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

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: 03/05/2023 ***Signature***:

Case No. 24698/2014

In the matter between:

E S, obo, B S Plaintiff/Applicant

and

THE ROAD ACCIDENT FUND Respondent

Neutral citation: *E S obo B S v The Road Accident Fund* (Case No. 24698/2014) [2023] ZAGPJHC 417 (03 May 2023)

JUDGMENT LEAVE TO APPEAL

MAHOMED AJ

This is an application for leave to appeal a judgment I handed down on 22 February 2023, in which I dismissed the plaintiff's claim for loss of earnings and awarded no costs. I granted an undertaking for any future medical expenses. The plaintiff at trial relied on expert reports which were admitted in terms of Rule 38(2). The application for leave was opposed, Advocate Klaas appeared for the respondent.

I found that the plaintiff had failed to discharge the onus, in that the expert reports relied on failed to demonstrate a causal connection between the sequalae of the injuries suffered and the accident which occurred on 16 September 2013.

Furthermore, the expert reports in my view were unhelpful in that the experts formulated their opinions on two distinct injuries, a mild head injury and orthopaedic injuries, but only the head injury was pleaded. It is trite that a court is bound to only the pleaded case.[1] In any event, the expert and x ray reports on the orthopaedic injuries were contradictory and therefore unreliable. In **Twine v Sharon Naidoo** and Others, Vally J, held that an expert report is valueless if the expert relied on irrelevant facts or failed to consider important relevant facts. None of the reports set out the distinct sequalae from each of the distinct injuries and therefor impact of injuries on earning capacity was unclear.

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[1] See judgment paras 100 -104

The matter proceeded on a default judgment basis. The merits were conceded on the day of trial, however there could be no debate on this aspect, given that the minor was 7 years old on the date of the accident and was *doli incapax*.

The HPCSA rejected the claim for general damages, it found the injuries were not serious. Consequently, counsel addressed the court on loss of earning capacity only, arising out of orthopaedic injuries and head injuries.

1. The judgment is attacked on various grounds as counsel submitted that the court relied too heavily on the finding of the HPCSA and that the court failed to consider the findings in the De Bruyn judgment,[2] where Sutherland J, as he was then, in determining whether a pending decision of the HPCSA could delay the hearing of the trial on the issue of loss of earnings held, that the two heads of damages were separate and different, that they each involved different inquiries and that the HPCSA had no authority to determine a loss of earnings.

2. Counsel argued that in my judgment I conflated the two heads of damages. I noted the judgment in De Bruyn,[3] that the two heads are assessed individually and referred to the HPCSA finding. This cannot be interpreted as a “heavy reliance on the findings. It is not unusual

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[2] See judgment footnote 24.

[3] See judgment para 9.1, 74, 76 and 83.

for a claimant to rely on his or her success in the claim for general damages, to fortify the claim for loss. The criticism is in my view without basis and the judgment in De Bruyn is distinguishable if one has regard to the reasons and context.

3. Furthermore, counsel submitted that I relied too heavily on the hospital records, which he argued by reference to the judgment in Rautini,[4] that it is hearsay evidence, which cannot be admitted and that the court ought not to have considered it at all.

3.1. The medical condition, treatment and sequalae which impacted on her earning capacity are necessary considerations for the proof on a balance of probabilities. The plaintiff's medical experts referred to the hospital records.

3.2. Mr Klaas reminded the court that the plaintiff in casu, relied on the medical records when she lodged her claim and that they could not be ignored. He submitted that in terms of s3(1) of the Law of Evidence Amendment Act 45 of 1998, this court must in the interest of justice admit the evidence, having regard to the fact that neither of the parties disputed the contents of that document and the "purpose for which the

[4] Caselines judgment at 034-56

evidence was tendered." In his view the common law exceptions must apply.

4. Counsel furthermore argued that the court drew its own analysis of the school records when it ought to have accepted the expert's analysis.

4.1. In my judgment[5] I was guided by the decision in **Michael v Linksfield Park Clinic**,[6] I did not find the "logical reasoning" that linked the cognitive fallouts to the injury from the accident in the educational psychologist report, which was completed 10 years after the date of the accident.

4.2. The minor child's scholastic performance, in the year of the accident and all the years following, did not demonstrate any significant changes from her pre accident pattern of performance.[7] It is noteworthy that some reports were incomplete as results for only some of the terms were before the Court.

5. It is trite that proof of causation is critical to succeed in a claim in delict.

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5 Judgment paras 106, 106.1

6 See judgment para 78

7 See Judgment

6. I considered the clinical psychologists report completed 5 years prior to the educational psychologist,[8] the fallouts appeared mild and again no logical reasoning is provided in her report either, to support proof of causation.

7. Counsel argued that I failed to consider that none of the applicant's reports were challenged, that there was no cross examination of witnesses, that the court granted the application in terms of R38(2) and therefore accepted that the evidence of experts was correct, that in effect by requiring further collateral evidence, and greater precision and accuracy , this court had in fact placed a higher onus on the applicant.

8. The submission cannot be sustained, in that is precisely for the fact that in proceedings by default, in the absence of an opponent's submissions, a court is duty bound to approach evidence with an inquiring mind and it cannot be expected to function as a rubber stamp. It should never do so particularly when it relates to public funds.

9. As I stated in my judgment, that when a matter proceeds by way of default judgment, greater precision and accuracy in adducing

[8] Judgment para 48, 50 and 94.1 -.2

evidence is critical to assist a court[9]. I do not mean to place any higher burden of proof on the plaintiff, as counsel insisted that I did, but rather to state that in preparation for a trial, parties, knowing that an opponent is no longer, and there will be no cross examination of witnesses, to ensure that the full and complete facts are before the court.

10. Another court would require the proof of the causal connection, as set out in the De Bruyn judgment,[10] to arrive at a different finding. Furthermore, the experts' conclusions were informed by the sequalae of the two injuries combined when only one was before the court.

11. The applicant has not met the threshold set out in s17(a)(i) of the Superior Courts Act 10 of 2013 and therefore this application must fail.

11.1. At the hearing of this application, counsel did not demonstrate the necessary causal connection, to discharge the onus. There are no reasonable prospects of success in this matter.

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[9] See Judgment at paras 101 and 102

[10] See judgment para 76

COSTS

12. The applicant argued that costs ought to have been granted in her favour. Counsel submitted that the plaintiff had been successful in that she proved the merits and future medicals, given that I ordered an undertaking in terms of s 17 of the Road Accident Fund Act.

13. The merits are by law in favour of the applicant, her minor child was 7 years only on the date of the accident. The submission of a birth certificate as is required at the time the claim is lodged would be sufficient. This cannot warrant costs; no extensive preparation is required on this aspect.

14. I granted the undertaking having considered that the defendant accepted that the plaintiff's child was involved in the accident, she could have suffered trauma, and that should she require psychological services it would be in the interests of justice that she have access to services. I noted the minor was never on any prescribed medication or treatment following the accident, although there was reference to follow up consultations at the hospital, no details of such were before the court.

15. The applicant has not demonstrated real prospects of success and there is no compelling reason for an appeal on costs the applicant has not demonstrated that the court was injudicious or failed to apply its mind regarding the costs order. The application fails.

I make the following order:

1. The application for leave to appeal is refused.

2. Each party to pay their own costs.

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MAHOMED AJ
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or 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 3 May 2023.

Date of hearing: 22 March 2023

Date of Judgment: 3 May 2023

Appearances:

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