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**THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

CASE NO: 4063 / 2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE **18 March 2025**

SIGNATURE

In the matter between:

T[...] X[...] S[...]

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

J U D G M E N T

RATSHIBVUMO DJP:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be on 18 March 2025 at 10H00.

[1] Introduction

This is a claim for loss of earnings following a motor vehicle accident involving the Plaintiff which took place on 20 July 2019. When summons was issued, the claim included general damages and hospital and medical expenses. These have since been settled and the trial proceeded on determination of future loss of earnings. When summons was issued, the Plaintiff claimed a total of R2 million in loss of earnings. This figure has since been adjusted to align with the expert reports to reflect the amount of R8 879 613.75. The Defendant conceded the merits and agreed to the handing in of expert reports contained in the affidavits in terms of Rule 38(2) of the Uniform Rules. Four of them however, gave *viva voce* evidence. In the trial, the Defendant disputed that the Plaintiff suffered any loss of earnings, alternatively, not in the amount claimed.

[2] Evidence:

Khetani S Bila: The report by this witness was handed in as part of evidence admitted in terms of Rule 38(2) as indicated above. According to this report, he is an Orthopaedic Surgeon. He consulted with the Plaintiff on 26 March 2021. At the time, the Plaintiff who was a minor at the time of the accident and consultation, was accompanied by her mother, Ms. P[...] S[...]. The child's date of birth was reported to him to be 19 May 2005.

[3] The Plaintiff was fast asleep in a front seat passenger in a sedan motor vehicle when it collided with another motor vehicle, leaving four fatalities. The witness noted in the report that the Plaintiff had not repeated a grade at school in the past, and that she was doing Grade 8 at the time of accident. At the time of examination, she was doing Grade 10. Scars were noted on the right shoulder, right knee with loss of sensation, left elbow and laparotomy scars. The witness also recorded the following injuries as reported to him by the Plaintiff:

- a) Blunt abdominal trauma with visceral injuries, done laparotomy.
- b) Right knee injury.
- c) Right hip laceration.
- d) Left and right humerus fracture.

The following injuries were noted from the records presented to him:

- a) Blunt abdominal trauma with bowels perforation.
- b) Right femur fracture.

c) Left and right humerus fractures.

- [4] Wilfred Goodwill Nkabinde: This witness gave *viva voce* evidence while his report was also accepted as an exhibit. He testified that he was a neurosurgeon and that he examined the Plaintiff some 20 months after she was involved in a motor vehicle accident. He recorded that the Plaintiff had no recollection of how the accident happened. She was initially treated at Tonga Hospital and was further treated at Kiaat Hospital. She used crutches for one year after the accident. He recorded that she has positive history of loss of consciousness. The witness concluded the report by recording the deductions from Plaintiff's history and clinical records as follows: "Clinical records indicate that [the Plaintiff] presented as poly-traumatised patient; and the injuries sustained indicate a high impact accident with increased likelihood of a mild diffuse axonal injury."
- [5] The reason he used the words "likelihood" instead of being definite sure of this condition is that the patient was not subjected to sufficient medical examination and tests that could exclude a margin of error regarding this conclusion. In this instance, the only way one could tell if the Plaintiff suffered diffuse axonal injury would be after her death and her brain is sliced and placed under microscope for examination. The hospital records did not reflect the diffuse axonal injury on the Plaintiff because it is difficult to diagnose a mild one at that stage. It is only when it is serious (and not mild) that it could be detected by means of computerised tomography scan or through the GCS score.
- [6] All the other experts who examined the Plaintiff henceforth, and prepared reports, they relied on this opinion for their consultation and to prepare their reports. In fact those reports suggest that the Plaintiff actually suffered diffuse axonal injury – not mild. After all, according to this witness, the impact of a mild diffuse axonal injury cannot be distinguished from a serious one as it equally damages the nerves, and the brain functionality is no longer optimal. He further recorded that the patient is forgetful and endures headaches with neurocognitive decline. This has impacted negatively on her quality of life and her ability to compete fairly in an open labour market.

- [7] Evans Mandla Mhlanga, the Clinical Psychologist, also testified for the Plaintiff. The Plaintiff was in the company of her mother when she came for consultation. He was informed by the Plaintiff and her mother that before the accident, she was doing well at school and that her academic performance has since dropped. According to his findings, her working memory was below average. He had with him the clinical records and reports from the neurosurgeon and orthopaedic surgeon at the time of examination. He also did his own objective tests. His findings were in line with those of the neurosurgeon. He also testified that although he was not given the Plaintiff's school reports, it was reported to him that she failed and repeated Grade 1.
- [8] Zenzele Leonard Kubheka, the Educational Psychologist testified that he too, examined the Plaintiff. He noticed that her performance had declined to below average meaning she was a child with special needs. He had hospital records when he examined her. The information about the Plaintiff failing Grade 1 was not relayed to him. He only learned of such from the other expert witnesses when they testified in this trial. That information would however not make him amend his report because, the Plaintiff must have been 6 years old at the time she did Grade 1 which was before the right school starting age which is 7 years old. Failing a grade at the time one was not even supposed to be at school does not reflect much on a learner's capabilities. He was not presented with the school reports for her pre-accident academic performance, but the school reports for the period after the accident were made available to him.
- [9] The Plaintiff's Grade 10 report reflects that she failed all the terms but was condoned to Gr. 11 and proceeded to fail all the terms in Gr 11. This according to the witness, reflected that the Plaintiff's academic performance dropped drastically. The family history reflected that the Plaintiff's father passed matric and her siblings had tertiary qualifications. He concluded therefore on the available information that, prior to her involvement in a motor vehicle accident, the Plaintiff had an average intellectual potential. He concluded further that the Plaintiff would have probably progressed in a mainstream school and passed Grade 12 with a diploma admission and registered at a TVET college and completed N6 with in-service training, thereby attaining NQF level 6 in a field of her choice. With her current

condition, the Plaintiff was unlikely to go beyond Grade 12 and would remain with a condoned Grade 11.

[10] Bathobile Prosperity Nkambule, the Industrial Psychologist, testified that she prepared a report after consultation with the Plaintiff. In it, she opined that the Plaintiff would have progressed to achieve a university degree (NQF level 7), had it not been for the accident. She also opined that the Plaintiff would have entered the open labour market at Paterson B4 in corporate sector and that at the age of 45, she would have progressed to Paterson C4. She admitted that her report had a wrong foundation because of her conclusion on how far the Plaintiff would have progressed academically, as it was based on a conclusion she was not qualified to opine, and one which differs from that of the Educational Psychologist, who concluded that the Plaintiff would have completed N6 with in-service training, thereby attaining NQF level 6. With this admission, she was given an opportunity to rectify this error and corrected her report in this regard.

[11] The unfortunate result of this exercise is that those who prepared further reports relying on her opinion, did not have the opportunity to read her corrected report. From the amended report, the witness concluded that the Plaintiff would have been active in seeking employment in the open labour market and would have secured a job as an entry in the open labour market (internship) which would have been at Paterson B3 in the corporate sector. Her earnings would have probably been in the lower quartile (basic package). At the age of around 45 years she would have progressed up to Paterson C4.

[12] Her post-morbid conclusion which remains unchanged was that the Plaintiff will not be able to reach her pre-accident learning potential. She will not reach her pre-accident career potential. She will likely reach a career ceiling in the unskilled non-corporate sector. She will not be able to compete equally with her uninjured peers in the open labour market. As such, her performance review will always be affected which will also affect her promotional opportunities. In addition, it will take her longer to find employment in the labour market as she will need to be reasonably accommodated. She will suffer loss of future earnings as employers often prefer to hire uninjured candidates. She will be capable of working until reaching the normal

retirement if at some point she will be lucky to be employed where she will be reasonably accommodated, and her earnings will be in the median scale.

[13] P[...] S[...], the Plaintiff's mother testified that the Plaintiff was her daughter. She was still a minor when she was involved in the accident and when she consulted all the experts whose reports were before the court. She therefore accompanied her when she consulted all these expert witnesses. She is the one who gave the information about the Plaintiff's pre-accident academic performance. That information was to the effect that she had resided with the Plaintiff from the date she was born. The Plaintiff was born on 19 May 2005. She did Grade 1 in 2011, which she repeated and passed the following year. When she was involved in an accident, she was doing Grade 8. She failed Grade 8 but was condoned to Grade 9 which she passed. She failed and repeated Grade 10 and was condoned to Grade 11 the following year. She failed Grade 11 twice. She decided to stay at home and not study any further.

[14] The Plaintiff has a big sister who, at the time she gave evidence, was doing practical work at the Department of Social Development. The sister in question holds a diploma in journalism. According to the witness, the Plaintiff had no head injuries noted at the time she was admitted in hospital. Head injuries were however discovered later by a doctor in Kiaat Hospital. She conceded that she did not present any of the experts with the pre-accident school reports because she believed these would not be found as the Plaintiff had changed the schools a few times and that so much time had since lapsed.

[15] The court was not satisfied with this explanation especially because these reports would have guided the experts to give a precise view, based on facts, of what could have happened had it not been for the accident, as opposed to giving thumbs-suck predictions. It also created an impression that information was being deliberately withheld in order to influence the experts' opinions. The witness was therefore allowed an opportunity to go to the schools where the Plaintiff attended and obtain the school reports and avail them the following day, which she did.

[16] The reports were availed to the Court and the legal practitioners representing the Plaintiff and the Defendant. As these were not presented to the Court as evidence by the Plaintiff or the Defendant, their handing over would not serve to advance the case of any of the litigants. The contents of the reports remain relevant and important to the extent that they would have swayed the experts who prepared their reports without the privilege of seeing the contents thereof. The Educational Psychologist, in particular, prepared the report with the understanding that the Plaintiff had the pre-accident “average intellectual potential” based on the word of mouth from her mother.

[17] In his report, the Educational Psychologist indicated that his view that the Plaintiff had “average intellectual potential” could be amended if the school reports become available in the future. That never happened. With the available school reports, the Plaintiff did not ask to have the Educational Psychologist prepare an addendum or indicate the extent to which the new information would impact his report. One thing that is clear from the reports availed by this witness is that her performance was way below class average and that besides failing and repeating Grade 1, there is another grade which the Plaintiff failed, in the pre-accident era, but was condoned to do the next grade. This information was withheld from the Educational Psychologist and all the other experts.

[18] Other experts reports handed in by the Plaintiff in terms of Rule 38(2) are those prepared by the Occupational Therapist, Maryanne Nkabinde and by the Actuary, David Mureriwa. Relying on the report prepared by the Industrial Psychologist, the Actuary put the future pre-accident loss of earnings at R11 353 190 and the future post-accident loss of earnings at R1 185 535, with a difference of R10 167 655, without contingencies. If one applies the proposed contingency of 15% on the future pre-accident figure and the 35% on the future post-accident figures, the total comes to R8 879 613.75 which is the amount being claimed by the Plaintiff.

[19] With this evidence, case for the Plaintiff was closed and the Defendant also closed its case without leading evidence.

[20] The Plaintiff submitted that the Court should first make a finding that the Plaintiff suffered future loss of earnings. Once that is done, it can apply the contingency on the amount presented by the Actuary and order the Defendant to pay that as the loss of earnings suffered by the Plaintiff. In the alternative, so it was argued, the Court can adopt the global estimates approach of what appears to be a reasonable and fair amount to compensate the Plaintiff's loss of earnings, without any reliance on expert evidence presented.¹

[21] Although the global estimates approach has been done by the courts in the past, it remains entirely a matter of guesswork, a blind plunge into the unknown. The last alternative presented by the Plaintiff is for the court to direct how the calculations should be done and presented before it, as was done in *Bosman N.O obo W.T.M v Road Accident*.²

[22] It was submitted by the Plaintiff that the amendment to the Industrial Psychologist's report should have no impact on the actuarial calculations as both, NQF level 6 and NQF level 7 have entry level of Paterson level B4, which is the same scale utilised by the Actuary. The fact that the Plaintiff could have completed her studies exiting with NQF7 (university degree) or NQF6 (a diploma) should therefore make no difference in the actuarial calculations.

[23] The Defendant on the other hand wants the Court to determine if the motor vehicle accident caused the alleged diffuse axonal injury and the impact of the absence of certain information that was not presented to the experts, particularly the school reports. Having made this determination, it was submitted that the Court should find that the Plaintiff failed to discharge its onus and as such, the claim should be dismissed. In the alternative, the Defendant submitted that the Court should award the amount of R567 659.50 as the total amount of future loss of earnings suffered by the Plaintiff. In reaching this figure, the Defendant relies on the Plaintiff's actuarial calculations and puts the pre-morbid future earnings at the same figure as the post-morbid future earnings, save for the contingency to be applied, which is

¹ See *Mlotshwa v Road Accident Fund* (9269/2014) [2017] ZAGPPHC 109 (29 March 2017) at para 17

² (80735/2019) [2024] ZAGPPHC 855 (26 August 2024).

20% on the pre-morbid and 25% on the post-morbid. The difference between the two makes the amount above.

[24] Discussion.

There is no tangible basis on which the Defendant's alternative submission is made. This coupled with the fact that the Defendant relies on the Plaintiff's expert reports takes the alternative argument by the Defendant to a quick dead end and should be rejected as such.

[25] In the main contention, the Defendant questions whether the Plaintiff suffered any diffuse axonal injury, mild or otherwise. The neurosurgeon who gave evidence says so. There is no other expert presented as a witness to counter that opinion. The Defendant tried hard under cross examination to poke holes on that piece of evidence, and all it managed to create was doubt in the mind of the Court. Doubt alone is insufficient to reject an expert opinion.

[26] The Defendant had to bring another expert who can counter the opinion made by a counterpart in answering the following: a) Can person suffer mild diffuse axonal injury and get through the hospital treatment without it being diagnosed? b) Can mild diffuse axonal injury be diagnosed by merely inquiring how the patient behaved and performed pre and post the accident, without being subjected to medical tests? c) Is there no way to tell if the patient suffered mild diffuse axonal injury without having to slice the brain and place it under microscope, meaning, in one's lifetime? And e) Are the neurological consequences of diffuse axonal injury similar even when the injury thereof is mild?

[27] The only expert opinion before the Court answers all the questions positively and the courts, or legal practitioners for that matter, lack the necessary expertise to present a counterview. The Court shall therefore accept the evidence presented by the Plaintiff in this regard and find that the Plaintiff indeed suffered a mild diffuse axonal injury. Flowing from this is a conclusion that this injury impacted the Plaintiff's brain functionality to the extent that her academic performance was no longer at its pre-accident state. This consequently caused her to suffer future loss of earnings or earning capacity as quantified by the experts.

[28] The next question is the reasonable amount that should be awarded in this regard.

It is worth mentioning that the evidence making up the claim for loss of earnings started as a vague suspicion that can be likened to thin vapour which developed to solid rock when it reached the conclusion. When the Plaintiff was in hospital, no head injuries that could form the basis of this claim were recorded. Several months later, when the Plaintiff consulted the neurosurgeon, without any medical examination or tests on the person of the Plaintiff and based on the doctor's reading of the notes and the answers given by the Plaintiff and her mother, a picture puzzle was drawn, albeit not so clear, painting a "possibly" mild diffuse axonal injury. Several experts worked on this picture puzzle to give it colour and shape to the extent that when it was finally presented to the court, the Plaintiff had suffered a definite diffuse axonal injury.

[29] How this picture managed to get its colours in the process of compilation of all these reports is rather puzzling but not worth of rejection. Not in the absence of any counter opinion. I hold a view that this gradual change from a possibility that the Plaintiff may have suffered a mild diffuse axonal injury, which started as being remote and turned to being very likely, can be cured by the application of the necessary contingencies. Contingencies take into consideration the possibility as to how likely could one suffer an injury and the medical staff that stayed with her while hospitalised, for several days, were unable to diagnose it; only for it to be detected by a neurosurgeon long after she had been discharged from the hospital.

[30] The Defendant argues that the Court should not even consider the contents of the school reports that were presented outside the expert reports as these were not properly discovered or presented in terms of the rules. I have no qualms with this submission. The Defendant however must make its choice clear. It cannot argue that the Court should not look into the reports and at the same time submits that the experts were misled, based on the contents of the same reports. How does one realise that the experts were misled without looking into the information contained in the reports? Either the contents are ignored, and no reference is made- to the contents thereof, or the Court considers the contents only for purposes of

evaluating if the expert opinions were based on correct information. I hold a view that the later approach is correct non-prejudicial.

[31] It is clear that while the Plaintiff or at least, her mother painted a picture of a person whose intelligence was of average intellectual ability, the school reports paints a picture of someone whose academic performance was way below class average. With the school reports withheld from the experts, I have no hesitation in concluding that the experts were misled in this regard; in particular, the Educational Psychologist. It was worse with him because he was made to believe that the Plaintiff never failed and/or repeated a grade prior to the accident, something that was false. The Plaintiff had failed at least twice before. I say at least, because many more reports were not furnished even after the Court afforded the Plaintiff's mother, time to avail them.

[32] Of all the experts who examined the Plaintiff, the Educational Psychologist needed the accurate information more than any other person in this regard. While I find that the information presented to him was not entirely accurate, I am unable to find that the report presented to the Court would have been any differed had the remaining accurate information been made available to him. This I say in the light of the vigorous stance he presented saying even after discovering that he was not told the truth about the Plaintiff repeating Grade 1, that would change nothing in his report. After all, average intellectual capacity does not always depend on the class average of a learner.

[33] This now leads me into the weight the Court should attach to the reports by the experts. The Actuary concluded that the Plaintiff was likely going to enter labour market on Paterson level B4 and not B3. He made these calculations relying on the reports presented to him, in particular, that of the Industrial Psychologist, who amended her report while giving evidence. This was when she seemed to reject some of the conclusions therein in that when preparing her report, she delved in a field of expertise she was not qualified to opine. Moreover, the Industrial Psychologist had relied on the report by the Educational Psychologist who, as indicated above, was not furnished with full accurate information that he required when compiling his report.

[34] The court's approach to experts' evidence has been described by Nicholaas JA in *Southern Insurance Association Ltd v Bailey NO*³ as follows:

"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a *non possumus* attitude and make no award. See *Hersman v Shapiro & Co* 1926 TPD 367 at 379 *per* STRATFORD J:

'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages'

[1] In *Michael and Another v Linksfield Park Clinic PTY LTD*⁴ the Supreme Court of Appeal held said,

"[I]t is perhaps as well to re-emphasise that the question of reasonableness and negligence is one for the Court itself to determine on the basis of the various, and often conflicting, expert opinions presented. As a rule, that determination will not involve

³ 1984 (1) SA 98 (A) at p.113G-H and p.114A-B.

⁴ 2001 (3) SA 1188 (SCA) para 34 & 40.

considerations of credibility but rather the examination of the opinions and the analysis of their essential reasoning, preparatory to the Court's reaching its own conclusion on the issues raised.” This essential difference between the scientific and the judicial measure of proof was aptly highlighted by the House of Lords in the Scottish case of *Dingley v The Chief Constable, Strathclyde Police* 200 SC (HL) 77 and the warning given at 89D - E that:

‘(o)ne cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a Judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved - instead of assessing, as a Judge must do, where the balance of probabilities lies on a review of the whole of the evidence.’

[2] The Court approaches the question of the award for compensation for loss of income, mindful of what Fisher J said in *MS v Road Accident Fund*⁵ to wit,

“The evaluation of the amount to be awarded for the loss does not involve proof on a balance of probabilities. It is a matter of estimation. Where a court is dealing with damages which are dependent upon uncertain future events - which is generally the case in claims for loss of earning capacity - the plaintiff does not have to provide proof on a balance of probabilities (by contrast with questions of causation) and is entitled to rely on the court’s assessment of how he should be compensated for his loss.”

[35] Although the Court had reservations on using the presented actuarial calculations as the basis for the award, it would appear the Defendant accepted the Plaintiff’s argument, to the effect that either of the levels (NQF 6 and NQF7), qualify the Plaintiff to enter the labour market on Paterson B4 scale. This is evident when in the alternative argument, the Defendant presented its own calculations based on

⁵ [2019] 3 All SA 626 (GJ) para 36-41.

that actuarial report. I will therefore accept the Plaintiff's argument and apply the necessary contingencies I have already alluded to above.

[36] I am of a view that it would be improper for the Court to order how the calculations should be redone as suggested by the Plaintiff. The Plaintiff had the opportunity to present the case the way she wanted and that is how she chose to. The information referred to as having been withheld from the experts, was always known to her and her mother. The reprints of the school reports was only a replacement of what she had already had in her possession, from the schools. There was nothing new in the reprints. Even after the reprints were brought to the attention of the Court, she chose to close her case with the evidence as it existed at that stage. Any other approach could be seen as the Court descending into the arena where it does not belong. While the reports remain relevant and important, the court should consider the necessary contingency given the possibilities they present therein.

[37] The Court further takes into consideration that the Defendant has always been aware that the pre-accident school reports were not made available to the experts. It could have conducted its own investigations and acquired them and depending on the contents, obtained its own expert reports, which it elected not to do. The contingencies should therefore take into the various possibilities regarding where the Plaintiff would have ended in her career had it not been for the accident, and where she will likely end up now that there was an accident. I am of a view that a reasonable amount to be awarded can be attained when applying contingencies of 60% on the pre-morbid loss of earnings, and 10% on the post morbid loss of earnings.

[38] The Order:

For the aforesaid reasons, I make the following order:

The Defendant is ordered to pay:

38.1R3 474 294.50 (three million, four hundred and seventy-four, two hundred and ninety-four rand fifty cents) to the Plaintiff for her loss of earning capacity, within 180 days from the date of this order.

38.2 Interests on the amount above at the prescribed rate if this is not paid within 180 days from the date of this order.

38.3 Costs on party and party, scale A.

TV RATSHIBVUMO
DEPUTY JUDGE PRESIDENT
MPUMALANGA DIVISION OF THE HIGH COURT

FOR THE PLAINTIFF: ADV. K SHAI
QQ MKHTSHWA INCORPORATED
MBOMBELA

INSTRUCTED BY:

FOR THE DEFENDANT **MR. TO MGWENYA**
STATE ATTORNEY
MBOMBELA

INSTRUCTED BY:

DATES HEARD: 17-21 FEBRUARY 2025

DATE HEADS OF ARGUMENT

WERE

SUBMITTED: 03 MARCH 2025

JUDGMENT DELIVERED: 18 MARCH 2025