

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

Case Number: 19817/18

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

In the matter between:

**N[...] I N[...]
Obo B N[...]**

Applicant

and

ROAD ACCIDENT FUND

Respondent

***Delivered:** This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 09 June 2025.*

Summary: A claim for loss of earning capacity. The onus to prove that a claimant has lost capacity to earn lies with the claimant. A Court must be satisfied that a claimant has indeed lost capacity to earn. A Court is not bound by opinions of experts who baselessly opine that less serious injuries have affected the earning capacity of a claimant. The plaintiff has failed to discharge the onus that she lost her earning capacity. Held: (1) The claim for loss of earning capacity and income is dismissed.

JUDGMENT

MOSHOANA, J

Introduction

[1] This matter came before me on Monday 02 June 2025. Counsel for the plaintiff had already commenced dealing with the matter when this Court raised an issue regarding the alleged head injury sustained by the injured minor child out of the motor vehicle accident in question. Counsel indicated to the Court that the Neurologist and the Neurosurgeon would provide the Court with the clarity sought. As a result, this matter was stood down to 5 June 2025 for the purpose of obtaining the required clarity regarding the alleged head injury.

[2] On 5 June 2025, indeed, this Court received oral testimony from the Neurosurgeon and the Neurologist respectively. This Court must mention that on 4 June 2025, the plaintiff uploaded photographs depicting the injured minor child allegedly provided to the Neurosurgeon on the day of the assessment. Those photographs allegedly assisted the Neurosurgeon to reach a conclusion that the injured minor child sustained a head injury on the day of the motor vehicle collision.

[3] That said, this is a delictual action instituted by Ms N[...] N[...] ("Plaintiff") on behalf of Mr B[...] N[...] ("the injured minor child"). The issue of the merits of the action was settled between the plaintiff and the Road Accident Fund (RAF). It was agreed that the RAF shall pay 100% of the plaintiff's proven damages. The only issue that required determination by this Court is one of loss of earning capacity and income in respect of the injured minor child. Central to the present action is the question whether the injured minor child sustained head injuries on the day of the motor vehicle accident.

[4] All the postulations of the other experts like the Occupational Therapist (OT); Educational Psychologist (EP) and the Actuary are premised on a conclusion that the injured minor child sustained a head injury with neurocognitive deficits. A finding that no head injury was sustained by the injured minor child renders the opinions of those experts useless for this Court. This because they are all premised on a wrong factual basis. This Court must remark at this point that experts witness are there to assist a Court with an opinion in areas where a Court lacks competency. It is not the purpose of an expert witness to mislead a Court. Such a misleading, when it occurs, constitutes a serious professional misconduct. Given the oral evidence received and the contents of the medicolegal reports, this Court takes a view that the expert witnesses misled it, with the apparent solitary view, to manufacture, as it were, non-existent head injury. This Court is minded to refer its observations in this matter to the Health Professions Council of South Africa (HPCSA) for consideration whether a cause to investigate professional misconduct exists.

[5] This Division, to my observation, battles, almost daily, with instances where, what this Court may conveniently term “a lucrative head injury”, is manufactured. It shall be a sad day in this country, if a finding is made that professionals aid in the manufacturing of non-existing head injuries. This Court uses the phrase lucrative head injury because out of head injury, irrespective of its seriousness, experts are able to conjure up a massive claim for loss of earning capacity, particularly where minor children are involved. An allegation that head injuries are involved is a pricey allegation

[6] The RAF exist to compensate victims of road accidents, who present with valid and genuine injuries arising out of the negligent driving of motor vehicles. The RAF is funded by the tax payers of South Africa through the fuel levy. Lately, the RAF has taken an approach not to defend actions instituted by road accident victims. This approach makes it extremely difficult for Courts to administer justice. That notwithstanding, a Court must still be satisfied before entering a judgment in favour of a claimant that a claim has been proven on the balance of probabilities.

[7] Turning to the brief facts of this action, on 27 January 2017, the 9 year old injured minor child was hit by a motor vehicle whilst playing with his friends and

sustained bodily injuries. He was first attended to by another medical institution and later transported to Mediclinic Bloemfontein (Mediclinic) for further treatment. He was received at the emergency centre of Mediclinic at 18H03. On arrival, he presented with abrasions on the right elbow and right knee injuries. He complained of pain in the back. According to the head of Emergency Centre Dr Michael-Robert Waldeck, the injured minor child was clinically stable. He was alert and reacted to voices. His GCS was 15/15. The clinical notes made by Dr Fourie at 18H15 reflects the following:

“MVA

Abrasions @ elbow 1x1cm

Abrasions (L) elbow 2x2 cm

Neck: tender

(-) neurological outfall

Chest: (-) tenderness

Bilat normal

Abd: Soft

Pelvis stable

Pearl “a right tick” was made.

[8] Drs Van Dyk & Partners Inc performed a CT scan on the injured minor child. It seems customary for well-to-do hospital to perform a CT scan to all their patients. Thus, it cannot axiomatically follow that where the CT scan is performed a head injury was sustained. With regard to the brain scan of the injured minor child, it was noted that there was no evidence suggestive of a base of skull fracture. With regard to the spine, it was noted it was normal and no pre vertebral soft tissue swelling or vertebral body collapse were noted. The abdomen and the pelvis were found to be normal. At 19H42, Dr Loubser was informed of the results. At 20H00 the injured minor child was discharged and he walked out stably. It is important to mention that nowhere in the hospital records was a head injury diagnosed.

[9] On 12 July 2022, five years after the accident, the injured minor child was assessed by the Neurosurgeon, Dr Mazwi (Dr Mazwi). On the day of the assessment Dr Mazwi had the Mediclinic records in his possession. Surprisingly, in his medicolegal report, under the history of the accident, he recorded the following:

“The claimant experienced head trauma, also **had occipital head swelling and occipital head pains, with loss of awareness**. The claimant had a brief loss of consciousness and amnesia in keeping with mild head injury.”

[10] It must be mentioned that the medical institution, Free State Emergency Medical Services (FSEMS), received the injured minor child at 16H52. In the patient report form clinical findings were made and recorded as abrasion on the elbow and the right knee. From FSEMS, the injured minor child was transported to the Mediclinic.

[11] In his report, Dr Mazwi recorded the following, with regard to the injuries allegedly sustained by the injured minor child following the motor vehicle accident.

1.2 Injuries sustained

According to the claimant

- *Head injury*
- Right elbow injury
- Right knee and Thoracic back injury

According to hospital records and RAF 1 form

- *Head injury*
- Right elbow injury
- Right knee and Thoracic back injury.

[12] Having scoured the clinical records of FSEMS and Mediclinic, this Court was unable to observe any head injury recorded or diagnosed. However, it is clear that the alleged head injury was mentioned to Dr Mazwi by the claimant as recorded by him in his report. This Court also perused the RAF 1 form completed by Dr M Waldeck. Nowhere does Dr Waldeck mention any head injury. *Prima facie*, the above recorded information is misleading. This is very much concerning for this Court. A doctor cannot rely on a patient's *ipse dixit* when it comes to the noting of injuries, particularly where clinical notes are available. The plaintiff arrived at the scene of accident after the collision has happened. As to what injuries were sustained her evidence is of no moment. It is evidence that cannot be relied on.

[13] On 4 April 2023, Professor Kakaza (Professor), a Neurologist, assessed the injured minor child. This was six years after the accident. Of significance, the plaintiff informed the Professor the following, with regard to the injuries sustained by the injured minor child:

“Ms. N[...] found him still at the scene of the accident. He was bleeding from the nose. He had a swelling in the **occipital area**¹. He also had multiple bruises. He was able to recognise his mother when she came to the scene but Ms. N[...] **felt that he was confused.**”

[14] In her medicolegal report, the Professor reached the following startling conclusions:

“9 The *clinical picture* is in keeping with:

- (i) **A mild traumatic brain injury**
- (ii) Soft tissue injuries.

10 The assessment of mild traumatic brain injury is **based on the history** that B[...] was awake when Ms. N[...] found him at the scene of the accident **but appeared confused...**”

The CT scan of the brain done a week later was reported to be within normal limits

11. He **has recovered from the mild traumatic brain injury**
He has a normal cognitive score

[15] It is clear from the report of the Professor that the assessment of the mild traumatic brain injury is not a clinical one but it is the product of history provided by the plaintiff. This is clearly unreliable. According to the Professor, the injured minor child had recovered from the alleged mild traumatic brain injury. Mention is made of a CT scan done a week later. Other than a CT scan performed on the day of the accident, this Court was not presented with any other results. This is unsatisfactory.

[16] Returning to Dr Mazwi, he stated the following, which, to my mind, had a ripple effect to all the other expert witnesses' opinions:

¹ This is the area located at the back of the head and encompasses the occipital lobe of the brain.

“B. Cognitive disturbances

The claimant **had a head injury which resulted in neuropsychological disturbances**, and risk of epilepsy, and behaviour disturbances, defers to neuropsychologist.”

[17] What is disturbing is that Dr Mazwi does not reveal in his report the source of his conclusions that a claimant had a head injury. When his oral evidence is evaluated later, it shall become clear what his unreliable source was. He mentions in his report occipital swelling without identifying the source of that information. At least, unreliable as it may be, the Professor disclosed the source of the occipital swelling to be the plaintiff. Tellingly, Dr Mazwi in his report reached the following conclusions:

“7. Conclusions

The claimant had the following damages arising out of the injuries sustained during the motor vehicle collision:

- *Mild head injury*
- Has significant long term mental disturbance

Deference to *neuropsychologist*

- Has Epileptic fits

Deference made to neurologist

- Thoracic back injury
- Right elbow and Right knee injury

Deference made to orthopaedic surgeon

- Has educational disturbance

The *head injury is a direct result of the accident.*

The memory disturbances and poor concentration *are due to the head injury...*”

[18] The plaintiff did not lead any evidence of a neuropsychologist to prove any significant long term mental disturbance. Based on the above exposition, this Court is not convinced that the injured minor child sustained head injury during the motor vehicle collision. The existence of the head injury is a clear manufacture of Dr Mazwi and the plaintiff. Dr M Bongobi, an Orthopaedic surgeon assessed the injured minor child on 11 July 2022. This was after Dr Mazwi had made unsupported conclusions

about a head injury having been sustained. In his report he reports about an “unspecified head injury”. This is, with respect to him, meaningless to this Court.

[19] With regard to employability, Dr Bongobi concluded that the extent of the injured minor child’s orthopaedic injury does not preclude him from succeeding at school and finding gainful employment.

[20] This Court received evidence from Dr Mazwi and the Professor regarding the alleged presence of a head injury. This Court must declare upfront that it found the testimony of the two to be with considerable regret unreliable and unhelpful. With regard to the alleged head injury, he told the Court that photographs which were only uploaded on CaseLines the day before, were availed to him during his assessment of the injured minor child. Using his trained eye, he was able to observe a swelling on the head. I must remark that with the Court’s own observation, a swelling cannot be spotted. Based on eye observation of the photographs, Dr Mazwi then reached a conclusion that the injured minor child sustained head injury on the day in of the motor collision. His report refers to occipital swelling, which is the back part of the head, yet the photographs so uploaded depicts the front portion of the head. He testified that because a CT scan was done on the day of the admission, such suggests that there was a head injury. This against a clinical note that excluded neurological fallout. He testified that the swelling on the photographs was only obvious to him because he possesses a trained eye. He could not explain why the swelling was not observed by the doctors who saw the patient on the day of the accident. He could not explain as to why in his report he did not mention the photographs as source documents for a conclusion that there was a head injury. He accepted that his report is incomplete. He also suggested that the report of the radiologists is incomplete and unhelpful because it does not depict the swollen injuries observed by him using his trained eye. With considerable regret, this is preposterous to the extreme in this Court’s respectful view.

[21] The Professor testified that the reason why she mentioned the neurocognitive disturbances and a head injury is because the plaintiff told her that the injured minor child was confused. When asked by the plaintiff’s counsel she attempted to suggest that she made her own independent observation. This cannot be correct, when

regard is had to the contents of her own medicolegal report. She could not make any conclusions about epilepsy because there were no hospital records or medication to support the existence of epilepsy. Ironically the plaintiff told her that the injured minor child became epileptic a week after the accident. She saw the child six years after the collision and she has no knowledge as to what could have happened to the injured minor child in the intervening period.

[22] Owing to the above exposition, this Court is regrettably unable to reach a conclusion that the injured minor child sustained a head injury. When regard is had to the report of the Educational Psychologist (ED) it is unclear as to what accounts to her conclusion that the injured minor child must be enrolled at a remedial school. She does not link the poor educational performance to a head injury. She still concluded that the issue of the head injury must still be investigated by the Neurosurgeon.

[23] When counsel realised that the case for the loss of earning capacity is not supported by the alleged effects of a non-existent head injuries, he implored the Court to consider the conclusions reached by the Occupational Therapist (OT) that the injured minor child will be suitable for sedentary work. The OT reached the following unsupported conclusion:

“Occupational therapy findings revealed **back pain...** which is **common on significant head injury and headaches...**

Physically, B[...] is expected to be able to perform sedentary, light, and to some extent medium physically demanding work in the future. He is not expected to cope with heavy or strenuous jobs due to back pain, headaches and generalised fatigue.”

[24] The difficulty with the above findings is that this Court has already found that there is no evidence supporting a head injury. Secondly, the Orthopaedic surgeon has concluded that the work ability of the injured minor child shall not be affected in future. For those two reasons, this Court remain unconvinced that the injured minor child had lost any earning capacity. A Court must be satisfied on a balance of

probabilities that the claimant has lost earning capacity as in patrimonial loss. In *Road Accident Fund v Kerridge (Kerridge)*², the SCA had the following to say:

“Indeed, a **physical disability which impacts on the capacity to earn an income** does not, on its own, reduce the patrimony of an injured. There must be proof that the reduction in the income earning capacity will result in actual loss of income.

[25] The above position was already stated in *Rudman v Road Accident Fund (Rudman)*³. It remains the onus of the claimant to prove on a balance of probabilities that the physical disability firstly impacts on his or her capacity to earn and secondly that an actual loss shall follow due to the impact on capacity.

Conclusions

[26] In summary, this Court is far from being convinced that the injuries sustained by the injured minor child led to any neurocognitive deficits. The Professor recorded in her medicolegal report that the injured minor child was cognitively normal. On the available medical evidence, the injured minor child did not sustain a head injury. Accordingly, the plaintiff has failed to discharge her onus of proof that the injured minor child lost his earning capacity and income. The action must fail. This Court fully agrees with the Court in *P.E.M obo P.C.M v Road Accident Fund (PEM)*⁴ when it said:

“[24] ... What may not be ignored is that higher grades typically introduce more complex and abstract material which may be challenging to grasp by any learner who is still developing their ability to think.”

[27] On account of all the above reasons, I make the following order:

Order

² 2019 (2) SA 233 (SCA) para 25.

³ 2003 (2) SA 234 (SCA).

⁴ (4545/2019) [2025] ZAMPMBHC 49 (6 June 2025)

1. The claim for loss of earning capacity and income is dismissed.

**GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

APPEARANCES:

For the Plaintiff:

Mr Mohlala

Instructed by:

Ntozake Attorneys, Pretoria.

For the Defendant:

No appearance

Date of Hearing

02 and 06 June 2025

Date of judgment:

9 June 2025