

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
Signature Date..... 16/9/2021	

CASE NO: HCAA 18/2019

In the matter between:

KGANYAGO: MG o.b.o KGANYAGO KGABO

APPELLANT

and

ROAD ACCIDENT FUND

RESPONDENT

JUDGMENT

TSHIDADA, AJ

- 1 This is an uncontested appeal against the judgment and order of Semanya J, upon which the learned Judge granted leave to appeal to the Full Court of this division on the 13th of August 2019. The Order was granted on the 28th

of June 2019 in respect of the future loss of earnings amounts awarded to the minor child in the matter.¹

- 2 The Appellant legally represented by Mashabela Attorneys Incorporated instituted a personal injuries claim on behalf of her minor child against the respondent (the "Road Accident Fund"), in her representative capacity as a biological mother and natural guardian of Kganyago Kgabo, herein referred to as the minor, born on 19 December 2006.
- 3 The Appellant instituted a claim to recover damages suffered by her minor child and/or for compensation of her minor child by the Respondent for damages suffered as a result of the injuries the minor sustained when he was knocked down by a motor vehicle which was then driven by Mafonko Moetjie on the 3rd April 2012, whilst the minor was a pedestrian.
- 4 It is apparent from the record that prior to the *court a quo* dealing with the issue in dispute herein, the Respondent had already conceded the issue of liability 100% in favour of the Appellant. The Respondent had also resolved the issue of the minor's future medical treatment expenses by issuing him with a Section 17(4)(a) undertaking certificate. However, a dispute was declared in respect of the minor's general damages claim, which claim by agreement between the parties was then referred to the Health Professions Council for further adjudication.

¹ See page 52 of Index and Pagination, Vol. 1 (Judgment)

5 In support of its case and claim for the minor's future loss of earnings, the Appellant filed and served the medico legal reports before the *court a quo* from which reports and consideration of counsel submissions, Semenya J wrote a judgment with an ancillary order forming the subject matter of this appeal.²

6 The undermentioned medical experts filed their medico-legal reports on behalf of the minor herein respectively;³

6.1 Dr P.W.S Williams – Orthopaedic surgeon

6.2 Dr M.E Thobejane – Neurosurgeon

6.3 S Molepo – Clinical psychologist

6.4 Dr R.J Phetla – Educational psychologist

6.5 Ms T Maitin – Industrial psychologist

6.6 Independent Actuaries and Consultants – Actuary

7 This appeal is premised on the fact that the Appellant contends that the learned Judge erred and misdirected herself in making the following factual and legal findings:

7.1 relying on an Orthopaedic surgeon's opinion that the minor did not suffer any loss of earnings and capacity, whilst the above expert was

² See page 39 of Index and Pagination: Vol. 1 (Judgment)

³ See plaintiff's experts Index and Pagination: Volume 2

in no position to provide expertise or an opinion on the minor relating to loss of earnings, productivity and functional work capacity.

- 7.2 concluding that there was no evidence from the reports to conclude that the minor's inability to cope with complex tests were as a result of the accident.
- 7.3 concluding that the hospital records were not made available to neither the court nor Dr Phetla, yet same was made available.
- 7.4 concluding that there was no evidence to compare the minor's school performance pre-accident and post-accident.
- 7.5 finding that there was no evidence that proves that the minor child sustained brain injury.
- 7.6 concluding that the Educational Psychologist's report cannot be relied upon on the basis that it is not supported by objective facts and that it has incomprehensible shortcomings.
- 7.7 finding that there was no evidence from the reports that proves that the minor suffers from poor health affecting his learning abilities.
- 7.8 concluding that the minor's post-accident effects may be related to anything other than the accident.
- 7.9 finding that the conclusion that the minor may not succeed academically due to various disabilities caused by the accident, is not supported by the findings of other experts.

7.10 finding that there is a contradiction between the Clinical Psychologist and Educational Psychologist in so far as the minor's intellectual disability and learning disorders are concerned.

7.11 not relying on the Industrial Psychologist and Actuarial reports filed, instead, simply assuming that the minor will suffer minimum loss of future earnings due to headaches that responds to medication, however, failing to consider that, the minor's injuries have reached maximum medical improvement (MMI) which only means that the injuries and sequelae are permanent and are likely incurable because of its chronic nature.

7.12 lastly, that the learned Judge erred and misdirected herself in applying a round estimate method on minor's future loss of earnings award, instead of applying contingencies she would have deemed necessary on the actuarial calculations which were before court.

- 8 The main issue contended by the Appellant herein and as it were before the *court a quo* is that, due to the injuries sustained by the minor from the accident under discussion and the resultant deficits or sequelae, the minor child's school performance is said to have deteriorated to an extent that the minor's post-accident health condition, that is his moderate to severe neuropsychological impairment as well as his alleged intellectual disability will negatively affect his academic progress in future. As a result, he will be excluded from achieving his expected pre-accident academic achievements and employment potential.

- 9 Therefore, it has been projected that the minor will suffer potential future loss of earnings of a difference between what he would have earned had the accident not occurred to what he would earn having regard to the accident as set out on the Appellant's actuarial report, subject to application of contingency deductions that the court would have deemed reasonable and appropriate.
- 10 It is inconceivable that in matters of this nature, I emphasise that there has to be a clear nexus between the injuries sustained by the claimant, proven sequelae of the said injuries post-accident and the projected claim for future loss of income, before an award for future loss of earnings can be entertained by the court. The foregoing cannot be separated. It is happening frequently that some claimants are found exaggerating in an appalling manner, the nature and severity of injuries they sustained in order to inflate their loss of income claims against the respondent ("the Fund"). I am therefore not for a moment suggesting that it is or was the case in the current matter.⁴
- 11 This court is summoned to decide whether there is a substantial variation or notable disparity between the award made by the *court a quo* on the minor's future loss of income, and the award which this court considers reasonable and fair, and that which ought to have been pronounced after consideration of the circumstances of this case having had regard of the expert's evidence presented before court.

⁴ My emphasis

- 12 The significant and cardinal principle governing the appeal court is that the appeal court should be slow in interfering with the findings and awards granted by the trial court to the extent necessary. The appeal court has a reciprocal duty, entitled and obliged to interfere with the trial court finding, order and award, provided it is satisfied that:

12.1 there has been an irregularity or misdirection by the court, either by being too generous in making a contingency allowance or that the decision was based on inadequate facts;

12.2 where the appeal court is of the view that no sound basis existed for the award to be made by the trial court;

12.3 or where there is a clear substantial variation or striking disparity between the award made by the trial court, with that which the appeal court considers ought to have been made and/or that which the appeal court would be inclined to make.⁵

- 13 It has been projected *in casu* that the minor will suffer potential future loss of earnings of a difference of what he would have earned had the accident not occurred to what he will now earn having regard to the accident.⁶

- 14 I now proceed to summarise the Appellant's expert's opinions and findings from the assessment conducted on the minor herein. In the same breath, I propose to simultaneously deal with the crucial issues raised against the

⁵ RAF v GSO Guedes (2006)(5) SA 583 (SCA)

⁶ See page 95 of Index & Pagination, Vol. 2 (actuarial report)

court a quo's finding by the Appellant on this appeal interchangeable and where necessary.

- 15 The minor was approximately 6 years old at the time of the accident attending Grade R. He had just started with his academic life when he was involved in an accident. It is stated in the reports that he was only able to return to school to finalise his Grade R after 4 months of recuperating at home.
- 16 According to the copies of the attached school report, he managed to pass his Grade R, regardless of the accident and was accordingly promoted to Grade 1 at the end of that school year. The available school reports which are up until the year 2018 reflect that the minor has never repeated any Grade post-accident, despite fluctuating marks and results. At the time of filing the school reports under scrutiny, it is evident that in 2018 the minor was enrolled and doing Grade 6.
- 17 On this note, I agree with the learned Judge a quo's finding that there was indeed no objective evidence or school records in order for the Educational Psychologist to make a comparison on when it came to the minor's pre-accident educational performance to enable the expert to determine if there has been any decline or improvement of the minor's performance.
- 18 It is apparent from the medical experts' report that from the accident, the minor sustained a head injury with post-concussive headaches, which head

injury was classified as mild head injury by the Neurosurgeon. He also sustained a mid-shaft right femur fracture with lateral angulation.

- 19 During the evaluation of his orthopaedic injuries in 2014, the minor complained of pain and cramps exerted on his leg when picking or carrying heavy objects. He complained of his reduced endurance to stand for long periods as well as unable to run or walk fast. The expert opined that the minor is not totally disabled save for limitation when conducting physical intense activities. No future medical treatment recommended. The orthopaedic surgeon concluded that no future loss of income is anticipated as a result of orthopaedic injuries sustained by the minor herein.⁷
- 20 In light of the foregoing, this court is satisfied that the assertion by the court a quo that the minor did not suffer any loss of earnings, in no uncertain terms could have only been with reference to the outcome of the minor's orthopaedic injuries assessment as clearly stated by the expert and alluded to in the preceding paragraph.
- 21 With regards to the head injury, the head injury experts recorded that the minor complained of frequent headaches which usually occurs 3 to 4 times a week and treated by pain medication. The minor was also reported to be forgetful. Complaints have already been received from his school teachers regarding his inconsistencies and poor performance. The experts concluded that the reported learning difficulties could most likely be related to amnesia,

⁷ See Page 9 Index and Pagination: Volume 2

poor concentration and memory problems which also form part of post concussive syndrome.

- 22 This court accepts that the minor appears to have suffered a head injury from the accident *in casu*. Its impact, magnitude and extent in my view remains minimal when one has regard to the absence of pre-accident educational record and the post-accident educational performance.
- 23 This court takes judicial notice that the mild head injury sustained by the minor to some extent, seem to have impacted on his learning abilities such that from the available school reports, the minor's school marks and performance are noted to be fluctuating between average and above average level of performance. Of significance is that the minor has been able to perform and pass each grade up to Grade 6 maintaining the standard described above.
- 24 The educational psychologist assessed the minor back in 2018 and also evaluated his school reports from the year of accident until 2017 when the minor was in Grade 5.
- 25 This court has also evaluated the attached summaries of the minor's school reports. Having had regard to same and comparatively speaking, the performance is as described in paragraph 20 above save for Term 1 in Grade 5 where and when for the very first time the minor obtained levels one and two of Grade 5 school results. However, the minor improved his

performance back to the usual the very same year in terms 3 to 4 wherein he gained promotion to Grade 6 at the end of the year.

- 26 I therefore find it imprudent for the psychologist to suggest and conclude that given the minor's momentary drop in performance to levels one and two once in Tem 1 of Grade 5, that that alone was enough to suggest a possibility that if such a once off downward trend continues, the minor may only obtain a matriculation and a tertiary qualification up to a diploma provided he is given professional assistance, whereas had it not been for the accident, the minor could have passed matric with a tertiary qualification that could have included a degree.
- 27 I am of the view that the psychologist's opinion is speculative, selective and opportunistic and a clear attempt to build a narrative that the minor's educational performance is likely to deteriorate without objective facts.
- 28 The opinion is selective simply because the projection of the minor's potential future loss of income is based solely on the poor results of term 1 of Grade 5. The minor however appears to have improved his performance in terms 3 and 4 which led to his promotion to Grade 6. Strangely there is no mention or analysis of the other years' school results in the educational psychologists discussed in the report.
- 29 This court is not convinced and persuaded that the minor's fluctuating school performance can necessarily be attributed to the accident only, when

considering the minor's assumed and unaccounted pre-accident learning ability.

30 I am therefore inclined to agree with the court a quo's finding that, the foregoing expert conclusion cannot be relied upon for lack of its objectivity and for the reasons I have already stated above. Least said about the assertion and/or suggestion of the minor's deteriorating school marks which from the record appears to be the same. This court finds no basis for this conclusion more so because it has been conceded that there has been no pre-accident school performance results for the expert to compare with when dealing with the post-accident performance.

31 However, this court does not negate the possibility that the sustained head injury might have possibly impacted on the minor's learning ability. The question that remains to be answered is the severity of the injury and the extent of its impact. Without certainty from the medical experts, the courts have historically and over the years addressed similar cases by adopting a method of contingency deductions approach to resolve these kinds of matters.

32 In light of the above, I conclude that the current matter is no exception for application of contingency deduction to the computed loss of income in order to compensate for the minimal expected residual loss of future income by the minor herein.

33 I therefore find it unnecessary to comment on the industrial psychologist's report simply because it is largely based on the unsubstantiated opinion of the educational psychologist's report on which this court has already made a finding on.

34 In the matter of ***Road Accident Fund Tribunal & Others v Gouws & Another [2017] ZA SCA, 188 [2018] 1 ALL SA 701 (SCA) para 33***, the court said:

"Courts are not bound by the view of any expert. Courts make the ultimate decision on issues on which experts provide an opinion."

35 It is trite that an expert witness is required to assist the court and not to usurp the function of the court. Expert opinion must therefore be capable of being reconciled with all proven evidence in a particular case. The court must guard against the risk of immersing itself in every detail and opinions of the expert.

36 It is needless to reiterate that the Road Accident Fund Act was legislated to compensate victims of motor vehicle accidents for their loss or damage caused by the driving of an insured motor vehicle by an insured driver.

37 The appropriate award can only be determined by taking into account all the relevant evidence in a case not necessarily restricted to the experts opinion and findings.

38 Ignorance of reliable and credible evidence placed before court will undermine the purpose and objective of the Road Accident Fund.

39 The general principle applicable to the assessment of the damages for loss of earnings capacity is that the claimant must prove that the reduction in earning capacity gives rise to the pecuniary loss.

40 In ***Prinsloo v RAF***⁸, in dealing with this principle, Chetty J stated the following:

“A person’s all-round capacity to earn money consists, inter alia, of an individual’s talent, skill, including his/her position and plans for the future and, of course external factors over which a person has no control, for instance in casu, consideration of equity. A court has to construct and compare two hypothetical models of the plaintiff’s earning after the date on which he/she sustained the injury. In casu, the court must calculate, on the one hand, the total present monetary value of all that the plaintiff would have been capable of bringing into her patrimony had she not been injured, and on the other, the total present monetary value of all that the plaintiff would be able to bring into her patrimony whilst handicapped by her injury. When the two hypothetical totals have been compared, the shortfall in value (if any”) is the extent of the patrimonial loss. At the same time, the evidence may establish that an injury may in fact have no appreciable effect on earning capacity, in which event the damage under this would be nil.”

41 It was held in the matter of ***Southern Insurance Associate Ltd v Bailey NO***⁹, that:

⁸ 2009 (5) SA 406 SE

⁹ 1984 (1) SA 98 AD

“Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future without benefit of crystal balls, sooth sayers, augers or oracles. All that the court can do is make an estimate which is often a very rough estimate of the present value of a loss.”

42 Matters which cannot otherwise be provided for or cannot be calculated exactly, but which may impact upon the damages claimed, are considered to be contingencies, and are usually provided for by deducting a stated percentage of the amount on specific claims. Contingencies include any possible relevant future event which might cause damage or a part thereof or which may otherwise influence the extent of the claimant's damage.

43 In ***Van der Plaat's v Southern African Mutual Fire & General Insurance Co***¹⁰ it was held that:

“Contingency deductions allow for the possibility that the plaintiff may have less the normal expectations of life and that he may experience periods of unemployment by reason of incapacity due to illness, accident and labour unrest or even general economic conditions.”

44 It is therefore my considered view that, having considered the expert's opinion and had regard to the cumulative evidence herein that this is one matter capable of resolution by application of contingency deduction which the court deems fit.

¹⁰ 1980 (3) SA 105 (A)

- 45 In the matter of **Sethole v Road Accident Fund**¹¹, Kganyago J reaffirmed that it is settled law that contingency deduction is a matter which falls with the discretion of the court. A court may be entitled, in quantifying an amount of damages, to form an estimate of the plaintiff's damages, to form an estimate of the plaintiff's chances of earning a particular figure. This figure will not have to be proven on a balance of probability but will be a matter of estimation.
- 46 It is inevitable that contingencies, whether negative or positive are an important control mechanism to adjust the loss suffered to the circumstances of the claimant in order to achieve equity and fairness to the parties. There is therefore no hard and fast rule regarding contingency allowances.
- 47 The court has accepted applying higher contingencies in exceptional circumstances as highlighted in the matter of **Mutual Assurance Association v Maqula 1978**¹².
- 48 I therefore find that there are exceptional circumstances in this appeal as discussed from paragraph 23 to 27 of this judgment justifying application of 50% contingency deduction in terms of the principles enunciated in the matter of Maqula referred to above. Application of 50% contingency deduction befits the cumulative evidence and circumstantial factors in this matter.

¹¹ (1487/2014) [2018] ZALMPPHC 11 (17 April 2018)

¹² (1) SA 805 (A) at 811 A-E and 813 C-E

49 Under the circumstances, this court finds it justified to interfere with the award made by the *court a quo* and substitute it with an award which the court is of the view ought to have been awarded.

50 In the result the following order is made:

ORDER

50.1 The appeal is upheld with costs.

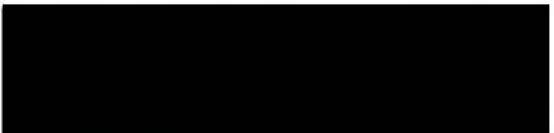
50.2 The order granted on 28 June 2019 by the court a quo is set-aside.

50.3 The order is substituted with the following order.

50.3.1 Judgment is granted in favour of the appellant on behalf of the minor against the respondent for:

(a) Payment of the amount of R1 726 174.50 in respect of the minor's residual future loss of earning capacity.

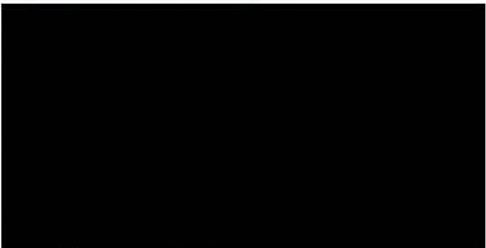
(b) Costs of suit.


T C TSHIDADA
ACTING JUDGE
LIMPOPO DIVISION, POLOKWANE

I agree,


E M MAKGOBA
JUDGE PRESIDENT OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

I agree,


L G P LEDWABA
ACTING JUDGE
LIMPOPO DIVISION, POLOKWANE

It is so ordered

APPEARANCES:

- | | |
|---|---|
| 1. For the Appellant:
Instructed by: | Mr M D Mashabela
Mashabela Attorneys Inc, Polokwane |
| 2. For the Respondent:
Respondent: | No appearance
Road Accident Fund
Menlo Park, Pretoria |
| 3. Date of hearing: | 20 th August 2021 |
| 4. Judgment delivered on: | 16 September 2021 |