

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: 2020/05925

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

28 FEBRUARY 2023

DATE

SIGNATURE

In the matter between:

MALINGOANA THATO GIFT

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 28 February 2024.

JUDGMENT

WEIDEMAN AJ

1. This matter was before Court 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, had its defence struck out through failure to adhere to the Rules of Court or the Court's Directives.
2. Advocate L.R Molope-Madondo acted on behalf of the Plaintiff.
3. There had been prior engagement between the parties at which time the aspect of liability had become settled on the basis that the Defendant will be liable for 80% of such damages as the Plaintiff may be able to substantiate.
4. The aspect of general damages had also become settled on the basis that the defendant admitted the minor's entitlement to general damages and offered payment of the sum of R850 000 less 20% contributory negligence, rendering a not insignificant net amount due under this Head of Damage of R680 000.
5. This court was asked to only address and deal with the claim for future loss of income, alternatively, impairment of earning capacity.

6. The accident from which this claim arose occurred on the 30th of March 2019.
7. The plaintiff was 15 years old at the time of the accident and walking along Ndabezitha Street when a motor vehicle with registration letters and numbers DW [...] GP collided with him.
8. The claim was initially instituted by his mother but after obtaining majority he was substituted as the plaintiff in 2023.
9. As a result, the plaintiff sustained a facial fracture, an injury to the left eye, a head injury, and a fracture of the right big toe.
10. The Neurosurgeon, Dr Mazwi, opined that the plaintiff sustained the following injuries:
 - 8.1 Head injury with GCS 15/15.
 - 8.2 Facial abrasion.
 - 8.3 Right 1st digit foot fracture.
 - 8.4 Left eye injury.
 - 8.5 Rib fracture.
 - 8.6 Maxillary sinus fracture.
11. As a result of the head injury, the plaintiff suffers from:
 - 11.1 Concentration difficulties
 - 11.2 Memory disturbance
 - 11.3 Headaches
12. The Clinical Psychologist, Ms Grootboom, stated that the plaintiff's pre-morbid functioning is estimated as average.
13. Her neuropsychological assessment revealed mild to severe neurocognitive deficits with compromise of short-term memory and encoding skills for auditory presented information, immediate memory, delayed memory, manual

dexterity for fine motor skills and executive functioning relating to pace control, self-monitoring skills, executive planning, problem solving, focused attention and cognitive flexibility.

14. His neurocognitive deficits can be ascribed to the head injury and sequelae and are compounded by emotional sequelae.
15. His school performance had decreased due to his concentration and memory problems. His current psychological profile may negatively impact his performance at tertiary levels and subsequently his occupational potential in the future.
16. His interpersonal relations with his peers and teachers are likely to be negatively impacted by emotive factors.
17. The Educational Psychologist, Mr Mthimkhulu stated that the Plaintiff's cognitive abilities have declined. The submitted Grade 12 certificate indicates that he had passed grade 12 with a diploma endorsement.
18. He cannot see with his left eye. His eyes are teary and painful. He experiences headaches and dizziness when walking and standing for long or when he is in the sun. He is forgetful. He will not be able to compete with his peers for occupations in line with his qualifications.
19. He has been rendered a compromised individual on a functional and educational level. He has suffered a loss of educational potential which will have a significant impact on his ability to work and earn at the level that he would have, prior to the accident.
20. Mrs Z Fakir is the industrial psychologist who prepared a report on behalf of the plaintiff in this matter. There were several aspects of her report that the court was not comfortable with and accordingly she was called to testify.

21. Before looking at extracts from her report it would be useful to summarise the plaintiff's academic history, immediately prior to the accident and thereafter.

We find this on Case Lines at 028-78 and further:

21.1 In Grade 8 the minor achieved above 50% in 5 subjects and below 50% in 4 subjects.

21.2 In Grade 9 the result was 6 subjects above 50% and 3 below 50%. This was the year in which the accident took place (2019).

21.3 In Grade 10 he achieved 4 results in the 50ties and below 50% in 3 subjects.

21.4 In Grade 11 the minor achieved above 50% in 2 subjects and below 50% in 5 subjects.

21.5 His final Grade 12 result in 2022, more than 3 years after the accident, was as follows.

21.5.1 Zulu 71

21.5.2 English 66

21.5.3 Life orientation 75

21.5.4 Mathematics 58

21.5.5 CAT 51

21.5.6 Physical Science 48

21.5.7 Life Science 56

21.5.8 In 2023 he rewrote Mathematics, Physical Science and Life Science and achieved the same result as he did in 2022.

22. Direct quotations from Ms Fakir's report:

20.1 On CaseLines at 033-145:

The writer opines that Mr Malingoana would have likely obtained Grade 12 (NQF4) and further completed a degree (NQF7) in keeping with his career interests.

20.2 On CaseLines at 033-146:

The submitted Grade 12 certificate revealed that he passed the grade with Diploma (NQF6) endorsement. This proves that his learning potential has been compromised as he had not been able to obtain degree endorsement.

20.3 From CaseLines at 033-147 and 033-148:

Considering the above, the writer takes into account the Educational Psychologist report by Mr Mthimkulu indicating that "His family's educational background revealed that his mother completed Grade 12 level of education. His 1 sibling was reported to have completed Grade 12. When one considers the familial educational background, there is evidence that he hails from a family which is education orientated. It should be noted that given better academic opportunities via study loans such as NSFAS to learners who are economically disadvantaged, the younger generation possesses the ability to flourish academically as compared to their parents. Therefore, Mr. Malingoana is considered to have had the potential to surpass his parents and do better for himself academically. It should also be noted that children in the family differs with resilience suggesting a possibility that Mr. Malingoana could have done better in comparison to her sibling. It was

reported that his scholastic profile suggests that he was retained in his grade R because he was too young to progress to another grade and not necessarily that he failed. His reported scholastic profile suggests that he failed Grade 1 before the accident in question. However, he managed to recover from his difficulties and passed all his succeeding grades. His failure of grade 1 could be suggestive that he was probably still playful and was not emotionally ready for the scholastic content considering after grade 1 he passed all grades. This simply means although he had intact intellectual abilities, his socio-emotional development was not quite ready for formal Grade 1 studies. Based on the information provided above, the writer opines that Mr. Malingoana would have likely obtained Grade 12 (NQF 4) and further completed a Degree (NQF 7) in keeping with his career interests.

A media statement released in 2022 by NSFAS indicated that “NSFAS has confirmed funding for 691,432 students for the 2022 academic year, with 462,983 being female and 227,072 being male students.”
Source: Statement by the Minister of Higher Education, Science and Innovation, Dr Blade Nzimande on the 2022 National Student Financial Aid Scheme (NSFAS) funding: 24 June 2022. Source: Statement by the Minister of Higher Education, Science and Innovation, Dr Blade Nzimande on the 2022 National Student Financial Aid Scheme (NSFAS) funding.

When considering the aforementioned information, the writer postulates the possible career path that Thato may have been able to follow with the associated earnings: the writer is of the opinion that he would have in all likelihood had the financial support to continue with tertiary studies after having completed a Grade 12 level of education. He would have been able to pursue a four-year degree of his choice. After having completed a tertiary qualification, she (sic) would have then been able to enter the open labour market after a period of 6 – 12 months of seeking employment. His entry level into the open labour market would have been on a Paterson B3/B4 level (Quantum Yearbook, 2023). As a qualified, young black male he would have had opportunities to progress at three-to-four-year intervals in his career. He would have reached a senior position by his mid to late forties where he would have reached his career earning ceiling on a Paterson D1 (median to upper quartile: total package) earning level.

23. Counsel for the plaintiff indicated that she had no questions for Ms Fakir, other than to re-affirm that she stood by the contents of her report.
24. I indicated to Ms Fakir that the duty of an expert witness is to assist the court to understand issues which fall outside of its field of expertise by calling on the expertise of other specialists. *In casu* the court's questions are not an indictment on her or her report but simply an effort to better understand the content of the report and to place it in perspective in the context of the claim.
25. Having said the above the court posed the following questions:

25.1 On what basis did she determine that the minor's intellectual capacity had been compromised, i.e., how did she test the child's pre-accident intellectual ability? Ms Fakir indicated that she did not test pre-accident ability but that her findings in this regard were based on the report of the educational psychologist.

25.2 To the extent that she quoted figures relating to the number of bursaries available to students via NSFAS; did she know how many of those were in respect of first year, second year and third-year students? She did not know and could not assist.

26. Based on the statement that the minor would have been able to attend university and complete a four-year degree of his choice immediately after completing Grade 12, the following questions were posed to Ms Fakir:

26.1 Does she agree that not every student with a university exemption goes to university? She, correctly so, immediately agreed.

26.2 In the absence of any formal evidence before court in substantiation, does she agree that there are many more applicants for university admission than there are places available at the various universities and that at most universities only the top 20-25% of applicants actually obtain admission? She responded that she did not have any information about the percentage of applicants that are accepted but she agreed that there were many more applicants than there were places for at the various universities.

26.3 Does she agree that in respect of most of the specialist degrees, such as medicine, engineering, most of the sciences, actuarial etc. there were

entry requirements requiring exceptional marks in order to qualify? She agreed that this was correct.

26.4 Does she have any information about the number of students that enrol and complete their studies in the minimum time, i.e., complete a three-year degree in three years? She could not assist the court in this regard.

26.5 Did she agree that most degrees were three-year degrees? Yes.

26.6 Given the issues raised by the court and in respect of which she could assist, as well as the issues in respect of which she could not, what was the factual premise underlying her statement that the minor would complete matric and proceed to university, completing a four-year degree of his choice within four years? In her response she clarified that what she meant was a three-year degree which would probably take the minor four years to complete. She did not mean a four-year degree, *per se*.

26.7 As per CaseLines 033-145, “doing better than the parents”. Was obtaining a diploma not doing better? Ms Fakir responded that she stood by her opinion that “doing better” was obtaining a degree and which he would have been able to do, had the accident not occurred.

27. When asked to explain why she used the Paterson scales rather than STATS SA, Ms Fakir simply stated that “they were trained to use the Paterson scales”.

28. Ms Fakir, correctly so, immediately conceded that the sample used by STATS SA is much bigger than that used in preparing the Paterson Scales and would take into account a greater portion of the population.

29. Ms Fakir could not assist the court when asked to indicate why a salary package rather than a cash salary was used on the Paterson Scales that she

proposed. Similarly, Ms Fakir could not assist by indicating what percentage of the sample collected and from which the Paterson Scales are derived would fall under the Cash Salary values and which percentage would fall under the Package Values where both are reflected on the Paterson Scales.

30. Ms Fakir made concessions were called for and admitted gaps of knowledge where it was evident that these existed.

31. To the extent that Ms Fakir's opinion was based on the minor's pre-accident ability which she took untested from the educational psychologists' report, the educational psychologist was also required to testify.

32. Mr Mtimkulu, the educational psychologist, was available to testify the following day, 14 February 2024.

33. Contrary to Ms Fakir, Mr Mtimkulu was not willing to make any concessions.

34. When asked what factors he took into consideration in reaching the conclusion that there was a depletion of cognitive ability, Mr Mtimkulu referred to the birth records (which suggests normality) which he compared to the Grade 12 results which the minor attempted to improve in 2023.

35. I understood his evidence to be that even though the minor has university exemption due to his 2023 results, he will not succeed at university.

36. Looking at the actual 2023 results the marks there appear to be the same as what was achieved in the 2022-year end exams and it is thus unclear why the minor would now have university exemption.

37. The important point, to me, was the fairly modest scholastic performance, pre-accident, and which, on the face of it, is not much better or worse than the post-accident achievements. This, Mr Mtimkulu brushed off, reiterating his

opinion that a comparison between the birth records and matric results demonstrate a depletion of ability.

38. The actuary in preparing his report, extracted the following income and career information from the industrial psychologist's report:

38.1 Pre-accident earnings:

In 2022 Thato was in Grade 12. Thato's education progression would have been as follows:

End	2022:	Complete	Grade	12.
2023	to	2026:	Complete	Degree (NQF level 7)

2027: Remain unemployed for 9 months.

From the 1st October 2027 he would earn at the average median of a total Package at the Paterson levels B3 & B4 and which at the date of the calculation was R 330 500 per annum.

From the 1st June 2051 at the age of 47½ he would have progressed to the average median & upper quartile of the total package at the Paterson level D1 at R 1,190,000 per annum.

38.2 Post-accident earnings:

At the end of 2022 he completed Grade 12

In 2023 he attempted to improve his grade 12 results.

From 2024 to 2027 he will complete a Diploma (NQF level 6)

From 2028 he will remain unemployed for 15 months.

From the 1st April 2029 he will earn at the Median Basic Salary of the Paterson level B3, and which is R 234,000 per annum. Thereafter his income will increase uniformly until the 1st December 2048 (Age 45), and

at which stage he shall earn at the Median Total Package Paterson level C3, and which equates to R 641,000 per annum.

39. Taking the above information, the actuary calculated various scenarios one of which, for illustrative purposes, is:
40. A pre-accident ceiling at the average of the median and upper quartile total packages of the Paterson C3 level at age 45. On this basis the value, pre-contingencies of the future uninjured income will be **R 12,874,520**.
41. Now that the accident had occurred and based on the above scenario, the actuary arrives at a value of the injured income of R **7,153,147**, pre-contingencies.
42. 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 evidence 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.”

43. I am in full agreement with the above extract.

44. This court found the evidence of Ms Fakir wanting insofar as it goes to the factual basis to underpin her pre-accident scenario. There is in fact nothing to support her proposition of the Plaintiff's career path set out in her report, but for the accident, nor is there any support for her proposition from the evidence of the educational psychologist.

45. Mr Mtimkulu's insistence that the plaintiff's Grade 10 and 11 results and comparison between it and the grade 8 and 9 results were of little significance and that only the Grade 12 results should be considered is problematic as the Grade 12 results, in general, are better than either the pre-accident or post-accident high school results and represents the plaintiff's best academic performance in high school.

46. It is my opinion that the projected post-accident scenario is in fact the plaintiff's pre-accident high water mark. It does not offend against the research which Ms Fakir referred to and which states that children tend to do better than their parents as the plaintiff's parents do not have post matric qualifications. Achieving a Diploma (NQF level 6) is furthermore in line with the totality of the plaintiff's high school results (pre – and post-accident).

47. This does however not imply that the plaintiff will not suffer a loss of future income. He sustained serious injuries which will affect his career and his ability to freely engage in economic activity. However, the evidence suggests that it is an impairment of capacity claim and not a direct loss of income claim.
48. If the figure of R7 153 147,00, as referred to in paragraph 40 above, is taken as the probable future income of the plaintiff and his age as 20, then the period of interest is 45 years. If provision is made for impairment of capacity at 0,5% per annum, then the net result is an amount of R1 609 458.08. This figure represents the amount which this court will allow in respect of the claim for impairment of earning capacity.
49. The court was advised that the aspect of negligence was settled on the basis that the Plaintiff will be entitled to 80% of such damages as he may be able to substantiate.
50. The said sum of R1 609 458.08 must therefore be reduced by 20% and which then renders a net result of **R1 287 566.46**.

51. In the circumstances I make the following order:

51.1 The defendant is to pay the plaintiff:

51.1.1 The sum of R1 287 566.46 in respect of the claim for loss of income.

51.1.2 Interest on the said sum of R1 287 566.46 at the rate of 11.25% from 14 days from date of judgment to date of payment; and

51.1.3 Party and party costs, as taxed or agreed, on the High Court scale.

COURT,

D. WEIDEMAN
ACTING JUDGE OF THE HIGH

JOHANNESBURG

APPEARANCES:

Plaintiff 's Counsel: Lebohanga Molohe- Madondo

For the defendant: State attorney

DATE OF HEARING: 13 FEBRUARY 2024

DATE OF JUDGMENT: 28 FEBRUARY 2024

