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: 2023/045903

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

29 FEBRUARY 2023

DATE SIGNATURE

In the matter between:

L[…] M[…] S[…] obo
M[…] R[…] Plaintiff

and

ROAD ACCIDENT FUND Defendant

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties /their legal

representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be 29 February 2024.

JUDGMENT

WEIDEMAN AJ

1. This matter was before Court on the 13th February 2024 in one of the dedicated Default Judgment Courts created in the South Gauteng Division of the High Court to deal with claims against the Road Accident Fund where, for whatever reason, the Road Accident Fund had failed to file an appearance to defend, failed to file a Plea, or had its defence struck out through failure to adhere to the Rules of Court or the Court's Directives.

2. The Plaintiff is an adult female claiming in her representative capacity on behalf of her minor child who was injured in a motor vehicle accident. The issues of liability and as well as the value of the claim for general damages and future medical expenses have been settled.

3. The only remaining issue in dispute is that of loss of earning capacity.

4. The Plaintiff has elected to lead expert evidence by making use of affidavits as envisioned in rule 38(2) of the Uniform Rules of Court, read together with paragraphs 30 and 31 of the Judge President's Revised Practice Directive 1 of 2021. The affidavits are found on CaseLines, section 10. The application was moved and granted.

5. The Plaintiff has appointed the following expert witnesses to testify on her behalf:

   5.1 Dr Ngobeni – Orthopaedic Surgeon.

   5.2 Dr A. Mazwi- Neurosurgeon.

   5.3 Lufuno Modipa – Clinical Psychologist.

   5.4 Dr Seabi- Educational Psychologist.

   5.5 Daphney Mathebula- Occupational Therapist.

   5.6 Zaheerah Fakir – Industrial Psychologist.

   5.7 Ekhaya Risk Consultants and Actuaries.

6. Dr J. Seabi- Educational Psychologist opines:

   On the basis of all available information, it is estimated that Mbalentle's pre-morbid intellectual ability was within the Average range, which is consistent with functioning at a level where she could have progressed through the mainstream school system, matriculated and proceeded to obtain a Bachelor's Degree (should they have the financial means) considering that it is well documented in recent studies that children are achieving better qualifications than their parents.

   Based on all available information (such as depressed cognitive profile, behavioural difficulties including distractibility, poor working memory and lapses of concentration, which will serve as added barriers to Mbalentle's studies; emotional trauma due to the accident and the sequelae of her injuries), given the accident in question, Mbalentle's highest level of education will in all likelihood be Grade 10, with

support. There has been a substantial loss of potential. A person without Grade 12 is at a substantial disadvantage.

7. Ms D. Mathebula- Occupational Therapist opines:

The depressive symptomatology also renders her vulnerable and weak against work stress factors such as working with individuals with undesirable personalities, criticism and working under pressure. She may find herself struggling to complete tasks on time and she may find herself falling behind. The writer opines that challenges with emotional control affects her interpersonal relationship and engagement in activities within her life roles. In addition, problems in relating with others would pose a challenge in her participation at school, social activities and in future work should they not be addressed. Mbalentle's vocational prospects in the open labour market has been negatively affected as a result of the injuries sustained in the accident in review as she would be a vulnerable candidate and will not compete fairly with her non-injured counterparts. The writer is of the view that Mbalentle's employment potential will ultimately be determined by the level of education she will attain. The writer defers to an opinion of an industrial psychologist regarding post vocational potential and loss of future earnings.

8. The following extract is from the report of the industrial psychologist, Ms Fakir:

The writer considers Dr Seabi's opinion with regards to Mbalentle's pre-accident schooling potential, and considering her socio-economic circumstances, the writer is of the opinion that she would in all likelihood have progressed through school and would have matriculated. Thereafter, with the availability of funding, it is envisaged that she would have enrolled for a degree of her choice at a tertiary institution. It is opined that Mbalentle would have most likely completed with her studies approximately 4 years later. It is however common that most graduates will not secure employment immediately and would have sought employment for 6-12 months until securing employment.

Mbalentle would have entered the labour market as a semi-skilled worker initially earning at the upper quartile of the Paterson B4 level (basic package). Approximately 5-years later, with the acquisition of experience within the corporate sector, it is envisaged that her earnings would have progressed to the median of the Paterson C2 level (total package).

Accounting for increases every 3 – 5 years, the writer opines that Mbalentle would have continued to work within his scope of expertise, gaining experience and skills that would have allowed her to compete for higher paying occupations. In this respect, it is envisaged that her earning ceiling would have been reached at the median of the Paterson D1 level (total package) in her mid-forties.

Thereafter, she would have received only market related salary increases until retirement at age 65 years.

As far as the post-accident scenario is concerned, Ms Fakir states:

The writer is of the opinion that her level of education will directly impact on the level she enters into the open labour market at. Considering the postulation by Dr Seabi that she will at best complete a Grade 10 level of education with the necessary support, she is likely to enter the open labour market after approximately 12 to 24 months of searching for employment.

It is postulated that with a Grade 10 qualification, she may enter the open labour market working in the informal sector, earning at the lower quartile of earnings reported for unskilled workers in the labour market.

It is envisaged, with the acquisition of experience her earnings would over 7 – 10 years have increased to the level between the median and upper quartile of the above-indicated scale.

Should she be fortunate enough to have the opportunity to work within different sectors within the labour market and obtain experience in different sectors, she may be able to secure work within mid-level occupations of a semi-skilled nature (non-corporate) for 5 to 10 years earning at the level between the median and upper quartile. The writer is of the opinion that she is likely to reach her career earning ceiling towards the upper quartile of the above-mentioned scale by age 45 years.

Thereafter she would receive annual inflationary increases up until reaching the normal retirement age of 65 years. She will thus suffer a loss of earnings comparable to her pre-accident earning potential for which she should be compensated.

9. In the relatively recent case of *AM and another v MEC Health, Western Cape (1258/2018) [2020] ZASCA 89 (31 July 2020)* the Court had the following to say about expert testimony:

> *"[17] Something needs to be said about the role of expert witnesses and the expert evidence in this case. The functions of an expert witness are threefold. First, where they have themselves observed relevant facts that evidence will be evidence of fact and admissible as such. Second, they provide the court with abstract or general knowledge concerning their discipline that is necessary to enable a court to understand the issues arising in the litigation. This includes evidence of the current state of knowledge and generally accepted practice in the field in question. Although such evidence can only be given by an expert qualified in the relevant field, it remains, at the end of the day, essentially evidence of fact on which the court will have to make factual findings. It is necessary to enable the court to assess the validity of opinions that they express. Third, they give evidence concerning their own inferences and opinions on the issues in the case and the grounds for drawing those inferences and expressing those conclusions.*
>
> *[18] Before an expert witness may be called it is necessary to deliver a summary of the witness's opinions and the reasons therefor in terms of Uniform Rule 36(9)(b). The court held in Coopers 1976 (3) SA 352 (A) that the summary must at least include: "… the facts or data on which the opinion is based. The facts or data would include those personally or directly known to or ascertained by the expert witness, e.g. from general*

scientific knowledge, experiments, or investigations conducted by him, or known to or ascertained by others of which he has been informed in order to formulate his opinions, e.g., experiments or investigations by others, or information from text books, which are to be duly proved at the trial."

[19] In the same case Wessels JA said:

"…an expert's opinion represents his reasoned conclusions based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning that led to the conclusion including the premises from which the reasoning proceeds, are disclosed by the expert." …

[21] The opinions of expert witnesses involve the drawing of inferences from facts. If they are tenuous, or far-fetched, they cannot form the foundation of the court to make findings of fact. Furthermore, in any process of reasoning the drawing of inferences from the facts must be based on admitted or proven facts and not matters of speculation."

10. I fully support the Court's view as expressed above.

11. Before turning to the actuarial calculations, there are a few issues which appear not to have been properly dealt with by the experts.

12. The educational levels of the parents have not been reported consistently in the various reports. According to the educational psychologist the minor's mother has a Grade 11 qualification and the father an NQF5 qualification. In the industrial psychologist's report, both parents are recorded as having obtained Grade 12 qualifications. These discrepancies are not dealt with in their respective reports, although they have had sight of each other's reports.

13. On CaseLines, at 09-143 and again at 09-156, it is recorded that the minor had been born with eyesight problems requiring her to wear glasses from the age of four. In 2019, two years before the accident, she underwent surgery to improve her eyesight. This issue should have been fully canvassed by both the educational psychologist and the industrial psychologist in their respective reports. Their failure to do so leaves the court at a disadvantage and no explanation is given for not addressing this fact. In Court, this issue was raised with counsel, but no further information could be elicited. The minor's eyesight may or may not have influence her ability to study and progress academically, pre - accident.

14. Similarly, ADHD is listed as a secondary diagnosis, having resulted from injuries which the minor sustained in the accident. The experts suggest that as a result thereof, the minor now requires remedial schooling without considering any other options available to treat or manage ADHD such as medication. This again leaves the Court at a disadvantage.

15. In the matter of *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue 1992 (4) SA 202*, the Court had the following to say:

> *On the other hand we must bear in mind Lord Tomlin's famous words in Pearl Assurance Co Ltd v Government of the Union of South Africa 1934 AD 560 at 563 [1934] AC 570 at 579 (which was cited with approval, for example in Feldman (Pty) Ltd v Mall 1945 AD 733 at 789 that the Roman Dutch law is '…a virile living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society.'*
>
> *This being the nature of our system the Courts should not hesitate to adapt a principle which is found not to be in line with present-day developments in the particular branch or other branches of the law. As Innes CJ aptly said in Blower v Van Noorden 1909 TS 890 at 905: 'There comes a time in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions. And it is for the Courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision, and when they are so important or so radical that they should be left to the Legislature.'*

16. A bold statement that the minor would have matriculated whereafter she would have proceeded to obtain a degree of her choice, without providing detailed facts to support it, is not tenable in our current society. References to unknown research suggesting that children in South Africa, generally, perform better – and progress further, academically (and in employment) than their parents are also not of any assistance. Why should progress necessarily equate to a university degree? Why could progress not be a trade qualification or a post matric diploma? The experts have simply not provided sufficient reasons for considering that only the obtaining of a degree would constitute the minor having "*progressed further*" than her parents. There is no evidence before this Court supporting the statement that the minor would have proceeded to university and obtained a degree.

17. If the evidence had been that the minor had the ability to progress to university, it may have been accepted, as it is common knowledge that more students obtain university exemption, than which actually proceed to study there.

18. Certain degrees however have higher admission requirements than others. The statement that the minor would have been able to progress to university and obtain a degree of her choice can therefore simply not be accepted without specifying which degrees the minor would have been able to achieve the minimum requirements for, and the reasons for holding such view.

19. The statement that the minor would have secured a degree of her choice further also needs to be tempered by consideration of the attrition rate in a chosen faculty. There is no evidence before this Court as to what percentage

of students progress from first to second year and from second to third year, which information is essential, given the period over which the actuarial calculation is to be performed.

20. Ms Fakir states that financial aid is much more readily available today for less privileged students than might have been the case in the past. I understand her opinion to be that the minor will take four years to complete a three-year degree, yet her report is silent about what the effect of a delay in completion of the degree would have on such financial aid. i.e. would a student who fails subjects, causing the degree to be extended to four years, still qualify for financial aid or does the specific financial aid scheme to which she refers require that the student successfully complete each year for the funding to continue? This information is not before Court creating yet another disadvantage in considering the statement made by the industrial psychologist.

21. It is my opinion that an industrial psychologist's report is incomplete if it does not properly address the high levels of unemployment in South Africa. A statement that it would take a candidate 12 to 18 or 18 to 24 months to secure employment is not of any real assistance without divulging where this information was obtained from, when the data supporting it was collected and why it should be relevant in the particular circumstances of the minor in question.

22. The industrial psychologist's report in this matter uses the Patterson Scales to plot the minor's projected career path. To the extent that there are different scales available which measure occupations and income, it is necessary to

motivate why a particular scale is preferred over any other that is available to industrial psychologists. For example, why use the Paterson Scales rather than STATS SA? It requires a motivation by the expert, based on the facts available to the expert and the circumstances of the case.

23. Similarly, once the Paterson Scales have been selected as the appropriate basis for projecting a career path, then the way it is used needs to be stated and motivated in the report. The Paterson Scales make provision for a cash / basic salary as well as for cost to company / inclusive / comprehensive package. The expert must set out the factual basis which informed her opinion that one method of calculation should be preferred above the other.

24. It is also important to consider the implications of postulating a career that would end in the so called “D band”. It may well be that progressing to the D band requires additional qualifications or training, over and above an undergraduate degree. Once it is postulated that the minor’s career will culminate in earnings in the D band, an explanation is required as to how such a conclusion has been reached. This information is not in Ms Fakir’s report and the report is silent on the facts which she used to project the career path postulated in the report.

25. Furthermore, the Patterson Scales make provision for three tiers of earnings - the 25th percentile, the median and the 75th percentile. If the opinion is expressed that a calculation must deviate from the median, the contents of the report must motivate why, and state the facts which underly such opinion. *In casu,* use of the 75th percentile is recommended without any reasons given.

26. Given the content of paragraphs 12 to 25 above, the industrial psychologist's report and as a result, the actuarial calculation based on the opinion expressed therein, is of limited assistance to the Court in coming to a fair assessment of the minor's loss of earnings or earning capacity.

27. Having said the above, the only figures available are those set out on CaseLines at 09-174 in the actuarial report, and which reflect the industrial psychologist's pre- and post - accident postulations.

28. The actuarial calculation was performed in 2024. The minor was born in 2015 and it is projected that she would retire in 2080, after a working lifespan of 46 years.

29. The "*but for the accident*" figure equals R8 715 227. Given the length of time over which the calculation is done as well as the uncertainties caused as a result of the shortcomings in the medico legal report of the industrial psychologist's set out above, it is my view that an appropriate contingency deduction would be 0,75% per annum, reducing the *but for the accident*" figure to R5 054 832.

30. The "*having regard*" calculation comes to R2 243 427. Although the period of the calculation is the same, the post-accident figure does not suffer all the same uncertainties as the pre-accident figure and there is no reason to deviate from the historical usual 0,5% per annum contingency deduction, resulting in a post contingency figure of R1 615 267.

31. Setting off the post-accident income of R1 615 267 against the pre-accident figure of R5 054 832 renders a net loss of R3 439 565.

32. In the circumstances I make the following order:

a. The defendant is to pay the plaintiff the sum of R3 439 565 in respect of her loss of earning capacity.

b. The defendant is to pay the plaintiff interest on the said sum of R3 439 565 at the rate of 11.25% per annum from 14 days from date of judgment to date of payment.

c. The defendant is to pay the plaintiff's party and party costs, as taxed or agreed, on the High Court scale.

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D. WEIDEMAN

ACTING JUDGE OF THE HIGH COURT,

JOHANNESBURG

APPEARANCES:

Plaintiff 's Counsel: M. LUFELE

For the defendant: STATE ATTORNEYS ROAD ACCIDENT FUND

DATE OF HEARING: 13 FEBRUARY 2024

DATE OF JUDGMENT: 29 FEBRUARY 2024