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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO.: A36/2023

COURT A QUO CASE NO.: 76371/2016

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

DATE: 27 May 2025

SIGNATURE

In the matter between:-

L[...] M[...] obo T[...] C[...] M[...]

Appellant

v

ROAD ACCIDENT FUND

Respondent

Heard on: 07 May 2025

Delivered: 27 May 2025 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to

the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 27 May 2025.

ORDER

It is ordered:-

1. The appeal is upheld with costs.
2. The order of the court *a quo* is set aside and replaced with the following order:
 - 2.1 The Defendant shall pay the Plaintiff the sum of **R 4722190.00** (Rand only) in respect of Loss of Earnings.
 - 2.2 Interest shall be charged on the amount at the current prescribed rate per annum calculated 181 (One Hundred and Eighty) days from date of Judgment to date of payment.
 - 2.3 The above amount shall be payable into the Attorney's Trust Account as follows: -

Name of Bank: Standard Bank
Account Holder: Godi & Zangwa Attorneys Inc
Account Number: 0[...]
Branch Number: 010545
Type of Account: Attorneys Trust Account
Branch Name: Silverton (Pretoria)

2.4. The defendant is ordered to pay costs on the party and party scale which costs are subject to the discretion of the Taxation Master and may include:

2.4.1. The reasonable costs of Counsel on Scale B, which includes the respective attendances and preparation in respect of the trial proceedings as well as the preparation and attendance in respect of the appeal.

2.4.2. The costs of obtaining medico-legal reports of the following experts:
witnesses,

- 2.4.2.1 Dr LF Oelofse, an Orthopaedic Surgeon
- 2.4.2.2 Dr BA Okoli, a Neurosurgeon
- 2.4.2.2 Dr JFL Mureriwa, a Clinical Psychologist
- 2.4.2.3 Dr van Niekerk, an Educational Psychologist
- 2.4.2.4 Tebogo Matsape, an Occupational Therapist
- 2.4.2.5 Messrs Ben Modie & Mark Day ,Industrial Psychologists
- 2.4.2.6 Munro Forensic Actuaries
- 2.4.2.7 Dr JJ Schutte, a General Practitioner
- 2.4.2.8 Sandton Radiology

2.5 The Defendant must furnish the Plaintiff with an Undertaking in terms of Section 17 (4) (a) in respect of the costs of the future accommodation of the Plaintiff in a hospital or nursing home for treatment and/or rendering of a service or supplying of medical goods to him; after the expenses and/or costs have been incurred and on proof thereof, as a consequence of the accident that occurred on the 20 October 2014.

2.6 The Plaintiff shall serve the notice of taxation on the Defendant's attorneys of record.

2.7. No contingency fee agreement was signed by the Plaintiff .

2.8. The issue of general damages is postponed *sine die*.

3. The TC M[...] Trust ("The Trust") would be created on the basis of the provisions as more fully set out in the draft Trust Deed;

- 3.1. The Trust's main objective would be to administer the capital amount on behalf of the Plaintiff.
- 3.2. The Trustee would be a NOMINEE of Absa Trust Ltd, with powers and abilities as set out in the draft Trust Deed. Marked "A"
4. Until such time as the Trust is registered, the plaintiff's attorney is authorised to invest the capital amount in an interest-bearing account in terms of Section 86(4) of the Legal Practice Act to benefit of the minor with the registered banking institution.
5. To this end, the Plaintiff's attorney and/or Trustee is ordered to provide a report to the Office of the Deputy Judge President, regarding the formation of this Trust. Such report to be provided upon the expiry of a period of twelve (12) months, from the date of this order.
6. The Plaintiff's Attorney is authorised and ordered to make any reasonable payments to satisfy the need for the minor's treatment and care that may arise in the interim.
7. The cost of establishing the aforementioned Trust, administration and remuneration costs of the Trustee shall be paid by the Defendant.

JUDGMENT

KOOVERJIE J (D Mlambo JP and JJ Strijdom J concurring)

THE APPEAL

- [1] This is an appeal against the entire judgment and order of the court *a quo* dated 31 October 2022 whereby the claim instituted on behalf of the minor, T[...] C[...] M[...] (T[...]), for loss of earnings and earning capacity, was dismissed. The appellant, L[...] M[...], instituted this claim on behalf of T[...], her minor child.

- [2] The issue on appeal is whether the claim for loss of earnings and earning capacity had indeed been proven.
- [3] The appellant contends that the court *a quo* erred in its findings. Apart from the orthopaedic injuries, the appellant also contends that T[...] sustained a concussive brain injury that has resulted in neurocognitive sequelae which now impacts on his scholastic abilities and would affect his future earning potential.
- [4] It is settled law that this appeal court would only interfere if there are grounds made out of material misdirection or irregularity or because the discretion is one no reasonable court will make.¹

BACKGROUND

- [5] T[...] was injured in a motor vehicle accident on 20 October 2014, he was hit by a car whilst crossing the road. The only injury listed in the hospital records was a fracture of his right distal femur. T[...] underwent skin traction in the right leg. At the time he was 5 years and 11 months old and he was repeating Grade R at the time. After the accident he was promoted to Grade 1.

THE COURT A QUO'S FINDINGS

- [6] It is evident that the court *a quo* had regard to the expert reports filed on behalf of both the plaintiff and the defendant. The court *a quo* held the view that the experts relied heavily on the unverified version presented by T[...]’s mother and that same constituted hearsay evidence. The court *a quo* also noted that the minor did not sustain any brain injuries at the time of the accident. It found that the respective experts opinions were not premised on proven facts and lacked an

¹ Fine v Society of Advocates of SA (Witswatersrand Division 1983(4)SA 488 A at 494 H-495 Road Accident Fund and others v Hlatwayo and others(724/2023 72415/2023 [2025] ZASCA17(5 March 2025)

independent assessment of T[...]. It concluded that as T[...]'s orthopaedic injury did not affect him long term and since no recordal of a brain injury exists, the claim for loss of earnings and earning capacity remained unproven and dismissed the claim.

ANALYSIS OF THE PLAINTIFF'S EXPERT REPORTS

[7] The main issue of contention, on appeal, is whether the minor suffered from any brain injury. According to the appellant, the minor child suffered a concussive brain injury and post-traumatic amnesia. The expert reports filed on behalf of the plaintiff were the following:

- 7.1 Dr Oelofse, the orthopaedic surgeon;
- 7.2 Dr Bila, the orthopaedic surgeon;
- 7.3 Dr Okoli, the neuro-surgeon;
- 7.4 Dr Mureriwa, the clinical psychologist;
- 7.5 Mr Nethavhani and Dr van Niekerk, the educational psychologists;
- 7.6 Mr Matsape, the occupational therapist; and
- 7.7 Mr Moodie, the industrial psychologist.

[8] It was pointed out that the plaintiff's reports were filed in accordance with Rule 36(9)(b) of the Rules of court and that the respective Rule 38(2) affidavit was filed, requesting the court to consider the expert reports without the aid of oral evidence. Rule 38(2) makes provision for the evidence adduced, at trial, to be given on affidavit.

[9] The defendant filed the reports of:

- 9.1 Dr Tladi, the orthopaedic surgeon;
- 9.2 Mr Kgwele, the educational therapist;
- 9.3 Mr Makgetla, the occupational therapist;

9.4 M Molausi, the industrial psychologist;

9.5 Mr Tjale, the industrial psychologist.

[10] The appellant correctly pointed out that the court *a quo* erred in considering the defendant's expert reports. The said reports were not tendered in accordance with Rule 38(2) of the Rules of Court. Furthermore, the defendant did not participate in the trial proceedings. Consideration should therefore only have been given to the expert reports filed by the plaintiff.

[11] The minor's orthopaedic injuries were found not to be an impediment to his future occupational prospects. Both orthopaedic surgeons, Dr Oelofse and Dr Bila, opined that the right leg injury would not have a detrimental effect on his life expectancy. He would be able to manage the injury with the appropriate pain medication and physiotherapy.

[12] Dr Bila, who examined T[...] on 15 November 2016, two years after the accident, noted that T[...] experiences pain on his right thigh, especially in cold weather.

[13] Dr Oelofse examined T[...] on 1 December 2021, 7 years after the accident. At the time T[...] was already 13 years old. Similarly, Dr Oelofse noted that T[...] complained of pain in his upper leg and knee, especially when he is running, playing soccer or walking long distances. T[...] remains with an antalgic gait. He firmly concluded that from an orthopaedic perspective, the injury sustained did not have a detrimental effect on his life expectancy.

[14] With regard to his future earning capacity, Dr Oelofse deferred to the occupational therapist for an opinion as to whether the injuries would have an impact on his current and future productivity, his working capability, and his amenities of life.

- [15] Dr Okoli, the neurosurgeon, examined T[...], in May 2019, four and a half years after the accident. He had regard to the hospital records as well as the report of the clinical psychologist, Dr Mureriwa. He noted that the hospital records did not record any head or brain injury. The records show that T[...] arrived at the hospital fully conscious with no history of loss of consciousness, no mention was made of a “craniofacial soft tissue wound” and the appellant had no direct knowledge of T[...]’s post-accident condition as she only saw him 7 days after the accident.
- [16] Dr Okoli had regard to Dr Mureriwa’s report, who opined that T[...] suffered from a behavioral disorder which has affected his scholastic abilities. Dr Okoli opined that post-traumatic amnesia in children is very difficult to identify and a conclusive decision cannot be made at that stage of T[...]’s life. He therefore concluded that it may be probable that T[...] had suffered a concussive brain injury and such diagnosis should not be disregarded. He accordingly deferred to the opinion of the educational psychologist.
- [17] Dr Mureriwa, the clinical psychologist, was one of the first experts that had examined T[...]. He examined him on 16 November 2016, two years after the accident. He had regard to the RAF1 form and the clinical records. He observed that although T[...] was alert and cooperative, he was easily distracted and fidgety. He opined that T[...]’s aggressive attitude towards peers was due to the accident-related stress.
- [18] He assessed T[...]’s neurocognitive status based only on his mental status and his clinical history. He opined that: T[...] experienced considerable tension and/or anxiety; he was fidgety and restless during the assessment; and his arithmetic reading and writing skills were impaired. With regard to T[...]’s educational abilities, he deferred to the educational psychologists. He concluded that T[...] developed a significant adjustment disorder with an anxious mood and was therefore at risk for conduct disorders. He concluded that the stress would

negatively impact on his school performance. He recommended that T[...] receive psycho-therapy sessions to address the accident-related pain, discomfort, the cognitive problems as well as the emotional distress.

- [19] Mr Nethavhani and Dr van Niekerk, the educational psychologists, examined T[...] on 17 November 2016, 2 years after the accident. At the time T[...] was 8 years old and was in Grade 2. The report was premised on various information which included interviews with T[...] and the appellant, the test results, the school records, the collateral information provided by the instructing attorney, as well as the report of Dr Mureriwa and the orthopaedic surgeon, Dr Bila. The school records illustrated that he was performing poorly in all learning areas in Grade 2.
- [20] They further took cognizance of Dr Mureriwa's findings that T[...] was at risk of conduct disorders which would negatively impact on his school performance. Consequently his ability to manage his own affairs fell in the below average range because of the cognitive and emotional problems.
- [21] They independently conducted a psycho-educational assessment on T[...] by means of, *inter alia*, the Junior South African Individual Scale (JSAIS). The JSAIS is normed for children of his cultural background between ages 3-7 years and 11 months. It was established that his global IQ fell in the extreme low range.²
- [22] The said experts however opined that in respect of T[...]’s pre-accident potential, it was difficult to determine the level of educational achievement since he was very young and his brain was still developing. Mr Nethavhani and Dr Van Niekerk took into account the educational attainment of his parents and siblings. In particular T[...]’s mother attained Grade 9 but she was then unemployed. Although his father’s qualification was unknown, it was established that he was

² At page 16 of the report it was opined that “T[...] showed many signs of perceptual difficulties. It can be expected that the motor vehicle accident had traumatic consequences on a perpetual as well as an emotional level, and may later manifest as serious learning disabilities.

unemployed. It was postulated however, that T[...] had an average IQ before the accident and would in all probability have passed Grade 12 and qualify for a higher certificate.

- [23] At the time of the assessment, T[...] was in Grade 2. The school reports illustrated that he was performing very poorly. His teacher indicated that he was not coping with his work, he did not like to read and write and tended to be aggressive with other learners. It was postulated that, post-accident, the chances of him thus progressing in a normal academic environment appeared to be very slim. It was recommended that T[...] attend a special school due to his IQ being in the retarded range. Moreover the risk of the conduct disorders would impact negatively on his school performance. He would require remedial help during his school career. He would most likely attain Grade 9 or an equivalent grade at a special school. He would therefore not reach his pre-accident potential. The experts deferred to the industrial psychologist for an opinion in respect of his vocational future.
- [24] The industrial psychologist (Mr Moodie) examined T[...] on 21 February 2019, four and a half years after the accident. In his assessment he also took into account the reports of Mr Mahlokweng, Dr Bila, Dr Mureriwa, Mr Nethavhani and Dr van Niekerk, the family history as well as the family members' educational qualifications. At the time T[...] was repeating Grade 4, his school history reflected that he repeated Grade R, Grade 2 and Grade 4. Mr Moodie had access to his school records. He was requested to postulate T[...]’s employment/working potential post-accident and compare same to the circumstances pre-accident.
- [25] Mr Moodie did not conduct any psychometric assessments due to T[...]’s age. Instead, deference was given to the educational psychologist to comment on T[...]’s pre- and post-accident educational potential which in turn would have a direct bearing on his pre- and post-commencement earning potential. Mr Moodie

considered the educational psychologists' opinion that pre-accident, in order for T[...] to fulfil his educational potential, he would in all likelihood have entered the open labour market after completing Grade 12. He would have to set aside funds in order to study further. Very early in his career he would then complete a one year certificate or similar NQF Level 5 qualification in a part-time capacity.

Pre-Accident Postulation

[26] On this basis Mr Moodie postulated that pre-accident:

- 26.1 T[...] would enter into the open labour market, but would in all probability, struggle to obtain a permanent post for approximately 18 to 24 months;
- 26.2 In this period, he would have earned sporadic part-time income in the region of R2,500.00 to R3,000.00 a month;
- 26.3 He would then secure employment on a lower level of the Patterson Scale A3, plus a thirteenth cheque;
- 26.4 He would gain experience and complete his one-year certificate or similar NQF 5 studies;
- 26.5 This qualification would allow him to then secure earnings on par with the Annual Guaranteed Packaged Salaries around the age of 25 to 28 years;
- 26.6 He would also reach his career ceiling between the ages of 40 to 45 where he would be earning on the Patterson Level C1/C2 (depending on the certificate he completed);
- 26.7 thereafter he would maintain his salary until retirement at the age of 65 together with the inflationary increases.

[27] Mr Moodie opined that the WPI is 30% if one considers his neurological deficits together with his orthopaedic injury. He noted that:

“cognisance of the above expert opinion with regard to the psychological and cognitive impairments that T[...] has developed as a result of his accident-related

injuries and sequelae thereof, coupled with the findings of Mr Nethavhani and Dr van Niekerk regarding T[...]’s post-accident limited educational potential as a result of the accident, and the direct impact that this will now have on his future occupational and earning potential; it can be concluded that T[...] has been left significantly impaired in comparison to that of his pre-accident self.”

Post Accident Postulation

- [28] It was postulated that, post-accident, and in accordance with Mr Nethavhani and Dr van Niekerk’s opinion, T[...] would at best achieve a Grade 9 level of education or similar level of education at a special needs school. T[...] would most likely pursue employment in the unskilled sector of the labour market. His earnings are measured as per Robert Koch’s 2019 Quantum Yearbook, his salary being in the region of R20,000 – R36,000 – R82,000 per annum (unskilled employment). He would, in all probability, then earn a wage of R3,500.00 (minimum wage) a month and reach his career ceiling between the ages of 40 to 45. His salary would then be adjusted in accordance with inflationary increases until the retirement age of 60 to 65, depending on the work that he would undertake. His earning potential is further exacerbated by him being prone to conduct disorders. Under these circumstances he would find himself struggling to sustain employment as a result of interpersonal conflict with his peers and supervisors. This condition would place him at risk of not being able to hold a long-standing job and would eventually result in him being unemployed.
- [29] Having taken cognisance of the respective expert opinions, I find that the court a quo’s findings were misdirected. The court a quo did not accord the required weight and cognizance to the expert reports. Furthermore, the court was misdirected when it considered the defendant’s expert reports and according them undue cognizance. These expert reports should have been ignored as the defendant’s defence was struck out and in any event, the defendant did not partake in the trial proceedings. The plaintiff’s experts have unequivocally opined

that T[...] has been neurologically and cognitively compromised. The accident related injuries affected his scholastic capabilities and would ultimately compromise his future vocational prospects.

THE QUANTUM

[30] This court would be guided by the respective expert opinions together with the factual evidence when determining what a fair award would be. The actuarial calculations were premised on T[...] finding employment in the unskilled sector. The national minimum wage is R3,500.00 per month together with the inflationary increases (In terms of the Robert Koch 2019 Quantum Yearbook).

[31] The appellant presented actuarial calculations, whereby an amount of R4,722,190.00 was sought. The calculation for future loss of earnings was as follows:

Value of income uninjured:	R5,988,600.00
Less contingency deduction 10%:	(R 598,860.00)
Total:	R5,389,740.00

Value of income injured:	R1,335,100.00
Less contingency deduction 50%:	(R 667,550.00)
Total:	R 667,550.00

[32] It is accepted practice that actuarial calculations are there to assist the court. In ***Southern Insurance Association Ltd v Bailey***³ the court expressed itself on this issue thus:

“Any enquiry into damages for loss of earning capacity is of its nature speculative ... 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

³ Bailey matter, at paragraphs 113H – 114E

approaches. One is for the Judge to make a rough 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.”

- [33] Where the method of actuarial computation is adopted, often contingencies are factored in the calculations. In a wide sense, contingencies are described as the hazard that normally beset the lives and circumstances of ordinary people.⁴ These would include a possibility that the plaintiff may have less than a ‘normal’ expectation of life; he/she may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The contingency deductions may vary, depending upon the circumstances of the case.⁵
- [34] The court has a wide discretion to apply the approximate contingency. Consideration must be given to all relevant facts and circumstances of the plaintiff, and ultimately the contingency deduction must be justified and fair.
- [35] I find that the higher contingency deduction proposed by the appellant was appropriate in respect of the post-accident earnings, due to T[...]’s limited cognitive abilities and the risk of conduct disorders that would affect his long-term employment. In this matter, the appellant proposed a contingency deduction of 50% in respect of the future loss of earnings (post-accident), which has been justified.

Formation of the Trust

⁴ Bailey matter at paragraphs 117 to 119

⁵ Bailey matter at paragraph 116G-H

[36] I am inclined to the view that it is necessary to protect whatever funds are awarded to T[...]. This court serves as the upper guardian of minor children, like T[...], and is vested with the inherent jurisdiction to make decisions in the best interest of the minor. I therefore hold the firm view that the establishment of a trust would be appropriate in these circumstances. In particular, T[...] has neuropsychological and behavioral deficits which may impact his ability to manage his finances in the future. Currently T[...] is 16 years old and it would be appropriate that the Trust remains in place until he attains 25 years of age. If it is later established that T[...] is unable to manage his financial and day-to-day activities, then the trustees would retain the discretion to extend the duration of the trust.

[37] I further take judicial notice of the fact that there are always endemic delays in the formation of trusts which are in most instances to the detriment of the beneficiaries. For this reason, I find it appropriate that the court retain a supervisory role regarding the formation of the Trust, until such time same is fully established and operational.

COSTS

[38] Counsel motivated that the appellant is entitled to not only costs of this appeal but to the costs incurred in the trial proceedings. Counsel argued that the appellant cannot be penalized due to the defendant's non-participation. In my view the appellant would be entitled to the costs incurred during the trial proceedings.

[39] With regard to the appeal, the general principle that; costs should follow the result, is applied. Since the appellant has been successful on appeal, she is entitled to costs on appeal as well. Consequently, the appellant is entitled to both the costs incurred in the trial proceedings as well as prosecuting this appeal.

H. KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

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Counsel for the respondent: *No appearance*
Instructed by:

Date heard: *07 May 2025*
Date of Judgment: *27 May 2025*