IN THE HIGH OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: **A187/2021**

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES

15 NOVEMBER 2022

In the matter between:

ADVOCATES SAYED N.O. (CURATOR AD LITEM OF

B T[....]) Appellant

and

ROAD ACCIDENT FUND Respondent

JUDGMENT

NEUKIRCHER J:

1] This appeal isdirected solely against the award for loss of earnings made by the court *a quo* on 11 March 2021 in the amount of R 1 423 578-00.

2] Given that an award for damages involves the exercise of a discretion, an appeal court will be slow to interfere with the award unless the court a *quo* committed an irregularity or misdirected itself.[1] In my view, this is what occurred in this matter and therefore this court is entitled to interfere with the award. What follows are the reasons that I hold this view.

BACKGROUND

3] The plaintiff[2] was injured when a motor vehicle collided with him on 16 December 2017 whilst he was crossing a road in Hendrina, Mpumalanga. He was 9 years old at the time and therefore *doli incapax.*

4] He suffered orthopaedic[3] injuries and a soft tissue injury to the hand. but the most severe of the injuries were the head injuries which included a skull fracture, a haematoma in the temporal parietal region, a diffuse axonal injury and bleeding from the ear.

5] Action was instituted against the RAF on 8 November 2018 and an amount of R4 300 000-00 claimed in compensation for the plaintiff's injuries[4].

6] Whilst it appears that the RAF participated in the action initially[5], by

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[1] Road Accident Fund v Guedes 2006 (5) SA 583 (SCA) at p586-587
[2] A curatrix ad !item, was appointed to represent the minor child in the proceedings against the defendant (the RAF) - for purposes of this judgmeot, any reference to "tbe plaintiff" is a reference to the minor child
[3] A pelvic fracture and deformity of the skull
[4] According to the Amended Particulars of Claim dated 15 January 202l
[5] It filed a Special Plea and a Plea and participated in pre-trial conferences on 8 February 2019 and 10 November 2020.

the time the matter was set down for hearing on 10 March 2021, the RAF had failed to participate any further.

7] It bears mentioning that, at the pre-trial conference held on I 0 November 2020, the RAF admitted liability to pay the plaintiff's proven or agreed damages.

8] Be this as it may, when the matter was called on 10 March 2021, it proceeded in default of the RAF's appearance [6]. Plaintiff's counsel engaged with the Court and made submissions on:

8.1 the merits:

8.2 the issue of general damages and whether the court could award in the absence of a concession by the RAF that the injuries were "serious":

8.3 the remainder of the quantum and specifically the loss of earnings.

9] It is the latter that enjoys the attention of this appeal. The following important exchanges appear from the record: after pointing out that various experts[7] had been engaged and provided expert opinions on the plaintiff's injuries, their sequelae, their effect on his future earning capacity and that the actuary had calculated the loss of earning capacity in the amount of R2 256 585-00, the court *a* quo then states:

"COURT: Yes, Counsel, I cannot see that I will be in a position to differ from this. I am *going to* go *through the* reports *though, but I* mean, *if you* based *there* on *there* is *not going to be* a *differentiation."*

[6] Despite service of a Notice of Set Down on 8 October 2020 and several emails from plaintilT's attorney to the RAF.
[7] All of whom had provided confirmatory affidavits in terms of Rule 38

10] It is clear from the exchange that followed this that there were only 2 issues that were focused on: the first was whether or not the court could make an award for general damages; the second was pertaining to the establishment of a Trust to protect the funds. Counsel and the *curotrix ad litem* were given the opportunity to address the Court on both.

11] The matter then stood down until 11 March 2021 and on this date an order was granted in which, *inter alia:*

> 11.1 merits were *"settled 100% in* favour *of plaintiff";*
>
> 11.2 general damages were separated out and postponed *sine die;*
>
> 11.3 plaintiff was awarded R1 423 578-00 in respect of his claim for loss of earnings.

12] In the reasons[8] for the award of loss of earnings, the court a quo states:

> *"[4] I considered the expert affidavits and affidavits filed.*
>
> *[5] The calculations done by the actuary* were *informed by the Industrial Psychologist's ('IP') report. The IP opined that the plaintiff would have been able* to *"should have been able* to at *least* progress *earning comparative to Semi-Skilled Worker (UQ Level) level, by age of approximately 40 years old, reaching career ceiling."* As *counsel pointed out, it is indeed true that another expert did not challenge the IP's opinion. However, an expert witness provides an expert opinion that must be considered by* a *court when the quantum* for a *claim is determined. The expert witness's opinion must be rooted in* a *factual context. In casu, no*

[8] 8 Dated 2 June 2021

factual basis supports the submission that the plaintiff would have progressed to a Semi-Skilled Worker (UQ). The IP's opinion must be considered in the context of *the current unemployment statistics, aggravated by the Covid-19 pandemic, and the plaintiff's family history that indicates that his mother, uncle, and two aunts* were *unemployed."*

13] Thus the court rejected the basis upon which the Industrial Psychologist (IP) concluded that plaintiff would have progressed to a semi-skilled worker and opined on factors including the context of the current unemployment statistics, the effect that Covid would have on these and the plaintiff's family history - this without giving plaintiff or the *curotrix* the opportunity to address the court, or lead evidence on these issues[9].

The expert reports

14] The opinion of the IP cannot be seen in isolation - it is after all based on the expert reports filed by *inter alia* the orthopaedic surgeon, the neurosurgeon, the psychiatrist, the educational psychologist, the counselling psychologist and the occupational therapist.

The Orthopaedic surgeon

15] Dr Engelbrecht opines that the orthopaedic injuries would not have a major impact on the plaintiff's work capacity or choice of career, but head injury was the major injury which presents with *"significant"* sequelae and that it is expected that the plaintiff suffered a loss of work capacity as a result.

[9] Pepkor Holdings Ltd v ANH Holdings (Pty) Ltd 2021 (5) SA 115 (SCA) at para 14:·•...It is axiomatic that a hearing should be fair. This lies at the heart of our system, is common sense and is enshrined in the Constitution. As the litigants, the appellants should have been given an opportunity to raise with the court any concerns they might have had in relation to the draft order. Secondly. as pan of the decision making process·. their legal representatives were entitled to

The Neurologist

16] Dr Kritzinger opines that, from the school reports and pre-morbid history, it is clear that there was a *"mental problem present here with intellectual problems"* and that the plaintiff's head injury would simply exacerbate those problems. He states that the already impaired cognitive and memory issues would further deteriorate, that there was a higher risk for the development of Parkinson's disease and an increased risk of epilepsy.

17] He states that the plaintiff's mental condition, his brain damage[10] and his cognitive dysfunction would not improve and that the brain injury caused 100% damage to the brain. He thus describes the plaintiff's prospects of employment as the following:

> *"14a. This will be very bad and Bafana will never be able to* do *work in an open work environment. He will always be in a protected environment and will probably never be able to look after himself.*
>
> *b. Bafana*'s *future ability to work is thus severely impaired* and was *further impaired by the fact that he was in an accident with a severe closed head injury."*

The neurosurgeon

18] Dr Moja refers to the plaintiff's poor academic history pre-morbid[11]. In his opinion the plaintiff suffered a severe brain injury which would lead to long-term organic brain dysfunction. Plaintiff also presents with residual neurocognitive and neurobehavioral problems which, as he has

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make written or oral submissions regarding the draft order. This may have obviated the need/or an appeal. The issuance of the order in the circumstances is regrettable.

[10] As he had already achieved maximum medical improvement

[11] He failed and Repeated Grade 1 and was repeating Grade 2 when the incident occured

reached maximum level of improvement, should be regarded as permanent.

The Psychiatrist

19] According to Dr Naidoo, the plaintiff was a vulnerable individual prior to the accident and there is strong genetic loading for mental illness on his maternal side[12]. In his opinion the plaintiff is likely presenting with neurocognitive disorder due to traumatic brain injury with behavioural disturbance.

The Clinical Psychologist

20] Mr Sisson's opinion is that the plaintiff's intellectual functioning has been affected by the accident although some form of intellectual inability may been present pre-morbid. He thus recommends that the plaintiff may require placement in a school for children with learning disabilities. Mention is also made of the fact that his mother and grandmother both receive disability grants for mental and psychiatric disabilities.

The Educational Psychologist

21] Prof Seabi took into account the results of the tests[13] he conducted, the plaintiff's socio-economic background and his pre-morbid educational functioning and commented as follows:

> "9.7. *1 ...Bafana shows notable deficiencies in almost all areas of his functioning, namely, communication, daily living skills, socialisation, and maladaptive behaviour, with the exception of motor skills... "*

[12] As his mother was born with mental retardation and his maternal grandmother and uncle have some form of mental illness

[13] In respect of the plaintiffs cognitive functioning, visual and auditory discrimination and memory skills, spelling, reading, story writing, mathematics, alphabet amongst many administered

22] Insofar as the plaintiff's pre-morbid intellectual capacity is concerned he states that the plaintiff's ability was in the borderline range

> *"11.6.7 ...which is consistent with functioning at a level where he could have progressed through the primary school system and obtained Grade 7, and placed in vocational training, where he would have learned a specific skill. And placed in sheltered employment; considering that it is well documented in recent studies that children are achieving better qualifications than their parents. It would appear that he probably hod the ability to perform considerably better, were it not for the accident".* (sic)

23] On the issue of the plaintiff's post-morbid functioning, he states:

> *"12.7 In light of the above information, the impression is that Bafana's psycho-educational profile is considered to be the result of pre-existing and the injuries he sustained in the accident currently under discussion as well as post-accident socio-psychological difficulties associated with depressive and posttraumatic stress symptomatology, exacerbated by physical limitations and pain.*
>
> *12.8 Based on all available information (including cognitive difficulties, i.e. slow mental processing of information, Extremely Low Verbal cognitive functioning, concentration lapses, and difficulties with retrieval of information), which serve as added barriers; recurrent headaches; emotional trauma: reduced hearing; and travel related anxiety incurred due to the accident and the sequelae of his injuries), given the accident in question, his highest level of education would in all likelihood remain Grade 3.(sic)*

<u>The Counselling Psychologist</u>

24) Ms Jonker opines that pre-morbid, the plaintiff would probably have attended special schooling but would likely have been able to secure unskilled employment like his father. She also noted that post accident, his neuropsychological profile denotes that his prospects in the open labour market have been limited to sheltered and sympathetic employment.

The Occupational Therapist

25] Ms September's opinion is that the plaintiff could have completed and secured employment in the open labour market at an unskilled level working under supervision but that, post-morbid, he is unsuited for jobs in the open labour market and at best, is a candidate for protected workshops.

The Industrial Psychologist

26] Mr Moritz took into account all of the above and opined that, pre-morbid, the plaintiff would most probably have completed his schooling up to Grade 7 but that this would have been at approximately age 16 as he would have failed several times before deciding to leave school permanently. He would then most likely have sought and secured various temporary employments working for a maximum of 6 months per year for approximately two years. This would have resulted in plaintiff earning on par with an unskilled worker (MED level) within the non- corporate sector. He would have most likely secured a permanent position earning comparative to an unskilled worker (MED level) for approximately five years and as his experience and skill set increased, he would have most likely progressed to earning comparative to a semi- skilled worker (UQ level) by age 40 when he would reach his career ceiling. He would have received inflationary increases until retirement at age 65 [14].

[14] Dependent on company policy and his health

27] Post morbid, the postulation is that, given the plaintiff's injuries, he will in all likelihood leave school early, seek work in the unskilled labour market and will probably require supervision (i.e. sympathetic employment) should he be able to find employment. However, given his particular challenges, it is unlikely that he will be able to fulfil his job demands and he will find it difficult to sustain his employment. He is however an unequal competitor in this sector of the labour market and it is unlikely that he will secure gainful employment in future as:

> *"12.3.7 In addition, South Africa's growing unemployment rate is 'concerning as it stands at* 30,*1%, and when the plaintiff experience(s) difficulty in securing and sustaining employment, he will become part of the* expanded *unemployment rate (which includes discouraged work- seekers), currently sitting at* 39,7%."

27] Whilst the court rejected the IP's opinion that the plaintiff would have progressed to a semi-skilled worker, in my view there was no basis to do so as the IP's opinion is based on the expert opinion of Prof Seabi as set out in paragraph 22 supra. The fact that the plaintiff's mother, uncle and two aunts were unemployed was not an insurmountable factor to the plaintiff achieving a pre-morbid UQ status for the very reason that *"it* is *well* documented *in recent studies that children are achieving better qualifications than their parents. It would appear that he probably had the ability to perform considerably better, were it not* for *the accident".* There is no dissenting view from any other expert and, in failing to call either the Educational Psychologist or the IP to give *viva* voce evidence, the court was left with their opinions[15] and had no basis upon which to deviate from it. This is especially so given the fact that the court is not an expert in this area, is reliant upon the opinion provided and, where it doubts the basis of the opinion, should ensure that evidence is presented to satisfy it - this the court here did not do.

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[15] Which were confirmed by the Rule 38 affidavits

28] In my view, the opinion of the IP on this issue was cogent.

28] As to the issue of the unemployment statistic *"aggravated by the Covid- 19",* it can clearly be seen that the IP certainly took the unemployment statistics into account. As to the weight that the Covid-19 pandemic should be given, I am of the view that this was not a relevant consideration as the plaintiff was approximately 12 years old at the time of evaluation in 2020 and in Grade 4. As it was postulated that he would (pre-morbid) leave school at age 16 in Grade 7, the pandemic would not bring any weight to bear on the probabilities of his gainful employment. Thusthis was not a relevant factor for the court to take into account.

29] It is for these reasons that I am of the view that the court a quo misdirected itself and that the appeal must succeed.

30] I am also of the view that there is no necessity to remit the matter. All the relevant evidence is before the court and we are in a position to adjudicate the issue of loss of earnings on the evidence before us.

CONTINGENCIES

29] In my view, the proper way to address any concerns that the court a quo may have had would have been by way of applying contingencies to the calculation done by the actuary.

30] In **Phahlane v Road Accident Fund**[16] it was explained thus:

> *"[17] Contingencies are the hazards of life that normally beset the lives and circumstances of ordinary people (AA Mutual Ins* Co *v Van Jaarsveld reported in Corbett* & *Buchanon, The Quantum of* Damages, *Vol II* 360 *at 367)* and *should therefore, by its very nature,* be a *process of subjective impression or estimation rather*

[16] 48112/2014) [2017] ZAGPPHC 759 (7 November 2017)

than objective calculation (Shield Ins Co *Ltd* v *Booysen 1979 (3) SA* 953 *(A} at 965G-H). Contingencies for which allowance should be* made, *would usually include the following:*

(a) the possibility of illness which would have occurred in any event;

(b) inflation or deflation of the value of money in future: and

(c) other risks of life such as *accidents or even death, which would have* become a *reality, sooner or later, in any event (Corbett, The Quantum* of Damages, *Vol I, p 51).*

[18] In the Quantum Yearbook (by Robert Koch, 2017 Edition, p 126) the learned author points out that there are no fixed rules as *regards general contingencies. However, he suggests the following guidelines:*

"Sliding scale: Yz% per year to retirement age, *i.e. 25% for* a *child,* 20% *for* a *youth and 10% in the middle* age ...

Normal contingencies: The RAF usually agrees to deductions of 5% for post loss and 15% for future loss, the so-called normal contingencies."

31] The actuarial calculation postulates a future loss of earnings in the amount of R2 787 399-00. Mr Barn hos advocated that a contingency deduction of 20% is conservative but appropriate in this matter having regard to the postulation of the IP, which results in an amount of R2 229 919-00 for loss of earnings, and I agree.

ORDER

32] Thus the order is the following:

1.The appeal against paragraph 2 of the order granted on 11 March 2021 is upheld with costs.

2. Paragraph 2 of the order of 11 March 2021 is set aside and replaced with the following:

> "2. *The Defendant shall pay the Plaintiff an amount of R2 229 919-00 (two million two hundred and twenty- nine thousand nine hundred and nineteen rand) in full and final settlement of the Plaintiff's claim for loss of earnings, payable into the Plaintiff's attorneys of record trust account with the following details:*
>
> *Account Holder: Ehlers Attorneys*
>
> *Bank name: FNB*
>
> *Branch code: 261550*
>
> *Account number: [....]"*

B NEUKIRCHER
JUDGE OF THE HIGH COURT

I agree

S POTTERILL
JUDGE OF THE HIGH COURT

I agree

N TSHOMBE

ACTING JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 15 November 2022.

Appearances:

For the Appellant:	Adv Barn
Instructed by:	Ehlers Attorneys
For the Respondent:	No appearance
Date of hearing :	9 November 2022