REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: HCAA01/2018

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO THE JUDGES: YES/~~NO~~
(3) REVISED.

DATE 14/03/19 SIGNATURE:

In the matter between:

MOKGOTHU JEHEMIA HLOMOGANG **APPELLANT**

And

ROAD ACCIDENT FUND **RESPONDENT**

JUDGEMENT

KGANYAGO J

[1] This appeal, with the leave of the court *a quo*, is against the judgment and order of Sikhwari AJ dismissing the appellant's claim for future loss

of earning capacity. The question before the court *a quo* was whether the appellant was entitled to judgment for her claim for loss of earning capacity and also what contingency deduction has to be applied by the Court.

[2] The background facts are that on the 2nd February 2013 the appellant was a passenger in a motor vehicle that was involved in an accident with another motor vehicle driven by the insured driver. The appellant sustained mild head injuries, soft tissue injury on the neck, soft tissue injury on the back, and scars on the forehead as a result of the accident. At the time of the accident the appellant was aged 19 years and was still attending school.

[3] The appellant instituted action in the High Court against the respondent for damages. She is alleging that the accident occurred as a result of the negligent driving of the insured driver.

[4] The respondent has filed a special plea and plea on the merits. However it does not seem that the respondent has proceeded with its special plea. On the merits the respondent conceded to the accident occurring, but denied that it is liable to compensate the appellant the amount as set out in her particulars of claim.

[5] The parties did not lead any oral evidence but agreed to dispose the matter on arguments. The court *a quo* dismissed the appellant's claim. The court *a quo* was not persuaded that the appellant has suffered any loss of earning capacity. The basis for that was that the injuries which the

appellant has sustained will heal and restore her full premorbid condition if she can follow the treatment properly. The court *a quo* further held that there is no evidence based on facts to sustain the suspicion that the appellant's inability to pass Grade 12 at once and her challenges at the FET College are connected to the accident. The court *a quo* further held that in the absence of her school reports, it was not persuaded on the evidence before it that the appellant is a person of average ability on academic matters. The court *a quo* was of the view that the actuarial calculations of the appellant were without basis. In conclusion the court *a quo* found that the appellant has failed to discharge its onus of prove, and it accordingly dismissed the appellant's claim. Aggrieved by the dismissal of her claim, the appellant appeals with the leave of the court *a quo.*

[6] In this court, counsel for the appellant submitted that the court *a quo* misdirected itself in fact in finding that Dr Moloto of the defendant was of the opinion that the appellant was exaggerating her complaints. According to the counsel for the appellant Dr Moloto in his medico legal report has recorded that the appellant has not overstated her complaints. The counsel for appellant further submitted that Doctors JA Azhar and AB Mazwi in their joint minutes have recorded that since the occurrence of the accident, the appellant complains of poor memory and poor school performance; she suffered from mild head injury; she is suffering from post-concussion syndrome, and she has a left frontal; she failed the matriculation exam after the accident; she managed to start a diploma in electrical engineering, but she finds it hard to cope with her studies; to

some extent, her career path has been affected by the accident; and her whole person impairment according to the AMA guidelines is 18%.

[7] In this court counsel for the respondent submitted that the legal team of the appellant has failed to put very important evidence before the court *a quo* and therefore the court *a quo* was legally entitled and correctly held that it was not persuaded that the appellant has suffered any future loss of earning capacity.

[8] The merits of the case were settled in its totality, 100% in favour of the appellant. The issue of the future medical expenses was settled by way of a certificate in terms of section 17(14) (a) of the RAF Act. The parties are in agreement that the appellant did not suffer any past loss of earning. The issue of general damages has been referred to the HPCSA. The issue before the court *a quo* was to determine the appellant's future loss of earning capacity, if any, and thereafter factor in the appropriate contingency deductions.

[9] At the time of the accident, the appellant was in grade 12. She failed her grade 12 on her first attempt and passed it on the second attempt. Thereafter she enrolled for a diploma in Electrical Engineering at an FET College. As at the 22nd April 2015 when she consulted the Industrial Psychologist, she was a first year student at an FET College. It is not clear whether she has completed her diploma.

[10] The purpose of the **Road Accident Fund Act 56 of 1996** is to compensate victims of motor vehicle accidents for loss or damage caused by the driving of a motor vehicle. In **Road Accident Fund v Guedes,**[1] it was held that it is trite

[1] 2006 (5) SA 583 (SCA)

that a person is entitled to be compensated to the extent that a person's patrimony has been diminished in consequences of another's damages which includes loss of future earning capacity.

[11] In the present case the parties did not lead any oral evidence. The parties in disposing the matter relied more on the reports of the experts. In **Beer v Road Accident Fund**[2] the court said:

"[66] … litigants are required to reach agreement on as many matters as possible so as to limit the issue to be tried. Where the matters in question fall within the realm of the experts rather than lay witnesses, it is entirely appropriate to insist that experts in like displines meet and sign joint minutes. Effective case management would be undermined if there were an unconstrained liberty to depart from agreements reached during the course of pre-trial procedures, including those reached by the litigants' respective experts. There would be no incentive for parties and experts to agree matters, despite such agreement, a litigant would have to prepare as if all matters were in issue…

"[66]… Since it is common for experts to agree on some matters and disagree on others, it is desirable, for efficient case management that the experts should meet with a view to reaching sensible agreement on as much as possible so that the expert testimony can be confined to matters truly in dispute. Where, as here, the court has directed experts to meet and file joint minutes, and where the experts have done so, the joint minute will correctly be understood as limiting the issues on which evidence is headed. If a litigant for any reason does

[2] (093/2017) [2018] ZASCA 52; 2018 (4) SA 366 (SCA) (29 March 2018) at paragraph 65 and 66

not wish to be bound by the limitation, fair warning must be given. In the absence of repudiation (i.e. fair warning), the other litigant is entitled to run the case on the basis that the matters agreed between the expert are not in issue."

[12] In the joint minutes of the Clinical Psychologist of Ms Mokgothu and Drs' Molepo and Peta, they agreed that the appellant has a long term neuro-cognitive impairments or deterioration to her cognitive behavioural and psychiatric functioning. They further agreed that after the accident she become short tempered, shy and a very sad person. Their conclusion was that the appellant's accident related injuries are considered to have the potential to impact negatively on her occupational functioning and career progression.

[13] In the joint minutes of Drs' Azhar and Mazwai who are neurosurgeons, they are in agreement that the appellant has suffered a mild head injury and further that she is suffering from post-concussion syndrome. They are also in agreement that to some extent her career path has been affected by the accident. They concluded by agreeing that the appellant's whole person impairment according to the AMA guidelines is 18%.

[14] The Industrial Psychologists could not agree on crucial issues in their joint minutes. According to Dr Malaka, the appellant's prospects for general employment have diminished in relation to her able bodied counterparts and she need to be compensated adequately. Mr Smith is of the view that the appellant could be exaggerating her injuries and the *sequelae* thereof in order to substantiate her claim for compensation and that she has no grounds for a claim.

[15] It is trite that the courts are not bound by the views of any expert. The court make the ultimate decision on issues on which experts provide an opinion (**See Road Accident Fund Appeal Tribunal and Others v Gouws and Another** [3]

[16] The purpose of experts having joints minutes is to try and shorten the proceedings. It is very rare that a court will reject an agreed opinion of experts in their joint minutes. If the court is faced with conflicting expert opinions, it must decide which one if any to accept. It must also make a findings on the reliability of various expert opinions (See **Jacobs v Transnet)**[4]

[17] According to the court *a quo* the nature and extent of the appellant's injuries as well as the opinion of the various experts, except the appellant's industrial psychologist, did not persuade it to come to the conclusion that the appellant has suffered any future loss of earning capacity. The clinical psychologist and neurosurgeons in their joint minutes were all in agreement that the accident had the potential to impact negatively on the appellants occupational functioning and career progression. It was only the Industrial Psychologists who differed on crucial issues. The respondent's Industrial Psychologist as I have already pointed out above in paragraph 14 is of the view that the appellant could be exaggerating her injuries in order to substantiate her claim, and therefore, did not have the ground for a claim.

[18] The court *a quo* in its judgment has attributed the statement of the appellant exaggerating her complaints to the opinion of Dr Moloto. Dr Moloto in his report has stated that the appellant has not overstated her complains. It is Mr Smith the Industrial Psychologist who is of the view that the appellant is exaggerating

[3] 2018 (3) SA 413 (SCA) at para 33
2015(1) SA 139 (SCA) at PARA 14

her injuries. In my view, it might have been an honest mistake on the part of the trial Judge to attribute that statement to Dr Moloto instead of Mr Smith. In my view, Mr Smith the Industrial Psychologist was not competent to comment on whether the appellant was exaggerating her injuries as that is not within his field. His field was to comment on industrial issues and how they will have an impact on the appellant. It was Dr Moloto the Orthopaedic Surgeon, Drs Azhar and Mazwai the neurosurgeons who were competent to make that opinion.

[19] It is only Mr Smith who is of the opinion that the appellant did not suffer any loss. The rest of the experts are of the opinion that the accident had an impact on the appellant's occupational functioning and career progression. The court *a quo* did not make any finding on the reliability of the various expert opinions and the reasons why it did not accept or overlooked them. In my view the neurosurgeons and clinical psychologists were objective in their opinions and were not partisan to the appellant. Their joint minutes were therefore reliable and credible and the court *a quo* erred in rejecting and/or overlooking their opinions in their joint minutes. According to the joint minutes of the neurosurgeon, the appellant's whole impairment according to the AMA is 18%. The appellant must therefore be compensated to the extent of that impairment. The appeal must therefore succeed.

[20] What remains is to determine the appropriate contingency deductions to be applied. It is trite that the determination of the allowances for contingencies involves, by its nature, a process of subjective impression or estimation rather than objective calculation. In **Road Accident Fund v Guedes** *supra,* it was held that the calculation of the quantum of a future amount, such as loss of earning capacity is not a matter of exact mathematical calculation, but such

inquiry is speculative and a court can therefore only make an estimate of the present value of the loss that is often a rough estimate.

[21] According to the joint minutes of the neurosurgeons, the appellant has suffered a mild head injury. The orthopaedic surgeons in their joint minutes are of the opinion that the appellant's injuries did not result in any serious long term impairment/ loss of body function. At the time of the accident the appellant was aged 20 years. The Clinical Psychologists are of the opinion that the appellant suffers from moderate symptoms of Post- Traumatic Stress Disorder, neurocognitive disorder and somatoform disorders. The Clinical Psychologists are further of the opinion that the appellant's psychological problems are reactive and she should benefit from psychological intervention.

[22] The appellant's whole impairment has been agreed by the neurosurgeons to be 18%. It is below the 30% threshold to be classified as serious. In my view taking into consideration the age of appellant and the opinions of the various experts in relation to her injuries, it will be appropriate to apply a high contingency deduction.

[23] The respondent did not engage the services of an actuary. The only actuarial report before the court is that of the appellant. According to the appellant's actuarial calculations, the respondent's future loss of earning capacity is an amount of R6 301 646-00. The appellant is further suggesting a contingency deduction of 5%. As I have pointed out in paragraph 22 above that a high contingency deduction should be applied, in my view an appropriate contingency deduction under the circumstances will be 40%. The parties are in agreement that the appellant did not suffer any past loss of earnings.

[24] In my view, the following calculations are fair and equitable:

Future loss of earning capacity	R6 301 646-00
Less 40% contingency deduction	R2 520 658-40
Total loss	R3 780 987-60

ORDER

[25] In the result I make the following order

(25.1) The appeal is upheld.

(25.2) The order of the court *a quo* is set aside and substituted with the following:

"The plaintiff's succeed in her claim for compensation against the defendant. The defendant is to pay the plaintiff the sum of R3 780 987-60 which represent the plaintiff's future loss of earning capacity. The defendant to pay the plaintiff's taxed or agreed costs.

(25.3) The respondent is ordered to pay the costs of the appeal.

M.F KGANYAGO

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION
POLOKWANE

I Agree

G.C MULLER
JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION
POLOKWANE

I Agree

MV SEMENYA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION
POLOKWANE

APPEARANCES

FOR THE APPELLANT	:	**ADV. G.SHAKOANE (SC)**
INSTRUCTED BY	:	**MAKGAHLELA MASHABA ATT**
FOR THE RESPONDENT	:	**ADV. AP LAKA (SC)**

INSTRUCTED BY	:	**PULE INC**
DATE OF HEARING	:	**08 FEBRUARY 2019**
DATE OF JUDGMENT	:	14th March 2019