer investigation.

[19] Dr Moja, the neurosurgeon, concludes that Ms M[...] “has no residual neurophysical deficits”. Dr Moja concludes there is no loss of amenities of life. Overall “she sustained non-serious injuries” with no sequelae.

[20] Dr Moja reports that the plaintiff returned to the hospital on 7 February 2013 complaining of decreased hearing in the left ear. The clinical notes of the hospital of 7 February 2013 notes that there was “no signs of an ear injury” and the skull x-ray was normal. Dr Moja concludes that the eardrum is intact.

[21] Dr Moja finds that based on the report by the plaintiff of a brief episode of post traumatic amnesia, that the plaintiff had sustained a “minor/mild concussive brain injury.” The conclusion, however, is that “from a neurosurgical perspective, a minor/mild concussive brain injury is not expected to have a negative impact on her future employability. Overall, she sustained non-serious injuries.” Dr Moja states that such an injury is not expected to result in permanent organic brain dysfunction”.

[22] The submission regarding the injury and sequelae in relation to the neurosurgeon, is not borne out by the report of Dr Moja.

ENT Specialists

[23] The next submission relates to the ENT, the identification of the injury and sequelae lifted from the supplementary heads are:

“ENT Specialist

f) Abrasions in the Lumber region.

g) Sequelae

- Bilateral deafness since accident.”

[24] The submission must be tested against the reports from the specialists.

[25] The ENT specialist, Dr P D Albertyn’s report states –

“the ear, nose and throat system specifically did not show any specific abnormalities. Tympanometry was normal. Furthermore: “the percentage of binaural loss of hearing reaches a value of 1.3% which can be regarded as normal hearing”.

[26] The audiologist, Ms Carina Avenant states:

“Based on these results, it is clear that the patient did not sustain any permanent injury or damage to her hearing abilities during the accident”.

[27] The submission of “bilateral deafness” is not borne out by the expert reports.

The medical experts: conclusion

[28] The injuries relied on by the plaintiff’s counsel are instances of self-reported symptoms to the experts. None of the expert reports make any finding of any injuries, save for those referred to in the hospital records. None of the injuries identified in the hospital records have, based on the expert reports, resulted in lasting injuries or any loss of amenities.

[29] In summary, all experts and medical reports confirm the abrasion and the soft tissue injury. All the medical doctors conclude, consistently, that Ms M[...] suffered “no serious injuries”. In addition, there is a consistent rejection that Ms M[...] suffered any hearing loss as a result of the accident.

[30] The Court accepts the findings of these medical experts. These findings do not support the claim for the injuries as identified by the plaintiff.

[31] The plaintiff must prove harm (the injuries) on a balance of probabilities and bears an onus in this regard. I have not been provided with a basis, despite the additional opportunities for witnesses, oral and written submissions, to find that the plaintiff has proven the element of harm.

[32] The injuries complained of, and their *sequalae*, are not borne out by the expert reports. In short, the injuries identified by the plaintiff is not upheld by the Court as they are not rooted in the medical expert reports.

Cognitive fall-out

[33] The arguments before the Court placed emphasis on the plaintiff’s cognitive fall-out as a result of the accident. The Court asked for assistance regarding the element of causation in this regard.

[34] The plaintiff relies on the report of the Clinical Psychologist, Ms Sewpershad as the basis for the claim for what the plaintiff’s counsel termed the “cognitive fall-out”.

[35] Ms Sewpershad finds that –

“Ms M[...] has features of post-traumatic stress disorder. She is anxious to travel in a speeding car. She also reported that she is bothered by the amnesia she has for the accident. She often tries to piece together what happened as highlighted”.

“She reports that she is having difficulties adjusting to being physically inactive and not being able to do her chores at home”.

- [36] Ms Sewpershad finds that Ms M[...] suffers from mild anxiety, has features of post-traumatic stress disorder and moderate depressive symptoms.
- [37] Ms Sewpershad basis this on the self-reporting by Ms M[...] and her mother. The difficulty is that Ms M[...] reported that she lost consciousness for 2 days after the accident. This is not borne out by the medical reports.
- [38] Ms M[...]’s mother reported that pre-accident Ms M[...] suffered no academic difficulties. This is contradicted by the Educational Psychologist’s report which indicates pre-accident academic challenges. The experts and the court have not been provided with Ms M[...]’s school reports prior to the accident. Only those subsequent to the accident had been provided. However, it was reported to the neurosurgeon that Ms M[...] failed two degrees, being grade 4 and 7 prior to the accident.
- [39] Ms M[...]’s mother reported that Ms M[...] was kept back by her in grade 4 and that she had not failed the grade. This is contradicted by the reports by Dr Moja and the Educational Psychologist, Ms Masipa.
- [40] It was further reported to Ms Sewpershad that Ms M[...] had failed all her grades subsequent to the accident. This is not supported by the school reports. These show that Ms M[...] failed one year after the accident, which was also the year she gave birth to her son. The school reports indicate that the plaintiff passed grade 9 subsequent to the accident.
- [41] The Court accepts that the accident must have been traumatic for Ms M[...]. The difficulty is that Ms Sewpershad’s conclusion is premised on information relayed to her, no doubt in the context of Ms M[...] and her mother reliving a traumatic event, however, these are contradicted by objective evidence which did not serve before Ms Sewpershad. The Court draws no negative inference regarding Ms Sewpershad’s conclusion, it is based on the evidence presented to her. Nor does

the Court draw a negative inference regarding the self-reporting by Ms M[...] and her mother.

[42] It does however weigh with the Court that much of what informed Ms Sewpershad's conclusion is not supported by objective facts.

[43] In *J.A obo D.M.A v Member of Executive Council for Health, Eastern Cape*² Van Zyl DJP summarised the position regarding expert evidence. The position is that –

“An expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance.”³

[44] A proper evaluation of the expert evidence in this context focuses primarily on “the process of reasoning which led to the conclusion, including the premise from which the reasoning proceeds...”⁴ The cogency of an expert opinion depends on its consistency with proven facts and on the reasoning by which the conclusion is reached.”⁵ The source for the evaluation of this evidence for its cogency and reliability are (i) the reasons that have been provided by the expert for the position adopted by him/her; (ii) whether that reasoning has a logical basis when measured against the established facts; and (iii) the probabilities raised on the facts of the matter.⁶ It means that the opinion must be logical in its own context, that is, it must accord with, and be consistent with all the established facts, and must not postulate facts which have not been proved.⁷ In general, it is important to bear in mind that it

² (C.A.& R: 8/2021) [2022] ZAECBHC 1; [2022] 2 All SA 112 (ECB); 2022 (3) SA 475 (ECB) (21 January 2022)

³ *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingbekämpfung MbH* 1976 (3) SA 352 (A) at 37H-I

⁴ *Coopers* at 371 H

⁵ *MEC for Health and Social Development, Gauteng v TM obo MM* (380/2019) [2021] ZASCA 110 (10 August 2021) at para [125]. Also *Buthelezi v Ndaba* 2013 (5) SA 437(SCA) (*Buthelezi*) at para [14]

⁶ *Oppelt v Department of Health* 2016 (1) SA 325 (CC) at para [35]

⁷ *MEC for Health and Social Development, Gauteng v TM obo MM* supra at para [126] and *BEE v Road Accident Fund* 2018 (4) SA 366 (SCA) at para [23]

is ultimately the task of the court to determine the probative value of expert evidence placed before it and to make its own finding with regards to the issues raised.⁸

[45] The expert's process of reasoning is affected by the facts on which it is premised. The facts on which it is premised are – for reasons set out above – not borne out by the objective facts. The facts presented to Ms Sewpershad regarding Ms M[...]’s scholastic history, deafness, time in hospital and loss of consciousness are not supported by the school reports or medical reports.

[46] In this regard, the Court is not persuaded that the cognitive fall-out has been proven. The Court notes that Ms Sewpershad does not state the position any higher than features of post-traumatic syndrome, mild anxiety and mild depression. In addition, the court is not convinced that the plaintiff has proven that, to the extent there has been a cognitive fall-out, these have been caused by the accident.

Costs

[47] The matter proceeded by default, there is thus no need to make a finding of costs. In addition, it weighs with the Court that the plaintiff's socio-economic circumstances would make a costs order inappropriate.

Order

[48] As a result, the following order is granted:

- a) The determination of general damages is postponed sine die.
- b) The remainder of the action is dismissed.
- c) There is no order as to costs.

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⁸ JVV v Lewis 1924 AD 438 at 447; S v Gouws 1967 (4) SA 527 (E) at 528D and Buthelezi supra at para [14]. See also Schmidt and Rademeyer op cit at page 17 – 16.

Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	M MASHAU
Instructed by:	Molefe Machaka Attorneys
Date of the hearing:	16 November 2023
Date of judgment:	22 February 2024