REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
LOCAL SEAT, JOHANNESBURG

CASE NO: A5072/18

DATE: 27 NOVEMBER 2019

DELETE WHICHEVER IS NOT APPLICABLE
1. Reportable: Yes / No 2. Of Interest To Other Judges: Yes / No 3. Revised
DATE: SIGNATURE:

In the matter between:

T, G obo **APPELLANT**

T, E

and

ROAD ACCIDENT FUND **RESPONDENT**

CORAM: MABESELE J, WRIGHT J AND KEIGHTLEY J

JUDGMENT

WRIGHT J

[1] Master E T was born on […] January 2003. On 26 June 2015, when he was 12 years old he was knocked over by a motor vehicle. His father, Mr G T instituted action against the RAF claiming damages on E's behalf. The Fund conceded liability on the merits to the extent of 90% in favour of E, entitling E to an undertaking by the Fund under section 17(4) of the Road Accident Fund Act. A claim for past medical expenses was abandoned prior to trial. By agreement, a claim for general damages was postponed. The trial proceeded in 2018 when E was 15 years old only on the question of loss of future earning capacity.

[2] Expert reports were delivered on behalf of both parties. These reports and joint minutes form part of the record as do various other documents like school reports. After both sides had led evidence and closed their cases and after argument the learned trial judge absolved the defendant from the instance but granted leave to appeal to this full court.

[3] A joint minute prepared by neurosurgeons for both sides notes agreement that E suffered a minor concussive brain injury with loss of consciousness but that *"long term neuropsychological, neurobehavioral and cognitive problems are less likely*

to occur." Also noted, by agreement is that there are no neurophysical deficits and that the risk of epilepsy is not increased. They note that any award would need to be protected.

[4] A joint minute prepared by clinical psychologists for both parties notes agreement that, pre-morbidly no developmental, medical or psychological problems were evident. This minute notes that, according to the educational psychologists for both sides there may have been learning difficulties pre-accident. Post-accident, the minute of the clinical psychologists contains agreement that E has ongoing physical problems in the form of headaches and left knee pain. Agreement is further noted that E presented with neuropsychological impairments including with mental tracking and complex attention and concentration problems and with verbal memory. These experts agreed that these problems are compatible with mild traumatic brain injury.

[5] A joint minute prepared by educational psychologists for both parties notes agreement that E *"might have had some pre-existing learning difficulties."* This joint minute notes that neither parent of E completed formal schooling and notes further that E has a younger sibling. This joint minute notes agreement that E, pre-accident *"would probably have been able to complete Grade 12 in the mainstream education system and would probably secure an endorsement to continue with a Higher Certificate (NQF level 5) or Diploma (NQF level 6)".* Neither educational psychologist suggests a probability either way as to whether level 5 or level 6 is more likely or less likely. The plaintiff has the onus and in these circumstances it is inappropriate simply to take a position half way. In my view, the agreement is to be read as limiting the pre-accident potential to level 5. The educational psychologists disagree as to E's post-accident functioning. Ms Mattheus, for the plaintiff notes exceptionally poor marks in Grade 9 during 2017. Ms Sepenyane, for the defendant notes that E will achieve his pre-accident potential. Ms Mattheus notes that E is likely to repeat some Grades between Grades 10 – 12.

[6] A joint minute between the industrial psychologists for both sides records agreement that E was in Grade 6 during 2015 when the accident occurred. Ms Roets, for the plaintiff noted that, had there been no accident, E would probably have completed a Grade 12 in a mainstream school and then furthered his studies by obtaining a Higher Certificate after one or two years of study. Mr van Blerk for the defendant noted that, but for the accident it is possible that E would have managed to complete matric. Mr van Blerk referred in the minute to the high unemployment rate in the country and noted that E is not likely to have found employment immediately after leaving school. Mr van Blerk did not note impairment in work prospects because of the accident. Ms Roets noted a retirement age, pre-accident of 65 years. Mr van Blerk suggested 60 – 65 years pre-accident.

[7] An analysis of E's school report for 2010, grade 1, shows satisfactory to excellent results with a conclusion of *"excellent results*" and promotion to grade 2. The next year led to satisfactory results and promotion to grade 3. By the end of 2014 E was passing but was weak in maths. His marks for life skills were very good. At the end of March 2015, one term before the accident, E's results were assessed as reasonable but that maths remained a problem. His life skills mark had dropped. The report at mid-year 2015, that is immediately before the accident is not available. His report for the term immediately after the accident, dated 2 October 2015 shows no significant change to that just before the accident. School reports for 2017 show pass marks but E appears to be weakening academically.

[8] School reports for 2018 show a pass for the year with weak marks in maths. The reports for 2019 show a weakening in marks. The 2018-19 reports were not tendered in evidence at trial and were not the subject of expert consideration. However, at the hearing of this appeal it was common cause that these reports could be read as part of the record.

[9] A Connors and Vanderbilt questionnaire, completed by E's maths teacher, Ms Tlhapane in March 2016, that is about nine months after the accident shows that Ms Tlhapane scored E as restless, overly sensitive to criticism, made excessive

demands for her time, failed to finish what he starts, had difficulty learning and the like. However, Ms Tlhapane noted in conclusion that E was normal, with no impairment any more than is expected with a typical child of the same age.

[10] E's mother, Ms M T testified. She gave convincing and essentially unchallenged and un-contradicted evidence that before the accident E had started school in Lesotho and had passed Grade 1 in Lesotho. The family then moved to South Africa and E repeated Grade 1, not because of any problem or difficulty from his side but only because of a change in syllabus between Lesotho and South Africa. Ms T testified that E never failed a year prior to the accident nor did she receive complaints from teachers about him prior to the accident. E was a normal child without problems before the accident. Ms T testified that on the day of the accident E had been playing soccer. On hearing of the accident she rushed to the scene and found E on the ground and unresponsive. It took an ambulance 10–15 minutes to arrive. A neck brace was placed on E and he was taken to Jabulani Hospital. Ms T accompanied E to hospital. On the way to hospital, E woke up and vomited blood. He did not know where he was. Ms T testified that the accident happened during the mid-year school break and that E went back to school when it re-opened. Ms T testified that E has changed since the accident. He is forgetful, has mood swings and becomes angry. He does not play with his friends like he did before the accident. She said that since the accident his teachers complain about E not finishing his work.

[11] Ms Tlhapane testified for the plaintiff. She taught E maths in Grade 6 during 2015, during which year the accident happened and in Grade 7 during 2016. Ms Tlhapane gave evidence that E deteriorated after the accident. She contacted his parents to discuss the matter. He did not complete class activities like he had previously. He had become aggressive and was a different person. MsTlhapane does not appear to have been asked to explain the apparent contradiction between her assessment of E in the Connors test and her conclusion therein.

[12] Various experts testified. No useful purpose would be achieved by trawling through their lengthy testimonies. The following synopsis suffices for present purposes. Pre-accident, E was average and normal and had a normal life expectation. His repeating grade 1 was not because of a problem on his part but solely because of a change in syllabus. Post-accident, E has problems, described above which trouble him now and which will trouble him in the future. Pre-accident, E was vulnerable to the extent that there is a high unemployment rate which would have affected negatively his chances of finding or sustaining employment. These considerations remain post-accident.

[13] The question is, has the plaintiff discharged the onus of proving on a balance of probabilities that E is more vulnerable in the labour market because of the accident and if so to what extent and more particularly how does this increased vulnerability translate into a damages award ?

[14] Ms Watts, a clinical psychologist testified for the plaintiff. She confirmed her observations as set out above in the relevant joint minute. Her opposite number was not called to testify in contradiction. There is no reason to reject her evidence.

[15] Ms Mattheus, an educational psychologist testified for the plaintiff. In her report she had concluded that, on the little information available E would probably have completed grade 12 pre-accident *"with an endorsement to continue with a Higher Certificate."* In her report, she concluded, post-accident that E's pre-existing learning difficulties, as suggested by the educational psychologists, could not account for his drop in academic performance and that any pre-existing learning difficulties were exacerbated by the traumatic brain injury sustained in the accident. She went on to conclude in her report that E will probably finish matric but take two years longer to do so. She writes in her report that E is unlikely to pursue tertiary training given his socio-economic background. This suggested

inability to proceed to tertiary education applies presumably to both pre and post-accident scenarios. However, litigants are effectively bound by pre-trial agreements by opposing experts at least in the absence of fair warning to the contrary. See **Bee v RAF**, a decision of the SCA given on 29 March 2018, at paragraphs 64-79. The agreement reached between the educational psychologists that E would, pre-accident have obtained matric and an NFQ level 5 higher certificate stands and evidence to contradict the agreement is inadmissible.

[16] Ms Sepenyane, an educational psychologist testified for the defendant. She said that, in effect, pre-accident E would have obtained a matric with an NFQ level 5, that is a higher certificate, post matric education. This concession, reasonably made read with the agreement set out above as to the likely pre-accident tertiary education scenario calls for a finding that pre-accident E would probably have passed matric, albeit one year late because of the change in syllabus and then have gone on to complete an NFQ level 5, higher certificate.

[17] On the question of the post-accident earning capacity of E, Mr Van Blerk, an industrial psychologist testified for the Fund. He reasonably conceded that E will " *have difficulties academically, behaviourally and occupationally "*

[18] Mr Jacobson, an actuary retained by the plaintiff, prepared a report dated 9 March 2018. The Fund challenged the pillars on which the report is based, rather than the contents other than the pillars. While the plaintiff contends for a higher case, which has not been proved, Mr Jacobson calculated damages, on the proven facts, at R2 828 970 using 25% contingency deductions both pre and post-accident. In my view these deductions are fair given the circumstances of the case particularly the unemployment situation and E's young age. This amount has to be reduced by 10% given the agreement on the merits, leaving an amount of R2 546 073.

[19] Appellant's counsel asked us to make a draft order an order of court. It provides for a trust to be formed to protect the damages, for costs and related issues.

19.1 The appeal is allowed with costs including those of senior counsel where so employed.

19.2 The order of the trial court is set aside and replaced with an order in terms of

the draft marked x as amended.

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G. WRIGHT
Judge of the High Court
GAUTENG LOCAL DIVISION

I agree

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M. MABESELE
Judge of the High Court
GAUTENG LOCAL DIVISION

KEIGHTLEY J:

[20] I have read the judgment of my learned brother Wright J. While I do not depart from him in finding that the appeal should succeed, in my view, there is a short and simple reason why this should be the case.

[21] In her submissions before the trial court, counsel for the Road Accident Fund accepted in argument that the plaintiff had established that he had suffered loss: the debate was around which actuarial scenario presented by the actuary, Mr Jacobson, was better aligned with the evidence. The trial court did not engage with this debate between the parties, and instead, absolved the defendant from liability

.[22] In her written heads of argument before us on appeal, counsel for the respondent repeated her concessions made at trial, and she addressed the court further in this regard. In her submissions she made clear the limits of the respondent's case: it accepted that the evidence established that the mild traumatic brain injury suffered by the minor (the appellant) had, among other things, neruopsychological consequences which would impact on his scholastic achievement; it further accepted that one of the consequences of this was that his entry into the employment market would be delayed by two years; however, it contended that with psychotherapeutic remedial

intervention, the appellant should retain his ability to achieve what, but for the accident, he could have hoped to achieve. In other words, the respondent contended that the appellant's loss was limited to the two-year period of delay before he would enter the employment market.

[23] This, then, was the narrow ambit of the appeal. The respondent did not contend that the trial judge was correct in absolving it of liability. It accepted that the evidence established a loss pertaining to the plaintiff's future earnings flowing from the cognitive impairments caused by the mild traumatic brain injury. The question was thus whether this loss should be limited to, and quantified based on, the two year delay in the appellant entering the employment market, as contended by the respondent, or whether it extended to cover a loss of income flowing from the fact that the appellant would not in fact now achieve his pre-accident academic level, as contended for by him.

[24] It is so that in the appellant's clinical psychologist, Dr Watts recommended that psychotherapy might assist him to function better in the workplace. However, the joint minutes of the two clinical psychologists were clear: they agreed that: "*given the time which has passed since E's motor vehicle accident, it is unlikely that he will undergo any further physical recovery for his neuropsychological problems, although his emotional/behavioural conditions should be subject to some amelioration with treatment*." (my emphasis)

[25] In my view, this aspect of the joint minute puts paid to the respondent's submission. The appellant's case was not that he would suffer a loss of

earnings because he would not cope in the workplace due to the emotional/behavioural problems emanating from the accident. His case was that the cognitive impairment of his brain would prevent him from reaching his pre-accident potential of achieving a matric and a NQF level 5/6, and that for this reason his earning capacity was less than it would have been but for the accident.

[26] The clinical psychologists agreed in the above-quoted portion of their joint minute that these cognitive neurological impairments would not improve, and that psychotherapy would only assist with the emotional and behavioural aspects. It follows that according to both experts, psychotherapy will not solve the problem that the appellant asserted was the source of his loss of earning capacity, and hence the basis upon which his damages should be quantified. In the circumstances, there is no evidence to support the respondent's basis for contending that his only loss will be the two-year delay in entering the employment market.

[27] This being the only basis on which the respondent ultimately opposed the quantum of damages claimed by the appellant, the court on appeal must uphold the appellant's claim.

[28] For these reasons, I would uphold the appeal, and agree with the order proposed by my learned brother Wright J.

[29] I should add, in closing, that but for the limited nature of the respondent's defence of the appellant's claim, both at trial and on appeal, I would have

subjected the plaintiff's claim to greater scrutiny. In my view, the evidence presented to establish an alleged clear picture of the appellant's poorer school performance post-accident was not entirely convincing. The school reports show variable results by the appellant both pre-and post accident. Even his latest school reports show that although his marks are poor, they are not out of sync with, and in a number of instances surpass, the class average. In my view, therefore, had the case been run differently from inception, it may well have been that the appellant would have had a more difficult time in establishing that the alleged (and in my view not clearly demonstrated) drop in his school performance was caused by his mild traumatic brain injury. This is particularly so in view of the fact that the experts agreed that he may have been afflicted by pre-accident cognitive difficulties to begin with.

[30] Furthermore, nobody seems to have paid much attention for purposes of the trial to other factors that may have affected his school conduct and performance: in particular, the onset of teenage years; the school environment; moving to high school and the additional demands, both social and academic, that occur then; and whether the choice of subjects (including continuing with maths and not maths literacy; and physical science) were appropriate to the appellant's real aptitude.

[31] These are all factors that, in my view, it is important for a trial court to be placed in a position to consider properly, particularly in relation to the causation element that lies at the heart of delictual claims like this one. This is particularly so in that Road Accident Fund cases involve the public purse, and

while it is critically important to ensure that victims are compensated, it is equally important to ensure that the courts are placed in the best position to make a proper determination as to the proven damages.

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R. KEIGHTLEY

Judge of the High Court

GAUTENG LOCAL DIVISION

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