

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: 30440/2014

- | | |
|-----|---|
| (1) | <u>REPORTABLE: YES / NO</u> |
| (2) | <u>OF INTEREST TO OTHER
JUDGES: YES/NO</u> |
| (3) | <u>REVISED.</u> |

In the matter between:

**ADV ABRAHAM MATTHYS SMIT
(obo BUSISIWE NONHLANHLA NKOSI)**

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

MASHILE, J:

INTRODUCTION

- [1] On 21 June 2012, Busisiwe Nonhlanhla Nkosi, then a 22 year-old young lady collided with a white Toyota Venture motor vehicle with registration number [...] driven by Nkosana Radebe while crossing

Stretford Street on foot in Orange Farm. In consequence of the collision, Busisiwe sustained bodily injuries. Believing that the collision was caused by the negligent driving of Nkosana Radebe, she instituted a delictual claim against the Defendant in terms of the Road Accident Fund Act 56 of 1996, as amended. The head injuries with which this Court is concerned have been captured in the particulars of claim as scalp wound left temporal, abrasions on right brow and cheek and laceration to scalp. The hospital notes recorded her GCS as 15/15 and it was noted that brain scan detected nothing abnormal

[2] When the matter served before this Court, the Defendant had conceded liability up to 80% of Busisiwe's proven damages. To that end, on the 11th of June 2016, the Deputy Judge President ordered that:

- 2.1 Liability be finalised at 80%/20% in favour of Busisiwe;
- 2.2 The Defendant would provide an Undertaking in terms of s17(4)(a) of the RAF Act;
- 2.3 The defendant would pay R300 000 as an interim payment; and
- 2.4 Costs would be paid by the Defendant.

[3] The Deputy Judge President further declared Busisiwe incapable of managing her affairs and made provisions for a trust to be created. He also postponed the remaining issues pertaining to *quantum* to an undetermined date. The Defendant was not satisfied that Busisiwe's injuries were so serious to deserve compensation. For that reason the parties agreed that Busisiwe be referred to the Appeal Tribunal for

assessment of her injuries to determine whether or not she would qualify for such damages. The Tribunal conducted the assessment and in a letter dated the 7th of August 2017, found that Busisiwe's injuries were not serious.

[4] On 19 April 2018, during the parties' pre-trial conference, they agreed and noted that the Plaintiff intended to bring application for review of the decision of the Tribunal. In this regard, they recorded that the issues of the Defendant's obligation to compensate the Plaintiff for non-pecuniary loss (as meant in s17(1)(b) of the Road Accident Fund Act 56 of 1996) and any subsequent determination of an amount for compensation for a serious injury were separated from all other issues and/or heads of damages and was postponed sine die. The main issue before this Court is, as such, now loss of earning capacity "having regard" to the accident.

[5] According to the Plaintiff the issue of the gravity of the brain injury and/or any other injury insofar as it relates to non-pecuniary loss is immaterial. However, the issue of the *sequelae* of a brain injury and/or any other injury insofar as it relates to pecuniary loss is material. In other words, it is not the severity of the injuries that she sustained but the impact that such injuries have on her ability to earn a living. Insofar as the orthopaedic injuries are concerned, the Plaintiff submitted that the impact thereof on Busisiwe's past loss of earnings is acknowledged since recovery from pure orthopaedic injuries, fractures of vertebrae and pelvis together with associated disability and pain, led to a period of unemployment.

[6] The Plaintiff further submitted that the impact thereof on Busisiwe's future loss of earnings will depend on adequate medical treatment. In the event that she receive medical treatment, the effect thereof can either be minimal or can be taken into account by way of contingencies. It follows that the opinion of any Occupational Therapists, based on orthopaedic injuries, cannot be significant as it will neither contribute nor undermine Busisiwe's future employability. The Plaintiff conceded that physically Busisiwe retains a residual capacity to be employed in a sedentary or light physical occupation or even in a capacity that requires medium physical strength.

[7] The parties secured various expert reports. These reports form part of the documentary evidence before this Court. Where a report has been updated, I shall mention the updated version only. The following are the reports:

- 7.1 Dr C Barlin, an Orthopaedic Surgeon, dated 17 April 2018;
- 7.2 Dr Sulman & Partners, Radiologists, dated 17 April 2018;
- 7.3 Dr D Irsigler, a General Practitioner who completed the RAF4;
- 7.4 Dr H Edeling, a Neurosurgeon whose report is dated 12 April 2018;
- 7.5 Ms M Adan, a Neuropsychologist whose report is dated 19 April 2018;
- 7.6 Ms G Bales, a Clinical Psychologist whose report is dated 4 April 2018;
- 7.7 Ms A Reynolds, an Occupational Therapist;
- 7.8 AM Kellerman, an Industrial Psychologist;
- 7.9 Algorithm Actuary;

[8] The defendant obtained the following reports:

- 8.1 Dr MG Mashaba who completed the RAF4;
- 8.2 Milpark Radiology Radiologist;
- 8.3 Ms M Magoele, an Occupational Therapist;
- 8.4 Ms L Modipa, a Neuropsychologist;
- 8.5 Mr T Tsiu, an Industrial Psychologist;
- 8.6 Dr A Mazwi, a Neurosurgeon.

[9] In addition to the reports mentioned above, some of the experts of the respective parties who were engaged to write on the same subject put together and signed joint minutes. These too form part of the documentary evidence before this Court. These joint minutes were signed between the occupational therapists, industrial psychologists, and neuropsychologists. Ms Bales, Dr Edeling, Ms Adan and Dr Kellerman testified on behalf of the Plaintiff

POINTS IN LIMINE

[10] The Defendant made a 'big song and dance' about the outcome of the investigation of the Tribunal concerning Busisiwe's head injury that it was not severe. The Defendant contended, as a point in limine, that the finding of the Tribunal should be accepted as correct by this Court and that it must override the evidence of Dr Edeling. The objective of doing so was to render the evidence of Dr Edeling inconsequential. Perhaps this is the appropriate stage at which to address and dispose of the points in limine.

[11] The argument of the Defendant seems to suggest that loss of earnings cannot be suffered in circumstances where the injured party did not

sustain severe injuries. If this is correct then the Defendant's argument is totally misguided. The position is that the injured party is compensated for the *sequelae* that injury has on him or her regardless of the gravity of the injury. In short this Court will have to decide on the *sequelae* that the head injury had on Busisiwe. The decision of the Tribunal that Busisiwe has sustained minor injuries and that as such she is disqualified for a claim for general damages is discrete from that concerning her entitlement to a claim for loss of earnings.

- [12] The second point *in limine* pertains to what authority the decision of the Appeal Tribunal has on loss of earnings with particular reference to reasons to a finding that Busisiwe did not qualify for an award on non-pecuniary loss. The answer to this second issue ought to lie in the fact that decisions of the Tribunal and Appeal Tribunal may be subjected to a review by the High Court. Accordingly, the High Court cannot be bound by decisions of the Tribunal or the Appeal Tribunal, which it can either confirm or overturn. See, *Road Accident Fund Appeal Tribunal and others v Gouws and another* [2018] 1 701 (SCA) where it was stated that the Appeal Tribunal is not the final arbiter on such matters and that its powers are intently delineated.

EVIDENCE OF PLAINTIFF'S WITNESSES

- [13] The first witness of the Plaintiff was a clinical psychologist, MS J BALES. Her testimony was that she found Busisiwe to be suffering from different features of depression. Busisiwe's moods vacillated, she was irritable AND had moments of outbursts. Busisiwe was not

physically as active as before the accident. She isolated herself from the family and friends. She resented being asked where she was going by her mother. Busisiwe slept rather more often relative to the period before the accident. Her thought processes were noticeably sluggish. Ms Bales further stated that Busisiwe was disinterested during the examination. Busisiwe told her that pain disturbs her sleep.

[14] Busisiwe had enrolled for N4 but could not cope as a result of lack of concentration. Ms Bales found Busisiwe to be aware of her physical injuries. Ms Bales' further testimony is that she found her depression to have increased. She surmised that her depression was probably caused by unemployment. She showed signs of cognitive impairment, severe impairment in self-esteem. Busisiwe has drifted into severe depression. Her attention level was inconstant. Both Busisiwe and her mother advised her that she was not active like before anymore.

[15] When cross-examined, Ms Bales conceded that the head injury may not have been the only source of her depression and that lack of employment could well be one of the contributory factors. She was silent when it was suggested to her that Busisiwe did well at school because she registered and passed N4 and that the memory deficit could not have been significant as such. During N5, she passed two modules and failed another two. She agreed that it is difficult to reduce neurocognitive deficit to a brain injury. It was put to her that the tearing of Busisiwe that she observed could have been due to the death of her father in October 2017 or brain injury or both. Her response was that the behaviour was first noticed in July 2016 well before her father's

death and again in April 2018. This, she thought isolated brain injury as the source of the tearing.

[16] It was put to Ms Bales that Busisiwe as a twenty-six year old lady felt that her mother was undermining her and was too invasive to her space. Her mother, on the other hand, read this as something else. It was noted that Busisiwe sat in court and was seemingly very alert and looked not bored. Ms Bales conceded that Busisiwe's search of words during her interview with her could have been lack of vocabulary because she is not English speaking. Ms Bales struggled to give specific symptoms that are cause by brain injuries. Ms Bales stated that she did not ask Busisiwe why she was sleepy and tired during the consultation.

[17] Dr Edeling is a neurosurgeon. His credentials were not challenged. first time he consulted with Busisiwe was in October 2015. He notes that Busisiwe did not have any pre-existing pathology. Her injuries were fractures of the Pelvis and lumber spine and multiple soft tissue injuries. He also records that Busisiwe sustained a head injury with facial injuries. The head injury led to a 'complicated traumatic brain injury of severe degree', brought about by subsequent developments that occurred to Busisiwe but left unattended by the hospital personnel.

[18] Stratford clinic records that Busisiwe lost consciousness as a result of the injury to her head. The level of consciousness as measured by GCS read 15/15. Dr Edeling testified that GCS is used to determine the level of consciousness and not brain functioning. He testified further that Busisiwe may have been conscious on arrival at the hospital but

she would have been very ill. For that reason, GCS ought to be used in conjunction with other tools to achieve maximum results. Dr Edeling could not assist on the question why the Stretford Clinic records state that Busisiwe was unconscious after the accident.

[19] CT brain Scan, testified Dr Edeling, cannot detect brain injury. For a patient to be referred for CT Brain Scan, three prerequisites must be satisfied. Busisiwe was referred but the Chris Hani-Baragwanath Hospital records do not state why she was referred. Dr Edeling stated that the referral should serve as indication that the treating doctor was concerned about the head injury albeit that he did not record his reasons. The scan detected nothing abnormal on the brain but Dr Edeling said that with contusional brain injury the scan should have been repeated after two to three days. Dr Mazwi, the Defendant's neurosurgeon, initially said that there was no brain injury but changed his mind after seeing the Stretford Clinic records and referral to CT scan by doctors at Chris Hani-Baragwanath Hospital.

[20] Dr Edeling further said that the hospital staff did not monitor the patient. Observation should have been four hourly for 24 hours. Post traumatic amnesia suggests moderate brain injury. The post traumatic amnesia should have been for 1 hour but with Busisiwe it was 18 hours suggesting that it progressed to moderate. Thereafter, it stabilised and remained there. Dr Edeling thinks that Busisiwe suffered a secondary brain injury, which came after the primary injury having been caused by other factors subsequent to the initial blow to the head. He also recorded memory problems in 2015 when he consulted with Busisiwe.

Dr Mazwi also consulted with her in 2016 but did not notice this but states that he did not have Busisiwe's medical records.

[21] Dr Edeling consulted with her again in 2018 and repeated his observations as per his report of 2015. The brain injury had stabilised and had become permanent. He also noted that her depression had worsened. When cross-examined, Dr Edeling stated that the report from the Health Professional Council of South Africa ("HPCSA") that she sustained a mild brain injury could not be trusted because the Council incorrectly refers to the report of Dr Reed instead of Dr Barlin. It was also put to him that since the reasons for her referral to brain scan are not stipulated, he was speculating on why she was, notwithstanding her head injury.

[22] Dr Edeling pointed out during his cross-examination as well that no daily neurological hospital records were noted between the date of admission until date of discharge, which was seven days later. He also testified that frontal lobe injury can lead to depression.

[23] Ms Adan is the neuropsychologist of Busisiwe. She testified that she consulted with Busisiwe in 2015. Pre-morbid information was volunteered by Busisiwe. Ms Adan confirmed that she has seen Busisiwe's National Senior Certificate. The reading of her matric results depict Busisiwe as a student who was not high performing pre-morbidly. She gave a detailed account of the accident. Busisiwe also gave her post-morbid account of her symptoms. Ms Adan stated that Busisiwe told her that she tires quickly. She was also able to tell Ms Adan that she was cognitively impaired since the accident.

- [24] Psychosocially, her life style has changed. The pain that she experiences affects her mood. Ms Adan observed spasmodic tearfulness during her assessment of Busisiwe. She is of the opinion that these symptoms are the lingering repercussions of the accident. Ms Adan testified further that she found Busisiwe difficult to comprehend long questions. Busisiwe became easily upset during the interview especially when discussing the accident. Busisiwe has visual reconstruction and perception deficits. Her brain can take so much and no more.
- [25] Insofar as comprehension is concerned, she could remember only eight of twenty-two. Busisiwe's level of concentration reduced as she was given more tasks to do. Thus, she would score quite high on the first task and yet low on the second time around. Ms Adan understood this to be related to Busisiwe's memory defects, which will affect arithmetic problems. She needed a physical object with which to work to carry out tasks.
- [26] It was put to her during cross-examination that Dr Edeling found no evidence of neurological abnormalities. Her response was that Dr Edeling's finding was that physically there was no neurological injury but thought the treating doctors should have detected it had they done the correct things.
- [27] It was noted that her average pass mark for matric was 45% and that the mark was consistent with her performance post-morbidly. The reliability of Ms Adan's method of testing Busisiwe's post-morbid performance came under spotlight. Ms Adan thought that there were

many factors with previously disadvantaged students to be considered. It was put to Ms Adan that Busisiwe's post-morbid performance reflects exactly who she is within that community. Ms Adan in response stated that her full academic record was required to get a true picture of her performance. It was then suggested to her that she could not have concluded as she did because she had insufficient information. As matters stood on the date of the trial, Busisiwe's matric results remained the only pre-morbid tool with which her post accident performance could be assessed.

[28] Persistence of headaches, dizziness and other related conditions do not exclude presence of neuropsychological problems. Ms Adan noted that her depression has worsened since the death of her father. Ms Adan was steadfast that the death of her father notwithstanding, the primary cause of Busisiwe's depression was the head injury. Pain affects mood and anxiety, which give rise to depression. It was put to Ms Adan that the reading of the GCS was 15/15 on arrival at hospital but yet there is talk of loss of consciousness. She could not reconcile unconsciousness and the GCS reading. All that she could say was that unconsciousness was reported by Busisiwe herself.

[29] The next witness to testify on behalf of the Plaintiff was Dr Kellerman, an industrial psychologist. She stated that all pre-morbid information was furnished by Busisiwe herself. Busisiwe told her that she was productively employed earning an amount of R2 000.00 per month before the accident. She attained matric level of education prior to the accident. Dr Kellerman testified further that Busisiwe was an average

student if her matric results are anything to determine this. She also stated that Busisiwe's results ought to be understood against the background that matric curriculum changed in 2008. The change probably account for the apparent drop in performance of many students.

[30] Under cross-examination, Counsel for the Defendant put it to Dr Kellerman that according to records, it is apparent that Busisiwe did not complete N5 because of poor performance and lack of funds. Her pre-morbid performance shows an average student and that is consistent with her post-morbid results, which culminated in her failing N5. Concerning Busisiwe's employment, it was further put to Dr Kellerman that Busisiwe quit her employment because she could not cope with the challenges that came with the job. She could not manage after the accident mainly due to her orthopaedic injuries and not her intellectual capacity.

[31] Busisiwe's mother, Ms T E Nkosi, testified that her daughter grew under her watchful eye. Busisiwe has not lived anywhere else with anyone except at her current home with her mother. She described Busisiwe as a loving and lovable child. Mrs Nkosi was told by Busisiwe's friend that Busisiwe was a dancer. She was personally aware that Busisiwe modelled and sang in church. Busisiwe was also very keen on gym and running. However, she has not been to the gym place to experience what or how they were performing.

[32] Mrs Nkosi's evidence was also that she checked Busisiwe's school work regularly. She could not remember, even once, being called for any problems caused by Busisiwe at school. Busisiwe began work in 2010 having completed matric in 2008. When Busisiwe collided with the vehicle, she was on her way to work. She started by assisting her mother as a domestic worker working for one Mr Reineke. Thereafter, she worked for Jumbo Cash & Carry for which she worked for 1 year. Her work consisted mainly of sticking barcodes onto hair wigs and was, on the face of it, happy at work.

[33] Mrs Nkosi then described how she came to learn of the accident. She received a telephone message that her daughter had been involved in a motor vehicle accident and that she had been taken to Chris Hani-Baragwanath Hospital. On arrival at the hospital, she found Busisiwe with a bandage around her neck, body and had an open wound on her head. Busisiwe was lying down surrounded by paramedics. At that time, she could not speak to her until 14h00. She was awake and surrounded by doctors. She could only tell her that she loved her and that God is great whereupon Busisiwe told her that she too loved God.

[34] Mrs Nkosi's observation of Busisiwe in hospital was that she had bruises on her face and it was swollen. Her eyes could not focus and were blinking like a malfunctioning lamp. Mrs Nkosi could not tell at that moment whether or not Busisiwe could see her because the blinking of her eyes was rather abnormal. Busisiwe stayed in hospital and remained in the same condition for approximately four weeks. She could not walk after discharge from hospital and had to be washed,

dressed. Mrs Nkosi continued to testify that she had to devote her entire time on Busisiwe until she could fully recover somewhat.

[35] Post accident, Busisiwe is now irritable, becomes angry easily, cries and complains of pain. Busisiwe went back to work but she ultimately stopped because she could not stand for long, which the job at Jumbo Cash & Carry required. She was subsequently trained by Shoprite Supermarket and presented with a certificate as proof of her training. Thereafter, she was called by Shoprite Checkers where she was given work to pack and display bread. She was then moved to the kitchen. Mrs Nkosi further stated that one day Busisiwe came back complaining of terrible headaches, saw feet and backaches.

[36] When the short-term work at Checkers Supermarket ended, she was never called again. She sent her *curriculum vitae* to different companies hoping to secure employment but none of them responded. She stopped the gym because of her orthopaedic injuries. However, she still sings. She continues to assist with home chores but gets tired too quickly. She spends most of her time in her room reading the bible. Busisiwe does not look as happy as she did previously. She worries that she is the only one among her siblings who is unemployed. As a result, she thinks that she is useless. Mrs Nkosi did not know why Busisiwe failed N5.

[37] Under cross-examination, Mrs Nkosi confirmed that Busisiwe may not have been a top student but emphasised that she never repeated a standard until she completed matric. She further confirmed that Busisiwe completed matric in 2008 and that in 2009 she was neither at

school nor working. She clarified that Busisiwe worked for Lilly who was a tenant inside the Jumbo Cash & Carry Supermarket. Lilly sold wigs inside the supermarket and Busisiwe was her employee. Busisiwe stayed for a further three weeks recuperating from her injuries after her discharge from hospital. She returned to her previous job for a week. She then left as she could not cope because the work was too draining.

[38] When Busisiwe went back to school, she started well but experienced difficulties as a result of headaches and fatigue. While she studied, she also slept for most of the time. She performed well for her N4. During N5, she gathered that she was not the same anymore as she lost her school material continually. Mrs Nkosi could not comment on Busisiwe's statement to the psychologist that she stopped schooling because of financial difficulties. This concluded the case for the Plaintiff.

EVIDENCE OF THE DEFENDANT'S WITNESSES

[39] The Defendant began its case by calling Mr Tsiu, an Industrial Psychologist. His testimony and, as such, his report was of less significance. This was largely because he had only seen the report of Dr Mashaba and not those other experts when he consulted with Busisiwe. For that reason, his report lacks in many respects. This explains why after reading the reports of all the other experts especially those of the Plaintiff, he revised his opinion. He now recognises that Busisiwe has neuropsychological deficits.

- [40] He stated that Busisiwe will be less competitive compared to her peers. He noted that the neuropsychologists differ insofar as the Ms Adan records significant neuropsychological deficits whereas the defendant noted that they are less noteworthy. The difference according to him is the degree of severity of the neuropsychological *sequelae*. He testified that to reach his conclusion, he merged the two opinions of the neuropsychologists. He conceded that had he seen the reports of Mesdames Adan and Kellerman and Dr Edeling he would have acknowledged the existence of neuropsychological *sequelae*. He concluded that Busisiwe will never match her uninjured counterparts and that will express itself in late entry to jobs and sustainability of work.
- [41] Dr Mashaba testified on behalf of the Defendant. He is a medical general practitioner. He purported to give evidence as a head injury expert but had to concede that he was not as qualified as a neurologist or neurosurgeon. Dr Mashaba confirmed that a mild brain injury can lead to serious brain *sequelae*. However, a mild brain injury can never lead to a severe brain injury. He stated that Busisiwe was awake albeit that she was somewhat disorientated. That said, she could still give a good account of herself.
- [42] He saw Busisiwe in 2016 around the same period as Dr Adan but did not notice what the latter has noted in her report. Regarding what Dr Edeling recorded, he said that it was possible as Busisiwe might have still been in the process of convalescence. Dr Mashaba disagreed that the accident represents a seminal moment in the life of Busisiwe. In

2016, when he consulted with her, he did not find the symptoms recorded by Dr Edeling to be enduring.

[43] Had Busisiwe's condition deteriorated, her GCS would have dropped. The CT scan would have detected it as well. Dr Mashaba was quick to add that this would not have excluded injuries such as concussion. Dr Mashaba was adamant that there was no reason for a second CT scan. Protocol dictates that it is only if there is a negative occurrence after the first scan that a second scan becomes necessary. They failed to call the people who compiled the medical records and it is therefore hard to know why certain measures were adopted or excluded. The size of Busisiwe's laceration on her head did not appear compatible with the resultant brain injury. Besides, Busisiwe's injury was not captured as a severe brain injury.

[44] Ms Magoele testified as the Defendant's occupational therapist. Her testimony was that her impression of Busisiwe as she walked into her office was that she was normal, neat and independent. She came on her own and was alone in the consulting room. Ms Magoele's superficial assessment of Busisiwe was that Busisiwe did not have any cognitive deficits. Furthermore, Busisiwe did not shed a tear drop during consultation. She also did not exhibit any signs of memory blanks. She conducted neuropsychological tests. The impression that she got was that Busisiwe experienced headaches that were not major.

[45] Insofar as Busisiwe's functional capacity is concerned, she said that Busisiwe can do sedentary low level work. Radiological orthopaedic findings appeared normal. She complained of pain on the date of

consultation. The question of brain injury did not arise at the time of consultation with her. Ms Magoele also said that from her consultation with Busisiwe she would have determined whether or not she required to conduct tests that were neurocognitive.

PLAINTIFF'S ASSERTION

[46] The Plaintiff contends that a claim for loss of earning capacity has been demonstrated on a balance of probabilities. This Court has been implored to accept the evidence of Busisiwe's mother that the accident brought about a turning point in the life of Busisiwe and that her testimony is buttressed by all the experts witnesses of the Plaintiff. According to the Plaintiff, the Defendant has failed to challenge the evidence that the Plaintiff's expert witnesses have levied before this Court. In the circumstances, concludes the Plaintiff, Busisiwe must be compensated for the loss occasioned by the change in her post accident life.

DEFENDANT'S ASSERTION

[47] Conversely, the Defendant argues that the Plaintiff has not succeeded to establish on a balance of probabilities that Busisiwe has suffered loss of earning capacity. The Defendant disputes that the head injury sustained by Busisiwe slipped from a mild head injury to a moderate to severe brain injury that resulted into the *sequelae* described by the expert witnesses of the Plaintiff. Busisiwe's pre and post-morbid

conditions remain the same such that no loss attributable to the head injury can ensue.

ISSUES

[48] A starting point here should be a clarification of the fact that this Court is only concerned with the *sequelae* of the head injury. The gravity of the head injury or lack thereof is at this stage immaterial as it could be a subject of review of the decision of the HPCSA. Those introductory remarks lead this Court to set out what the issues are. Firstly, what requires determination is whether or not Busisiwe suffered a head injury that developed into a complicated traumatic brain injury of a severe degree as described by Dr Edeling. Secondly, if she only sustained a mild head injury, do the alleged *sequelae* owe their genesis to the brain injury? If the answer to the aforesaid question is positive, this Court must decide on the award that it must make given the contents of the expert witnesses of both parties.

LEGAL POSITION

[49] It is trite that while experts are entitled to make assumptions, they should avoid basing their opinions on conjecture or speculation for once they do so they place their evidence at risk of being disallowed. Expert witnesses ought to confine their testimony to their respective disciplines but at times and under suitable conditions may venture outside their area of expertise. If it becomes necessary to step out, they should then

and there declare. See, *S v Adams* 1983 (2) SA 577 (A) at 586A-C and *S v Van As* 1991 (2) SACR 74 (W) at 86c-e.

[50] It is noteworthy to point out that Busisiwe's failure to testify renders the probative value of Dr Edeling's evidence and virtually all the experts weak. In this regard, it could be instructive to refer to *S v Mthethwa* (CC03/2014) [2017] ZAWCHC 28 at [98] where the following was said:

"The weight attached to the testimony of the psychiatric expert witness is inextricably linked to the reliability of the subject in question. Where the subject is discredited the evidence of the expert witness who had relied on what he was told by the subject would be of no value."

ANALYSIS OF THE EVIDENCE

[51] Central to finding whether or not there was a brain injury is the evidence of Drs Edeling and Mazwi, neurosurgeons for the Plaintiff and Defendant respectively. All the opinions of the other expert witnesses of the Plaintiff premise their conclusions on the belief that there has been a head injury of severe magnitude. If that opinion diminishes, so too should their opinions. Dr Edeling first consulted with Busisiwe in 2015. He diagnosed a mild to moderate brain injury which slipped into a moderate to severe injury with devastating consequences due to lack of adherence to required standard of observation by hospital personnel of patients in the position of Busisiwe.

[52] Mazwi on the other hand saw Busisiwe for the first time in 2016 and diagnosed no serious head injury. However, it should be noted that when he changed his opinion later he specifically stated that he did not

have advantage of Busisiwe' medical records, which Edeling had. After the production of Dr Edeling's report citing the sources on which it was based, Dr Mazwi simply accepted them. He then proceeded to discard his initial opinion and fully adopted that of Dr Edeling. It is notable that he did this without ascertaining or interrogating the sources or even calling for a second consultation with Busisiwe. His opinion is therefore no different from that of Dr Edeling.

[53] The source documents on which Dr Edeling relies are the Chris Hani-Baragwanath Hospital records and those from Stretford Clinic. The latter records state that Busisiwe fell unconscious and refer to her as the source of that information. Busisiwe did not testify and one is left to wonder whether or not she knows what the state of unconsciousness is. In circumstances where her description of such condition is challenged, the hospital records from Chris Hani-Baragwanath showing that her GCS registered 15/15 and therefore well awake on arrival, the Plaintiff should have done more to demonstrate this on a balance of probabilities. Moreover, she was taken for brain scan and nothing abnormal was detected. According to Chris Hani-Baragwanath Hospital, Busisiwe was properly monitored until she was fully conscious of her surroundings and discharged to convalesce at home.

[54] Busisiwe's mother gave a full account of her pre-morbid condition. She was socially active, an average student at school but never repeated a grade. She participated in the gym, dancing and singing. The accident, she testified robbed her of that active life. She is now withdrawn, sits in her room reading bible most of the time when at home. Her

performance at school has deteriorated. This, is evident from her failure of N5. Dr Edeling and virtually all the experts of the Plaintiff take this to be the *sequelae* of the brain injury.

[55] Busisiwe sustained a scalp laceration measuring 4 centimetres at the parietal region around which the scalp was swollen. Dr Reid, a neurologist, classified the head injury as a minor head trauma. Dr Edeling, a neurosurgeon, categorised it as a moderate brain trauma. There is no injury that suggests a massive or even a moderate thump to Busisiwe's head that could have resulted in what Dr Edeling testified probably started as a mild to moderate brain injury which developed into a 'complicated traumatic brain injury of severe degree'. The Plaintiff has done nothing to exclude her orthopaedic injuries as the source of the *sequelae* with which she now presents. It is evident that her unemployment, the direct cause of which is attributable to her orthopaedic injuries, is responsible for her leaving her position as a merchandiser. Ms Bales does not exclude her unemployment as part of the causes of her psychosocial problems.

[56] The laceration referred to in the medical records did not even cut as far as Busisiwe's skull. The obvious question is how could such an injury have turned out to be what Dr Edeling makes it. The only addition to the Chris Hani-Baragwanath Hospital records is a note that Busisiwe had slipped into unconsciousness on the side of the road where she had collided with the vehicle. The source of the unconsciousness is said to have been Busisiwe herself even though the note is said to have emanated from Stretford Clinic. I have already aired my views on

Busisiwe's alleged unconsciousness in the preceding paragraphs. It is not known and no attempt was made to have the author of the record from Stretford Clinic to come to court to clarify the circumstances under which it was written. The contents of the Stretford Clinic records must therefore be regarded with great circumspection especially in circumstances where Busisiwe did not testify. See, the Mthethwa case *supra*.

[57] I am mindful of Dr Edeling's criticism of the HPCSA. I need to note in that regard though that his criticism relates in the main to how it was constituted when it evaluated Busisiwe's injuries. In the second place, it concerns what the purpose of HPCSA generally is when it sits to make these kind of assessments. Counsel for the Plaintiff has correctly stated that it is totally irrelevant that the HPCSA has classified Busisiwe's head injury as minor because it is Busisiwe's *sequelae* for which she must be compensated. The HPCSA classification is, however, material in another context and that is whether or not Busisiwe is entitled to general damages. This Court is sitting to determine the *sequelae* of Busisiwe's head injury and not the seriousness of her orthopaedic and/or brain injuries. I will discuss the *sequelae* of the head injury later in this judgment.

[58] As I understand, Busisiwe stopped working because of her orthopaedic injuries but not of *sequelae* flowing from her brain injury. She was successfully trained at Checkers at the end of which she received a certificate. The fact that she was not called again at Checkers does not seem to have anything to do with her mental faculties. The work at

Lilly's Wig where she worked as a merchandiser required physical strength, which she apparently does not have since the collision.

[59] Her post-morbid school results are consistent with Busisiwe's pre-morbid performance. Her matric average pass was 45%. She passed N4, which is an equivalent of matric, without any obvious glitches. She struggled to obtain similar results in N5. Unlike matric and N4, N5 is more challenging and I take judicial notice that the pass mark is 50%. Her failure of N5 is thus understandable having regard to her average performance previously. It must be logical to think that had the accident affected her academic performance, she would not have passed N4.

[60] Dr Mashaba professed to testify on the head injury while simultaneously acknowledging that he was neither a neurosurgeon nor a neurologist. To the extent that he purported to be giving evidence as a head injury expert, I will disregard his evidence. However, his evidence is relevant to the orthopaedic injuries, which are not the concern of this Court. Virtually all the experts take their queue from the neurosurgeons, Drs Edeling and Mazwi in this case. If their evidence and reports are rejected, it follows that there will be no place for the opinions of the other experts because they all assumed that the diagnosis of the neurosurgeons is correct.

[61] I need to point out that neurologically Dr Edeling diagnosed nothing of significance about Busisiwe. The primary source documents to which Dr Edeling would have had regard consist in hospital records at time of accident and what he was told by Busisiwe. I have already stated that this Court will not place significant emphasis on the contents of the

medical records from Stretford Clinic mainly because Busisiwe is the source of their contents besides, they were not there initially but emerged after Dr Edeling had compiled his report. The question is where were these records and why did they not form part of the Chris Hani-Baragwanath Hospital records from onset?

[62] In any event, the claim of unconsciousness is not a matter that was objectively established but it was rather what Busisiwe herself said. There is no indication that Dr Edeling probed what Busisiwe meant when she said she fell unconscious. The only proper examination tests conducted at Chris Hani-Baragwanath Hospital revealed that she was conscious and that the CT Scan detected nothing abnormal. These findings are consistent with the hospital's classification of the head injury as minor but totally at odds with a brain injury that is said by Dr Edeling to have now become a complicated brain injury of severe degree.

[63] Dr Edeling has insinuated that the Chris Hani-Baragwanath Hospital personnel were negligent by not monitoring Busisiwe constantly. He pointed to the hospital records as the basis of his allegation. The onus of proving the case on a balance of probabilities lies with the Plaintiff. Surprisingly, the Plaintiff called none of the hospital personnel who compiled the records to state why they did not note certain things which are, according to Dr Edeling, the norm under these circumstances.

[64] Having found no justification for a permanent neurological complications and no brain injury of significant magnitude, Dr Edeling

firstly, claims that the moderate brain injury that he had diagnosed became a 'complicated traumatic brain injury of severe degree', brought about by the negligence of hospital personnel. Secondly, Dr Edeling then takes a leap into other experts' disciplines to find that Busisiwe's recollection was fragmented, disoriented, confused and dreamlike to justify his diagnosis. I do not think that it was for Dr Edeling to venture into such areas. His was to diagnose whether or not there was a brain injury. This is unacceptable because Busisiwe did not sustain the injury that Dr Edeling says she suffered and this is evident from the Hospital medical records. See, the Adams case *supra*.

[65] If the *sequelae* described by Dr Edeling and the other experts are a fact in the life of Busisiwe then there exist no link between them and the head injury. The origins of the *sequelae* might well be the repercussions of the orthopaedic injuries. The Plaintiff has done nothing to eliminate the probability that their foundation might be the orthopaedic injuries notwithstanding their lack of seriousness. It is apparent from the papers of the Plaintiff that the *sequelae* are attributed to the alleged 'complicated traumatic brain injury of severe degree' as described by Dr Edeling. Failure to establish a causal link between the Plaintiff's neurocognitive deficits and the orthopaedic injuries means that the Plaintiff's claim must fail.

[66] The slipping of the moderate brain injury into a 'complicated traumatic brain injury of severe degree' mentioned by Dr Edeling is speculation. Dr Mashaba's testimony in this regard is that Busisiwe stabilise dafter a few days even though her detention was prolonged for further

observation. The fact that the nursing personnel and doctors at Chris Hani-Baragwanath Hospital did not record that there was a setback in her recovery process should, in the absence of any evidence to the contrary, serve as indication that nothing serious developed from the head injury.

[67] I have already mentioned earlier in this judgment that Dr Mazwi's sudden change from classifying the head injury as minor to agreeing with virtually everything that Dr Edeling puts forward in his report is extremely disappointing and disquieting. The least that Dr Mazwi could have done upon being presented with opinion different from his own was to consult once again with Busisiwe to verify the further information with which he was being presented. Thus, the fact that Drs Edeling and Mazwi agree in their joint minute is for purposes of this Court, regrettably irrelevant

[68] The finding of this Court is that the head injury did not slip into what Drs Edeling and Mazwi describe as a 'complicated traumatic brain injury'. I cannot burden this Court by analysing the opinions of the other experts in circumstances where their views entirely derive from the fallacious findings of the neurosurgeons. This conclusion obviously renders it pointless to consider what award should be made to the Plaintiff. Against that background, it is apparent that the claim must collapse as a result of which I make the following order:

The claim is dismissed with costs.

**B A MASHILE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

APPEARANCES:

For the Plaintiff: **Adv. A Lamplough**
Instructed by: C N Sweetnam Attorneys

For the Respondent: **Adv. K T T NTSEWA**
Instructed by: Maribana Makgoka Inc.

Date of Hearing: 17 May 2018

Date of Judgment: 31 January 2019