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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 76371/2016

DOH: 22, 23 & 28 February 2022

DOD: 31 August 2022

Reportable: No.

Of interest to other judges: No

Revised.

31 August 2022

In the matter between:

L[....] M[....] obo T[....] C[....] M[....]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

This judgment has been handed down electronically and shall be circulated to the parties via email. Its date and time of hand down shall be deemed to be 31 August

2022.

JUDGMENT

Munzhelele J

Introduction

[1] The plaintiff, L[....] M[....], is claiming damages from the Road Accident Fund on behalf of the minor child T[....] C[....] M[....] who was involved in an accident on 20 October 2014. The child was a pedestrian on the date of the accident.

[2] Merits were granted in favour of the plaintiff on 18 April 2019 by the Honorable Judge Raulinga. The defendant was liable to compensate the plaintiff for the proven damages. The child's future medical expenses claim was granted in his favour, and the Honorable Judge Raulinga ordered the defendant to give the child an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act.

[3] Regarding the general damages, it is trite that the Road Accident Fund should have shown satisfaction that the injuries have been assessed correctly. In terms of regulation 3(C) of the Road Accident Fund Regulation, it is stated that:

‘the fund or an agent shall only be obliged to compensate the third party for non-pecuniary loss as provided in the Act; if a claim is supported by a serious injury assessment report submitted in terms of the Act and these regulations, the fund or agent is satisfied that the injury has been correctly assessed as severe in terms of the method provided in these regulations’.

[4] This is an administrative duty which the Road Accident Fund or agent has powers to decide. Therefore, unless the Road Accident Fund exercises such discretion and is satisfied that the child has suffered serious injury, the court cannot have jurisdiction to deal with the general damages. The general damages claimed, in this case, will not be entertained because the court has no jurisdiction to entertain such before the Road Accident fund could be satisfied. The general damages claim will be postponed *sine die*.

[5] The heads of damages I proceeded with on default judgment was the loss of earnings and earning capacity. The court must ensure that a just and fair award is guided by the expert doctor's opinions and the factual evidence presented concerning the future loss of earnings and earning capacity. The plaintiff has to prove the case on a balance of probabilities that the child's capacity to earn has been affected by looking at the child's position before and now concerning his injuries. It is trite that courts can only rely on the facts that have been verified. In the case of *Road Accident Fund v S M*¹ in paragraph 2: the SCA held that:

"[T]he Court must first consider whether the underlying facts relied on by the witness have been established on a prima facie basis. If not, then the expert's opinion is worthless because it is purely hypothetical, based on facts that cannot be demonstrated even on a prima facie basis. It can be disregarded. If the relevant facts are established on a prima facie basis, then the Court must consider whether the expert's view is one that can reasonably be held on the basis of those facts. In other words, it examines the expert's reasoning and determines whether it is logical in the light of those facts and any others that are undisputed or cannot be disputed. If it concludes that the opinion can reasonably be held on the basis of the facts and the chain of reasoning of the expert, the threshold will be satisfied." See also Maumela J decision in Van Tonder NO v Road Accident Fund (4032/2013) [2021] ZAGPPHC 382 (30 May 2021) at para 7".

¹ (1270/2018) **[2019] ZASCA 103** (22 August 2019),

[6] The experts' affidavits containing their opinion regarding the injuries suffered by the child were filed by the plaintiff. Some of their opinions were based on the facts stated by the mother of the child, which was never verified, especially the school results, which were not even filed. The plaintiff did not prove these facts. Further, the facts given by the mother were never reduced into writing by the plaintiff in an affidavit, and the court only read this information from the expert's reports. These facts become hearsay evidence because the probative value of such evidence lies with the mother, who never filed any proof or testified either orally or through affidavit. In *Santam Versekeringsmaatskappy Bpk v Byleveldt*² it was held that:

“In a case such as the present, damages are claimed on behalf of the aggrieved party, and damages mean the difference between the victim's position of ability before the wrongful Act and after that. See, e.g., *Union Government v Warneke* 1911 AD 657 on p. 665 ... the damage is the unfavourable difference caused by the wrongful Act. The impairment must be in respect of something valuable in money. It would include the reduction caused by an injury resulting from which the injured party can no longer earn any income or alone but earn a lower income.” **The plaintiff is required to provide and prove the factual basis that allows for an actuarial calculation, which the Court is then asked to use to determine the plaintiff's loss of earnings.**

Background facts of the case

[7] Background facts of the case are extracted from the particulars of the claim. On 20 October 2014, at or near Extension 9 main road Mpumalanga Province, a motor vehicle with registration letter and number [...] driven by one Sizwe Benedict Ngomane collided with a child who was a pedestrian at the time. The child suffered bodily injuries, which are a right distal femur fracture and skin traction on his right leg.

[8] The plaintiff claimed the following amount:

² 1973 2 SA 146 (A);

General Damages	R1 400 000,00
Loss of earnings and capacity	R4 256 840,00

Experts witnesses

[9] Orthopaedic Surgeon Dr. S Mphele-Tladi assessed T[....] on 19 February 2019. During the examination, T[....] was found to be a reasonably healthy ten years old male with no apparent signs of systemic diseases. T[....] was found to have a unified right femur fracture with good alignment and has healed. There are no significant adverse effects. The orthopaedic surgeon's opinion about T[....]'s injuries is that there is no loss of future earnings capacity due to the injuries sustained from the accident, and there's also no effect on career choices. The injuries sustained in this accident will not likely influence the claimant's natural survival. The sequelae of his orthopaedic injuries have not resulted in significant loss of earning capacity, employment capacity amenities, independence and enjoyment of life.

[10] Dr. Okori, a neurosurgeon, said that T[....]'s mental function shows a good understanding of instructions and responds appropriately. He gave full co-operation, good speech and no impediments. He had a stable mood and no apparent irritability. His cranial nerves normal, although there is an antalgic gait when he runs. His sensory modalities and coordination are also normal.

[11] The neurosurgeon found that there is no head injury, and post-traumatic amnesia that can be problematic to diagnose in young children, and in this accident, it is undeterminable. The spectrum of his neurocognitive and neurobehavioral disorder and its onset cannot be explained based on his skeletal injury, which is a femur fracture. He found that there are scholastic difficulties based on his behavioral disorder and cognitive disturbances.

[12] Occupational therapist Ruth Makgetla assessed the child on 21 February 2019. The child's mother informed the occupational therapist that the child (T[....]) never lost consciousness but was taken to the general hospital, had traction on his left leg, and was given pain medication. He walked on crutches but now walking free from crutches. The femur fracture has good alignment and has healed, according to the radiologist Doctors Oosthuisen and Engelbrecht and orthopaedic surgeon Dr. S. Mphole-Tladi, T[....] doesn't have 30% WPI. T[....] was observed by the occupational therapist and was found to be functioning with strength and full range movement of both upper and lower limbs and could perform all mobility and agility skills with no limitations. He could handle loads up to 12.5 kilograms at the age of 10. The occupational therapist found T[....] to be able to follow global instructions as given to him with repetitions. Psychologically T[....] had the appropriate effect during the evaluation. T[....] is found with some cognitive and perceptual problems even though there has been no history of head injury.

[13] Clinical psychologist Khethani Bila, an orthopaedic surgeon, assessed T[....] on 15 November 2016. Upon examination on T[....], found that he followed instructions appropriately and had a normal gait, but will always experience pain.

[14] Psychologist Lazarus K Kgwete assessed the child on 21 February 2019, when she was ten and three months old. He said that T[....]'s intellectual functioning falls below average, and his performance IQ score falls within the average range. The psychologist relied on the information provided by T[....]'s mother. The latter said that T[....]'s birth developmental milestones were within the norm. She also said that T[....] grew up a happy and healthy child without any significant traumas before the accident. She said this without clinical records or developmental history records. The psychologist's opinion is based on assumptions, not on proven facts. There has not been any evidence by the mother that the court could rely on.

[15] Further, the educational performance and achievements before the accidents weren't presented by the plaintiff during the interview or in Court. The mother said that T[....] passed grades R and one after the accident. He failed only grade 2 but passed

without failing grade 3. The plaintiff provided no records. If the information given by the mother amount to something to go by, the court could not be able to say that the child has been impaired after the accident because he passed his grades grade R, grade 1 and grade 3. He only failed grade 2, and now he was in grade 4.

[16] Industrial psychologist Dr K.B Molausi assessed T[....] on 20 February 2019. The industrial psychologist didn't administer a psychometric assessment on T[....]. T[....]'s educational assessment was done by the psychologist, and the psycho-educational expects without any school report. T[....]'s mother informed the industrial psychologist that T[....] suffered leg pains in cold weather. He also suffers headaches during the summer. Further, it is also said that T[....] cannot play with other kids for long because of the pain. The mother has reported that T[....] is also naughty, bullying and playful, cannot concentrate for long, and is forgetful. Before the accident, it was reported by the child's mother that the child had no complaints and would listen. Now he would go to school but stay away from classes. This evidence was never given to the court by the mother or the teacher, and as such, the court cannot attach much weight to this hearsay evidence.

[17] The industrial psychologist also referred to the orthopaedic surgeon Dr. S. Mphele-Tladi, who said that there's no loss of future earning capacities due to the injuries sustained and has no effect on his career choices or amenities of life and independence and enjoyment of life but still said that T[....] will only struggle to secure himself a job in the corporate sector so he will only be employed in the informal sector. This opinion is based on the educational psychologist who said T[....] would only pass grade 11 at 18/19.

[18] The industrial psychologist relied on the report by the educational psychologist when dealing with career potential before and after the accident, even though the educational psychologist relied on a piece of unsubstantiated information from the mother. He rejected the opinion of the orthopaedic surgeon who saw the child's injuries. He did not indicate on what basis is he rejecting the opinion of the orthopaedic surgeon. However, I cannot reject the opinion of the orthopaedic surgeon who examined the child

and, based on his examination, found that the child has no loss of earning capacity. I reject the opinion of the psychologist who based his opinion on the hearsay of the mother. To me, it is clear that failing of grade 2 by the child has nothing to do with the injuries because when the child was from an accident, he passed grade R and the following year passed grade 1 and then again passed grade 3. The only grade that he failed was grade 2. The fact that he is not intelligent cannot be attributed to injuries because there was no diagnosis by the neurosurgeon of a brain injury in this case.

[19] The industrial psychologist opined that T[....] would struggle to secure himself a sedentary type of work considering his intellectual level, which is low on average. An industrial psychologist opined that T[....] can only secure a security officer's job if he receives medical treatment and support. Progression into a higher position is not anticipated. T[....] will retire at the usual age of 65. This opinion is not based on the injuries sustained and is rejected. See in *Mathebula v RAF*³, it was stated that

“an expert is not entitled, anymore more than any other witness, to give hearsay evidence as to any fact, and all facts on which the expert witness relies must ordinarily be established during the trial, except those facts which the expert draws as a conclusion by reason of his or her expertise from other facts which have been admitted by the other party or established by admissible evidence”.

[20] Ben Moodie, the industrial psychologist, assessed T[....] on 21 February 2019 and opined that T[....] will not pass grade 12 and will struggle to get a job but will get a job where his earnings will be lower per month and will also reach his career ceiling at around 40 to 45 years earning median at Patterson level C1/C2. His retirement would be 65. T[....] will experience pain even though he is healed. T[....]'s post-accident limited educational potential is a result of the accident. There is a direct impact on his future occupational and earning potential. This has left him significantly unpaired in comparison to his pre-accident self. There is a conflict of opinion between the

³ (05967/05) [2006] ZAGPH

orthopaedic surgeon Dr. Tladi and the industrial psychologist Mr. Ben Moodie regarding whether the injuries sustained by the child T[....] of right distal femur fracture, which is healed and skin traction on his right leg could cause him loss of earnings. Therefore, when there is a contradiction in opinions, the plaintiff would have failed to prove his case.

[21] Psycho-Educational experts Nethavhani and Dr. Van Niekerk said T[....] would only pass grade 9 and pursue employment in the unskilled market. On the other hand, they opined that it is difficult to determine the level of educational achievement in young children, mainly because the child's brain is still developing. Still being this, two psycho-educational doctors said that T[....]'s pre-accident shows that he would have passed grade 12, but post-accident, it was found that he is a candidate for a retarded school as his IQ is in retarded range. This child had passed grade 1, grade 2, and grade 3, yet the educational specialist believes that the child is developmentally disabled. This is a biased opinion aimed at a high compensation through a distorted information. A person who only failed one grade and passed three cannot be said to be a developmentally disabled person. The neurosurgeon and the orthopaedic surgeon have found the child to be in good health. The child's sister has failed two grades but was never involved in an accident or labelled to be retarded. The neurosurgeon found no brain injury. This means the child's problem is not related to the injury.

[22] Actuarial report compiled by Munro forensic actuaries was on the basis that T[....] will not be able to reach the pre-accident career potential and is expected to retire two and a half years earlier. Lastly, he might suffer losses that are not directly quantifiable and should be addressed via contingencies. The calculations are based on the information provided by the attorney and the industrial psychologist report by Ben Moodie. There is no past loss of earnings because he was a child when the accident occurred. The child T[....] will leave school at 18 and earn an unskilled minimum wage of R3 500,00 (three thousand five hundred rand) at the age of 42, and an amount R59 150,00 (fifty-nine thousand one hundred and fifty rand) per year and then will retire at 62 years. The total loss of earnings will then be R4 653 500,00 (four million six

hundred and fifty-three thousand five hundred rand) and the court will apply contingencies.

[23] The actuary relied on information from the industrial psychologist, who also relied on the opinion of the psycho-educational specialist, whose opinion I have already rejected because they were biased. Their opinion was not stemming from injuries caused by accident. The orthopaedic and neurosurgeons did not find any brain damage on the child. The actuarial calculations based on the rejected findings would therefore be incorrect and bound to be rejected. See Seriti JA in *Bee v Road Accident Fund*⁴ para 22, who affirmed that the decision taken in the case of *Road Accident Appeal Tribunal & others v Gouws & another*⁵, this court said:

‘The view of any expert’ does not bind courts’.

[24] In her arguments, the counsel, advocate L Haskins indicated that the child suffered a concussive brain injury and right femur fracture. She requested the court to award general damages to the amount of R1 400 000,00 (one million four hundred and thousand rand) and future loss of earnings to the amount of R 4 256 840,00 (four million two- hundred and fifty-six thousand eight hundred and forty rand). Unfortunately, the counsel is relying on incorrect information about concussive brain damage. The neurosurgeon never performed an MRI scan on the child to diagnose the concussive brain injury. The court should only be able to rely on the information which has been proved to be correct, not on speculations.

[25] In order to determine a plaintiff's claim for future loss of income or earning capacity, it is necessary to compare what the claimant would have earned before the accident with what he would likely have earned after the accident. The court has a wide discretion that should be exercised judicially to arrive at fair and reasonable compensation. Of importance is that the expert evidence plays a vital role in the qualification of damages for loss of earning and earning capacity.

⁴ 2018 (4) SA 366 (SCA)

⁵ [2017] ZASCA 188; [2018] 1 ALL SA 701 (SCA) para 33

[26] If there is a dispute between medical experts, the medico-legal report, which is the most plausible, will be accepted and followed by the court. The claimant must adduce sufficient evidence to enable the court to assess the loss. See *Anthony v Cape town Municipality*⁶, *Kwele v Rondalia Assurance*⁷ and *Rudman v RAF*⁸. The injuries should affect his earning capacity. In this case, I have taken the medico-legal report of the orthopaedic surgeon because he was not biased in the circumstances of this child. His report says that there is no loss of earnings and earning capacity. Therefore, the claim for loss of earnings and earning capacity cannot succeed.

Order

[27] In the circumstances, the following order is made:

1. The general damages claim is postponed sine die.
2. The claim for loss of earnings and earning capacity is dismissed.

M. Munzhelele
Judge of the High Court Pretoria

Virtually Heard:	22, 23, & 28 February 2022
Electronically Delivered:	31 August 2022

APPEARANCES:

⁶ 1967(4) SA 445(A),
⁷ 1976(4) SA 149 (W)
⁸ 2003(2) SA 234 SCA

For the plaintiff:

Adv. L Haskins

Instructed by:

Godi Attorneys

For the defendant:

No appearance