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

Case Number: A244-2023

(1) REPORTABLE: YES / NO

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

(3) REVISED: NO

DATE **22 September 2025**

SIGNATURE

In the matter between:

N[...] N[...]

Appellant

and

ROAD ACCIDENT FUND

Respondent

JUDGMENT

NOKO J (Mngqibisa-Thusi J et Davis J concurring).

Introduction

[1] This appeal is against the judgment and order of Makhoba J, (Court *a quo*), who dismissed the appellant's claim for past and future loss of income launched against the Road Accident Fund (The RAF) in the sum of R 2 785 000.00 and R 6 508 580.00, respectively. The Court *a quo* awarded general damages in the sum

of R500 000,00 for general damages. The appeal is with the leave of the Supreme Court of Appeal.

Background

[2] The appellant, N[...] N[...], a 23-year-old female, who was initially¹ represented by her guardian, P[...] M[...] N[...], sustained injuries arising from a motor vehicle accident which occurred on 21 May 2015. The appellant was knocked down by a motor vehicle with registration letters and numbers N[...] 7[...], then and there driven by Sonwabile Mkani (“the insured driver”). The appellant was 14 years old at the time of the accident and was in grade 8. The merits were decided in favour of the appellant on 27 October 2017, and the respondent was ordered to provide the appellant with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act² (“Act”). The determination of the other heads of damages was postponed *sine die*.

[3] The trial on quantum was heard on 23 February 2023, and the judgment was handed down on 31 March 2023.

Before the Court a quo

[4] The matter was allocated to the judge attending to the default judgments, as the respondent did not appear during the roll call. The counsel for the appellant took the court through the heads of argument together with the medico-legal reports which were submitted in terms of Rule 38(2) of the Uniform Rules of Court. The Court *a quo* dismissed the claim for loss of income as both the orthopaedic and neurosurgeon opined that the appellant had recovered fully.

[5] The appellant was aggrieved by the order of the court *a quo* and instituted appeal proceedings to challenge it on the following grounds: *first*, that the Court *a quo* misdirected itself by limiting its reasons in the judgment only to the reports of the primary doctors and failing to have regard to the opinion from the secondary

¹ The plaintiff's guardian was substituted by the appellant once she reached age of majority.

² Act 56 of 1996.

experts, being the occupational psychologist, clinical psychologist, and educational psychologist.³

On appeal

[6] The appellants contended that the Court *a quo* erroneously limited itself to the reports of the primary doctors and failed to consider the reports of both occupational and clinical psychologists, although the primary doctors deferred to them for their opinions regarding the sequelae of the injuries sustained.

[7] Counsel for appellant submitted further that the experts compared the appellant's pre-morbid potential and earning capacity and post-morbid and earning capacity and concluded that the accident had a negative effect. These opinions, counsel argued, were not challenged by the respondent. The sequelae of the physical injuries set out by the occupational therapist and the sequelae from the brain injury, as stated by both clinical and educational psychologists, limited the appellant's potential career, job opportunities, and future employment.

[8] The counsel summarised the reports of the experts as set out below. The clinical psychologist identified the following sequelae: reduced emotional and cognitive difficulties; reduced attention and concentration; increased anxiety; self-esteem difficulties; mood swings; easily startled and feelings of depression. Regarding physical disabilities: the appellant tires easily; struggles to perform overhead activities; can no longer stand or walk for prolonged periods; struggles to perform household chores; experiences pain in the injured leg and struggles to kneel. All these factors compromised the appellant's ability to adequately perform tasks or learn new information and take proper instructions. Her quality of life was disrupted.

[9] The occupational therapist, on the other hand, referred to the following challenges: that the appellant struggles to lift or carry heavy objects due to pain; to

³ More particularly paragraphs 11.1 and 38 of the heads of argument.

stand and walk for prolonged periods due to pain; she experiences frequent dizziness; her visual acuity is poor, and she experiences frequent headaches.

[10] Further that as a result of the sequelae aforesaid, the appellant would not be able to work with ease until retirement and would only be able to carry out light work. Her ability to compete in the open market is greatly compromised. She finally classified the appellant as a vulnerable person who will depend on sympathetic employers to accommodate her physical and psychological limitations.

[11] The educational psychologist noted that the appellant's academic performance had declined markedly; she now displays a lack of concentration and continuous pain in his limbs. Her visible scars dented her self-esteem, which limited her ability to easily associate with people. The academic record before the accident was flawless, and she had not repeated grades. Her educational progress took a nosedive after the accident. With the recurring headaches, her concentration span compromised her academic abilities. She repeated grade 9, 10, and dropped out in grade 11 in 2021.

[12] In conclusion, the expert stated that with the records at her disposal, the appellant would have passed grade 12 and proceeded to obtain a tertiary qualification, including a diploma from a University of Technology, and could have acquired NQF 6 qualifications. The effect of the accident means that she will achieve no more than a NQF 2 with no work-related skill sets.

[13] The industrial psychologist opined that since the appellant would have achieved NQF 6 level qualification pre-morbid, the appellant would have entered the open labour market at the age of 22 in 2023 with earnings falling in the lower quartile range of Paterson B4/B5 total package income. Further, she would have progressed to Paterson level C and subsequently progressed to Paterson C4 level at the age of 45. And thereafter, she would have continued with her work until retirement age. She noted that with the sequelae identified by the other experts, she has no work-related skills and would be unable to compete in the normal

labour market. In addition, the fact that she could only attain a NQF 2 excluded her chances of being employed in an office-based environment, and her compromised physique, particularly decreased muscle strength in her left arm, also reduces her chances of being employed in an environment that may require physical activities.

[14] The industrial psychologist concluded that the appellant, with her grade 10, meant that she would enter the labour market with earnings falling in the lower quartile of earnings of Paterson A1 and with a career ceiling on Paterson B1 medium scale.

[15] Though the order sought was that the appeal court should set aside the order and judgment of the court *a quo*, counsel later discovered a judgment of a full court in *Neethling v Weekly Mail and Others* 1995 (1) SA 292 AD, which dealt with a matter similar to the matter serving before us. In that case, it was held that the court need not refer the case back to the Court *a quo* and may instead exercise its discretion to substitute the decision of the Court *a quo*. Counsel submitted that the respondent was never active in this *lis*, the judgment was obtained by default as there was no appearance when the matter was allocated to the Court *a quo* on 23 February 2023. There was also no opposition to the application for leave to appeal.⁴ If the matter were to be referred back, there would be prejudice suffered by the appellant, as she has waited for more than 10 years in this matter. On the other hand, the respondent was served with heads of argument, which indicates that a request would be made for this court to substitute the decision of the court *a quo*, and has failed to mount any opposition.

[16] To this end, the appellant has submitted updated calculations from the actuary⁵ who made calculations subtracting 5% and 25% on past and future earnings, respectively, in respect of the uninjured loss of earnings and 25% in

⁴ But opposed the application for leave to appeal to the Supreme Court of Appeal of South Africa when leave to appeal to this Honourable Court was granted by the Honourable Judges Goosen JA and Siwendu AJA. see para 1.6.3. of the Appellants' Heads of Argument at 020-26.

⁵ The appellant has filed an updated actuarial report.

respect of the future earnings, with the total claim being the amount of R 6 355 600.00.

[17] The appellant's counsel further submitted that the court *a quo* erred in granting general damages in an instance where the respondent had not made an election in terms of section 3 of the Act.

[18] It has been a common practice that the Road Accident Fund does not file any reports to gainsay the opinions of the experts invited by the claimants, and also fails to file heads of argument. To this end, the courts are denied the benefit of considering opinions by different experts in the adjudication process. That notwithstanding, the presiding officers are still enjoined to interrogate experts' opinions presented, even if invited by one party to the *lis*.

Issues

[19] The issues for determination are whether the Court *a quo* misdirected itself in failing to have regard to the evidence of other experts in coming to its conclusion, and whether awarding general damages is consistent with the law.

Legal principles

[20] It is trite that a court may disregard some of the evidence presented before it on certain pronounced grounds, for example, if such evidence is irrelevant, false, hearsay, unreliable, or contradictory. The decision to ignore such evidence must be preceded by a careful examination of such evidence, and having embarked on a holistic approach to the exercise. If the reasons for the discarding of evidence are set out in the judgment, the presiding officer may be construed as having committed an irregularity.⁶ The losing party may find it difficult to discern the reasons for losing its case if some of the evidence was ignored without furnishing

⁶ See SCA in *Ngcobo v The State* (115/2024) [2025] ZASCA 12 (12 February 2025)2, at para [31] where it was stated that "I am of the view that the magistrate's refusal to allow the appellant's attorney the opportunity to present ... statements amounted to an irregularity...". This was a criminal case and has been referred to on the basis of parity of reasoning.

reasons.⁷ Failure to properly consider all evidence presented may be considered as negatively affecting the parties' right to a fair trial.

[21] It is trite that earning capacity may constitute an asset in a person's patrimonial estate. If loss of earnings is proven, the loss may be compensated if it is quantifiable as a dominium in the value of the estate.⁸ The Court would generally get a cue from an actuary whose report may allude to contingencies. That being said, the actuarial recommendations are not etched in stone, and the Court is at large to exercise its discretion and may deviate from suggested actuarial calculations.

[22] The contingencies may be higher where evidence is clear that the chances of re-employment will mainly depend on sympathetic employment. It was held in *Krohn*⁹ where a higher contingency was applied that:

“There is little doubt that, having regard to the sequelae of his injuries fully canvassed by the experts, the plaintiff is at risk of losing his current position, and the prospects of him obtaining another position are indeed very slim. The plaintiff is on the proverbial “knife’s edge”. He can be dismissed from his job anytime. There is no other option in my mind other than to apply a 50% post-morbid contingency deduction. By applying the 50% contingency deduction, the plaintiff is regarded as having a 50% chance of sustaining his current employment or obtaining alternative employment. This is a conservative approach if one has regard to the plaintiff’s condition.”

⁷ See *Vodacom Pty Ltd v Makate and Another* [2025] ZACC 13, where the Constitutional Court stated at para 63 that “The reasons must be such as to enable the losing party to see that the court has decided the case that was argued and to understand why that party lost. Reasons must also be such as to enable an appellate court to follow the court’s reasoning with a view to assessing whether it was right or wrong; reasons must disclose the “path of reasoning”. Further at para [74] that “The Supreme Court of appeal is also guilty of failing to assess evidence or being unaware of evidence that it ought to have assessed”.

⁸ *Prinsloo v Road Accident Fund* 2009 5 SA 406 (SE) at 409C-410A.

⁹ *Krohn v Road Accident Fund* (1402/2013) [2015] ZAGPPHC 697 at [24] and [27].

[23] The *locus classicus* regarding loss of earnings is *Southern Insurance Association Ltd v Bailey NO*,¹⁰ where the Court acknowledged that 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. It was held that the Court can only make an estimate, which is often a very rough estimate of the present value of the loss, and in this exercise, one has to decide to make an award that is just and equitable. One needs to be guided by, but not tied down by, inexorable actuarial calculations.¹¹

Analysis

[24] Both the primary doctors noted a fair recovery process and indeed deferred to the other experts for final assessment. They have all qualified the appellant for general damages under the Narrative test, implying that the injuries resulted in severe long-term mental and behavioural disorders. The reports of the experts, which were not considered by the court *a quo*, are clear that the appellant's future is indeed bleak. There is no evidence presented by the respondent to gainsay the said evidence, and this denied the court the opportunity to have regard to a different perspective. That notwithstanding, the court is enjoined to assess the reports of the experts and come to its conclusion, noting that "The view of any expert does not bind courts. They make the ultimate decision on issues on which experts provide an opinion".¹²

[25] In civil cases, a failure by the court *a quo* to consider all evidence presented is a valid ground for appeal. If the appellant can demonstrate that the court overlooked or failed to properly weigh significant evidence that could have influenced the outcome, this could lead to the original decision being overturned or the case being remitted for a new trial. In this case, the court *a quo* did not consider the reports of the appellant's educational psychologist and the industrial psychologist and their conclusions and recommendations. The school reports of

¹⁰ 1984 (1) SA 98 (A) at 99A-C.

¹¹ *Legal Insurance Company v Botes* 1963 (1) SA 608 (A) at 614 F-G.

¹² *Road Accident Appeal Tribunal & Others v Gouws & Another* [2017] ZASCA 188 at para 33.

the appellant indicate the appellant's school performance both pre- and post-morbid. They are relevant to the determination of the loss of earnings/earning capacity. This is a matter which falls within the expertise of the educational psychologist.

Conclusion

[26] It is trite that the appeal court may not interfere with the findings of the court *a quo* unless there is material misdirection or incorrect application of the law. In casu, ignoring evidence of the expert is a material misdirection. Upsetting the findings of the court *a quo* is justified. The court *a quo* has further failed to properly apply the law by making an order in respect of general damages even though the respondent has not exercised its election in terms of section 3 of the Act.

[27] I had regard to the recommended calculations by the Actuary of the sum of R6 355 600.00 to be a fair and reasonable award of damages.

Costs

[28] The general principle that the costs follow the results applies.

Order

[29] In the premises I make draft order is marked X and is made an order of court.

M V NOKO

Judge of the High Court.

I agree

N MNGQIBISA-THUSI

Judge of the High Court.

I agree

N DAVIS

Judge of the High Court.

This judgement is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **22 September 2025**.

Dates

Hearing: 11 June 2025.

Judgment: 22 September 2025.

Appearances

For the Appellant: F A Ras SC with Mametse, instructed by MC Maubane Attorneys.

For the Respondent: *No appearance.*