REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 7972/2015

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

…….. ……..

Date **ML TWALA**

Deleted: ¶

In the matter between:

C V (curatrix ad litem to N, T) **PLAINTIFF**

AND

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

TWALA J

[1] Miss V, an advocate of this Court and a curatrix ad litem in this case, instituted action on behalf of her Ward, Mr T N (*"the Plaintiff*"), for the damages it suffered as a result of a motor vehicle and pedestrian accident that occurred on the 16th of September 2012. The plaintiff sustained serious injuries as a result of the accident which will appear more fully hereunder.

[2] On the 11th of August 2017 the Court ordered the separation of the issue of liability and quantum in terms of the provisions of Rule 33 (4) of the Uniform Rules of Court. Further, the defendant was ordered to pay 90% of the plaintiff's proven damages.

[3] At the commencement of the hearing, the parties placed it on record that the other heads of damages have been agreed and settled between them and that the issue that remained for determination is that of loss of earnings or earning capacity. For the sake of completeness, the parties agreed to settle the other heads of damages as follows:

I. That for future medical and related expenses, the defendant is to issue an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 as amended in favour of the plaintiff limited to 90%.

II. That the defendant is to pay the plaintiff a sum of R1 012 500 for general damages.

[4] It is on record that the plaintiff was referred to a myriad of medical experts who compiled medical legal reports and joint minutes which are, by agreement between the parties, admitted in evidence except for the medical legal report of the plaintiff's industrial psychologist. It is noteworthy that at this stage of the proceedings, I had not had the opportunity to read through the medical legal report of the industrial psychologist nor any other medical legal and joint report of the experts.

[5] It is not in dispute that as a result of the accident, the plaintiff suffered the following injuries:

I. A severe brain injury with multiple cerebral contusions;
II. A right parietal subdural haemorrhage;
III. A right parietal skull fracture extending to the temporal region;
IV. Laceration of the scalp, and
V. Fractures of the T11 and T12 vertebrae.

[6] The sequelae of the injuries sustained by the plaintiff are summed up by the experts as having cognitive dysfunction involving comprehension, concentration, fatigue and tiredness. The plaintiff suffers from posttraumatic headaches, mechanical back pain, posttraumatic epilepsy which requires management over the remainder of his life, mood and psychotic disorder, aggression and symptoms of depression. The plaintiff has suffered loss of amenities of life and his life expectancy had been reduced by between 3 and 5 years.

[7] Ms Barbara Donaldson, an industrial psychologist, whose qualifications and expertise was admitted in evidence, testified that the plaintiff was in grade 6 when the accident occurred. However, he was promoted to grade 7 on the basis of his performance and class marks before the accident. His scholastic problems surfaced in grade 9 when he failed and was promoted to grade 10 after repeating. But grades 10 and 11 are impossible because he had not received the foundations in grades 8 and 9 due to his cognitive deficits. She testified further that the plaintiff will not pass grade 12 even if he were to be placed at a Technical Vocational and Educational Training College (TVET), as opined by the educational psychologist for the defendant, for there is no supervision of the students at these colleges making it difficult for the plaintiff who has such cognitive challenges to achieve anything.

[8] She testified that many young people who passed grade 12 without difficulty are struggling to secure employment and the plaintiff is in a worse position due to his inhibitions. The educational psychologists are agreed that, had the accident not happened, the plaintiff would have completed grade 12 and probably obtained a bachelor's degree which would have left him with an NQF7 level qualification. He would have started work at the salary band at Paterson grade C level. He would have accepted, for a start and to put his foot at the door, a salary in the Paterson grade B4 level in the lower quartile and would have progressed and reached a ceiling of Paterson grade C4 level in the upper quartile. She however, allowed one year of failure in grade 12 since the twin sister to the plaintiff failed and had to repeat two subjects in grade 12. Because of his physical injuries, the plaintiff cannot do any physical work and it would be impossible for him to obtain employment in the open labour market owing to the injuries he sustained in the accident.

[9] She testified under cross examination that she did not take into account that the plaintiff would not have immediately after completing his tertiary education secure employment due the economic conditions in the Republic. However, this can be catered for by way of contingencies to be applied.

[10] In terms of the Road Accident Fund Act, Act 56 of 1996, the defendant is liable to compensate litigants who are injured or suffered damages in motor vehicle accidents fairly and reasonably. It is trite that, to succeed, the onus is on the plaintiff to prove its damages on a balance of probabilities.

[11] It is trite law that, to claim for loss of earnings or earning capacity, a plaintiff must prove the physical disabilities and or neuro-cognitive deficits resulting in the loss of earnings or earning capacity and the actual patrimonial loss. Loss of earnings or earning capacity is assessed under the Lex Aquilia on the basis that the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. (**See Rudman v Road Accident Fund 2003 (2) SA (SCA)** and **Dippenaar v Shield Insurance Co Ltd 1979 (2) SA 904 (a)**).

[12] In **Southern Insurance Association v Bailey NO 1984 (1) (AD) 98** the court stated the following:

> *"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an*

amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a bling plunge into the unknown. The other is to try to make an assessment by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends upon the soundness of the assumptions, and these may vary from the strongly probable to speculative. It is manifest that either approach involves guesswork to a greater or lesser extent."

[13] In **Bee v Road Accident Fund (093/2017) [2018] ZSCA 52 (29 March 2018)** the Supreme Court of Appeal per Seriti JA stated the following:

"It is trite that an expert witness is required to assist the court and not to usurp the function of the court. Expert witnesses are required to lay a factual basis for their conclusions and explain their reasoning to the court. The court must satisfy itself as to the correctness of the expert's reasoning.

The facts on which the expert witness expresses an opinion must be capable of being reconciled with all other evidence in the case. For an opinion to be underpinned by proper reasoning, it must be based on correct facts. Incorrect facts militates against proper reasoning and the correct analysis of the facts is paramount for proper reasoning, failing which the court will not be able to properly assess the cogency of that opinion. An expert opinion which lacks proper reasoning is not helpful to the court.

……If an expert witness cannot convince the court of the reliability of the opinion and his report, the opinion will not be admitted. The joint report of experts is a document which encapsulates the opinions of the experts and it does not lose the characteristic of expert opinion. The joint report must therefore be treated as expert opinion. The fact that

it is signed by two or more experts does not alter its characteristic of expert opinion. The principles applicable to expert evidence or reports are also applicable to joint report. The joint report before the court is consequently part of evidential material which the court must consider in order to arrive at a just decision. The court, in such instance, will be entitled to test the reliability of the joint opinion, and if the court finds the joint opinion to be unreliable, the court will be entitled to reject the joint opinion. The court is entitled to reject the joint report or agreed opinion if the court is of the view that the joint report or opinion is based on incorrect facts, incorrect assumptions or is unconvincing."

[14] I agree with counsel for the plaintiff that I did not indicate to the parties that I was considering to reject any of the agreements reached by the parties and do not intend to do so. However, that does not preclude me from reading the documents filed of record beyond those that I am specifically referred to at the hearing. It is salutary to remind ourselves that the Court has a duty to exercise its oversight function in matters where public funds are involved. I requested the parties to address the two issues as to how long it would have taken the plaintiff to obtain his bachelor's degree and how long it would have taken him to secure employment thereafter.

[15] It is disconcerting to note that the evidence of Ms Donaldson tendered in Court somewhat differs with what she opined in her medical legal report. It is further quite disturbing to note that the defendant, who was served with Ms Donaldson's report some time ago failed to take issue with her evidence in Court. I was of the view that, since the defendant did not have its industrial psychologist report, it would make issue on certain aspect on the

report of Ms Donaldson but that was not to be as she somewhat deviated from her report.

[16] Ms Donaldson's conclusions in her report are that the plaintiff would have obtained grade 12 and thereafter would have been obliged to leave school and enter the world of work. He would have entered the labour market in a position graded at a lower quartile Paterson Job Grade A3 level and would have progressed and reached his career ceiling in a position at a Paterson Job Grade B4 upper quartile level. In the event that he had been given an opportunity to attend further studies at a tertiary institution, he could then have achieved a qualification at an NQF6 level which would have taken him 1.5 years to achieve. Then he would have started his employment at the Job Grade A3 but would have reached a career ceiling commensurately higher which is in Job Grade C3 level. Nowhere does she mention in her report that the plaintiff would have obtained a tertiary qualification at an NQF7 level as she testified in Court nor did the Ms Van den Heever, the educational psychologist on whose report she was relying on.

[17] Ms Van den Heever opined in her report that prior to the accident the plaintiff was probably a child of at least average capabilities. He probably had the potential to have completed grade 12. Depending on the availability of funds and educational environment, if offered the opportunity he probably would have been able to pursue further studies at a NQF6 level.

[18] In my view, if Ms Donaldson came across new information which was not made available to her when she compiled her report, she should have prepared a supplementary report and lay the factual basis for her change of opinion. However, she did not submit any supplementary report nor did she tender any cogent reasons for deviating from her report. In her testimony Ms

Donaldson did not take the Court into her confidence as an expert who was there to assist the Court but was more of a witness for the plaintiff. She even contended that the plaintiff would have been in a position to apply to NASFAS for funding of his tertiary education. This piece of evidence does not appear anywhere in her report.

[19] Counsel for the plaintiff contended that the report of Ms Tau, the educational psychologist, should be discarded since it was more than 2 years old. However, Ms Donaldson testified that both the educational psychologists are agreed in their joint report that the plaintiff probably would have obtained a bachelor's degree but for the accident. However, no factual basis has been laid before me as to why the educational psychologists agree in their joint report that the plaintiff would probably have obtained a bachelor's degree. Ms Van den Heever opined that the plaintiff would probably have obtained an NQF6 depending on the availability of funds and educational environment. The only expert who opined that it was possible that the plaintiff was going to reach grade 12 and pass it with either diploma or bachelor's is Ms Tau, whose report I am told to discard for it is old. There is no evidence before me to show why Ms van der Heever changed her stance from the plaintiff obtaining a qualification of a NQF6 to NQF7 (bachelor's degree). For the above reasons, the joint minute of the educational psychologists falls to be rejected.

[20] It is apparent from the report of the actuary that it is based on Ms Donaldson's report and "instruction received". It seems to me that the instructions given to the actuary were different from the opinion of Ms Donaldson. The actuarial report puts the plaintiff in a position to start employment at the lower quartile package of the Paterson B4 level whereas according to Ms Donaldson's report he would have entered the labour

market in a position graded at a Paterson Grade A3 level. The inescapable conclusion is therefore, that the actuarial calculation of the plaintiff's loss is based on wrong facts and is therefore unreliable and falls to be rejected.

[21] However, I hold the view that it is in the interests of justice that I invoke the provisions of Rule 33 (5) of the Uniform Rules of Court which provides as follows:

> *"When giving its decision upon any question in terms of this rule, the court may give such judgment as may upon such decision be appropriate and may give any direction with regard to the hearing of any other issues in the proceedings which may be necessary for the final disposal thereof."*

[22] I am satisfied that the plaintiff suffered the injuries as listed above in the accident and that he is experiencing the sequelae as stated supra. I am further satisfied that the plaintiff suffered damages which have to be computed based on the report of Ms van der Heever in that he probably would have passed his grade 12 and with the funds permitting and an opportunity prevailing, he probably would have obtained a tertiary education which would have positioned him at the NQF6 level. Both the educational psychologists although Ms Tau opines that he would possibly have obtained a bachelor's degree, have opined that he would probably have passed grade 12. However, it was argued that, according to Ms Van den Heever he probably would have progressed and obtained some diploma at tertiary, with funds permitting.

[23] It is my respectful view that this matter should be referred back to the actuary for the calculation of the loss. The actuary should take into account

that the twin sister to the plaintiff failed and had to repeal grade 12. It should also consider the reality of the economic situation of the Republic regarding youth unemployment and the time it would take the plaintiff to secure a job after completing grade 12 and or being engaged as an intern. I am mindful that this aspect of the claim may be accounted for by the contingency deduction to be applied. I am of the considered view therefore that a contingency deduction of 30% is fair and reasonable under the circumstances.

[24] In the circumstances, I make the following order:

I. The draft order marked "X" and annexed hereto as amended, is made an order of Court.

II. That the parties obtain an actuarial calculation of the plaintiff's loss of earnings on the premise that he would have obtained his grade 12 and thereafter a tertiary qualification which would have positioned him at NQF6 level and apply a 30% contingency deduction;

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JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: **9th May 2019**

Date of Judgment: **11th June 2019**

For the Plaintiff: **Adv. H Van Bergen**

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For the Respondents: **Adv. N Panther**

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