

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO.:50120/2021

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

21 June 2023

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DATE

In the matter between:

DLZ obo DTK

Applicant

and

ROAD ACCIDENT FUND

Respondent

**JUDGMENT
LEAVE TO APPEAL APPLICATION**

MAZIBUKO AJ

1. The applicant seeks leave to appeal to the Supreme Court of Appeal, alternatively to the Full Bench against the whole Judgment of this court delivered on 14 April 2023, where the applicant's claim on quantum for loss of earnings was dismissed.

2. During the trial the question was whether DTK, the minor child sustained a head injury and whether that injury sustained will impact DTK's future employment resulting in loss of earnings.
3. I do not propose to set out the full grounds of appeal again or repeat that which is set out in the judgment since that which was relevant was dealt with in the judgment.
4. Briefly the grounds of the bout on the judgment, are that the court erred:
 - 4.1. In admitting and relying on the hospital records as they constituted hearsay evidence.
 - 4.2. In placing much reliance on the cross-examination as it was not substantiated.
 - 4.3. By failing to consider the evidence of the neurosurgeon, educational psychologist, Industrial psychologist and occupational therapist and their findings.
 - 4.4. In not regarding the finding and its uncertainty as a question that may be resolved by higher contingencies as it relates to future occurrences.
 - 4.5. In not finding that the plaintiff could no longer do work or perform as she used to do pre-morbid as a direct result of the accident according to the reports of the educational psychologist, Industrial psychologist and occupational therapist.
 - 4.6. In not having regard to the fact that the only issue before the court was limited to the seriousness of the injuries and the related contingencies to be applied to the plaintiff's uncontested actuarial calculations.
 - 4.7. By not having regard to the fact the order prejudice the plaintiff who is a minor and that the judgment was not supported by the medical evidence placed before the court.
 - 4.8. In not exercising its discretion on the issues of accepting expert evidence and the seriousness of the injuries including the impact the injuries have on the plaintiff.
5. The respondent filed no cross-appeal and did not oppose the applicant's application. They were legally represented by Ms Mhlongo who during the application indicated to the court that she had no submissions to make. Her instructions were to abide by the court's decision in respect of the applicant's leave to appeal application.

6. The grounds for leave to appeal are, to a large extent, in my view, submissions and contentions made of what this court should have found, considered critically, and certain probabilities it should have considered and erred in not considering same.
7. In pursuing this court to grant the leave to appeal, the applicant, through its counsel, submitted that it placed its reliance on section 17 (1) (a) (i) and (ii) of the Superior Court Act, Act 10 of 2013, in that the appeal has a reasonable prospect of success and that there are compelling reasons for the appeal to be heard.
8. I agree with the submission that this court among others, relied on hospital records in rejecting the applicant's claim. However, the same hospital records were relied upon by both parties, for the applicant in proving its case and the respondent in defending the applicant's claim. They were admitted into evidence.
9. Regarding the compelling circumstances as envisaged by Section 17(1)(a)(ii) of the Superior Courts Act. No compelling reasons were placed before the court. What has been placed before this court is a wide range of grounds. The complaint is that the court should have accepted the expert evidence and findings thereof. In the circumstances, there is no ground for the application for leave to appeal to succeed.
10. Leave to appeal may only be given where the judge concerned is of the opinion that *'the appeal would have a reasonable prospect of success.'* See Section 17(1)(a)(i) of the Superior Courts Act 10 of 2013.
11. I do not believe the court was wrong in exercising its discretion by not accepting the expert evidence as set out in the Judgment. However, I am persuaded that the issues raised by the applicant in its application for leave to appeal are issues in which another court is likely to reach conclusions different to those I reached. Those issues include the fact that I did not accept the reports and findings of the neurosurgeon, educational psychologist, Industrial psychologist and occupational therapist as set out in the judgment. There are prospects of another court reaching a conclusion dissent from mine. Leave to appeal has a reasonable prospect of success and should be granted.

12. The issues of accepting or not accepting the experts' reports and their findings are not persuasive to grant leave to appeal to the Supreme Court of Appeal. Further, the matter is not complex for the Supreme Court of Appeal to hear the appeal. Accordingly, I intend to grant leave to appeal to the Full Bench of this court.
13. Regarding the costs of the application, the applicant asked that the application be granted with costs. In matters of costs, the general rule is that the successful party should be given their costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances.
14. The respondent did not oppose the application stating they will abide by the court's decision. Accordingly, I find no justification to award costs in favour of the applicant against the respondent.
15. Consequently the following order is granted.

Order:

1. The applicant's leave to appeal application succeeds.
2. The applicant is granted leave to appeal to the Full Bench of this court.
3. Each party is to bear its own costs.

N. MAZIBUKO

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

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 e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 14:00 on 21 June 2023.

Date of hearing: 8 June 2023
Date of Judgment: 21 June 2023

Appearances:

Counsel for the plaintiff: Mr M Phathela
Attorneys for the Applicant: Taula Attorneys

Counsel for the defendant: Ms N Mhlongo
Attorneys for the Applicant: RAF