

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

Case No: 60003/21

Reportable: No

Of interest to other Judges: No Revised: No

Date: 24 June 2025

In the matter between:

K J L[...]

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGEMENT

Mooki J

1 The plaintiff was injured in a car accident on 25 August 2018. He pleaded the following injuries: a head injury with swollen forehead, an injury to the right knee, and “upper back pains”. The plaintiff was a passenger at the time of the incident. He was 14 years and 7 months old and in grade 8 at school.

2 The Court (Lenyai AJ) found the defendant liable for 100% of the damages agreed by the parties or as proven by the plaintiff. The present proceedings are for the determination of the plaintiff’s claim for the loss of future earnings.

3 The RAF did not participate in the trial. The Court granted the plaintiff leave to

present evidence in terms of Rule 38(2). The plaintiff relied on evidence by the following experts: an orthopaedic surgeon, a neurosurgeon, a clinical psychologist, an educational psychologist, an occupational therapist, an industrial psychologist, and actuaries.

4 Dr L D Ramushu, an orthopaedic surgeon, assessed the plaintiff on 5 August 2022. He found the plaintiff to have a normal gait, with no deformity to the right knee, but with mild tenderness over tubercle of the knee. He diagnosed the plaintiff as presenting with a soft tissue injury to the right knee and that the plaintiff had reached maximum medical improvement.

5 Dr A B Mazwi, a neurosurgeon, assessed the plaintiff on 18 January 2022, when the plaintiff was 17 years old. The plaintiff told Dr Mazwi that the plaintiff lost awareness and woke up in the ambulance. Dr Mazwi considered that the plaintiff was observed on admission, was given medication as prescribed by the treating doctors and was discharged from hospital on the same day. The plaintiff informed Dr Mazwi that the plaintiff had normal scholastic performance before the accident. The plaintiff raised various complaints which he said were the result of the accident, including poor school performance, difficulty with concentration and memory disturbances. Dr Mazwi concluded that the plaintiff sustained the following injuries: mild head injury, right knee injury, right elbow injury, and poor hearing post the injury.

6 Ms N M Mqhayi, a clinical psychologist, assessed the plaintiff on 25 March 2020. The plaintiff informed Ms Mqhayi that the plaintiff's academic performance deteriorated since the accident. The plaintiff self-reported that he lost consciousness, which he regained in the ambulance. The plaintiff was subjected to various tests. Ms Mqhayi concluded that there were no significant occupational or psychiatric difficulties before the accident and that the plaintiff was fully functional. This changed following the accident, with the plaintiff, among others, complaining of headaches, short-temperedness, and a deterioration in academic performance.

7 Ms Mqhayi found that the plaintiff demonstrated areas of difficulty on various domains of neurocognitive functioning, including impaired sustained attention and inadequate auditory divided attention, impaired mental speed with impaired

psychomotor speed, and impaired short-term verbal memory. Ms Mqhayi opined that the plaintiff was probably of average intellectual functioning before the accident “considering his scholastic and family background”, and that the accident negatively affected his life and academic functioning. The plaintiff was found to have severe emotional disturbances, which interfered with his social and scholastic functioning.

8 Dr L T Kenana, an educational psychologist, gave evidence in person. This was in addition to his report. The plaintiff’s mother told Dr Kekana that the plaintiff had the following problems following the accident: short term memory problems, he did not concentrate and give sufficient attention, and complained about fatigue. Dr Kekana subjected the plaintiff to various tests, including a diagnostic arithmetic test. The result of this test showed the plaintiff to score at the age level of 10 years for addition, at the level of 9 years for subtraction, at the level of 7 years for multiplication, and at the level of 7 years for division. The plaintiff was 18 years at the time of the assessment. He was repeating grade 10.

9 Dr L T Kenana made the following diagnosis in relation to the plaintiff. He determined that the plaintiff has a borderline intellectual ability in relation to cognitive functioning. Dr L T Kenana stated that “The only reliable information is the performance of [the plaintiff’s] parents and siblings at school.” Dr Kekana opined that, pre-accident, the plaintiff “could probably pass Grade 12 and obtain admission to a diploma study.” This was the case “If the performance of his parents and older sibling at school is taken into account and looking at various factors that might determine the learner’s educational potential, including family members [...], environment, pedagogic neglect, socio-economic factors of the family, [...]” Dr L T Kenana opined that the plaintiff would have obtained an NQF Level 6 qualification pre-accident.

10 Dr L T Kenana also opined that the plaintiff’s scholastic performance following the accident was unsatisfactory; including that the plaintiff repeated grades 9 and 10. The accident, according to Dr L T Kenana, exacerbated the plaintiff’s learning difficulties. The prognosis of the plaintiff passing grade 10 in a mainstream school was bleak. He determined that the plaintiff was “a Learner with Special Educational Needs (LSEN) and should be referred to a pre-vocational school where he will

probably pass Grade 10 Special Education. His highest level of education is Grade 10 Special Education (NQF Level 2) post-accident.”

11 Ms Sarah Marule, an occupational therapist, assessed the plaintiff on 18 January 2022. The plaintiff presented with pain in the right knee, had poor physical endurance “due to the experience of pain”. Ms Marule opined that the plaintiff had various shortcomings, including that the test for manual dexterity showed pain in the right knee, which was aggravated by lifting and carrying a heavy object. The plaintiff also had poor balance and poor physical endurance.

12 The plaintiff was found that he would struggle to cope in the open labour market for being a candidate for the LSEN. This is because “One needs to be physically, emotionally, mentally and cognitively well and stable to compete fairly in the open labour market.” Being an LSEN candidate excluded the plaintiff from the open labour market. The plaintiff was found to be more suited for employment in a sheltered environment, where people with special needs are offered work under special working conditions.

13 The occupational therapist opined that the injuries sustained in the accident had negatively affected the plaintiff’s occupational prospects and that the plaintiff would struggle to attain and maintain suitable employment.

14 The industrial psychologist, Ms T Maitin, assessed the plaintiff on 5 October 2022, 4 years and 2 months after the incident. Ms Maitin stated the following regarding the plaintiff’s pre-morbid potential. She referred to Dr Kekana’s opinion that the plaintiff could pass Grade 12 and obtain a diploma, pursuing a course of study at NQF level 6. She also had regard to the qualifications of the plaintiff’s parents and the fact that the plaintiff’s sister was a student at a tertiary institution.

15 Ms Maitin posited the following pre-morbid employment scenario. She opined that, but for the accident, the plaintiff would have probably completed grade 12 with a diploma endorsement and would have enrolled at a tertiary institution, studying towards a three-year diploma of his choice. The plaintiff is then said to have entered the workforce at Paterson Level B4, progressing to Paterson Level C3/C4 by age 45.

He would then have earned inflationary increases until retirement at age 65. Ms Maitin premised her opinion on a view that “children tend to outperform their parents and significant others in both scholastic and occupational attainment, regardless of their socio-economic status.”

16 Ms Maitin noted observations by other experts when considering the plaintiff’s post-morbid employment potential. She opined that the accident had a negative impact on the plaintiff’s pre-accident learning and earning potential; with the plaintiff presenting with limitations that interfered with his ability to benefit optimally from learning which will interfere with his pre-accident earning potential. Ms Maitin indicated that the plaintiff would probably be unable to secure employment in the open labour market given his severe cognitive deficits. She concluded that the plaintiff did not suffer a loss of past earnings because he was a student at the time of the accident, but “will probably suffer a total loss of future earnings”.

17 The actuary computed their estimation on the following bases. They assumed that the plaintiff was unemployable in the future, and took his future injured income as nil. The past and future uninjured incomes were computed on the basis that the plaintiff would have completed a grade 12 and a diploma in 2022 and 2025, respectively; with the plaintiff obtaining employment in July 2028 earning in line with Paterson B4. His income was assumed to have increased to Paterson C3/C4 by age 45, and that his income would then increase with inflation to retirement at age 65. The actuaries computed that the present value of the loss in income amounted to R9 279 131.00.

18 The plaintiff initially claimed R5 600 000.00 from the defendant. This amount was the total of claims under several heads: past hospital and medical expenses, an estimate of future medical expenses, loss of earning capacity/reduced/loss of productivity/loss of employability, and general damages. The plaintiff amended his claim and now seeks R10 379 131.00, of which the amount of R9 279 131.00 is for “loss of earning capacity/reduced/loss of productivity/loss of employability”.

19 The Court put to counsel for the plaintiff that the plaintiff, in contending for “a total loss of future earnings”, was saying that there was absolutely no work that the

plaintiff could possibly do, meaning that the plaintiff has no work capacity at all. The occupational therapist did not opine that the plaintiff had no work capacity. Counsel submitted that the Court can adjust the claim by way of contingencies. The Court then put to counsel that contingencies that are applied off unfounded bases amount to a claimant being put in funds without a proper basis.

20 The plaintiff's claim for a loss of future earnings is premised on the incident having so affected the plaintiff's education, with the result that he would no longer be able to attain an NQF level 6 qualification but had become reduced to attaining an NQF level 2 qualification. Counsel submitted that the plaintiff was a moderate achiever at school before the accident. The educational psychologist opined that the incident severely affected the plaintiff's ability to learn, with the result that the plaintiff was a candidate for special education. The evidence does not support a finding that the accident so impaired the plaintiff, leading to the plaintiff becoming a candidate for special education.

21 The evidence shows that the plaintiff was a candidate for special education at the very beginning of his schooling. His school reports consistently show the plaintiff to be underperforming, to a large extent. He is shown to have consistently performed below the class average. He repeated grade 4. The results of the repeated grade 4 were not made available. He was in grade 8 at the time of the incident. His results for this grade were not made available. He was promoted to grade 9. He repeated the grade. The results of the repeated grade 9 were not made available. He also repeated grade 10. The results of the repeated grade were also not made available. Counsel submitted during the hearing that the plaintiff had dropped out of school at the time of the hearing of this matter.

22 The actuary made computations on the loss of earnings premised on the plaintiff having completed grade 12 in 2022. The plaintiff did not provide supplementary reports when the matter was heard.

23 The industrial psychologist would have the court accept that the plaintiff would have attained an NQF level 6 qualification based on the qualification of the plaintiff's parents and because the plaintiff's sister was a student at a tertiary institution, on the

supposition that “children outperform their parents.” These findings by the industrial psychologist ignore the facts.

24 The industrial psychologist gave the impression that the plaintiff’s poor school performance was attributable to the incident. The industrial psychologist does not mention the fact that the plaintiff consistently performed poorly since starting school. The evidence by the industrial psychologist was designed with an outcome in mind. This is illustrated by the following highly self-serving extract by the industrial psychologist of the evidence of the educational psychologist: t is likely that before the accident, Kamogelo, despite one repeat in Grade 4, could probably pass Grade 12 and obtain admission to a diploma study. He could probably pursue the study course of his choice and obtain an NQF Level 6 qualification. (11.1).....The prognosis of him passing Grade 10 in mainstream education seems bleak.....His highest level of education in (sic) Grade 10 Special Education (NQF 2) post-accident”. (11.2.2).

25 The industrial psychologist, in the above extract, failed to consider all the facts. The industrial psychologist did not, for example, consider the actual school reports in relation to the plaintiff’s performance since grade R, or the plaintiff’s results when repeating grades. The industrial psychologist ignored evidence and made conclusions based on a generalised assertion that children tend to outperform their parents.

26 It has not been shown that the accident or its sequelae so fundamentally affected the plaintiff that the plaintiff had been rendered wholly unemployable. Counsel submitted that the Court should apply a higher than normal contingency to the plaintiff’s claim. This would be a misapplication of contingencies. A proper basis must have been laid for the court to apply contingencies.

27 I determine that there is no evidence upon which the court can made a finding in relation to the plaintiff’s contended loss of future earnings.

28 I make the following order:

The court grants absolution from the instance in relation to the plaintiff's claim for future loss of earnings.

O Mooki

Judge of the High Court Gauteng Division, Pretoria

Counsel for the plaintiff:

P Makhubela

Instructed by:

Mashabela Attorneys Inc.

Date heard:

13 June 2025

Date of judgement:

24 June 2025