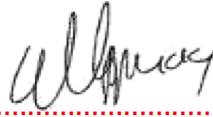


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER:00370/2018

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
1.REPORTABLE:	YES/NO
2.OF INTEREST TO OTHER JUDGES:	YES/NO
3. REVISED	
21/09/2020	
DATE	SIGNATURE

In the matter between:

**KHOZA: NONTIBEKO OBO
NKOSINATHI**

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

DIPPENAAR J:

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 21st of September 2020.

[1] This is a damages action instituted by the mother and natural guardian of Nkosinathi Khoza in her representative capacity (referred to as "Nkosinathi" or "the minor" where appropriate), who was born on 5 February 2010 and was seven years of age when he was knocked down by a motor vehicle whilst he was crossing a road in Dlamini, Soweto on 22 March 2017. Liability had been settled between the parties earlier in terms of which the defendant accepted 100% liability for the plaintiff' proved damages.

[2] The only issues to be determined at the trial pertained to the claim for loss of earnings. This entailed a determination of the minor's pre-accident and post-accident earning capacities as well as the contingencies which are to be applied.

[3] Subsequent to the conclusion of the evidence in the proceedings, the plaintiff sought to amend her particulars of claim. Although initially opposed, the defendant withdrew its opposition and at the commencement of the oral argument, plaintiff's application for leave to amend was granted on an unopposed basis.

[4] In argument, the defendant challenged the collateral information provided by the plaintiff to the various experts and contended that such evidence constituted inadmissible hearsay. It defined the issues as: (1) whether the plaintiff discharged its onus on a balance of probabilities that her version is more acceptable than that of the defendant; (2) if causation has been proved and if the actual nexus and primary cause of action has been established on an acceptable preponderance in the plaintiff's favour; (3) the probative value of the expert reports of the plaintiff weighed against those of the defendant and the quality of their viva voce evidence; (4) the hearsay rule in respect of collateral information and (5) the best evidence rule in respect of the plaintiff's burden of proof. .

[5] The evidence centered around the nature of the injuries sustained by Nkosinathi and its sequelae and the impact thereof on his future earnings. It was common cause that there was no past loss of earnings. The plaintiff led the evidence of five experts: Dr Seabi, an educational psychologist; Mr Modipa, a clinical psychologist; Ms Motsepe, an occupational therapist; Mrs Ngoako, an industrial psychologist, and Dr Schneid, an orthopedic surgeon.

[6] The defendant in turn, led the evidence of four experts: Ms Hofmeyr, a clinical and educational neuropsychologist; Dr Coetzee, an industrial psychologist; Ms Cilliers, an occupational therapist and Dr Du Toit, an orthopedic surgeon.

[7] The respective experts agreed that Nkosinathi sustained the following accident related injuries: a mild brain injury, multiple facial bone fractures involving the left intra orbital rim and lateral maxillary wall, a fracture of the left clavicle and multiple abrasions on both knees. Drs Schneid and Du Toit disagreed whether there was a shoulder injury, an ankle injury and a whiplash cervical spine injury as testified by Dr Schneid.

[8] The evidence established on a balance of probabilities that the injuries were related to the accident and that the necessary causal link between the injuries and the accident was established. There was no dispute in evidence that Nkosinathi had been born at full term through natural birth with no complications and had achieved his developmental milestones at an appropriate age. There was no report of substance abuse on the part of the plaintiff. There were no reported developmental, medical or psychological history prior to the motor vehicle accident, which was the only accident he was involved in.

[9] They further agreed that Nkosinathi had the following complaints: recurrent headaches, dizzy spells and nosebleeds, memory loss and concentration difficulties, behavioural problems characterised by incontinence, post-traumatic stress, anxiety and irritability, decreased hearing in his left ear, residual pain in his left shoulder and fatigue in his left arm.

[10] Each of the expert witnesses set out certain collateral information in their reports obtained from the plaintiff, who accompanied Nkosinathi to each of their respective examinations. In argument, the defendant sought an adverse inference to be drawn from the plaintiff's failure to testify at the trial on these issues. In response, the plaintiff sought to invoke the provisions of section 3 of the Law of Evidence Amendment Act¹ ("the Act") in terms of which hearsay evidence may be admitted.

[11] In the list of issues as defined in the pretrial minutes the defendant did not challenge the veracity of the collateral information provided by the plaintiff as particularised in the various expert reports. The parties had been requested to specifically narrow the issues to be determined at trial and did so, focusing on the pertinent areas of dispute between them. The defendant did not advise plaintiff that it intended challenging the collateral information and this was not contained in the list of issues as delineated by the parties during the pretrial conferences.

[12] If regard is had to the collateral information provided to both the plaintiff's expert witnesses and the defendant's expert witnesses, such collateral information was substantially the same and emanated from the minor's mother. Both parties' respective expert witnesses had regard to that information in formulating their respective reports. They all considered such collateral information common cause facts² and none of the information was challenged in evidence. The joint minutes reflecting the areas of agreement between those witnesses included the collateral information provided, without raising any disputes in relation thereto. In those circumstances, I am not persuaded that the drawing of an adverse inference is justified or that it is necessary to invoke the provisions of s3 of the Act to admit such evidence.

[13] All the evidence presented was of an expert nature. It is trite that an expert witness is required to assist a court and not to usurp its functions. Expert witnesses are required to lay a factual basis for their conclusions and to explain their reasoning in coming to their

¹ 45 of 1988

²Thomas v BD Sarens (Pty) Ltd [2012] ZAGPJHC 162 para 12

conclusions. A court must satisfy itself as to the correctness of the expert's reasoning in order to assess the cogency of an opinion³. The facts on which the expert witness expresses an opinion must be capable of being reconciled with all other evidence in the case. For an opinion to be underpinned by proper reasoning, it must be based on correct facts⁴. An expert opinion which lacks proper reasoning is not helpful to the court⁵. Thus, if an expert witness cannot convince a court of the reliability of the opinion and the report, the opinion will not be admitted. The same pertains to the joint minutes concluded by the experts, which were relied on by both parties in argument⁶. In certain instances, the experts in evidence changed their views as reflected in the joint minutes. In evidence, Ms Hofmeyr and Dr Seabi revised their views regarding Nkosinathi's pre accident intellectual ability and agreed it was average, rather than the "low average" assessment they had previously agreed on. Considering all the evidence, such amended view can be accepted as reliable.

[14] The main area of dispute between the experts pertained to the orthopedic injuries sustained by the minor. It is apposite to deal with this evidence first. The orthopedic surgeons, Drs Schneid and Du Toit agreed that there was a healed fracture of the left clavicle with 17 degree superior angulation, which is firmly united. Their views however differed substantially regarding remodeling potential of the clavicle and the nature and extent of the injuries sustained by Nkosinathi.

[15] According to Dr Schneid, the joint minutes of the orthopedic surgeons contained various errors on his part as he had failed to indicate his findings regarding a cervical spine injury and an ankle injury. He found restricted movements to the shoulder and had more extensive future prognosis. In his view there would be problems with the shoulder if treatment was not given and the minor qualified under the narrative test as the left shoulder symptoms have been present for 2 years after the accident and because the

³ Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd [2015] ZASCA 164; 2016 (2) SA 586 (SCA) para 15

⁴ Glenn Marc Bee v Road Accident Fund [2018] ZASCA 52 (29 March 2018) para 23

⁵ Jacobs v Transnet Ltd t/a Metrorail [2014] ZASCA 113, 2015 (1) SA 139 (SCA) paras 15 and 16

⁶ Bee v Road Accident Fund 2018 (4) SA 366 (SCA) para 30

shoulder is mal-aligned and will not adequately remodel. In his view the shoulder problems would persist for 3 years, if adequately treated. There was a 50% chance of resolution. However, Dr Schneid appeared to simply give estimates and did not support his percentages with any facts. Dr Schneid identified a shoulder problem which Dr Du Toit did not. His investigation/examination was more comprehensive than Dr Du Toit who merely observed the child interacting with his mother as the minor had shown an exaggerated response when he commenced his examination.

[16] Dr Du Toit on the other hand did not find any shoulder injury or future difficulties and was of the view that under future management and treatment there was no indication for orthopedic rehabilitation. His evidence was that the callous formation and healing injury of the shoulder contributed to a positive prognosis. The child was using his arm normally and there was no loss of feeling or obvious sign of wasting. The collarbone was healed and aligned. In his view there was no need for surgery and Nkosinathi had reached MMI due to good remodeling potential in a young person which would allow his collarbone to gradually align itself. In his view a whiplash cervical spine injury was unlikely. He could not account for the variance in their findings. In his view, although the angulation would be permanently seen from a radiological point of view, it rarely has a functional effect on the upper limb shoulder girdle and functionality.

[17] Dr Schneid further identified a whiplash injury to the cervical spine which Dr Du Toit did not note. The difference of opinion was explained by Dr Schneid on the basis that it may be due to the fact that the child was having a good day and was not symptomatic. I am not persuaded that reliable evidence was presented supporting the existence of a whiplash injury to the cervical spine. The same applies to the ankle injury.

[18] In their examinations of the minor, various of the other experts, including Mr Modipa, also identified a problem with Nkosinathi's shoulder and pain he was experiencing in that region. There was no other evidence corroborating the existence of injuries to Nkosinathi's cervical spine or ankle.

[19] Considering all the evidence, I find that the plaintiff has illustrated on a balance of probabilities that there may be a functional effect on the upper limb shoulder girdle and functionality and that there was an injury to the shoulder structures which may restrict Nkosinathi's movement. I am not persuaded that the plaintiff has established the ankle injury or the cervical spine injury contended for.

[20] The clinical psychologist and the educational psychologists agreed that the minor suffered deficits in attention and concentration, working memory and visual perceptual skills difficulties, which have rendered him vulnerable to develop long term cognitive deficits. They further agreed that trauma to the developing brain in younger children is often associated with insidious emotional behavioural and cognitive deficits due to the inherent vulnerability of a developing brain. Nkosinathi's scholastic achievement and career trajectory are expected to be adversely impacted should his reported difficulties persist. They agreed that he would benefit from psychotherapeutic intervention with clinical psychologist regarding his post traumatic stress anxiety and behavioural difficulties between 20 and 30 sessions were recommended.

[21] Mr Modipa testified that Nkosinathi presented with a cognitive profile characterised by some deficiencies in a few domains in his cognitive functioning. He specifically displayed deficiencies in sustained attention and memory, in concentration and psychomotor speed and inconsistency in visual perception skills in relation to cognitive functioning. On an emotional level, Nkosinathi presented with symptoms of post traumatic stress occasioned by the trauma of the accident and is sequelae and experienced emotional and behavioural stimuli occasioned by the trauma of the accident. He further suffered from incontinence which was affecting his emotional wellbeing. He had chronic pain in his left shoulder, which had psychological significance in the sense that pain has an interfering effect on a person and interferes with the performance of activities of daily living including sports participation. There was also a loss of hearing in the left ear, which emotionally bothered Nkosinathi. He was conscious of the facial scarring on his left side, which made him feel he was different from other children. He concluded that Nkosinathi's learning capacity has been adversely affected as a result of the difficulties which he

experiences, primarily because of the importance of attention and concentration and memory in learning. Those key skills of Nkosinathi were affected as a result of the accident.

[22] Mr Modipa's opinion was that with these difficulties in place, Nkosinathi is likely to have difficulties as he progresses to higher grades in his schooling and, if they persist, may affect his career path in due course. Any chronic pain associated with Nkosinathi's orthopedic injuries would likely result in emotional difficulties due to chronic pain associated therewith. In his view, therapy would not have a curative effect as its focus is to facilitate adjustment to the difficulties that Nkosinathi is experiencing. He further alluded to the sleeper effect which occurs when children experience trauma to the brain at a young age, where in most cases they do not show their symptoms and they do not show the full extent of the impact of the accident until a later age. As a child progresses to higher grades, the demands on his cognitive skills increase, which result in such a child starting to struggle to perform. He further testified that the accident was the only significant event in his life and that the difficulties Nkosinathi is experiencing bears a direct connection to the accident.

[23] After the accident, Nkosinathi regressed from being fully toilet trained to soiling and wetting himself, this incontinence had an important psychological effect on Nkosinathi. In his view, it was difficult to estimate how long the behavioural and emotional limitations could last. As long as pain persisted, other emotional consequences would arise. The prognosis of emotional difficulties would also depend on how far the other difficulties which gave rise to these emotional difficulties would get resolved.

[24] Mr Mosipa further testified that as part of his training he was taught brain functioning as it relates to behavioural manifestation. In a child who has difficulties with attention and concentration, the frontal lobe is involved, which controls emotions and planning capacity. Clinical psychologists focus on the outcome and behavioural manifestation of the impact of the head injury on the child. The GCS scale is not definitive. In his view, while a brain injury of Nkosinathi's severity is generally not expected to cause

difficult long terms neurocognitive defects, in some cases, particularly in young children, such an injury can cause insidious difficulties, including headaches, memory and concentration difficulties.

[25] The evidence of the neurosurgeon's diagnosis of a mild injury is consistent with his own and there are agreements surrounding the difficulties experienced by Nkosinathi. The clinical psychologist in their joint minute were in agreement with respect of the pre accident history, the physical emotional psychological cognitive functioning emotional outcomes and recommendations made. The opinions of Mr Modipa was corroborated by the evidence of various of the other experts and based on facts. His evidence can be accepted as reliable.

[26] The neurosurgeons, Drs Moja and Majeed, agreed that before the accident Nkosinathi was physically fit and healthy. He sustained the following accident related injuries: a mild brain injury, facial bone fractures, a left clavicle fracture and multiple abrasions on both knees. After the accident he complained of recurrent headaches and memory loss and behavioural problems.

[27] The hospital records reflected that Nkosinathi recorded a loss of consciousness for 5-15 minutes. On arrival at the hospital he was fully conscious with a Glasgow Coma Scale of 15/15, with no neurological defects. He suffered a head injury with a soft haematoma on the occipital region of his head. The CT brain scan report indicated occipital scalp haematoma, facial injury, bruised left eye, bleeding from nostrils, facial bone fracture, fracture left orbital floor and left maxillary sinus and left maxillary haemosinus. Nkosinathi was referred to the maxillofacial surgeon for treatment of his facial bone fractures and was treated conservatively. His left collar bone fracture was treated conservatively with a collar and cuff. He was discharged two days after the accident.

[28] The occupational therapists, Ms Motsepe and Ms Cilliers were both reliable witnesses. They agreed that Nkosinathi presented with attention and concentration

difficulties, perceptual difficulties, sensory integration difficulties, neurocognitive difficulties and neurocognitive challenges. The defendant's expert, Ms Cilliers noted that Nkosinathi had below average on the visual sequential memory and visual closure, sensory integration difficulties relating to avoid midline crossing, balance difficulties, difficulty assuming and sustaining anti-gravity positions, motor planning difficulties and bilateral integration difficulties. They agreed and recommended that Nkosinathi be placed in a remedial school as soon as possible with a full team of experts available, given that his current school does not have a full remedial team consisting of occupational therapists, and clinical and educational psychologists. Ms Cilliers further identified serious sensory integration difficulties experienced by Nkosinathi which required treatment to address the underlying psychological difficulties.

[29] The occupational therapists further agreed on a case manager to provide long term supervision and monitoring to recommend future assistance within Nkosinathi's home, school and work environment, thus indicating that Nkosinathi's recovery may not be soon and of long duration.

[30] Ms Cilliers during cross examination conceded that if treatment was not successful regarding Nkosinathi's orthopedic injuries, there would be limitations in him performing heavy physical work but he may be able to do light to medium work. In such instance, Nkosinathi would not be an equal competitor in the open labour market with respect of heavy work. If his physical problems persisted, he may have to be selective about the choice of work and could take longer than his peers to secure suitable employment. This would render Nkosinathi and unequal competitor in the unskilled labour market.

[31] The occupational therapists agreed that Nkosinathi's potential to enter the open labour market within a sedentary position was limited to positions of a concrete and repetitive nature, he would be best suited to simplistic, less cognitively demanding types of work which is performed in a structured environment with supervision. Mrs Cilliers conceded in evidence that this would amount to sheltered employment. Her view was qualified that such would depend on his response to remedial therapy. His ability to obtain

and sustain gainful employment would be dependent on the level of education he manages to secure. It appears from the undisputed evidence that if Nkosinathi does not favourably respond to remedial treatment he would be limited to sheltered employment and would not be an equal competitor in the open labour market. If his problems persisted into adulthood Nkosinathi would also be an unequal competitor in semi-skilled work.

[32] According to Ms Motsepe, because Nkosinathi now has cognitive problems, he is no longer reliant on higher cognitive skills to learn to do skilled forms of work. This puts him in a sheltered form of employment because of his cognitive problems. Nkosinathi will always need assistance as his challenges are organic. He will also have a challenge in keeping jobs in the sheltered workplace environment as he is compromised by his low neurocognitive and behavioural challenges in relation to his behavioural problems Mrs Motsepe explained that Nkosinathi is aggressive and isolates himself and angers quickly. Fighting with other children was reported by the plaintiff. As Nkosinathi grows older he will have problems in the open labour market as a person who cannot take criticism is a person who will fail continuously given his low level of perception and cognition. He will always be prone to mistakes and will have challenges in interacting in a formal environment.

[33] Mrs Cilliers conceded that the emotional trauma and impact has an impact on his ability to apply his functional and cognitive skills in the open labour market. She further conceded that if he needs breaks to accommodate his lack of endurance which affect his productivity, he would not be an equal competitor. He might not get a job in the semi-skilled structured work environment if he discloses that he needs accommodations and breaks. His risk of being fired if he needs accommodation or doesn't disclose this need in a semi-skilled structured job, his risk of being fired is greater than others who do not need the accommodation and in this respect he is also not an equal competitor. Ultimately, both experts were in agreement that Nkosinathi would not be an equal competitor in the labour market in either the unskilled or semi-skilled fields of employment. Their opinions are justified by the facts and can be accepted on the probabilities.

[34] Considering Nkosinathi's attention and concentration difficulties, which the occupational therapists agree are issues in both the semi-skilled and unskilled labour market if these problems persist. If he reaches grade 11 or 12, such problems will not have such a significant impact in the work environment. According to Ms Motsepe, he will not however be on par with his peers. In his present state, his performance is at a very low level compared to his peers. He would be excluded from any job with administrative, managerial or clerical work. If he does manual labour, he will not be a leader. In her view, Nkosinathi has been experiencing neurocognitive problems for more than 3 years after the accident. If there is no immediate intervention within 2 years, progress will be slow and Nkosinathi will struggle to reach the minimum standards to catch up to his peers. There is also a problem with habituation of neurological symptoms. Once a person has developed a pattern over 2 years it becomes difficult to break it. Even with treatment, his problems will not improve completely. Treatment will be compensatory rather than focused on improvement.

[35] Ms Motsepe further commented on Nkosinathi's physical problems, notably the painful shoulder left girdle and his hypersensitivity to touch. As a result, Nkosinathi will avoid contact and will avoid doing things that needs exertion, a factor which will compromise his work from a sensation point of view as he is failing to modulate his senses. This could emanate from the brain, resulting in a need for desensitization therapy. In her examination, she found coordination problems and headaches which are a challenge when he concentrates. Nkosinathi further fatigues easily and has blackouts and disorientation which compromises him further. If he is given instructions, he just stares and when he is shaken, he gets scared and soils himself. This would be a problem in the open labour market. In her view, physically he would be placed into sedentary job below shoulder level and he is unequal even in an unskilled environment.

[36] The educational psychologists, Dr Seabi and Ms Hofmeyr were both impressive and reliable witnesses. They agreed that no concerns were reported regarding Nkosinathi's emotional, scholastic and cognitive development prior to the accident. Based on the information provided, there was not a likelihood that his behavioural problems

existed before the accident. It was common cause that the plaintiff completed grade 10 and was employed as a cashier. Nkosinathi's father completed grade 11 and is employed as a builder. Nkosinathi was enrolled in grade 1 at the age of 5years 11 months and began formal schooling early. A psychologist at the end of the year recommended that he repeat grade 1 in 2017. He completed the first term of grade 1 in 2017 prior to the accident and achieved an average outcome of substantial achievement.

[37] They agreed that as he was only six years old at the time of the accident, he is likely to be more vulnerable to long terms sequelae as a result of a head injury even a mild head injury. This can cause problems in terms of cognitive functioning and frontal lobe executive function, working memory, attention and behaviours. Nkosinathi also fractured his one orbital bone and had bleeding from the ear and nose. This could be a problem. According to the defendant's expert, Ms Hofmeyr, it is unknown what could be happening to the side brain and even a GCS of 15/15 cannot lead to the conclusion that he did not have internal damage. When children have an accident with a head injury at a young age they can and often do show later behavioural problems and depression and emotional instability that can cause difficulties with learning. In her assessment, Ms Hofmeyr found Nkosinathi's attention problems quite severe and if they persist there are fears he may just give up trying.

[38] According to Dr Seabi, the educational background of the parents is important as a child is not an island and to exclusively focus on him without his contextual or socio economic backgrounds would be wrong. He emphasised that children currently perform better than their parents because of support from parents wanting a different lifestyle for their children and an educational system which is more inclusive and accommodating than it was in the past.

[39] In their joint minutes, the experts agreed that Nkosinathi's pre morbid estimate was within the low average intellectual ability range. In evidence both educational psychologists changed their evidence to average intellectual ability. In their view, he

would probably have continued with his competitive and determined personality to complete grade 12 and a diploma in his choice of occupation.

[40] Regarding Nkosinathi's post morbid learning potential, they noted that Nkosinathi's grade 1 (2017) results was above the grade average. He completed grade 2 with the results of the first 2 terms above the grade average. They agreed that this level of performance in his class was unlikely to persist as Nkosinathi was already reported to experiencing difficulty with increasingly complex number problems in class. His concentration and uncharacteristic behaviour difficulties have reportedly been worsening. They agreed that his deterioration in performance was due to his injuries sustained in the accident, considering his determined nature to succeed. According to Ms Hofmeyr, Nkosinathi's executive functioning was impaired. The causes could be emotional related to the brain injury and the problem is that the structure of the brain changes with changing emotional circumstances.

[41] They agreed that Nkosinathi has been dealing with substantial psychological and psychiatric sequelae caused by the accident. He was found to be suffering from moderate symptoms of depression and PTSD. They agreed that based on all the information available his highest qualification would in all likelihood be Grade 11. According to Ms Hofmeyr without intervention, Nkosinathi may struggle to get a Grade 9. With intervention, he may get a Grade 12, but he may only be able to scrape through. Two factors were relevant, first obtaining intervention and second, that such intervention proves to be successful. Ms Hofmeyr also testified that the available schools which could assist Nkosinathi were private schools and there was a lack of remedial schools in his area. I agree with the plaintiff's submission that on a practical level, Nkosinathi will have difficulty being adequately remediated.

[42] Considering the evidence of both the educational psychologists, I am satisfied that the plaintiff has established on a balance of probabilities that post morbid, Nkosinathi is likely to obtain a Grade 11 education with remedial intervention and that without it, he may struggle to achieve a grade 9 level of education. In coming to this conclusion, it is

significant that the defendant's expert, Ms Hofmeyr, substantially agreed with the conclusions reached by Dr Seabi.

[43] The industrial psychologists, Ms Ngoako and Dr Coetzee both deferred to the educational psychologist to comment on Nkosinathi's highest pre-accident educational potential, specifically as Nkosinathi is a minor and they are reliant on the educational psychologists' conclusions regarding the educational ability and prospective educational attainment.

[44] Dr Coetzee's view was that with referral to school learning remedial assistance and psychological support, Nkosinathi would be able to achieve a Grade 12 education after the accident. However, her evidence regarding Nkosinathi's pre-accident learning potential was at variance with the conclusions reached by the educational psychologists to which she deferred. In Dr Coetzee's view, before the accident, Nkosinathi would probably have achieved a grade 12 with possible semi-skilled work at best. After she accident, she postulated that Nkosinathi would be able to achieve a grade 12 education, subject to remedial treatment. In evidence she relied heavily on various employment statistics to justify this view and the existence of a lot of variables to determine whether Nkosinathi would have achieved a diploma. She focused on socio economic circumstances and family background in evidence.

[45] Although the existence of such variables is a factor which must be taken into account in considering the appropriate contingencies, on a conspectus of the facts and evidence of the educational psychologists, the probabilities favour the views expressed by the educational psychologists, Dr Seabi and Ms Hofmeyr.

[46] Dr Coetzee and Mr Ngoako agreed that with a diploma qualification Nkosinathi could have entered into the open labour market on Paterson B3/B4 approximately 6-12 months after completing his studies and was likely to progress to Paterson C3/C4. They agreed on a normal retirement age of 65. To benefit from the free education system NSFAS, Nkosinathi would have to adhere to the requirements of the institution of higher

education where he applied and would have to pass all his modules every year to continue being eligible for funding. Only 63% of applicants were eligible for funding in 2020. If Nkosinathi's application were to be successful, he would cover a large portion of the costs associated with his education but would remain dependent on his parents for the balance of the costs. Dr Coetzee opined that Nkosinathi would have large periods of unemployment due to the high unemployment rate in South Africa.

[47] Ms Ngoako's evidence was that once Nkosinathi obtained a diploma he would be unemployed for 6 months, whereafter he would secure employment and only move once better employment was secured. In between there would not be large portions of unemployment. In her view, entering the labour market with skills differed to entering it without skills. Unemployment rates for graduates were lower than for unskilled people.

[48] Accepting that Nkosinathi's highest level of education would be a grade 11 after the accident, the industrial psychologists agreed that he would be restricted to unskilled work in the non-corporate sector. His initial income would be equivalent to the current minimum wage of R3000 per month and he could over time progress towards the upper quartile scale for unskilled labourers in the non-corporate sector.

[49] They disagreed on Nkosinathi's potential to work in a semi-skilled capacity. Ms Ngoako's view was that with a grade 11 education and all the cognitive, aggression, concentration, poor memory and behavioural problems, Nkosinathi did not have the potential to progress to semi-skilled work, which requires a higher cognitive functioning. She deferred to the other experts who said Nkosinathi was a candidate for sheltered employment. In her view, should Nkosinathi continue to experience shoulder pain into adulthood, he may have to be selective about his choice of work and could take longer than his peers to secure employment. The reported behavioural problems, such as aggression may also lead him to struggle to retain employment, thus resulting in him experiencing longer periods of unemployment than his peers.

[50] Dr Coetzee on the other hand followed the view of Mrs Cilliers that with optimal treatment, Nkosinathi was not anticipated to experience any physical limitations in the performance of any functional tasks, scholastic work or eventually within the work environment. Thus her view was that Nkosinathi should be able to cope with work on an unskilled, semi-skilled or skilled nature. Mrs Cilliers had however in cross examination made numerous concessions that Nkosinathi is an unequal competitor in the open labour market.

[51] Considering all the evidence, the view of Dr Coetzee was over optimistic and the probabilities favour a finding that Nkosinathi would not be an equal competitor in the open labour market, nor would he be suitable for semi-skilled or skilled employment.

[52] Regarding Nkosinathi's socio economic background, Ms Ngoako's evidence was that a lot of children in South Africa came from environments where their parents were not educated as they did not have access to the same opportunities. Just because of a lack of education, it cannot be concluded that cognitively they would not have been capable of achieving more. There are now more opportunities available so that even children from poor socio economic backgrounds can achieve better and people are not defined by their social background. Dr Coetzee on the other hand emphasised numerous statistics including high unemployment rates of 29.1% in South Africa and 30.8% in Gauteng according to the official unemployment statistics for the last quarter of 2019. In quarter 3 of 2019, 16.9% of the unemployed in South Africa had tertiary qualifications and 6.4% were graduates.

[53] On the evidence presented I am satisfied that the plaintiff has discharged the onus to prove on a balance of probabilities the injuries sustained by Nkosinathi, with the exception of the alleged whiplash injury to the cervical spine and the ankle injury. The plaintiff has further proved the sequelae of the injuries contended for on a balance of probabilities. I am also satisfied that the plaintiff has established that the injuries and their sequelae were caused by the accident and that the necessary causal link has been established.

[54] In *Chakela v Road Accident Fund*⁷, Van Der Linde J considered the issues surrounding loss of earnings and earning capacity and referred to various pertinent judgments on the issue⁸. The correct approach was enunciated thus:

“There is a conceptual difference between the question whether a patient has suffered an impairment of earning capacity and the question whether a patient will in fact suffer a loss of income in the future.

The answer to the former question is determined on a balance of probability in that patient has the onus to discharge. The latter is a question of assessment in respect of which there is no onus in the traditional sense. This assessment involves the exercise of quantifying as best one can the chance of the loss actually occurring. The answer to the former question is at least theoretically answered affirmatively if the patient will have established a 51% chance of impairment being present, the answer to the latter question is provided by the best match between the likelihood of a loss been suffered and the fraction expressed as a percentage.

[55] Applying these principles to the facts, I find that the plaintiff has discharged the onus to illustrate that Nkosinathi has certain physical and other disabilities and suffered an impairment of earning capacity and that he will suffer a loss of income in the future⁹. What remains is an assessment to quantify the chance of the loss occurring.

[56] The following dictum in *Southern Insurance Association Ltd v Baily NO*¹⁰ is apposite in considering appropriate contingencies:

“Any enquiry into damages for loss of earning capacity is of its nature speculative, as it involves a prediction as to the future. 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. Where the method of actuarial computation is adopted in assessing damages for loss of earning capacity, it does not mean that the trial Judge is tied down by actuarial calculations. The court has “a large discretion” to award what the court considers right. One of the elements in exercising that discretion is the

⁷ (33599/2015) [2017] ZAGPJHC 141 (5 June 2017)

⁸ *Deysel v Road Accident Fund* (2483/09) [2011] ZAGPJHC 242 (24 June 2011); *Rudman v Road Accident Fund* (370/01) [2002] ZASCA 129; [2002] 4 All SA 422 (SCA) (26 September 2002); *Van Heerden v Road Accident Fund* (6644/2011) [2014] ZAGPPHC 958 (8 December 2014) and *Prinsloo v Road Accident Fund* (3579/06) [2008] ZAECHC 193; 2009 (5) SA 406 (SE) (18 November 2008).

⁹ *Rudman v Road Accident Fund* 2003(SA 234) (SCA)

¹⁰ 1984 (1) SA 98 (A) from 99-100 i

making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the patient may in the result have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions.

The amount of any discount may vary, depending upon the circumstances of the case. The rate of discount cannot be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case and may be favourable.

The technique of assessing damages involves consideration of relevant events which may occur, or relevant conditions which may arise in the future. Even when it cannot be said to have been proved, on a balance of probability justice may require that what is called a contingency or allowance be made for a possibility of that kind..."

[57] On a conspectus of the evidence, it is accepted that prior to the accident, on the probabilities, Nkosinathi would have been completed grade 12 and a diploma and that, having regard to the accident, it is probable that Nkosinathi may obtain a grade 11 and would be a vulnerable employee.

[58] Various actuarial calculations were prepared by the plaintiff based on the contents of the joint minutes of the industrial psychologists. The defendant also presented certain actuarial calculations based on the report of Dr Coetzee. Based on the plaintiff's calculations, the pre accident loss of income without any contingency deduction would be R6 334 754, and the income but for the accident would be R1 384 005.

[59] In argument, plaintiff relied on *Goodall v President Insurance Co Ltd*¹¹ and *Road Accident Fund v Guedes*¹² and argued for a 25% pre morbid contingency. It was argued that no higher contingency was required considering Ms Ngoako's evidence that Nkosinathi would not have large gaps in unemployment, having a grade 12 and diploma.

¹¹ 1978 (1) SA 389 (WLD) at 393E-G

¹² 2006 (5) SA 583 (SCA)

Plaintiff contended that a 50% contingency would be appropriate on the post morbid scenario.

[60] Plaintiff further placed reliance *M obo M v Road Accident Fund*¹³, *Sitholimela v Road Accident Fund*¹⁴, *Smit NO v The Road Accident Fund*¹⁵ and *Nkuna obo Nkuna v Road Accident Fund*¹⁶. The defendant relied on the same authorities and argued that contingency deductions of 20% pre-accident and 35% post-accident would be appropriate¹⁷.

[61] Nkosinathi, is presently only 10 years old, the accident having occurred when he was 7 years of age. His available schooling record is very limited. Nkosinathi's anticipated level of education may be overly optimistic, considering the risks associated with obtaining a diploma, the high unemployment rate and a risk of unemployment for longer periods than those postulated by MS Ngoako,

[62] These factors in my view require that a higher contingency percentage than the proposed 25 % should be applied. In my view and considering the relevant facts of this matter, a contingency of 35% should be applied to Nkosinathi's postulated pre-morbid career path. This would be fair to the parties and would be a just exercise of the discretion afforded.

[63] Regarding the post morbid scenario, a 50% post morbid contingency would be appropriate, given that the envisaged treatment would not necessarily be curative and considering his behavioural and cognitive challenges may result in Nkosinathi having difficulty in maintaining employment and as he is an unequal competitor in the labour market and would be vulnerable.

¹³ (4484/2016) [2018] ZAGPJHC 451 (18 June 2018)

¹⁴ 2015 JDR2162 (GP) 2015 JDR 2162 p1

¹⁵ 2006 (5B4) QOD 251 (T) (5B4) QOD p251

¹⁷ albeit

[64] The calculation of the loss of income of R6 334 754 less a 35% contingency deduction of R2 217 163.90 equals R4 117 590.10. The value of income having regard to the accident of R1 348 005 less a 50% contingency deduction (R674 002.50 equals R674 002.50. On this calculation the net future loss is R3 443 587 60.

[65] I thus conclude that an amount of R3 443 587.60 should be awarded for the injuries sustained by Nkosinathi as damages for loss of earnings.

[66] Considering the recommendations by the various experts it is also appropriate that the defendant provide an undertaking in terms of section 1717(4)(a) of Act 56 of 1996 to pay the costs of future medical treatment and/or the accommodation of Nkosinathi in a hospital or nursing home and such treatment, therapy, services or goods as he may require as a result of the injuries that he sustained as a result of the accident which occurred on 22 March 2017, specifically including the costs of the therapies recommended by the experts, and the placement of Nkosinathi in a remedial (specialised) school forthwith as soon as possible. The defendant has conceded that a 100% undertaking is appropriate. By agreement, the general damages are to be postponed.

[67] The normal principle is that costs follow the result. There is no reason to deviate from this principle.

[68] After conclusion of the trial, the parties were afforded the opportunity to prepare written heads of argument and to present oral argument at a later date. I was provided with comprehensive heads of argument. As Nkosinathi is a minor it is necessary to protect the funds awarded to him in trust. I requested the plaintiff to provide a draft order making provision for the establishment of such trust. By consent between the parties, a draft order was provided, to which the necessary amendments have been made incorporating the terms of order I propose to make. In the draft order, it was recorded that there is no contingency fee agreement between the plaintiff and her legal representatives.

[69] I grant an order in terms of the amended draft attached hereto marked "X".



**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATES OF HEARING		04, 05, 06, 07, 08 May 2020 and 06 July 2020
DATE OF JUDGMENT	:	21 September 2020
PLAINTIFF'S COUNSEL	:	Adv R Kay
PLAINTIFF'S ATTORNEYS	:	Rabothatha Attorneys Ref: Mr Rabothatha
DEFENDANT'S COUNSEL	:	Adv B Bodhania
DEFENDANT'S ATTORNEYS	:	Tasneem Moosa Inc Ms V Rama

