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**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

Case No: RAF 534/2022

Reportable: YES/NO

Circulate to Judges: YES/NO

Circulate to Magistrates: YES/NO

Circulate to Regional Magistrates: YES/NO

In the matter between:

J[...] L[...] D[...]

Plaintiff

on behalf R[...] J[...] D[...] (MINOR)

and

ROAD ACCIDENT FUND

Defendant

Heard: 21 October 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be 10h00 on **06 JANUARY 2025**.

JUDGMENT

PETERSEN J

Introduction

- [1] The action was set down on 21 October 2024 for adjudication of quantum. Merits were previously conceded 100% in favour of the minor child, a pedestrian at the time of the accident, who was knocked down by a motor vehicle driven by the insured driver.
- [2] The issues identified by the plaintiff for consideration include general damages, future medical expenses and loss of earnings. Since general damages remain in dispute between the parties, the law in that regard is trite. The assessment of whether an injury is 'serious' is regulated by the RAF Regulations, promulgated in 2008 and is left for determination by the Road Accident Fund. See: *RAF v Leboko* [2012] ZASCA 159; *RAF v Duma & three similar cases* 2013 (6) SA 9 (SCA); *RAF v Faria* 2014 (6) SA 19 (SCA). This Court is therefore precluded from considering same at this stage.
- [3] The matter consequently proceeded only on the issue of loss of earning capacity, which must be distinguished from loss of earnings as typified by the plaintiff.
- [4] An application was moved for expert evidence of certain of the plaintiff's witnesses to be adduced by way of affidavit in terms of Rule 38(2) of the Uniform Rules of Court. The application was granted and the evidence of Dr SK Mafeelane (Orthopaedic Surgeon), Dr MP Seroto (Neurosurgeon), Ms C Muhadisa (Clinical Psychologist), Dr LK Kgwete (Educational Psychologist), Ms P Khunou-Morake (Occupational Therapist), Ms KF Dlakavu (Industrial Psychologist) and JJC Sauer (Actuary) was admitted on affidavit.

Factual background

- [5] At the time of the accident on 26 February 2016, the minor child, aged 5 years at the time, was a pedestrian walking on a public road in the vicinity of M[...] Primary School, when he was knocked down by a motor vehicle with registration number J[...] driven by Tebogo Margaret Baloyi ('the insured driver').
- [6] The medical reports from Modderkuil Clinic; Moses Kotane, Job Shimankana Tabane and Dr George Mukhari Hospitals alluded to by the experts are not on file. The following information relevant to the accident and treatment of the minor child appears from the expert reports. The minor child was initially transported from the accident scene to the Modderkuil Clinic. There are conflicting reports made to the experts regarding his state of consciousness, although all indications are that he was fully conscious with a Glasgow Coma Scale (GCS) of 15/15.
- [7] The minor child in fact recalls being struck by the insured motor vehicle as he attempted to cross the road, with his friends calling out to him. He then recalls being stuck under the motor vehicle and being transported to the clinic. From Modderkuil Clinic he was taken to Moses Kotane Hospital, then transferred to Job Shimankana Tabane where he was admitted for about a week, until being transferred to Dr George Mukhari Hospital for surgery. He was, however, discharged since the surgery could not be performed due the lapse of time. It is not clear what surgery was to be performed.
- [8] The minor child, according to the hospital records from Moses Kotane Hospital records that the minor child sustained a head injury (haematoma on the head); swelling and fracture on the left temporal region; and was ultimately diagnosed with a head injury. Other injuries noted in hospital reports are said to include a left eye injury and general body lacerations, which were treated conservatively, resulting in him being discharged with medication only.
- [9] For purposes of assessment of the loss of earning capacity, the expert opinions of the clinical, educational and industrial psychologists, and to a lesser degree the occupational therapist against the expert opinion of the neurosurgeon merits scrutiny since those postulations have an impact on the actuarial calculations. It is

prudent to consider these expert reports sequentially based on the dates on which the minor child was assessed by the respective experts. Nothing turns on the expert opinion of the orthopaedic surgeon, who noted a negligible Whole Person Impairment (WPI) of 2%.

The Neurosurgeon

[10] Dr Seroto assessed the minor child on 22 November 2022. He inexplicably refers to loss of consciousness which is not borne out by the medical evidence or the evidence of the minor child himself. On this misconstrued basis he diagnosed the minor child with having sustained a mild traumatic brain injury, which he opines is evidenced by a GCS of 15/15, loss of consciousness of which there is no evidence and direct impact on the head.

[11] Dr Seroto further noted post concussive syndrome demonstrative from headaches, irritability, memory problems and dizziness. The minor child's prognosis for developing post traumatic epilepsy is 1.5%, and based on the post-concussion headaches he has an 80% chance of recovery in 2-3 years and 20% permanency post-injury, and new or worsening neurocognitive and psychosocial sequelae. The total WPI is 22%.

The Clinical Psychologist

[12] Ms Muhadisa assessed the minor child on 2 February 2023 and provided her report on 3 March 2023. The minor child at that time was 12 years and 2 months old and in Grade 7 at school. This was nearly 7 years post-accident. The assessment was targeted at establishing the possible effects of the accident on the minor child's scholastic, social and other important areas of his daily functioning. In addition to the neuropsychological assessment of the minor child, Ms Muhadisa considered collateral information from his parents; the RAF1 and 4 forms; hospital records; and the expert reports of Drs Seroto and Mafeelane of 22 November 2022 and 2 February 2023 respectively.

[13] Ms Muhadisa concluded that the minor child's profile indicated neurocognitive

deficits in various areas. These suggest that he may not be able to function in the school context at the same potential he would have pre-accident. She, however, defers to the educational psychologist for final comment on this aspect. In relation to his psychological functioning she notes that his profile indicates behavioural, emotional and personality changes as well as anxiety and PTSD symptomatology that appear to impact his functioning optimally in his environment. This too may impact his schooling but this is also deferred to the educational psychologist.

The Occupational Therapist

[14] Ms Khunou, the occupational therapist, assessed the minor child on 2 February 2023, the same day he was assessed by Dr Mafeelane. She notes contrary to Dr Seroto, that the minor child did not lose consciousness, either during or after the accident.

[15] Ms Khunou concluded that her assessment revealed that the minor child would be able to manage or cope with medium and heavy duties in the open labour market in future, given that the fact that there were no significant orthopaedic injuries. He would find it difficult to complete Grade 12 if he is not given support at home and school. She otherwise defers to the opinion of the industrial psychologist on the future realistic earning capacity of the minor child.

The Educational Psychologist

[16] Dr Kgwete assessed the minor child on the same day as the Industrial Psychologist, being 9 May 2023. He opines that the intellectual assessment indicates that the minor child's intellectual functioning falls within the average range, with his verbal and performance IQ scores both being average. On the educational assessment the minor child's reading and spelling are poor. He performed below his age and intellectual level on reading speed test. His performance in reading was not consistent with his average verbal intelligence and individual scale for Zulu-speaking learners.

[17] Dr Kgwete notes that the accident occurred when the minor child was 5 years and

3 months old and Grade R at M[...] Primary School in the North West Province, and that he was in Grade 7 at C[...] Primary School in Limpopo, at the time of assessment in 2023. School reports indicated that the minor child was consistently performing below the Grade average in most of his subjects though he has not repeated a Grade pre- and post-accident. Notably, the minor child was in Grade R at the time of the accident and repeating a Grade pre-accident reasonably could not be a factor.

[18] Dr Kgwete opines in conclusion that the minor child's pre-morbid cognitive functioning was average. Pre-morbid the minor child had the potential to achieve a Grade 12 pass and to proceed to obtain a bachelor's degree level qualification.

[19] Post-morbid he notes the minor child's reported head injury, post-concussive syndrome, memory impairment, emotional lability with short temperedness, signs of PTSD, neurocognitive deficits in some areas of cognitive functioning, and attention and concentration challenges. He does note that the minor child's school reports reflect that he is progressing satisfactorily after the accident, but this was not reflected in the scholastic assessments conducted. He opines that post-morbid the minor child's scholastic performance is likely to drop as the amount and complexity of the work increases in the higher Grades due to the sequelae of the accident, and particularly the noted attention and concentration difficulties. In the post-morbid scenario, he opines that the minor child will likely pass Grade 10 and proceed to obtain a vocational training certificate on NQF level 4 or 5.

The Industrial Psychologist

[20] Ms Dlakavu assessed the minor child on 9 May 2023 and submitted her report on 5 June 2023. Relying in the main on the other expert reports and specifically that of the educational psychologist. Based on the postulation by the educational psychologist that the minor child in the pre-accident scenario would have gone on to pass Grade 12 and obtain a bachelor's level qualification which would have enabled him to enrol at a tertiary institution as per his career aspirations, she opines two scenarios.

- [21] In the first scenario (pre-accident), she opines that the minor child would have progressed within a mainstream schooling environment to attain a Grade 12 (NQF 4) and thereafter pursued a tertiary qualification, either a Diploma or Degree as per his career choice and vocational interests and entered the open labour market at the higher semi-skilled level (Paterson B1/B2) and thereafter progressed to senior supervisory roles at Paterson C3/C4 by the age of 45 years in the open labour market.
- [22] In the second scenario (pre-accident), she opines that should the minor child attain Grade 12 (NQF 4) but not pursue tertiary education, he would enter the labour market at an unskilled level and with training and development progressed to a team leader level at Paterson B3 and later to a supervisor at Paterson C1 level at age 45.
- [23] He would retire in both scenarios at normal retirement age (60-65) depending on the policy of the employer.
- [24] In the post-accident scenario, Ms Dlakavu, again with much emphasis on the expert opinion of the educational psychologist, opines that the minor child is likely to complete only Grade 10 and then to remain unemployed upon leaving school.

The Actuary

- [25] The actuary, Mr Johan Sauer of Johan Sauer Actuaries and Consultant premised on the postulations of the industrial psychologist, sets out the basis of his calculation dated 7 June 2023 as follows. He moves from the following assumptions. The minor child was born on 24 November 2010; pre-morbid he would have retired at age 62.5 (being the average of ages 60 and 65); with the date of accident being 26 February 2016 and the calculation date being 1 July 2023.
- [26] He accordingly calculates the loss of earnings as follows:
- Pre-morbid: Grade 12; Post-morbid: Unemployed

	Pre-Morbid	Post-Morbid	Loss (Difference)
Future earnings	5 610 341	0	
Minus contingencies	1 122 068	0	
20%/0%	4 488 273	0	4 488 273

Future loss of earnings

Total loss of earnings 4 488 273

Minus effect of RAF cap (given the above contingency values apply) 0

Total loss of earnings after RAF cap 4 488 273

Discussion

[27] The minor child was in Garde 7, aged 5 years and 3 months at the time of the accident. Collateral information suggests that he had never been in an accident before and was generally of good health, having reached all milestones favourably.

[28] Save for the contradictory indications that the minor child lost consciousness after the accident, all other assessments are demonstrative of the fact that he has suffered cognitive impairment which has impacted his scholastic performance which is described as consistently below the grade average.

[29] Expert opinion must be founded on logical reasoning to satisfy this Court that it can safely be accepted when gauged against the onus on the plaintiff, to satisfy the Court of same on a balance of probabilities. I am satisfied that in the main the plaintiff has satisfied the onus on a balance of probabilities, subject to reservations on some of the postulations. These reservations are in the main on the postulations of the industrial psychologist which informs the actuarial calculations.

[30] The latter statement is further informed by the fact that here we are dealing with a minor child whose prospects in life remain greatly uncertain and has been

determined with a measure of speculation. In *Southern Insurance Association Ltd v Bailey* NO 1984(1) SA 98 AD at 113G, the following is stated in this regard:

“Any enquiry into damages for loss of earning capacity is to its nature speculative, because it involves a prediction as to the future without the benefit of crystal balls, soothsayers, augers or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of a loss.”

[31] The uncertainty inherent in matters of this nature, faced with a minor child, brings to the fore the making or allowance of suitable contingencies, which remains within the discretion of this Court, relevant to the peculiar facts of the matter.

[32] Considering the pre and post-morbid career paths postulated by the industrial psychologist, I find it difficult to accept that, with the minor child having been in Grade R at the precipice of his schooling, and performing on an average basis with his peers, and with the academic history of his parents that it could be said emphatically that he would have achieved a Grade 12 with a bachelor's pass and then proceeded on to a bachelor's degree. The statistical data for such an assumption is simply not there. This speculation obviously impacts the determination of his uninjured future earnings. Absent an established scholastic record, considering the minor child was in Grade R at the time of the accident, the degree of speculation on his pre-accident scholastic ability versus his post-accident ability which renders him unemployable, unfortunately does not avail the plaintiff and does not assist the Court.

[33] The actuary, Johan Sauer Actuaries and Consultants applied a 20% contingency deduction on the minor's pre-morbid (uninjured future earnings).

[34] The peculiar facts of this matter are such that a contingency deduction of 40% on the uninjured future earnings should be made to address what is speculative hypothesis on the minor child's ability to complete Grade 12 post-accident and to pursue tertiary studies; and the speculative hypothesis on the child's ability pre-accident with no statistical data for such assumption.

Conclusion

[35] In applying the aforesaid contingency of 40%, the minor child's possible uninjured future loss would be an amount of R3 366 204.60.

Order

[36] The following order is made:

1. The defendant shall pay the plaintiff the amount of R3 366 204.60 (three million three hundred and sixty-six thousand two hundred and four rand and sixty cents) in respect of the claim for loss of earning capacity.
2. The issue of general damages is postponed *sine die*.
3. The defendant shall pay the plaintiff's taxed or agreed party and party costs of the action on the High Court Scale.
4. The plaintiff shall, in the event that the parties are not in agreement on the costs as above, serve a notice of taxation on the defendant's attorneys and shall allow the defendant 180 court days to make payment of the taxed costs, from date of allocatur to make payment of the taxed costs.
5. Should payment not be effected timeously, the plaintiff shall be entitled to recover interest at the rate of 11,75% per annum on the taxed or agreed costs from the date of allocatur to date of final payment.
6. The costs shall include the costs of counsel on scale B, inclusive of the day fee for court attendance on 21 October 2024, which costs shall include costs of preparation, necessary consultations, travelling and accommodation expenses.

A H PETERSEN

**JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG**

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