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

CASE NO: 50120/2021
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED
14.04.23

In the matter between:

DLZ obo DTK Plaintiff

and

ROAD ACCIDENT FUND Defendant

Neutral Citation*: DLZ obo DTK v Road Accident Fund* (Case No: 50120/2021) [2023] ZAGPJHC 351 (14 April 2023)

It is trite that the identity of the plaintiff and the child in the proceedings, similar to the proceedings in this Court in this matter, is not to be revealed for publication.

JUDGMENT

Mazibuko AJ

Introduction

1. On 3 May 2016, the plaintiff, DTK, who was six years old and allegedly a pedestrian, sustained injuries from a motor vehicle collision at Usasa Street, Protea Glen, Johannesburg.

2. She is currently 13 years of age. In October 2021, On her behalf, DLZ, her mother, instituted an action in this court for a claim for general damages and future medical expenses in the sum of R1 million and R600 thousand, respectively, against the defendant arising from the collision mentioned above.

3. On 17 January 2023, the plaintiff filed a notice to amend her particulars of claim, alleging as follows, in

3.1. "*Paragraph 8. As the direct result of the above-mentioned motor vehicle*

accident, the plaintiff's minor child was then rushed to Bheki Mlangeni hospital, receiving emergency medical attention due to the following serious bodily injuries she sustained: 8.1Head injury, 8.2 Greenstick fracture of the distal right tibia/fibula, 8.3 Various bruises, abrasions, contusions, 8.4 Lacerations and 8.5 Soft tissue injuries.

3.2. Paragraph 9. As the direct result of the aforementioned serious bodily injuries sustained by the plaintiff's minor child, the plaintiff's minor child has been left with a permanent bodily disfigurement and/or disability in that she can no longer mobilize and/or utilise her body to the fullest as she used to before the motor vehicle accident occurred.

9.1 the plaintiff's minor child has lost her full and perfect use and enjoyment of her entire body due to the opposite injuries.

9.2 the plaintiff's minor child's constitutional rights to freedom of movement has been infringed and/or limited by the aforesaid injuries in that she is no longer able to walk for a distance;

9.3 the plaintiff's minor child is always suffering from

unbearable bodily pains end residual moderate neurocognitive deficits (in the form of memory impairment) due to the aforesaid motor vehicle accident, which left him with a permanent bodily disfigurement.

9.4 the plaintiff's minor child's rights to enter trade of her choice and earn a good living has been destroyed by the aforesaid motor vehicle accident as she now suffers from poor concentration.

3.3. 10.3 loss of income and earning capacity 7 992 904.00 (seven million nine hundred and ninety-two nine hundred and four rand)."

4. The issue pertaining to the defendant's liability was settled between the parties on the basis that the defendant shall pay the plaintiff 100% (one hundred per cent) of her proven or agreed damages, which damages flow from the injuries sustained by DTK during the said collision on 3 May 2016. Further, the defendant made an undertaking in terms of section 17(4)(a) of the Road Accident Fund, No. 56 of 1996 (The Act) regarding future medical, hospital visits and related expenses concerning goods, services and accommodation required by the plaintiff.

5. The general damages and future loss of earnings are heads of damages in dispute. In support of her claim, the plaintiff placed its reliance on the evidence tendered by experts, their experts' reports and hospital records.

6. In relation to general damages, the plaintiff filed the hospital records, neurosurgeon, orthopaedic surgeon and clinical psychologist's reports. The defendant rejected the general damages claim; it is not before this court for determination. Regarding her claim of future loss of earnings, the plaintiff called the experts to testify. They also filed reports.

7. The defendant did not file expert reports or call witnesses. However, it relied on the hospital records, which it argued did not reflect any head injuries having been suffered by the plaintiff as a result of the said motor vehicle collision. Further, even if there were head injuries, same did not cause the damages as claimed by the plaintiff.

Plaintiff's case

8. On 6 May 2022, DLZ, the mother of DTK, deposed to an affidavit in support of DTK's claim of future loss of earnings. She stated as follows:

> *"Paragraph 2. She was hit by a car while playing on the sidewalk on 10 May 2022 at Usasa Street Protea Glen Buy a vehicle driven by Mr Rabosiswana with registration number [...]."*
>
> *Paragraph 3. On the above-mentioned date, she (referring to DTK) was involved in a motor vehicle accident. As a result he sustained serious bodily injuries; the other injuries on his body will be confirmed by the medical records attached herein".*

9. The plaintiff placed its reliance upon the evidence and reports of Dr JA Azhar, the Neurosurgeon; Mr Talent Maturure, the Industrial Psychologist; Ms D Mathebula, the Occupational Therapist; Dr Z Radebe, the Clinical Psychologist; Dr Yvonne Matlala, the Educational Psychologist, Dr MJ Tladi, the Orthopaedic Surgeon, Drs Mkhabela & Indunah Diagnostic Radiologists and John Sauer Actuaries & Consultants.

Neurosurgeon

10. Dr JA Azhar testified that he is a neurosurgeon with an MBBS degree, speciality in neurosurgery since 1992. He examined DTK on 16 June 2021. In compiling his report, he regarded the RAF1 form submitted to the defendant and hospital records. He testified that he consulted with DTK. She was awake, talking, and orientated in person, place and time. Her speech was very soft, shy and reluctant. Her memory is impaired, and her calculations are very poor and slow. She was depressed and had low self-esteem. The skull

and spine are normal. All cranial nerves are intact, and no papilledema. No sensory deficit was detected. Regarding the motor, there was no focal deficit found. Reflexes, bulk and tone, are expected, and power is bilaterally equal and normal. There was tenderness on the right distal leg and ankle. Gait and range of movements are normal.

11. He was advised that DTK was involved in a car accident. He stated that the hospital did not think that DTK had a head injury, and same was not treated. On arrival at the hospital, she was awake, moving all limbs and had swelling on the right lower leg. She was sent for X-rays confirming a distal tibia/fibula fracture. She was followed up a couple of times in the OPD and found to be in satisfactory condition.

12. He was informed that since the accident, DTK often complains of headaches and a painful right leg, especially on playing or prolonged walking. This affects her social activities, relations with peers, extracurriculars, and academics at school. Her teachers often complain that she gets tired easily and is more lethargic in class. There are no sports in her school. She only plays with her peers. She aspires to be a doctor. Pre-injury, her academic school performance was satisfactory, but afterwards, she struggled with her grades not being so good.

13. She stays with her mother and sister. Her parents are no more in a love relationship. Her mother is unemployed. Their only source of income is R940, which they get as a Government grant. Her father is a taxi driver. He does not pay any maintenance towards her expenses.

14. He concluded that DTK suffered from a minor head injury/concussion. She has difficulties in her studies, which will likely affect her future studies and career. Her gross impairment is 9%. He recommended that DTK needed a brain scan (MRI) to assess her current morphology, focal injury and prognostication. She has a low risk of developing epilepsy at some stage.

Industrial psychologist

15. Mr T Maturure testified that he is qualified and has been an industrial psychologist since 2016. He compiled a report on behalf of DTK. He opined pre-accident: that in anticipating the level to which an individual may have advanced in their occupation, several aspects play a role, such as the familial background, developmental milestone and medical history, socioeconomic circumstances, overall functioning, educational achievements, vocational history and others.

16. He stated that DTK is likely compromised concerning her scholastic and vocational abilities post-accident and the sequelae therein. She will complete grade 11 (NQF level 3) with no tertiary training DTK will likely enter the labour market at the lower quartiles of unskilled labourers, reaching her career ceiling earning at the median quartiles of unskilled employees by the age 40-45, receiving inflationary increases thereafter. She was likely to be unemployed as a result of the sustained injuries.

Occupational therapist

17. Ms D Mathebula testified that she qualified as an Occupational therapist and has been practising as such since 2010. In essence, her evidence is that DTK was born a normal child. Her developmental milestones were reached within normal limits. she had no physical disabilities or challenges. She used to play well with other children. She was able to socialize with her family and friends. She did not have any behavioural problems. She was emotionally stable.

18. Pre-accident: DTK has not failed any grade. She was going to pass grade 12 and continue with the diploma course (NQF6) depending on the availability of finances such as bursaries or loans (NSFAS). The trend lately is that children often achieve more than their parents, academically and vocationally. The educational landscape has since changed to support the learners so that most are able to complete high school education.

19. Post-accident: DTK failed grade 1 once. She has learning difficulties. She needs psychotherapy and learning support. With learning support, she will, at best, achieve a grade 11 (NQF 3) and will not study further than that. It

seemed like she had suffered the psychological trauma of the accident. Her functioning post-accident has led her to have some physical, academic and emotional
challenges. She has suffered the loss of amenities during hospital confinement, pain and discomfort.

20. She recommended 25 sessions of therapy to enable her to deal with the trauma of the accident. Also, family counselling to help the family to understand DTK and help her to achieve her future goals.

21. DTK was found to be well-mannered during both structured and unstructured evaluations, was cooperative and maintained eye contact. She was well separated from her mother and could communicate fluently. She required minimal repetition of instructions and displayed immediate memory problems. Scores on developmental tests of visual motor integration were average for Motor coordination, below average for Berry Visual Motor Integration and low for visual perception. Scores on the visual perceptual test were below average on visual discrimination, visual memory, form constancy, sequential memory and figure-ground.

22. Her emotional difficulties relating to the accident impact her performance negatively. She is expected to improve as she works through her emotional difficulties in play therapy. She subjectively reported headaches, irritability and being short-tempered. The medical records indicate that she was alert and sustained a right tibia/ fibula fracture. She, however, presented with symptoms in keeping with a head injury exacerbated by her emotional difficulties.

23. Her mother reported that she failed and repeated grade four. She is reported to have difficulties at school. Her scholastic performance is said to be poor. She is forgetful about what she is sent to buy. She is accompanied to all her appointments as she is still a minor. She can wash dishes independently.

24. There were no school reports available at the time. She reported difficulties with concentration, which were evident during the assessment, likely affecting her scholastic performance negatively. She will benefit from play therapy.
The accident in question impacted negatively on her psychological and emotional well-being.

Clinical Psychologist

25. Dr Z Radebe gave evidence that she holds a Doctorate in Clinical Psychology and has compiled a report about DTK. She stated that she was informed that DTK was six years and five months at the time of the accident. According to her mother, she had normal developmental milestones. She was generally healthy. DTK's emotional assessment results are reported on the projective assessments. The themes depicted from the projective assessment involved anxiety and difficulty trusting her immediate environment. She yearns for closeness. She perceives her family to be close with emotional connectedness. According to the clinical psychologist, the minor was emotionally compromised due to reasons unrelated to the accident.

Orthopaedic Surgeon

26. Dr Tladi stated that she holds an MBCHB degree and a master's degree in orthopaedic surgery. She opined that she saw no adverse effects from DTK's injuries that would affect her future employment. She confirms that the plaintiff requires learning support. Remedial classes should be urgently implemented in her school environment with an Occupational therapist and clinical psychologist. She believes DTK's employment potential will ultimately be determined by the level of education she will attain.

Educational psychologist

27. Dr Yvonne Matlala testified that she is an educational psychologist holding a Doctorate. She testified that she consulted with DTK on 1 October 2021. The purpose was to evaluate DTK's pre- and post-accident cognitive, emotional and educational potential. The pre-accident potential is deduced from various information such as developmental history, formal and informal schooling reports, family circumstances, parental educational levels and/ or patterns of

and employment history of parents/ and or siblings. The minor started school in creche and was in grade 1 at the time of the accident. The available school reports suggest a range of below-average to adequate academic performance.

28. Post-accident school reports suggest that whilst her results are inconsistent, she is still coping with academic demands. She is unlikely to cope with tertiary training and would probably be limited to unskilled job environments when entering the open labour market with a Grade 11. She experiences headaches and painful right leg and sinuses which affect her activities of daily living.

29. Her post-accident intellectual ability suggested an average intellectual ability. Before the accident, DTK has not failed any grade. She was going to pass grade 12 and continue with a diploma course (NQF 6), depending on the availability of finances such as bursaries or loans (NSFAS).

Calculations

30. In support of the amount claimed, the plaintiff submitted an actuarial report with the application of pre-morbid and post-morbid contingencies.

Issue

35. The issue is whether DTK sustained a head injury and whether that injury sustained will impact DTK's future employment and employability.

Legal principles

36. In Michael and Another v Linksfield Park Clinic (Pty)Ltd and Another (2002) 1 All SA 384 (A), the Supreme Court of Appeal had the following to say regarding the approach to be adopted in dealing with the expert evidence:

"[34] ……. As a rule, that determination will not involve considerations of credibility but rather the examination of the opinions and the analysis of their essential reasoning, preparatory to the court's reaching its conclusion on the issues raised."

[36] That being so, what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning….

[39] A defendant can properly be held liable, despite the support of a body of professional opinion sanctioning the conduct in issue, if that body of opinion is not capable of withstanding logical analysis and is, therefore, not reasonable. However, it will very seldom be right to conclude that views genuinely held by a competent expert are unreasonable. The assessment of medical risks and benefits is a matter of clinical judgment which the court would not normally be able to make without expert evidence, and it would be wrong to decide a case by simple preference where there are conflicting views on either side, both capable of logical support. Only where expert opinion cannot be logically supported at all will it fail to provide "the benchmark by reference to which the defendant's conduct falls to be assessed" (at 243 A-E)."

37. In Twine and Another v Naidoo and Another (38940/14) [2017] ZAGPJHC 288; [2018] 1All SA 297 (GJ), the court had the following as a guide in approaching the expert evidence:

"Para 18:

a. The admission of expert evidence should be guarded as it is open to abuse,

c. The expert testimony should only be introduced if it is relevant and reliable. Otherwise, it is inadmissible.."

r. A court is not bound by, nor obliged to accept, the evidence of an expert witness: "It is for (the presiding officer) to base his findings upon opinions properly brought forward and based upon foundations which justified the formation of the opinion."

s. The court should actively evaluate the evidence. The cogency of the evidence should be weighed "in the contextual matrix of the case with

which (the Court) is seized. If there are competing experts, it can reject the evidence of both experts and should do so where appropriate. The principle applies even where the court is presented with the evidence of only one expert witness on a disputed fact. There is no need for the court to be presented with the competing opinions of more than one expert witness in order to reject the evidence of that witness.

t. In certain cases of neurological, psychological and psychiatric evidence the expert is dependent on the honesty of the person who is the subject of the assessment for their evidence to be of any probative value to the court. This problem has manifested itself many times and the approach of the courts is succinctly captured in the following dictum, which while dealing with the evidence of an expert in psychiatry, is no less applicable to an expert in the sciences of neurology or psychology:

"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."See Sv Mthethwa (CC03/2014) [2017] ZAWCHC 28 at [98], but see all the cases cited at [97] – [99] as well as R v Turner, n4 at 73f.

Should the subject of the assessment not testify, it would render the views of the expert meaningless as it was based on the untested hearsay of the subject of the assessment. In S v Shivute 1991 (1) SACR 656 (Nm) at 661H, the court, confronted with exactly this situation, held that "[t]he accused failure to testify stripped the opinion evidence of the expert witness of almost all relevance and weight."
The principle was re-stated in S v Mngomezulu 1972 (1) SA 797 (A) at 798F-799, *where the Court said that unless the psychiatric or psychological evidence is linked to facts before court, it is just "abstract theory."*

38. In *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) at 772G-H , it was held: *"If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is even dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour with the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does."*

Discussion

39. It is trite that the plaintiff must prove, on a balance of probabilities, that the injuries sustained during the collision mentioned in the amended particulars of claim and the sequelae of these injuries caused her diminished earning capacity. The hospital records are silent on the head injury.

40. The neurosurgeon concluded that DTK might have suffered a minor head injury, and the hospital did not think she suffered same. It can be accepted that the results were satisfactory at the time of examination and follow-ups, as indicated by the neurosurgeon.

41. However, the plaintiff has difficulties proving the alleged minor head injury, as opined by the neurosurgeon. He recommended a referral to do MRI. No MRI was done. There was no evidence that DTK has ever consulted or taken for medical examination or taking medication concerning the headaches she is experiencing.

42. The evidence was that she could not perform at school, which contributed to her future earning capabilities. It is not clear how the headaches affect her interpersonal relations and causes her short-temperedness. The experts stated that DTK could not participate in sports after the accident. Her interpersonal relationships are affected by irritability. These findings do not fit the sequelae of DTK. She was six years of age at the time of the accident. She was not involved in any sport.

43. There were no school reports before the accident. Even post-morbid, the school reports presented are not consistent. Sometimes she performs well, and sometimes, she does not. The educational psychologist had one session with DTK. She stated that it was unlikely that DTK would achieve beyond Grade 11, even with any intervention like therapy, extra classes and family support. DTK suffered a minor head injury with no MRI examination, according to the neurosurgeon.

44. Experts provide the courts with an objective opinion based on relevant facts before the court. They are expected to acknowledge that their evidence has to have a higher degree of objectivity otherwise, same is diluted to an extent that it cannot be treasured and accepted due to lack of unbiasedness. The experts' opinions based on their respective knowledge are presented to the court subject to acceptance by the court.

45. It is worth mentioning that the experts' testimony, especially the Industrial and educational psychologist, was fluid and wide-ranging to be of any probative value in determining whether the injury sustained by the plaintiff has any impact on her future employment and employability.

46. Conversely, to a certain extent, all experts suggest and give recommendations for treatment and psychotherapy for DTK to address and improve her abilities, even at school. The school reports presented before the court indicate that DTK has the potential to progress beyond Grade 11 and even into the tertiary level with the intervention of extra classes, educational psychologist and social workers' services. DTK retains her pre-morbid earning capacity. No cogent evidence was led to satisfy the court that DTK stands to lose any future earnings or employability due to the motor vehicle accident in question. As the result, there is no justification for admitting the experts' evidence.

47. Though the court only has the evidence of expert reports by the plaintiff, the court is not to be presented with the competing opinions of more than one expert witness in order to reject the evidence of that witness. In my view, the

plaintiff's claim relating to the future loss of earnings stands to be dismissed for the reasons already discussed.

48. Consequently, the following order is granted.

Order:

1. The plaintiff's claim for loss of earnings is dismissed.
2. No order as to costs.

N. Mazibuko

Acting Judge of the Gauteng Division, Pretoria

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Attorneys for the Defendant:	State Attorney (Johannesburg)
Heard:	From 17 to 19 January 2023
Date of Judgment:	14 April 2023