

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 487/2021

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

M[...]: Z[...] obo Y[...]

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

HEARD ON:

02 & 03 AUGUST 2022
15 & 16 NOVEMBER 2022
24 & 25 JANUARY 2023

HEADS OF ARGUMENT FILED:

14, 20 FEBRUARY & 01 MARCH 2023

JUDGMENT BY:

DANISO, J

DELIVERED ON:

This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 15 June 2023 at 9H00.

[1] The plaintiff claims damages for loss of earning capacity resulting from a mild traumatic brain injury and a fractured tibia and fibula of the right leg sustained

by her minor child in a pedestrian motor vehicle accident which occurred on 08 March 2020.

[2] Following the accident, the plaintiff's claim was settled between the parties on 21 April 2022 and on the basis that the defendant:

- 2.1. conceded the merits 100% in favour of the plaintiff in respect of proven or agreed damages;
- 2.2. undertook to pay the plaintiff's general damages in the amount of R800 000.00 and an interim award in the amount of R1 500 000.00 in respect of loss of earning capacity; and
- 2.3. to furnish the plaintiff with the statutory undertaking for future medical expenses in terms of section 17(4) (a) of the Road Accident Fund Act 56 of 1996 ("The Act").

[3] It is the plaintiff's case that the interim payment of R1 500 000.00 in respect of loss of earning capacity is not adequate the amount that would be fair and just is the amount of R9 973 400.00 and this is based on the evidence proffered to prove the plaintiff's case namely: the plaintiff testified that at the time of the accident the minor child was in grade 4. Pursuant to the accident the minor child's behaviour has changed in that he has become aggressive. He also has an element of forgetfulness. He would be asked to do something but would come back later to ask what is it that he was sent to do. He takes long to respond when spoken to and refuses to do his school work and his academic performance which was satisfactory before the accident has declined to the extent that he failed grade 4. He continues to struggle with his school work as a result the school has recommended that he

should be sent to a special school. Before the accident he also enjoyed playing soccer. After the accident he no longer participates in that sport he is also reluctant to go to school because his school mates make fun of his scar, he even threatened to kill himself if he is forced to go to school.

- [4] Dr Lindelwa Grootboom is a clinical psychologist. She attributes the minor child's poor academic performance to the brain injury and this is based on the fact that prior the accident, the minor child did not repeat a grade. He successfully completed all the grades 1 to 3, after the accident he had to condoned from grade 4 to grade 5. The injury has also has affected his neurocognitive functions hence he suffers from forgetfulness, poor self-esteem due to the teasing at school because he was in an accident which also has a negative impact on his learning capabilities, academic progress and occupational choices. Psychotherapeutic treatment is recommended for both the minor child and the family to understand the effects of the accident.
- [5] Dr Lavio Thandiwe Nhlapho is an educational psychologist, she concurred with Dr Grootboom's conclusions that minor child's academic challenges are attributable to the accident injuries as the minor child has never repeated a grade until after the accident. Pre-accident the minor child had a 50/50% chance of obtaining Matric and would have obtained Matric and he also had the potential to achieve a post degree qualification. Post-accident, his performance started declining as a result he will no longer be able to venture to a Bachelor's Degree he may not even be able to obtain Matric. He may benefit from special school placement for children with mild mental retardation.
- [6] The minor child's school principal Mr, Mahlubi Desmond Tsipane told the court that the minor child was transferred to his school, H[...] P[...] Primary School (H[...] P[...]) from M[...] C[...] School where he was in grade 3. He

started in February 2019 a month after the first term began. He failed the first two terms, in the third term he improved and subsequently passed at the end year. In the following year (2020), he failed the first term. During the next term he was involved in the accident on 8 March 2020 and due to the Covid 19 pandemic the school closed on 18 March 2020 as a result no marks are recorded for that term. In term 3 he was back at school. He failed that term and at the end of the year he was progressed to grade 5 solely on the aggregate of other learners. He once again failed grade 5 at the end of 2021. At the time of the hearing (January 2023) the minor child had progressed to grade 6.

- [7] Mr Tsipane attributed the minor child's poor academic performance in the first two terms at H[...] P[...] to acclimatising to the new environment because his previous school was a small village school while H[...] P[...] was a big school hence from the third term he improved as he was now settled into the new environment. With regard to his performance post the accident, his teachers observed that he needed support in a form of extra classes and it is also clear from the reports that he required some form of interventions. Exhibit "E8-12" it is respectively stated that: "...*Zama ukuzimisela*" in Isixhosa loosely translated "*he must try to improve his performance*" and that he "*must spend more time in his books.*" After he received that support he passed.
- [8] That was in short the plaintiff's evidence, in addition to the viva voce evidence, documentary evidence was handed in by concurrence of both parties and marked as Exhibits: the educational psychologist's report (*Exhibit "A4-A22 and "C56-71"*), the reports by the neurosurgeon Dr Kelly, industrial psychologist Mr Maturere, orthopaedic surgeon Dr Bongobi, Dr Rene Walker, clinical psychologist Dr Grootboom and actuarial Mr Charl Du Plessis (*Exhibit "C1—34"*) and the school reports (*Exhibit "E1-E15"*).
- [9] The cross-examination of the plaintiff and her witnesses revealed that the plaintiff did not disclose to the experts that the minor child had failed the three grades before the accident. When it was put to her that her experts were

adamant that the minor child never failed a grade before the accident her explanation was simply that the experts were mistaken.

[10] The plaintiff also did not inform the experts that while at M[...] C[...] School, the minor child lived with his grandparents in the Eastern Cape and the reason the minor child was transferred to H[...] P[...] in the Free State where the plaintiff lived was because he has suffered from fits and during that time he was also not emotionally well due to the death of his grandfather whom he regarded as a father. According to the plaintiff's experts, the minor child had no history of any ailments physiological or psychological. They said there were never apprised of this information.

[11] It does not end there, despite having testified that the minor child had performed well prior the accident she ultimately conceded that she had no knowledge about the minor child's academic performance in grade 1 and 2 as the minor child lived with his grandparents at that time.

[12] On the other side, the defendant handed in experts' reports accompanied by affidavits by the educational psychologist Dr Ezette du Plessis and the Industrial Psychologist Ms Louisa Maritz (Exhibit "H & J") and closed its case without calling witnesses.

[13] Uniform Rule 38(2) provides:

"(2) The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and

such witness can be produced, the evidence of such witness shall not be given on affidavit.”

- [14] The plaintiff's objection to the defendant's application for an order to admit the defendant's experts' affidavits into evidence is in my view unreasonable due to the fact that the opposition is premised on the grounds that the defendants' expert witnesses were not in possession of the minor child's school reports relating to grade 1 to 3 when they compiled their respective reports whereas the same applies with the plaintiff's experts. The onus is on the plaintiff to prove that the injuries sustained by the minor child have resulted in the deficits relied upon in this claim. Accordingly, the objection is overruled.
- [15] According to the defendants' experts despite not being provided with the school reports relating to the minor child's academic performance in grade 1 and 2, having regard to the information alluded to by the plaintiff's expert pertaining to his performance in grade 3, the minor child's pre-accident intellectual ability was already below average in that he was already repeating a grade before the accident therefore his intellectual ability has not been compromised by the accident.
- [16] The defendant's experts opine that the minor child's pre and post morbid intellectual functioning, academic profile, likely qualification level and career paths remain the same.
- [17] It was argued that the plaintiff is not entitled to the additional amount she seeks. The defendant has already agreed to pay the plaintiff an amount of R1 500 000.00 towards loss of earnings and this amount should be sufficient to cover any possible loss of earnings. Based on these reasons the claim the balance of the amount claimed by the plaintiff ought to be dismissed with costs.

- [18] I am in agreement with the defendant's contentions. The duty is on the plaintiff to provide the court with sufficient information to enable it to make a just and equitable assessment of the damages she alleges to have sustained. In addition to the family history, the minor child's background including the minor child's pre-morbid intellectual ability is a factor that the court takes into account in the determination of whether the minor child's intellectual ability has been compromised by the injuries he sustained in the accident.
- [19] In this matter there are material discrepancies in the evidence proffered by the plaintiff with regard to the minor's child intellectual ability pre-morbid and post-morbid.
- [20] Much as the plaintiff and her expert witnesses sought to proffer that there was nothing untoward about the minor child's pre-morbid intellectual ability and that his bad performance post -accident was attributable to the injuries he sustained in the accident. The school reports for the three years preceding the accident, Exhibit "E1-4" attest to the minor child's struggle with his school work. After the accident, the struggle continued and it is a result of his unwillingness and not inability to do his school work.
- [21] The expert evidence is tainted and discredited by the lack of corroborating evidence they relied upon in their conclusions by merely relying on what they were told by the plaintiff. (*S v Mngomezulu* **1972 (1) SA 797** (A) at 798-799; *R v Turner* **[1975] 1 All ER 70**).
- [22] I am thus not persuaded that on the available evidence, it has been established that the injures that the minor child sustained in the accident have compromised his intellectual potential. The plaintiff is not entitled to the award she seeks.
- [23] Accordingly, the following order is made:

1. The plaintiff's claim for loss of earning capacity is dismissed.
2. The defendant is awarded the costs with effect 21 April 2022.

N.S. DANISO, J

APPEARANCES:

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Instructed by:

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