

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO.: 2014/38339

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

Date:

H. W. SIBUYI AJ

In the matter between:

N L obo M

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

SIBUYI AJ

INTRODUCTION

- [1] The minor child M N (“M”), was born on 30 August 2006. M was involved in a motor vehicle accident on 22 March 2012 at about 07h45 at Immink Road, Zone 5 Diepkloof, Soweto, Gauteng Province. Whilst a pedestrian on his way to school and crossing a street he was knocked down by a minibus taxi. He was allegedly in grade R at the time. He is reported to have had a seizure after the accident and had a depressed level of consciousness. M was immediately taken to Chris Hani Baragwanath Hospital, wherein he was admitted for day and discharged the following day. According to the hospital records he was admitted at 08h45 with pain and right side head laceration. He was diagnosed to have had a focal seizure involving the mouth and the left hand. He had an abrasion and swelling over the right temporal area. CT Scan Brain was reported normal. He was discharged the same day on an anticonvulsant (Epilim).
- [2] On 26 August 2013, about 1 year 5 months after the accident M was reported to have had a generalised atonic seizure in the early hours of the morning. He was reported to be in Grade 1 and not coping well, unable to write and reported to lose concentration easily. It was reported that his mother was called to M’s school with a complaint of abnormal behaviour in class and screaming inappropriately. He was admitted for overnight observation. He was booked for EEG and referred to Occupation Therapy Department for learning challenges. On the 24 October 2013 he was admitted for a EEG recording. The EEG was reported normal. He was later admitted for seizure, fever

and recurrent headaches. He is reported to have had a 3 day history of severe headache. He was also found to have sinusitis. He was now and then treated and put on medication for the above symptoms.

[3] On or about 2 July 2014 Dr. Mika Mokabane diagnosed M to have suffered a mild traumatic brain injury (a grade 3 concussion), brief loss of consciousness, with Glasgow coma scale of 15/15 in hospital and currently suffering from late onset post traumatic epilepsy which needs chronic treatment, post concussion headaches, and memory loss problems which needed assessment and treatment. It is common cause between the parties that M had suffered a mild traumatic brain injury and is under medication for chronic epilepsy as a result of the accident.

[4] On 27 February 2018 the matter came before me and was allocated to run for three days only. Counsel for both parties informed me that on 8 September 2015 the matter came before Basson J for the first time, merits, undertaking and general damages were settled. In the terms of the order granted by Basson J dated 8 September 2015, general damages were settled at R650 000-00 (Six hundred and fifty thousand rands) and the defendant undertook to provide the plaintiff with an undertaking in terms of section 17(4) of the Road Accident Fund Act 56 of 1996, to pay 100% of the cost of any future accommodation of M in a hospital or nursing home, or treatment or rendering of service to him or supplying of goods to him arising out of injuries sustained by M in the motor vehicle accident which occurred on 22 March 2012 after such costs have been incurred and upon proof thereof. Hence, the matter was before me to decide only

future loss of earnings. The parties had, at roll call, requested allocation for two to three days to run on factual dispute between Educational Psychologist and Industrial Psychologist only. I was informed that the balance of the expert evidence *vis* Orthopaedic Surgeon, Neurosurgeon, Neurologist, Clinical Psychologist bore common cause facts which were contained in the joint minutes and were not in dispute between the parties. I must point out at this stage that this approach by the parties was ill advised and materially complicated the matter. In my view the matter was not ripe for a hearing. I deal with this issue herein below.

COMMON CAUSE FACTS

The Neurosurgeons

[5] For the sake of brevity and accuracy, I further summarize the the joint minutes of Neurosurgeons who agreed as follows:

5.1 Pre-accident, M enjoyed a good general physical health. During the accident he suffered a mild traumatic brain injury. As a result of the accident he is suffering from post-traumatic epilepsy which will needs chronic medical treatment. Both Neurosurgeons agreed with the views of Dr. Mika Mokabane, the plaintiff's Neurologist. The Defendant did not instruct a Neurologist.

The Clinical Psychologists

[6] The Clinical Psychologists, Dr L Maseko and Dr L Roper, although they depart from slight different angles, agreed that the head injury sustained is considered to be of sufficient severity to bring about mild ongoing neuropsychological sequelae. Both noted similar neuro-cognitive sequelae and psychological symptoms on M, which symptoms they observed and measured during his evaluation and assessment in their individual reports following the accident in question. Both experts agreed that the accident related factors have potential to impact negatively on his academic functioning and scholastic progression as already evidenced in his current school performance. However, Dr L Roper (For Defendant) noted that the possible presence of pre-existing cognitive difficulties cannot be excluded considering the minor's reported socio-demographic context. If present, any such difficulties would probably have been exacerbated by the head injury and post-traumatic epilepsy.

[7] They further agreed that following accident, M also suffered significant symptoms of post-traumatic stress disorder. Both experts noted that as a result of the neuropsychological sequelae, M's interpersonal functioning, his enjoyment and quality of life has decreased since the accident. It was agreed that he has not yet had the benefit of treatment for his post-traumatic stress symptoms and they recommended psychotherapy and neuropsychological intervention as well as supportive family therapy. Lastly, they agreed that M needs to be fairly compensated for the head injury and symptoms suffered.

The Occupational Therapists

[8] The Occupational Therapists agreed that M needed occupational therapy twice per week, and a routine therapy with an educational / clinical psychologist to monitor and address possible psycho-social deficits. Further, they agreed that M presents with concentration deficits, hyperactivity, delayed learning, reduced gross motor and fine motor skills, visual perceptual deficits, restlessness, and impulsive behaviour. His cognitive, perceptual, coordination, and behavioural deficits, are likely to result in scholastic deficits and will influence his future work competence. Based on his current presentation he will benefit from placement in a remedial school where occupational therapy, psycho-therapy and remedial assistance is supplied on a daily basis. With remedial schooling he may be directed towards a more technical / manual type of employment, which case he will be reliant on his physical abilities to earn an income. Both experts noted that M presents with no neuromuscular limitations preventing him from pursuing a physical career, however given the possibility of post-traumatic epilepsy, he may not be suited for occupations involving driving or the use of dangerous machinery, working on elevated surface or in environments placing him at risk of burns and scalds. As a result, he will suffer a loss of employment opportunities.

The Educational Psychologists

[9] The Educational Psychologists, Dr M Mtshali("Mtshali") and Dr M Maseko("Maseko") compiled a joint minute on 22 June 2016. Pre-morbid, Maseko noted that scholastically M was probably going to be able to complete grade 12 without any

additional specialized educational assistance, Mtshali noted that in the absence of sufficient pre-morbid history of learning (pre-morbid academic records) it cannot be determined with certainty how well M would have been able to apply his qualities under the circumstances and one cannot rule out possibility of pre-morbid learning difficulties beyond reasonable doubt.

[10] Post-morbid, under cognitive functioning, Maseko noted that M's cognitive functioning fell well below average both verbally and non-verbally and Mtshali noted a within average level of functioning. Nevertheless, they both noted M's inadequacy in the areas of auditory sequential memory, logic memory, attention and concentration as an interference with his ability to perform optimally academically. They further agreed that M's inattentiveness could interfere with his future learning especially when progressing to next classes as he is currently presenting with learning disabilities due to poor memory and impaired ability to retrieve the bulk meaningful information. Maseko noted that erratic performance confirms that the accident did impact on M's memory as he appears unable to sustain attention and concentration and perseverance in task completion. In conclusion, Maseko noted that M will probably find it difficult to complete grade 12 as both his verbal and non-verbal cognitive functioning is impaired whilst Mtshali noted that with remedial intervention M may probably complete grade 12 taking into consideration that he still retains his average functioning.

- [11] Post-morbid, under educational functioning, Maseko and Mtshali noted that scholastically M's inconsistent and fluctuating auditory processing difficulties may interfere with integration of information. They agreed that attention and concentration difficulties may continue to undermine M's ability to perform adequately academically.
- [12] Post-morbid, under emotional functioning, Maseko noted that emotionally and socially, M seems to have experienced major changes. He currently lacks inhibition and when reprimanded he seems to have no clue of what kind of a change of behaviour is expected from him. The experts agreed that M may benefit from psychotherapy for emotional trauma and he appears to present with irritability and anxiety.
- [13] On M's future educational prospects the experts agreed that M is a learner with special needs. Maseko recommended an epilepsy school and Mtshali recommended remedial classes in order to meet academic challenges. Maseko noted that without the accident, M would have probably completed grade 12 with entry to a certificate or diploma qualification post matric. Mtshali noted that with remedial intervention M would still probably complete his grade 12 with entry to a certificate or diploma qualification post matric taking into consideration that his head injury is not rated as severe traumatic head injury.

THE DISPUTES

[14] The Educational Psychologists' latest joint minute compiled on 9 February 2018 tells a totally different story especially on the intellectual and educational functioning of M and also his future prospects. It appears that the recent change in their views is caused mainly by the recent school report which suggests that M's intellectual ability falls in the high average.

[15] Maseko is now of the view that M's intellectual ability falls in the average range and not below average as per her initial report. Maseko noted that M's memory inconsistency may be due to psychological trauma suffered in the accident which is likely to be aggravated by his concussive post traumatic headache. Based on M's recent school report Mtshali is also singing a different tune. She now opines that M's intellectual ability is estimated to fall in the high average and not average as per her initial report. Mtshali noted that based on her initial assessment, M did experience some memory inconsistency due to the psychological trauma suffered in the accident under discussion, but noted that based on his recent school report M appeared to have recovered well and the memory inconsistencies appears not to present anymore.

[16] On educational functioning Maseko opines that although M seems to perform adequately academically, and that his teacher's comments indicates him to be displaying a positive attitude towards his learning, the last psycho-educational assessment conducted on 21 June 2015 revealed impairments in his cognitive functioning with fluctuation of memory, and abstract reasoning both verbally and no-

verbally. These weaknesses may continue to interfere with his executive functions in higher classes where independent learning is expected to be applied in learned material by way of processing and retention. The recent school is but one of the factors to be taken into account and cannot be conclusive on the educational functioning issue. On the other hand Mtshali opines that based on M's latest school reports M has stabilized scholastically/educationally as he performed in the high average in all areas of learning, therefore there are no learning difficulties or challenges which can be anticipated to reappear in the next or higher grades.

[17] On the future prospects Maseko noted and confirmed during her testimony that M may have had the intellectual potential to have obtained grade 12 (NQ4) level of education should it had not been the presence of memory fluctuation. This impairment would probably continue to undermine his learning potential as post-accident M had already repeated a grade and suffered secondary epileptic injuries. She noted further that M may therefore find it difficult to achieve grade 12 according to his potential due to additional ailments of epilepsy, confirmed concussive post headaches and the psychological trauma suffered in the accident leading to memory fluctuation. These deficits would probably continue to interfere with M's executive functions in higher grades where bulk of academic work would need independent processing and retention of learned material. The new information from the addendum reports do not negate the previous findings of presence of cognitive impairments relating to memory and poor abstract reasoning abilities. She further opined that having reached age 12 M, who was never taken to a remedial school as per the recommendations, is no

longer a candidate for remedial schooling. Further, that M cannot cope in a private remedial school because of his poor English background.

[18] To the contrary, Mtshali disagreed and testified that based on M's latest school report, M appears to be functioning as his pre-accident potential and appears to have stabilized scholastically. If M was still experiencing memory challenges/impairments, it is most probable that he could have been still struggling and not coping with his school work especially from grade 4 and his recent school reports would have still indicated some learning challenges, therefore it has to be agreed that new learning challenges are not anticipated in the next or higher grades which can continue to interfere with his executive functions. Also taking into consideration that it is almost 6 years post-head injury but he is still functioning adequately, therefore it is confirmed that no learning challenges are anticipated in the next or higher grades which can continue to interfere with his executive functions and M appeared to have stabilised scholastically. Based on the above factors, Mtshali contended that it has to be agreed that the head injury sustained by M in the accident did not have the potential to cause any long term cognitive challenges/impairments.

The Industrial Psychologists

[19] The Industrial Psychologists, Dr M. Malaka ("Malaka") and Dr O. O. Sechudi ("Sechudi") compiled a joint minute on 14 February 2018. The two Industrial Psychologists did not have the benefit of reading minutes of other experts on the matter. Hence, their post

morbid views are not based on sound factual basis. They are out of context and to an extent irrelevant. I deal with this issue herein below. I now summarize their pre-morbid views.

Pre-morbid prospects

[20] Malaka reported and testified that, but for the accident, M would have been able to obtain grade 12 and would have been able to further his studies at a tertiary institution. In this context, assuming he could have obtained a further education qualification such as a two years diploma/three years degree, he could have been able to enter the labour market first as a semi-skilled worker at R20 600-R59 000-R151 000 per year. In five years or so, given more experience and even in-house training as well as further studies, he would have earned at Paterson C1/C2. In fifteen years or so, he would have earned at Paterson C3/C4. At the age of 45 years, he could have earned at Paterson C5. His ceiling would have been at Paterson D1 at age of 50 years old. At this time, he could have qualified for general annual increment until his retirement at the age of 65 years (*Koch: 2017; pages: 129 132*).

[21] Sechudi reported and testified that had the accident not occurred, M with the relevant remedial support, might have performed better with his academic studies and be on the right path completing his grade 12. M was going to have a fair chance to compete in an open labour market and securing employment. Upon completion of the studies he would have started searching for a job. A person with such a level of qualification

may be considered as an unskilled worker. The claimant would have spent at least 3 years to searching for a job equivalent to the qualification. On securing a job, he would have earned according to Paterson level A2 with gradual progression to Paterson level B3 (Koch, 2017) towards age 45 were he would be reaching his career ceiling. From the age 46, his earnings would have stabilized and he would have earned only additional inflationary increases until retirement age. Sechudi agreed with Malaka that with B. Degree M's earnings might reach Paterson D1.

Post-morbid employment prospects

[22] Malaka testified that Maseko is better placed to opine on how far M will go scholastically. Given the expert medical reports as well as the biographical information, it could be indicated that M employment chances will be based on the following two scenarios:

First scenario

22.1 In the event where M is able to receive medical support, remedial education and developmental support and is able to progress towards high school education, chances are that he will not pass grade 12. He might acquire basic skills which will provide him with an opportunity to obtain a low entry technical job. However, he will not be able to reach his pre-accident potential. In this respect, he will only be employable at the unskilled levels of the formal labour market. His remuneration will be limited to the to the following unskilled worker scale at R8 100-R20 600-R59 000 per annum (Koch, 2017: page 132). In this regard, he will experience long periods of unemployment. He

will have to depend on his physical capacity to do the job. However, he will find it hard to compete for possible job offers, given his mental physical injuries and limitations. When confronted with the recent school report, annexure "E4", which school report he never took into account when compiling his report, Malaka conceded that the recent school report looks impressive but he insisted that the recent school report is just but one of the factors to be taken into account when considering M's performance. He conceded that such results are possible with remedial support.

Second scenarios:

22.2 In the event where M is not able to find appropriate medical intervention as well as educational placement in accordance with his learning requirements, chances are that he will not be able to progress developmentally and educationally beyond grade 08 education or alternatively, he will not be able to acquire skills necessary to generate a reasonable income in order to live independently. He will have to remain in a supervised and protected environment for the rest of his life. The results of chronic epilepsy is that M will be on chronic epilepsy medication for the rest of his life. He can suffer epilepsy attack at any time. The impact of that is that he cannot drive or climb heights. He will be confined to employment chances of a general labourer or sympathetic work and not fully spect jobs. The result being that even on the lower levels jobs, he remains restricted. Malaka testified that technical school or jobs may not assist M as he may blackout whilst working. M can do courses or jobs that are sedentary inclined like clerical, admin and filing.

22.3 Sechudi on the other hand reported and testified that M's productivity in his future employment is affected but not limited by his post-accident health condition. He opined that M may still be able to pass grade 12. This possibility is based on the fact that according to him M is able to return to premorbid levels of functioning as reported by the defendant's Educational Psychologist, Mtshali. Furthermore, it was reported that with remedial intervention, he would still probably passed grade 12. Thus, it is possible for M to secure a meaningful job in the open labour market. It is important to note that should his epilepsy be uncontrollable in the future, M's intellectual functioning might be affected negatively. The post-accident contingency with health can be invoked. During cross -examination, Sechudi refused to comment on the views expressed by Malaka above and stated that he stand by what he wrote in the joint minute.

[23] I now return to the ripeness of the matter. From the out set, I must again say that this matter was not ripe for hearing, but was rushed to court and badly presented. The evidence outlined above bear testimony to my view. Less relevant facts about M were placed before this court. There is no explanation why a relevant witness, M's mothers was never called by either party to give relevant pre and post morbid evidence about M. Nor were his teachers called to give factual evidence on educational progress, especially where the Educational Psychologists for the parties disagreed on the issue and the recent school report indicated otherwise. Only one of his school reports was discovered and used by the defendant to advance its case. Progressive school reports were necessary to support the defendant's argument's below on the future prospects. Briefly stated, not all specific relevant personal circumstances of M are on record.

[24] The Educational Psychologists themselves came to court with half baked opinions. They failed to consider the complete factual backgrounds upon which they based their opinions. For example, Mtshali, based on one isolated school report, opines that it has to be agreed that the head injury sustained in the accident under discussion did not have the potential to cause any long term cognitive challenges/impairments on M. According to Mtshali, M appears to be functioning as his pre-accident potential and appears to have stabilized scholastically. On the other hand, Maseko rejects Mtshali's view on the bases that although M seems to perform adequately academically, and that his teacher's comments indicates him to be displaying a positive attitude towards his learning, the last psycho-educational assessment conducted on 21 June 2015 revealed impairments in his cognitive functioning with fluctuation of memory, and abstract reasoning both verbally and non-verbally. The recent school report is but one of the factors to be taken into account and cannot be conclusive on the issue. She concluded by stating that an independent holistic psychological educational assessment was necessary to verify whether or not the cognitive functioning challenges or impairments identified earlier were still in existence. However, nobody bothered to conduct such necessary independent assessment before the matter was set down for hearing. There is also no explanation as to why such approach was not followed. Had they done so, the main dispute on the matter would have been narrowed, if not settled by agreement between the Educational Psychologists.

[25] An informed view on the above issue was necessary to assist the Industrial Psychologists and actuaries to give their well balanced opinions on the future loss of

earnings. At this point, the reports of the Industrial Psychologists and actuaries, which are based on incomplete and disputed facts are less helpful to the court. As Wepener J put it in *Nicholson Charlene v RAF*¹: “[I]t is the function of the court to base its inferences and conclusions on all the facts placed before it.” This Court, in order to arrive at its own decision or finding, must of necessity have regard not only to the expert evidence but also to all the other facts of the case, including the viva voce evidence, the probabilities and the reliability of the witnesses. Kotze J (as he was then) put it as follows in *S v Gouws*²: “The prime function of an expert seems to me to be to guide the court to a correct decision on questions found within his specified field. His own decision should not, however, displace that of the tribunal which has to determine the issue to be tried.”

[26] It is fundamental that experts should have sound factual bases for the opinions they give. Unfortunately, in this case this fundamental rule has not been complied with. Meyer AJ (as he was then) warned against this in *Mathebula v RAF*³ at para [13] where he stated the following: “An expert is not entitled, any 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.”⁴ One of the duties of an expert witness is that “An expert witness should state the facts or

¹ Unreported Case No 07/11453 handed down in the South Gauteng High Court on 30 March 2012 at p 3 thereof.

² 1967 (4) SA 527 (EC).

³ (05967/05) [2006] ZAGPHC 261 delivered on 8 November 2006.

⁴ See also *Coopers SA (Pty) Ltd v Deutsche Gesellschaft für Schädigungsbekämpfung MBH* 1976 (3) SA 352 (A) at 371G; *Reckitt & Colman SA (Pty) Ltd v S C Johnson & Son SA (Pty) Ltd* 1993 (2) SA 307 (A) at 315E; *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) at 772I.

assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion"⁵. The Educational Psychologists in this matter, as stated above, failed to observe this rule. They both omitted to consider material facts which could detract from their concluded opinions. They both failed to consider progressive school reports, and or in the light of the recent school report used in court, to do a further independent psychological educational assessment on M to determine the current status of his challenges or impairments.

[27] Instead, each Educational Psychologist, based on incomplete facts, chose to express a view only favourable to the party that called them. In *Schreider NO & Others v AA & Another*⁶ Davis J stated as follows at 211J-212B: *"In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased an opinion, based on his or her expertise, as possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess."* It is common cause that the expert witnesses of the plaintiff that testified mostly tendered evidence that contradicted that of the defendant's experts. The approach to be followed in a case like this: where there is conflicting expert evidence was set out in *Michael and Another*

⁵ see *National Justice Compania Naviera SA v Prudential Assurance Co Ltd* 1993 (2) Lloyds Reports 68.

⁶ 2010 (5) SA 203 (WCC)

v Linksfield Park Clinic (Pty) Ltd and Another⁷ as follows at paras [36] and [37]: “[36] *That being so, what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. That is the thrust of the decision of the House of Lords in the medical negligence case of Bolitho v City and Hackney Health Authority [1997] UKHL 46; [1998] AC 232 (HL(E)). With the relevant dicta in the speech of Lord Browne-Wilkinson we respectfully agree. Summarised, they are to the following effect. [37] The court is not bound to absolve a defendant from liability for alleged negligent medical treatment or diagnosis just because evidence of expert opinion, albeit genuinely held, is that the treatment or diagnosis in issue accorded with sound medical practice. The court must be satisfied that such opinion has logical basis, in other words that the expert has considered comparative risks and benefits and has reached ‘a defensible conclusion’.*”

[28] In this case, I must assess all the expert evidence adduced and take into account the precedents set by our courts in line with the *stare decisis* principle or doctrine. Without any defensible conclusion from the experts and hard as it is, I must on the facts determine what will be an equitable loss of earning capacity. It is generally accepted that “*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*”⁸. I must do the best I can on the material available, “*by either making a round estimate of an amount which*

⁷ 2001 (3) SA 1188 (SCA).

⁸ see *Southern Insurance Association Ltd v Bailey No. [1984] 1 ALLSA 360 (A)*, at 368.

seems to be fair and reasonable to me (an entirely a matter of guesswork, a blind plunge into the unknown) or make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative”⁹. I am unable make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. There is simply not enough evidence to assist in that regard. Instead, I have to make a round estimate of an amount which seems to be fair and reasonable to the court. Counsel for the parties suggested during argument that I adopt a compromised common ground approach on deciding what constitute fair and reasonable figure.

[29] I now turn to the arguments on quantification of the plaintiff’s claim for loss of earnings and earning capacity. During argument Counsel for both parties agreed that the pre-morbid value of income uninjured was estimated at R6 566 398.00, as tabulated in Bundle C, page 56 thereof, and that this value may be taken as common cause between the parties. In the light of the facts of this matter, I agree with the parties as the the agreement on this figure seems to be a more reasonable one in the circumstances. Though I may have preferred between 23-25%, the actuary’s 20% contingency is not unduly generous. The respective Industrial Psychologists experts were also not far apart on the pre-morbid values. As stated above they agreed on most of the pre-morbid aspects. Serious disputes mainly arose on the post-morbid scenarios.

⁹ see Bailey supra, at 368-9

[30] Both the plaintiff and the defendant have filed reports by their respective actuaries. However, none of the actuaries testified. Based on the plaintiff's actuary quantification, specifically Basis II, it was contended on behalf of the plaintiff, that it will be just and fair to both parties for the court, to accept, for quantification purposes, that it is equally likely that M, pre-morbidly, would have attained a degree. On the same basis, it was submitted on behalf of the plaintiff that it will also be fair to both parties for the court to accept, for quantification purposes, that it is equally likely that M, post-morbidly would have been rendered unemployable. In line with the actuarial quantification in Bundle C, page 56 and applying the 20% pre-morbid and 0% post-morbid contingencies, the net future loss of earnings must be R5 253 118-00. In the event of the court adopting a middle ground approach, half of this amount plus a reasonable contingency for epilepsy must be awarded to the plaintiff.

[31] Counsel for the defendant submitted that based on the defendant's expert witnesses, M, except for the R325 542-00 which represent his late entry into employment, will suffer no future loss of earnings as his productivity in the future, though affected, is not limited by his post accident health conditions. However, as a compromised common ground, the defendant will accept a net future loss of earnings in the amount of R1 312 297.00, allegedly based on applying the 30% pre-morbid and 50% post-morbid contingencies.

[32] In the circumstances I can do no better than award an arbitrary sum, in fixing which I must try to steer a course between generosity at the expense of the defendant and niggardliness at the expense of M. This being the approach, I must take into account the existing undertakings and that general damages were fixed and awarded to the plaintiff separately. Further, the court must guard against any overlapping, and a resulting duplication. On the facts of this matter it is impossible to guess where exactly M will end up educationally and or work wise. Should his epilepsy be controllable in the future, with luck and hard work he might pass grade 12, proceed to obtain a degree and reach Paterson level D1 earning level. In other words, the fortunes of life may be favourable¹⁰ to him. However, there is no guarantee that this will happen. On the other hand, should the epilepsy be uncontrollable, his intellectual functioning might be adversely affected, making it impossible for him to achieve higher qualifications and or obtain a degree or better employment.

[33] However, to predict that on the facts of this matter, he will not pass grade 12 and or that he is rendered unemployable the Sangoma will be stretching the prediction too far. This view is myopic, without any basis, and fails to take into account the mild nature of the injury, views of other experts on the impairments, recent educational progress (including but not limited to the recent report), that with proper utilization of

¹⁰ In dealing with the question of contingencies, WINDEYER, J, said in the Australian case of *Bresatz v Przibilla* (1962) 36 A L J R 212 (H C A) at 213:

“It is a mistake to suppose that it necessarily involves a ‘scaling down’. What it involves depends, not on arithmetic, but on considering what the future may have held for the particular individual concerned (The) generalisation that there must be a ‘scaling down’ for contingencies seems mistaken. All ‘contingencies’ are not adverse: All ‘vicissitudes’ are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune? Each case depends upon its own facts. In some it may seem that the chance of good fortune might have balanced or even out-weighed the risk of bad.”

medication the headache and epilepsy may be controlled thereby limiting M's challenges and or impairments.

[34] On the other hand, to say that M, except for the R325 542-00 which represent his late entry into employment, will suffer no future loss of earnings as his productivity in the future, though affected, is not limited by his post accident health conditions, as argued on behalf to the defendant, one will be ignoring glaring evidence to the contrary dealt with herein above.

[35] In the post-accident scenario, it is my view that allowances must be made for the possibility that M's future academic life as well as his working life may be adversely affected by headaches, epilepsy, anxiety and depression and/or associated ailments. Further, I am in agreement with the experts who opined that M would find himself in future precluded from the following types of work environment which will expose him to flickering lights and or Television screens. That certain sounds (such as loud ringing, some voices or certain music or monotonous noise, and etc) and sensations may trigger his epilepsy. Further, that he may not be suited for occupations involving driving or the use of dangerous machinery, working on elevated surface or in environments placing him at risk of burns and scalds. It is accordingly my view that a reasonable contingency allowance for the epilepsy, headache, and above limitations is appropriate in the post-accident scenario. The late entry into employment, epilepsy condition, post concussion headaches, and tender age, remain significant factors in the circumstances of this matter.

[36] Taking all the above facts and circumstances into account, it is my view that an amount of R2 000 000-00 (“Two Million Rands”) ought to be awarded to the plaintiff in respect of loss of earnings and earning capacity.

COSTS

[37] There are no extraordinary circumstances that may dictate that this Court consider a different costs order than the normal one, which is, that costs should follow the result.

ORDER

[38] In the result the following order is made:

38.1 the defendant is ordered to pay to the plaintiff an amount of R2 000 000-00 (Two Million Rands), in respect of loss of earnings and earning capacity.

38.2 the defendant is ordered to pay the costs of suit, including the costs of experts.

H.W. SIBUYI

Acting Judge of the South Gauteng High Court, Johannesburg

CASE NO. : 38339/2014

HEARD ON : 27 February to 1 March 2018

COUNSEL FOR THE PLAINTIFF : Adv. Mjiba

ATTORNEYS FOR PLAINTIFF : Nkosi Nkosana Inc.

COUNSEL FOR THE DEFENDANT : Adv. Molojoa

ATTORNEYS FOR THE DEFENDANT : Nozuko Nxusani Inc.

DATE OF JUDGMENT : 17 September 2018