

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

CASE NO: 2015/44076

**REPORTABLE: NO  
OF INTEREST TO OTHER JUDGES: NO  
REVISED  
26/10/2021**

In the matter between:

**V[....] M[....] obo a MINOR**

Plaintiff

And

**ROAD ACCIDENT FUND**

Defendant

**Date of hearing:** 2 September 2021- In a 'virtual hearing' during a videoconference on Microsoft Teams digital platform.

**Date of Judgment:** 26 October 2021

This judgment is deemed to have been handed down electronically by circulation to the parties' representatives via email and uploaded to caselines.

**JUDGMENT**

**GRAF AJ**

## INTRODUCTION

[1] On the 26<sup>th</sup> of March 2015 and at or along Oliver Tambo Street, Klipfontein the plaintiff's minor son (hereinafter referred to as 'S') was involved in a pedestrian motor vehicle collision. S was 5 years old at the time of the collision. He is currently 11 years old.

[2] The plaintiff, in her representative capacity, instituted an action against the Road Accident Fund ('the Defendant') for the personal injuries sustained by the minor child. The plaintiff pleaded that the minor child sustained serious injuries as a result of the collision, which was caused by the sole negligence of the insured driver. The summons includes prayers for general damages in the amount of R350 0000-00 and for estimated future loss of earnings in the amount of R1000 000-00.

[3] Merits and future medical expenses have been settled between the parties and on 28 August 2017 the settlement was made an order of court. In terms of the order the defendant is liable to pay 100% of the plaintiff's agreed or proven damages and to furnish the plaintiff with an undertaking in terms of section 17 (4)(a) of the Road Accident Fund Act.<sup>1</sup> The claim for loss of income was postponed *sine die*.

[4] The defendant rejected the plaintiff's claim for general damages. The matter was referred to the Health Professional Council of South Africa (the 'HPCSA'), where the Road Accident Fund Appeal Tribunal resolved unanimously that the injuries sustained by the minor child were regarded as non-serious.

[5] On 24 June 2021 the defendant's defence was struck out, after the defendant disregarded a compelling order. It is on that basis that the plaintiff approached this court with an application for default judgment. The plaintiff informed the court that the claim for past medical expenses has been abandoned and that the matter was to proceed only in respect of the claim for future loss of earnings.

## EVIDENCE PRESENTED BY THE PLAINTIFF

[6] The plaintiff did not present any *viva voce* evidence, but relied on numerous reports compiled by expert witnesses, in support of her claim. The reports compiled by the plaintiff's experts, Dr Peter Kumbirai, Ester Monyela, Danushka Jenkins and

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<sup>1</sup> Act 56 of 1996

A.R. Haribai were accompanied by affidavits deposed to by the said witnesses. During argument the plaintiff also referred the court to reports compiled by the defendant's experts, Masekete Mtshali, Thembelani Lephoto and B.E. Ngobeni. These reports were duly uploaded to CaseLines. The minor child's school reports for 2019, 2020 and the first and second term of 2021 were also submitted into evidence.

[7] The plaintiff's orthopaedic surgeon, Dr Peter Kumbirai ('Kumbirai'), recorded that S sustained abrasions to the scalp and right groin and a fractured right tibia/fibula as a result of the collision. S was treated at Tembisa Hospital, where x-rays were taken. The wounds were cleaned and dressed and plaster of paris was applied to his right leg. S was provided with crutches. The plaster of paris was later removed. S still complained about pain in the right leg at the time of Kumbirai's examination during February 2016. With regards to the minor's occupation and future employability, Kumbirai did not foresee any significant orthopaedic negative effect. He assessed the whole person impairment at 2% and did not qualify S under the narrative test for serious long-term impairment or loss of body function.

[8] According to the plaintiff's educational psychologist, Esther Monyela ('Monyela'), she assessed S on 25 January 2016. Monyela considered his family background and school history and concluded that S would have passed grade 12 with 'university entrance or diploma that would allow him to follow courses at University or University of Technology', had the accident not occurred. The post-accident postulation was less promising. Monyela opined that the pain S experienced from his injuries would lead to a decline in his academic performance, as he would not be able to focus and concentrate. S would still be able to pass matric, but his results might be lower than his pre-accident potential. According to Monyela S's performance in subjects like Life Orientation would be lower, as S would be unable to do some physical activities like running. S would be unable to follow careers where manual skills were of great importance, and this would limit his choice of future careers.

[9] The plaintiff did not instruct a clinical psychologist or occupational therapist to assess the minor child. However, such assessments were conducted at the instance of the defendant. The plaintiff referred the court to the reports compiled by Thembelani Lephoto ('Lephoto'), a clinical psychologist, B.E. Ngobeni ('Ngobeni'), an

occupational therapist, and Masekete Mtshali ('Mthsali'), an educational psychologist. Although no affidavits were obtained from these witnesses, I have decided to consider their reports, in the interest of justice, and in as far as the plaintiff's industrial psychologist based her opinion regarding the minor's vocational potential on the reports compiled by both parties' experts.

[10] Lephoto assessed S on 15 May 2017. The neuropsychological evaluation carried out by Lephoto indicated, amongst other things, that S had impaired attention and concentration abilities, mild impairment in verbal fluency, adequate problem solving and abstract reasoning and adequate manual dexterity. Lephoto opined that the fluctuations in the multiple areas of functioning were indicative of S's developmental phase and that the minor's cognitive abilities were a reflection of other factors, such as immaturity and fatigue, and not as a result of a head injury. Lephoto concluded that there were no significant behavioural or emotional deficits and that the neurocognitive deficits might improve with maturity and support.

[11] The essence of Ngobeni's report is that no major physical difficulties were observed with the minor's physical functioning during the assessment. S did not complain of any pain in his leg during gross motor activities of running, balancing, jumping and hopping and it was thus expected that he would not experience any physical-functional difficulties when performing any physical activities. However, S was hyperactive and his cognitive abilities during the assessment appeared to be mildly affected. Ngobeni opined that the difficulties experienced by S were mild and addressable with therapeutic intervention. It was expected that, with remedial intervention, S would be able to catch up with his peers and even to perform better in class. S would be able to complete his higher grades at school and to progress to institutions of higher learning. According to Ngobeni the minor's choice of school related activities and employment would not be affected by the accident related injuries.

[12] The defendant's educational psychologist, Masekete Mtshali, had regard to the reports complied by Lephoto and the defendant's orthopaedic surgeon, Professor John Flemming, in her assessment of the minor. She also considered the minor's family background and educational history and determined that there was a history of learning difficulties in the minor's family. Mtshali recorded that S was in Grade R

when the accident occurred. He went back to school after the accident and he managed to pass grade R. S was in grade 1 at the time of Mtshali's assessment. Minor difficulties were noted in terms of attention, concentration, working and auditory short-term memory, visuo-spatial organisation and verbal fluency. In addition thereto, S presented with anxiety and irritability. No emotional or behavioural difficulties were noted pre-accident. Mtshali opined that the fact that the minor's father abandoned him and that he did not have any relationship with his father might have had emotional repercussions and that the emotional difficulties noted in the assessment might have been due to his pre-accident emotional status and not as a result of the accident. Mthshali concluded that S's minor learning challenges should not be attributed to the accident related injuries and that it was evident that he was functioning at his pre-accident potential and would continue as such. It was likely that after the accident, as before the accident, S would have probably achieved the same qualifications and career.

[13] The salient portions of the report compiled by the plaintiff's industrial psychologist, Danushka Jenkins ('Jenkins'), are as follows: Jenkins examined S on 11 August 2020. She did not note any difficulties with his memory, mobility or physical abilities. With regards to the minor's medical history Jenkins was informed of two pre-morbid incidents when S required hospitalization, to wit S consumed paraffin when he was 1 year 8 months old and he burned with boiling water at age 1. Post-morbidly S did not require any operations or medication and he was playing soccer for exercise. Jenkins referred to the specialist opinions of Monyela, Kumbirai, Fleming, Lephoto, Mtshali and Ngobeni in her determination of the minor's probable pre- and post-morbid career progressions. According to Jenkins, pre-morbidly S would have successfully completed his secondary schooling by the age of 18, obtaining his National Senior Certificate (NQF level 04). He would have secured temporary or contract positions in the non-corporate section for a period of approximately 2 years, before securing a permanent position with a basic salary on the Paterson A3 (MED level) with an eventual salary progression, as his benefits and experience increased. As per the opinion of Mtshali, this would have been the highest level of education obtained. However, according to Monyela, S could have furthered his studies and completed a tertiary qualification of choice, related to an NQF 06. Upon completion of this qualification his remuneration would have

increased to that of a Paterson B3 (MED Level), thereafter progressing to a Patterson C4/C5 (MED Level) by the age of approximately 45 years. Post-morbidly S will still complete his secondary schooling by the age of 18 years, obtaining his National Senior Certificate (NQ Level 04). Thereafter he will most likely secure temporary/ contract positions within the non-corporate sector for approximately 2 years, until securing a permanent position with a starting salary on the Paterson A3 (MED Level) with eventual progression to a Paterson B4/B5 (MED level) by the age of approximately 45 years. It is not expected that S will further his education. Jenkins postulated that S will not be able to reach his pre-morbid educational career potential, due to the various difficulties and complaints experienced by him.

[14] A. R Haribhai ('Haribai) from Risk House Africa, the plaintiff's actuary, based his report on Jenkins' postulations. Haribhai calculated the capital value of the loss of income based on the two possible scenarios outlined by Jenkins. In terms of scenario A, the highest level of education that would have been obtained by S, but for the accident, is a National Senior Certificate. In terms of scenario B, the highest level of education that would have been obtained by S, but for the accident, is at a NQF Level 06. Haribhai calculated the uninjured income, before applying any contingency deductions, based on scenario A at R4 557 314. The injured income, before the application of any contingency deductions, based on scenario A, is also calculated at R4 557 314. After applying a contingency deduction of 20% to the uninjured income and a contingency deduction of 40% to the injured income, Haribhai determined that the total loss of income, in terms of scenario A, is R911 463-00. The calculations in terms of scenario B are as follows: The uninjured income, before applying contingency deductions, is R7 953 459-00. The injured income, before the application of contingency deductions, is R 4 699 878. After applying a contingency deduction of 20% to the uninjured income and 40% to the injured income the future loss of income is R 3 542 840-00.

[15] The school reports for the years 2019, 2020 and the first two terms of 2021 that were submitted into evidence reflect that, save for a few courses, S is performing extremely well at school. He is presently in grade 6. His marks in general exceed the grade average. Although S experienced some difficulties with

mathematics in the first term of 2019,<sup>2</sup> his marks have improved considerably since then. In the second term of 2021 he managed to achieve 76% for mathematics, 88% for Xhosa, 85% for English, 73% for Natural Sciences, 83% for Social Sciences and 87% for Life Skills. His teacher made the following remark on the report: “Excellent work S...! Keep up the good work!”

## LEGAL POSITION

[16] In *M S v Road Accident Fund*<sup>3</sup> Fisher J explained that when dealing with claims for personal injury the plaintiff must establish that the injuries were sustained in the accident and that these injuries had certain effects on the claimant. It is only once these effects have been proved by the evidence that the court can turn to the determination of quantum. The learned judge proposed that the inquiry is best approached in four stages:

- First: Did the negligence of the third party driver cause the accident? (The so-called merits inquiry).
- Second: Did the plaintiff sustain the pleaded injuries in the accident? (The first causation inquiry).
- Third: How have these proven injuries affected the plaintiff? (The second causation inquiry).
- Fourth: How should the plaintiff be remunerated for the effects of such injuries on the plaintiff? (The Quantum determination stage).<sup>4</sup>

[17] In as far as the merits inquiry is concerned, the learned judge emphasised that a concession by the RAF as to the merits, ‘cannot, unless otherwise agreed denote anything more than that the RAF admits that the negligence of the insured driver caused the accident’ and that ‘given that the claim is for personal injury under the Act, of the assumed wrongfulness element as well’.<sup>5</sup>

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<sup>2</sup> The school report shows that he achieved 37 % for mathematics

<sup>3</sup> (10133/2018) [2019] ZAGPJHC 84; [2019] 3 ALL SA 626 (GJ) (25 March 2019) at [11]

<sup>4</sup> *MS v Road Accident Fund* (note 3) at [12]

<sup>5</sup> *MS v Road Accident Fund* (note 3) at [13]

[18] In view of the concession as to the merits that was made by the defendant *in casu*, this court is called upon to determine whether the plaintiff has crossed the hurdle posed by the first and second causation inquiries. If so, the assessment as to quantum will come into play.

## EVALUATION

[19] In regard to the first causation inquiry, the undisputed evidence of the plaintiff's orthopaedic surgeon, Kumbirai, shows that S sustained abrasions to the scalp and right groin and a fracture of the right tibia/fibula because of the accident. I have scrutinised Kumbirai's report and I am satisfied with the cogency and the veracity of the report. It is clear that S sustained injuries as a result of the collision. What remains to be considered is how these injuries have affected S, or put differently, whether the injuries resulted in the *sequelae* as contended for by the plaintiff.

[20] It is with this second causation inquiry that the plaintiff's evidence presents some difficulty. In determining what the effects of the injuries are likely to be, the court is faced with contradictory opinions. Kumbirai and the defendant's orthopaedic surgeon agree that the orthopaedic injury is not likely to have any negative effect on the minor's occupation and future employability. The clinical psychologist, the occupational therapist and the defendant's educational psychologist in essence echo this view. It is only based on the opinion of the plaintiff's educational psychologist, Monyela, that the industrial psychologist, Jenkins, postulated that S would probably not be able to reach his pre-morbid educational and career potential. This conclusion is surprising, in view of the fact that, already at the time of Jenkins' assessment in August 2020, S was playing soccer for exercise and his scholastic performance exceeded the class average. Jenkins noted no difficulties with the minor's memory or mobility. Jenkins was in a much better position than Monyela to assess the minor's vocational potential, having regard to the time lapse between Monyela's assessment in January 2016 and Jenkins' assessment in August 2020. However, Jenkins inexplicably ignored the factors that militated against Monyela's predictions.

[21] The 2020 school report reflects that S obtained the following grades for his subjects during the first term of 2020: 78% for Xhosa, 75% for English, 62% for



Mathematics, 61% for Natural Sciences and Technology, 67% for Social Sciences and 94% for Life Skills. Monyela's prediction that the pain would affect S in his learning and lead to a decline in his academic performance proved to be inaccurate. Monyela's opinion was in any event based on assumptions, such as the minor's 'performance in subjects like Life Orientation at school will be lower as he would not be able to do some physical activities like running'. Monyela's concerns regarding the minor child's inability to run and the negative impact this was likely to have on his performance in Life Orientation did not materialise. All indications are that the minor cognitive deficits identified during the assessments that were conducted in 2016 and 2017 have been addressed and corrected. These deficits could, in any event, not necessarily be attributed to trauma experienced because of the accident. Although the plaintiff and S did not testify, the evidence shows that S's father abandoned him at a young age. In addition to that S experienced two very traumatic incidents at a young age, both of which resulted in his hospitalisation. None of his relatives have been able to finish their secondary schooling, which could be indicative of learning difficulties in the family.

[22] The industrial psychologist's postulation that S will be unable to reach his pre-morbid vocational potential is simply not borne out by the objective factors and evidence. The minor's post-morbid career progression will in all likelihood mirror his pre-morbid career progression. This finding is in line with the actuary's calculations based on scenario A. It is only by applying a much higher contingency deduction to the post-morbid earnings that the actuary was able to determine that there would be a loss of income. However, contingency deductions only become relevant during the so-called fourth inquiry, when the assessment of quantum comes into play.

[23] In *M S v Road Accident Fund (supra)* Fisher J cautioned against the approach often adopted by plaintiffs, to shift the focus away from causation and onto the determination of quantum.<sup>6</sup> The failure of the plaintiff to establish on a balance of probabilities that the injuries complained of caused the loss contended for cannot be cured by the application of a contingency allowance.<sup>7</sup>

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<sup>6</sup> *M S v Road Accident Fund* (note 3) at [38]

<sup>7</sup> *M S v Road Accident Fund* (note 3) at [68]

[24] In the analysis of all the evidence I am not satisfied that the plaintiff has established that the injuries sustained by S were likely to have a negative impact on his vocational potential. As the plaintiff has failed to clear the second causation hurdle, it is unnecessary to venture into the fourth inquiry.

## **ORDER**

[25] The following order is made:

[25.1] The plaintiff's claim in respect of future loss of earnings is dismissed with costs.

**A GRAF**

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

<u>Date of Hearing:</u>	2 September 2021
<u>Date of Judgment:</u>	26 October 2021
<u>Appearance for the Plaintiff:</u>	Roberto Small Roberto@mincattorneys.co.za Instructed by Mostekuo Inc Attorneys
<u>Appearance for the Defendant:</u>	No appearance