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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: HCM13/2022

In the matter between:

K[…] M[…] M[…]
O.B.O KM **APPELLANT**

And

ROAD ACCIDENT FUND **RESPONDENT**

JUDGMENT

CORAM: MULLER ADJP, KGANYAGO J and MANZINI AJ
JUDGMENT BY: MANZINI AJ
HEARD ON: 06 OCTOBER 2023
DELIVERED ON: 17 NOVEMBER 2023

MANZINI AJ:

Introduction

[1] This matter came before us as an appeal against the judgment and order of Semenya AJP handed down on 29 December 2021 wherein the appellant's claim against the respondent was dismissed. The matter was heard in the court a *quo*

on 08 November 2021, where the Road Accident Fund (the defendant) was in default and it proceeded through the affidavits of the experts in terms of Rule 38(2) of the Uniform Rules. Aggrieved by the decision of the court a *quo,* the appellant appealed to this court after leave to appeal was granted by the court a *quo.* This appeal was argued on 06 October 2023 and only the appellant was represented and the respondent was again in default, despite proper notice given to them.

Settlement and Order prior to trial

[2] Prior to the trial of the matter in the court a *quo* the parties reached an agreement on the issue of the merits of the claim. Merits were settled at 100 per cent in favour of the appellant. Further, the respondent tendered an undertaking in terms of section 17(4) of the Road Accident Fund Act[1] (the Act) for future accommodation of the minor child in hospital or nursing home for treatment, rendering of service or supply of goods to him as a result of injuries arising from the motor vehicle accident in question (the undertaking). The agreement of the parties on merits, as well as undertaking were made order of the court by M.G Phatudi Jon 11 February 2019.

[3] Even though the matter was not defended during the trial and during the appeal, it is clear that the respondent did not dispute that the insured driver was 100 per cent negligent. Therefore, the issue of settlement of merits in favour of the appellant gives no challenges as it is clear. However, the issue of settlement on granting of an undertaking in terms of section 17(4) of the Act to the minor child by the respondent, and such settlement having been made order of court, will be discussed later in the judgment under the heading 'status of undertaking made'.

Facts

[4] The facts of this matter are briefly that the claimant in this matter (hereinafter referred to as the minor child) was a passenger in a motor vehicle

[1] Act 56 of 1996.

that was involved in an accident on 08 October 2013. The minor was a passenger in a motor vehicle bearing registration number CVW[…] driven by one Ms Elizabeth Malongete. The accident happened when the said motor vehicle collided with a truck, which failed to stop at the intersection. During the accident the minor child was two years and four months old. The action was brought on his behalf by his mother and natural guardian (the appellant). Following the accident, the minor child was taken to the hospital where he was treated with analgesia and discharged on the same day. The RAF Form 1 and the medical records from the hospital indicate that the minor child suffered no injuries.

[5] The minor child consulted with various experts some years after the date of the collision. He was examined by the specialist orthopaedic surgeon [2], neurosurgeon [3], clinical psychologist [4], otorhinolaryngologist [5] and ophthalmologist[6]. Also presented as evidence before the court a *quo* are the expert reports from the occupational therapist[7], industrial psychologist[8] and the actuaries[9]. It is significant to point out that all the specialists who examined and assessed the minor child did so several years after the accident. It must also be indicated at this stage that other than the hospital record referred to, the RAF 1 form and various expert reports there is no other information or medical record about the injuries sustained by the minor child.

Appellant's claim

[6] According to the appellant's amended particulars of claim, she is claiming on behalf of the minor child for past hospital and medical expenses[10], loss of

[2] Medico Legal Report by Dr LD Ramushu dated 21 February 2020.
[3] Medico Legal Report by Dr AB Mazwi dated 06 July 2021.
[4] Psycho Legal Report by Mr S Molepo dated 22 July 2021.
[5] Medico Legal Report by Dr MLS Masotja dated 10 August 2021.
[6] Medico Legal Report by Dr MN Melani dated 23 July 2021.
[7] Report by occupational therapist, Ms Sarah Marule dated 17 August 2021.
[8] Report by industrial psychologist, Ms Tryphina Maitin dated 17 August 2021.
[9] Report by Tsebo Actuaries dated 17 August 2021.
[10] In the sum of R100 000, 00.

earning capacity/loss of productivity/loss of employability [11] and general damages[12]. The appellant further contended that the minor child is entitled to damages, and their claim is supported by the assessment reports presented by the appellant in terms Regulation 3(1)(b)(iii)[13] (the regulations). This is based on the following heading: serious long-term impairment and loss of body function, permanent serious disfigurement and/or sever long-term mental or severe long-term behavioural disturbance or disorder. Based on the experts' reports presented to the court, the appellant contends that the court a *quo* should have granted the order in their favour in the amount of R7 080 138,75 for loss of earnings and R800 000,00 in general damages.

[7] According to the appellant's amended particulars of claim the minor child on whose behalf a claim is brought, as a result of the motor vehicle on 08 October 2013 suffered the following injuries: waist injury, head injury, leg injury and ear injury.

Decision of court a *quo*

[8] The matter was before the court a *quo* for determination of general damages, past medical expenses and loss of earnings or earning capacity/productivity. In order to prove this claim, the appellant relied largely on the various reports of the expert witnesses. The court a *quo* analysed these reports meticulously, highlighting significant points of contradictions among them and made its decision. The court a *quo* noted that a common feature in the majority of these reports is the fact that the experts largely relied on the version narrated to them by the mother of the minor child regarding the accident and the sequelae medical condition of the minor child. The court found that the mother exaggerated the nature of injuries sustained by the minor child in order to support the link between his medical condition and the accident.

[11] In the sum of R10 000 000, 00.
[12] In the sum of R12 100 000, 00.
[13] Road Accident Regulations, 2008 (as published in GN R77 in GG 31249 of July 2008).

[9] The court also found that the evidence and opinions of the neurosurgeon is not objective and credible as it is not supported by the facts of this matter. The neurosurgeon's report materially contradicts the report of the orthopaedic surgeon, information in the RAF 1 Form and the plethora of the hospital record presented to the court. The opinions of the industrial psychologist and the actuary are based on this report of the neurosurgeon. The court further noted the inconsistent versions given by the mother of the minor child to different experts, which is adapted and exaggerated, as stated, in order to link the minor's medical condition to the accident. All these, according to the court a *quo,* resulted in the appellant failing to prove that the minor child suffered damages and loss of earning capacity as a result of the accident. With these findings made, the court a *quo* did not deem it necessary to deal with the industrial psychologist's and actuaries' reports.

[10] In the end the court *a quo* went ahead and made the following order:

> 'The plaintiff's claim for delictual damages against the defendant is dismissed.'

[11] It is this order of the court a *quo* that the appellant is appealing against. It should be stated that the court a *quo* did not deal in detail with the settlement agreement that was made an order of court by M.G Phatudi Jon 11 February 2019. This aspect too also forms the subject of the appeal.

Evidence of expert witnesses

[12] As indicated, the evidence was presented by way of affidavits in the court a *quo.* I do not intend to repeat the evidence of the expert witnesses (the reports), nor do I intend to repeat the analysis made by the court a *quo* regarding these reports. However, only crucial highlights will be made in the shortest relevant terms for purposes of this appeal.

[13] The appellant presented before the trial court the report by the

orthopaedic surgeon, who assessed the minor child on 21 February 2020. The orthopaedic surgeon recorded under 'history' that the minor child suffered injuries on the left hip and the head, and the date of the injury is '26 August 2017'.[14] He suffered acute pain for one week after the accident, has intermittent hip pain, does not require any further treatment and he has reached maximum medical improvement. He further recorded that his impairment evaluation is 1% WPI. Finally, the orthopaedic surgeon noticed that the minor child has not met the requirements for a positive narrative test. He recommended that the minor child be seen by a neurosurgeon and occupational therapist. The radiologist[15] that the orthopaedic surgeon referred the minor child to for x-rays purposes noted that 'the joint spaces and alignment of both hip joints appear normal' and no epiphyseal displacement or bony pathology is demonstrated.

[14] The neurosurgeon interviewed the minor child on 06 July 2021.[16] He obtained the history from the mother of the minor child. This history contradicts the medical records, for instance, it states that the minor child 'experienced head trauma, also had head lacerations, with loss of awareness and woke up in an ambulance. The claimant had brief loss of consciousness and amnesia with GCS 15/15 in keeping with mild head injury.' Further, it states that he had 'occipital head scar 3cm X2'. It is clear that this history is incorrect and contradicts the medical record from the hospital. He then noticed that the minor child has difficulty in concentration and memory disturbances. He attributed all these to the collision, and ultimately concluded that the minor child qualifies to be compensated for general damages, future treatment and loss of earning capacity.

[15] The clinical psychologist, Mr Stephen Molepo, consulted with the minor child on 22 July 2021 and prepared a psychological assessment report.[17] The purpose of his report is to determine the nature and extent of the functional an.d cognitive impairment, as well as behavioural change of the minor child caused by the collision. In his report he states that the minor child sustained multiple injuries,

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[14] This is clearly an error since the date of the accident is not disputed that it is 08 October 2013.
[15] Report by Diagnostic Radiologist, Dr HA Stander dated 11 June 2021.
[16] See endnote 3 *supra.*
[17] See endnote 4 *supra.*

which includes head injury with bruises during the accident. He acknowledges that the hospital record and the RAF 1 form indicates that the minor child had no injuries when he was brought at the hospital. It is clear that the clinical psychologist might have largely relied on the incorrect information supplied to him when he was given the history of the matter, which contradicts the available medical records. He then concluded that the minor child has neurocognitive disorders, with other symptoms suggestive of learning difficulties.

[16] Dr MSL Masotja, who is an Otorhinolaryngologist, Head and Neck Surgeon examined the minor child and concluded that the hearing problems that he experiences are not related to the accidents since he started experiencing those problems three years after the accident. Dr M.N Melani, an ophthalmologist, examined the minor child and concluded that he sustained blunt trauma to the left eye. She acknowledges that she was informed that the minor child had no injuries after the accident. It is not clear how she links this blunt trauma of the eye to the accident. She also noted the scar on the minor child's forehead but could not confirm if it was accident related.

[17] The court also considered the report of the educational psychologist, Dr LT Kekana. One of the reasons for this report is to determine the personality and intellectual profile of the minor child and the extent to which the accident affected his cognitive, emotional, physical and social functions. A single one-hour session was held on 14 July 2021 with the minor and his mother. The mother informed educational psychologist that during the accident the minor child sustained injuries on the head, left eye, left and right hips and on his right leg. He started limping after the accident. This brief history is crucial when the expert conduct his assessment. However, it has a lot of inaccuracies and sharply contradicts the medical record. He noticed some learning challenges experienced by the minor child. He acknowledged that since the minor child was three years and four months during the accident, there is no pre-accident learning history. This expert's report too does not help much in establishing the nexus between the educational challenges experienced by the child and his involvement in the accident, except for the information supplied by the mother. One cannot resist to conclude that this

information given by the mother is exaggerated and, to a certain extent, differs with the one given by her to other experts.

[18] The next expert evidence considered by the court is that of occupational therapist, Ms Sara Marule. She referred to other medico-legal reports, which according to her, noted that the minor child 'sustained a head and left hip injuries' during the accident. She stated in her report that the mother of the child reported to her that the minor child 'failed Grade 1 two times, Grade 2 two times and currently in Grade 4 and struggling'. She then concluded that the minor child lost his normal capacity due to the accident.

[19] The expert report of the industrial psychologist, Ms Tryphina Maitin, was also considered. This report was aimed at evaluating the sequelae of the injuries and their impact on the future earning capacity of the minor child. In her consultation with the mother of the minor child, she told her that the minor sustained head and back injuries. He then received the treatment in the form of x-rays and pain medication. Among other things, he has difficulty in walking properly due to left leg pain. As usual, she considered other medico-legal reports and stated in her report hat but for the accident the minor child would have completed matric, completed a three-year diploma qualification, and would have secured employment to sustain himself until retirement. She then concluded that post-accident the minor child is uncompetitive and unemployable in the open market. This report and its conclusions are premised on the understanding that there is a nexus between the accident and the current situation of the minor child.

[20] Lastly, the actuarial report by Tsebo Actuaries was presented by the appellant. The actuaries made their calculations in a comprehensive report and concluded that a total loss of R5 658 129,00 in respect of the minor child is appropriate.

[21] These expert reports were fully analysed by the court a *quo* and as it made its decision and order based on them and other information presented

to the court by the appellant. The court a *quo* expressed its concern with the contradictions in the reports. The other concern was that some expert reports relied on the history narrated by the appellant that the minor child consulted with a private doctor a day after the accident, but the court was not furnished with those medical records. This made the court to be without evidence to support the information that the minor child was unable to walk, had hearing problems or had problems with eyesight after the accident. There is no evidence of any medical treatment of the minor child from the day after the accident until February 2020 (for almost 7 years). Eventually the court a *quo* was of the view that the version of the appellant, as narrated to the experts was not trustworthy and was exaggerated.

[22] The appeal court must make its decision as to whether the decision of the court a *quo* was correct or not. This will be with the help of, inter alia, the expert evidence summarised above. Opinion evidence should ordinarily be looked at together with reference to the version of the appellant, the medical reports presented and other relevant facts.[18] Evidence of experts has its own challenges, as was observed in S *v Mthethwa*[19] as follows:

> "The weight attached to the testimony of the psychiatric expert witness is inextricably linked to the reliability of the subject in question. Where the subject is discredited the evidence of the expert witness who had relied on what he was told by the subject would be of no value."

[23] In *Menday v Protea Assurance* Co *Ltd*[20] while clarifying on the approach to expert witnesses the court stated the following:

> 'In essence the function of an expert is to assist the Court to reach a conclusion on matters on which the Court itself does not have the

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[18] See *MS v Road Accident Fund (10133/2018) [2019] ZAGPJHC 84; [2019] 3 All SA 626 (GJ) (25 March 2019) para 20.*
[19] *(CC03/2014) [2017] ZAWCHC 28 (16 March 2017)* para 98; See also *PriceWaterhouseCoopers Inc and Others v National Potato Co-operative Ltd and Another (451/12) [2015] ZASCA 2; [2015] 2 All SA 403 (SCA) (4 March 2015)* paras 97 - 99.
[20] *1976 (1) SA 565 (E)* p. 569A-C.

necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the Court that, because of his special skill, training or experience, the reasons for the opinion which he expresses are acceptable. (*Cf. Phipson, Evidence, 11th ed., paras. 1280 et seq.; Hoffmann, Evidence, 2nd ed., pp. 78 et seq.; R. v. Nksatlala, 1960 (3) SA 543 (AD) at p. 546).*

Phipson and Hoffmann, op. cit., both point out the dangers inherent in expert testimony. For example, the inability of the Court to verify the expert's conclusions and the tendency of experts to be partisan and over-ready to find and multiply confirmation of their theories from harmless facts *(Phipson,* para. 1286). Nonetheless the Court, while exercising due caution, must be guided by the views of an expert when it is satisfied of his qualification to speak with authority and with the reasons given for his opinion.'

The fact that an expert witness who conducted his/her assessment concluded that the appellant (the minor child in particular) has a claim, either for general damages or loss of earning capacity, does not in itself bind the court that it should award damages. It does not make it imperative that the court should find in favour of the appellant. The court still has to examine critically and assess the factors that the expert relied on to come to that conclusion, and also consider other facts of the matter. I agree with the court a *quo* that to a certain extent, some experts relied on the inaccurate information regarding the nature and extent of the injuries of the minor child.

Legal principles

[24] There is no doubt that this appeal is mainly on facts. The legal principles in this regard are clear. It is trite law that a court of appeal will not interfere with a trial court's findings unless a material misdirection has occurred. Further, it is a principle of our law that a trial court's findings of fact are

presumed to be correct in the absence of a clear and obvious error. That presumption is rebutted by an appellant convincing a higher court that the trial court's factual findings were plainly wrong.[21] These are the long-standing principles of our law in dealing with issues such as in this current matter. I must be guided by them.

[25] In *S v Monyane and Other*[22] while confirming the existing legal principle of the appeal court's approach in the analysis of facts by the trial court, Ponnan JA stated the following:

> 'This court's powers to interfere on appeal with the findings of fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (S *v Hadebe and Others 1997 (2) SACR 641 (SCA)* at 645e - f).'

Nexus between accident and condition of the minor

[26] The appellant submitted that the court a *quo* erred in coming to the conclusion that the appellant had failed to prove that the minor child sustained injuries during the accident. It was further submitted that the court a *quo* erred in its finding that the appellant failed to prove the nexus between the condition of the minor child and the motor vehicle accident. According to them, different experts made their assessment to the minor child and made their summary and findings within their area of expertise and then deferred the minor child to other experts outside their fields of expertise. Those findings show that the accident had a significant bearing to the injuries or loss suffered by the minor child.

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[21] *R v Dhlumayo and another 1948 (2) SA 677 (A) p. 705-706 [also reported at [1948] 2 All SA 566 (A)*
[22] *2008 (1) SACR 543 (SCA)* para 15.

[27] The next phase of consideration is the issue of causation (the 'but for' or *sine qua non* test). Applying this test to the facts of this matter, the following question needs to be asked: did the injuries or medical condition of the minor child as described by various expert witnesses emanate from the accident? In *M S v Road Accident Fund*[23] Fisher J stated the following:

> 'In cases of claims for personal injury, the plaintiff must show that the injuries were sustained in the accident and that these injuries have had certain effects on the person of the claimant. Once these effects are established, the court can move to determine how such effects translate into loss. The assessment as to quantum does not require proof of facts. Instead it is based on an acceptance of the facts proved in the causation inquiry.'

[28] It is indeed so that the court a *quo* found that the appellant failed to prove that the injuries and loss suffered by the minor child have no nexus with the accident. It is the task of this court to conduct a proper inquiry to determine if the injuries as reported by the plaintiff to the experts, the report she made on how these injuries affected and the assessment the experts have a nexus with the minor's circumstances. For the appellant to succeed in proving nexus on balance of probabilities, she must show that the collision resulted in the condition of the minor child. Further, the medical record, taken together with the clinical findings, and the findings of various experts have to establish the necessary causation for the loss contended for by the plaintiff.[24] I agree with the sentiments expressed in *M S v Road Accident Fund*[25] that a measure of great care must be taken in cases where the injuries relied on are not obvious or where nexus cannot be easily established. While the court tries as much as possible to sympathise with the miserable and dreadful medical condition in which the minor child finds himself in, justice dictates that a proper inquiry by the court needs to be conducted in order to ensure that one does not benefits where he is not entitled to. It is the purpose of the Act to put the victim in a position he

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[23] *MS v Road Accident Fund (supra)* para 11.
[24] Ibid. para 14.
[25] Ibid. para 16.

would have been in had it not been the collision. This cannot be done out of sympathy where compensation is not due.

[29] Recently, in *Brummer v Road Accident Fund*[26] the court had to deal with almost similar situation where the court a *quo* found that the appellant had failed to prove that she had sustained any injuries during the accident or that there was a nexus between the accident and her medical condition (the fibromyalgia she suffered). In *Brummer* matter the expert evidence clearly support the necessary nexus. As a result, after consideration of the evidence before the court it concluded that the appellant's evidence and the expert evidence clearly proved that there is that necessary nexus between the accident and the appellant's fibromyalgia.[27] Further, in *Brummer* there was a judgment in favour of the applicant in respect of the quantum of the applicant's action, the extent and amount of the award was postponed *sine die.* In this matter there is no order on quantum.

[30] As stated, the onus is always on the appellant to prove on the balance of probabilities that the condition of the minor child was caused by the collision. In *M v The Road Accident Fund*[28] Opperman J stated the following:

> 'It is not on the defendant to prove that the claimant did not suffer the loss or the quantum of the loss or that there is not a causal link to the injury suffered and the damages claimed. This was, rightly so, ruled to be the law in *Van der Merwe v RAF (GP) (42358/15) [2018] ZAGPPHC 374 (16 March 2018)).'*
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> In *Minister of Safety and Security v Van Duivenboden*[29] the following was stated:

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[26] *[2023] 4 ALL 324 GP.*
[27] Ibid paras 50 and 54.
[28] *(128/201820) [22] ZAFSHC 245 (12 September 2022)* para 59
[29] *2002 (6) SA 431 (SCA)* Para 25; see also *International Shipping Company (Pty) Limited v Bentley 1990 (1) SA 680 (A)* p. 700E-I.

'A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than metaphysics.'

The court a *quo* could not find that proof that the condition of the minor child was caused by the accident, or that there was that nexus between the accident and the medical condition of the minor child and the resultant loss of earning capacity. I carefully scrutinised the evidence and all the available facts forming part of this matter and I could not find any link between the collision on the date of the accident and the loss suffered by the minor that was picked up by various experts.

[31] The next leg of possible inquiry is on whether or not the injuries suffered by the minor child have resulted in the condition that the appellant relies on for the claim. This may be a safeguard to ensure that the minor child is not unfairly prejudiced. I must indicate that the court will only embark on this inquiry if it is satisfied that the appellant successfully proved that there is nexus between the accident and the condition of the minor child. These would be the sequelae to the proven injury. In my view, it will be pointless to conduct this inquiry unless the court is satisfied that nexus has been successfully established by the plaintiff.[30] I have already found that there is no nexus, therefore I will not embark on this inquiry.

Liability of the Respondent

[32] One should look no further than the medical records of the minor child and the expert reports presented by the appellant, in order determine if, on the facts, if there is any liability on the part of the respondent. All the experts were that of the appellant and their evidence needs to be examined in that light. Any

[30] See *Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA)* para 24.

discrepancies, inaccuracies and contradictions count for the appellant and the court has to try to interpret them in a manner that will bring clarity and help it to resolve the issue at hand. The minor child was taken to the hospital by an ambulance immediately after the accident 08 October 2013. He was examined by the medical practitioner who noted in the RAF1 Form that he had no injuries. The medical record states that when he arrived at the hospital, he was fully conscious and he had no head injuries and no bleeding, with the Glasgow Coma Scale of 15/15. The mother of the minor child stated in the section 19(f) affidavit, which is dated 14 June 2018, that the minor child sustained the following injuries: 'waist injury, left leg injuries and ear injuries'. As stated above, the orthopaedic surgeon recorded the minor's impairment evaluation to be 1% WPI, and further stated that he has not met the requirements for a positive narrative test.

[33] The divergent of opinions of the experts whose evidence was presented to the court by way of affidavits are not immaterial. They are quite significant in that they go into the core of this claim. They cannot be overlooked, or the court cannot prefer one report over the other. Further, the court cannot ignore the source of information and its reliability that a particular expert relied on to arrive at the conclusion he or she has taken.[31]

[34] The issue of contradictions in the evidence or reports of expert witnesses is not a new thing. It happens on many occasions. It does not necessarily follow that if there are contradictions the claim must fail. Some contradictions are minor, but in other cases they may be huge and quite significant. The court cannot simply choose the opinion it agrees with. In its decision to align itself with a particular opinion, the court is guided by the facts of the case and what is more probable when viewed objectively. If I may borrow the words of Lowe J in *Prince v Road Accident Fund*[32], 'in a civil trial it is the probabilities that must be determined in the light of all the evidence. One must step back and ensure that one sees the wood from the trees.'

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[31] *MS v Road Accident Fund (supra)* para 22.
[32] *(CA143/2017) [2018] ZAECGHC 20 (20 March 2018) ZAECGHC 20 (20 March 2018)* para 45.

[35] It is accepted that apart from the fact that the respondent did not defend the matter, there is also no evidence or expert opinion from the side of the respondent. However, the court cannot rubber stamp what the appellant presented before it without analysing this evidence to ensure that justice prevails for both sides. The evidence presented will still have to be analysed critically. Afterwards the court will then make its decision based on sufficient proof that has been established. It will then draw an inference about the facts in issue, providing that the inference is consistent with all the proven facts.[33]

[36] The contradictions in the expert evidence presented by the appellant are manifold and material. This is also worsened by the version of the mother of the minor child about the injuries suffered by the minor following the accident. As the primary caregiver of the minor child, she is indeed a crucial witness. For instance, in her interview with various experts she gave them the following history about the minor child - (i) to the orthopaedic surgeon: he sustained left hip and head injuries; (ii) to the neurosurgeon: he experienced head trauma and head lacerations, loss of awareness and woke up in the ambulance; (iii) to the clinical psychologist: he sustained head injury and bruises, he sustained injury on the right leg, and hearing and eyes affected; (iv) to the otorhinolaryngologist: he sustained 'several lacerations on the forehead and other parts of the head'; (v) to the ophthalmologist: The claimant's mother informs me that he sustained the following injuries: none noted at the time'; (vi) to the educational psychologist: 'he sustained injuries on his head, left eye, left and right hips and on his right leg'; and (vii) to the industrial psychologist: he sustained head and back injuries.

[37] I am mindful of the point that the counsel for the appellant advanced that there is a possibility that the health practitioners at the hospital where the minor child was taken to immediately after the accident might have missed some injuries that the minor had. Another possibility that some medical conditions, such as the left and/or right hip injuries, leg injury, eye injury, or ear injury might have been hidden and not easily detected by ordinary health practitioner on the day of

[33] Ibid. para 55.

the accident. In my view all these possibilities are nothing but mere speculations. I do not agree with these suggestions because they are not based on reliable and credible evidence. Even if that is so, the appellant should have presented the clinical records from the private doctor that the minor child had consulted the following day, but had failed to do so.

[38] Several factors on the facts of this matter completely go against the appellant's submission on this aspect. Some of those factors are the following: (i) the hospital records indicate that the minor child had no injuries when he arrived at the hospital (no limping, no bleeding, no head injuries); (ii) no record of any medical examination by any health practitioner after the minor was discharged from the hospital until assessed by the first expert, the orthopaedic surgeon on 21 February 2020; and (iii) most of the experts based their conclusions, besides their assessments, on the history narrated to them by the mother the minor child, which at times differs from one expert to another.

[39] I do not hesitate to come to the conclusion that the appellant has failed to prove, on a balance of probabilities, that the minor child had sustained any injuries during the accident, or that there is a nexus between the accident, the negligent conduct of any of the drivers of the motor vehicles involved in the accident and the minor child's condition post the accident. In the premises, I propose that the appellant's appeal against the court *a quo's* decision and order to dismiss the claims for general damages, loss of earnings and/or earning capacity be dismissed.

Status of undertaking made

[40] In the notice of appeal to this court the appellant stated as one of the grounds of appeal that due to the fact that there is an order on the undertaking by the respondent in terms of section 17(4)(a) of the Act, the court *a quo* should have found that that is an indication that there is a nexus between the accident and the 'injuries sustained by the minor child'. Further, the grounds of appeal continue, the fact that there is an order regarding an undertaking in terms of

section 17(4)(a) of the Act the plaintiff does not have to prove that the injuries of the minor child are accident related. The settlement between the parties was indeed made an order of court, as stated above. According to the appellant's submission, the court a *quo* should have granted the order in favour of the appellant in terms of the undertaking in terms of section 17(4)(a) of the Act. The decision of *MS v Road Accident Fund*[34] referred to above comes to mind.

[41] I do not agree with any of these submissions of the appellant. It is not in dispute that concession by the respondent regarding the merits does not denote anything more than that the respondent admits that the negligence of the insured driver caused the accident.[35] It does not go further to prove that the respondent is liable to pay the appellant's claim, or that the appellant has proven his claim. Settlement on the section 17(4)(a) undertaking is, in my view, still subject to the appellant proving the nexus between the accident and the injuries sustained or loss suffered by the claimant. It is settled on the understanding that quantum will be proved by the appellant on balance of probabilities. Therefore, seeing that the appellant failed to prove on balance of probabilities that she is entitled to any claim against the respondent, it is just and fair that that settlement must fall off. It will be absurd to order the respondent to pay the appellant in accordance with the section 17(4)(a) undertaking, while the court has found that the injuries or loss suffered by the appellant is not accident related.

Suggested order

[42] In conclusion, I am of the view that the decision of the court a *quo* that the appellant has not succeeded to prove that the minor child suffered damages and loss of earning or earning capacity as a result of the accident that took place on 08 October 2013, cannot be faulted. The appeal against this decision cannot succeed. In the premises, the following order should in my view be made:

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[34] See endnote 18 *Supra.*
[35] Ibid. para 13.

(i) The appeal against the decision of the court a *quo* is dismissed.

(iii) The decision of the court a *quo* is confirmed.

(ii) There is no order as to costs.

LM MANZINI
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION: POLOKWANE

I concur

GC MULLER
ACTING DEPUTY PRESIDENT OF THE
HIGH COURT LIMPOPO DIVISION: POLOKWANE

I concur

MF KGANYAGO
JUDGE OF THE HIGH COURT
LIMPOPO DIVISION: POLOKWANE

APPEARANCES:

For the Appellant:	Advocate TJ Mosenyehi
	Mashabela Attorneys Incorporated, Polokwane
For the Respondent:	No appearance