REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 80323/15

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

10 – 10 - 2019
DATE

P D PHAHLANE
SIGNATURE

In the matter between:

DN JONKER **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

PHAHLANE, AJ

INTRODUCTION

[1] The plaintiff instituted a claim against the defendant for loss of earnings, as a result of the motor vehicle accident which occurred on the 24th September 1999 along the N9 between Willowmore and Aberdeen, in the Eastern Cape, between the motor vehicle bearing registration numbers and letters [.....] driven by B Samuels (the second insured driver) and motor vehicle bearing registration numbers and letters [.....[driven by D Jonker (the first insured driver). The plaintiff was a five years old passenger in the first insured vehicle at the time of the accident.

[2] The summons dated 30th September 2015 were served on 06th October 2015.

[3] At the commencement of the proceedings, Advocate Coetzee on behalf of the plaintiff informed the court that liability was previously settled 100% in favour of the plaintiff. This is confirmed in paragraph 4.3 of the particulars of claim wherein it is stated that: 'It is recorded that the defendant has conceded the issue of liability and negligence 100% in favour of the plaintiff. The acceptance of such offer dated 13 August 2015 is attached hereto and marked Annexure "A"

[4] General damages were settled at R450 000.00 in favour of the plaintiff. The defendant also undertook to furnish an undertaking in terms of section 17(4) of the Road Accident Fund Act in respect of future medical expenses.

[5] Advocate Thabethe on behalf of the defendant admitted the correctness of the medico-legal reports filed on behalf of the plaintiff, as well as the medico-legal report of the Neurosurgeon, Dr JH Kruger, which the defendant did not have. Furthermore, the defendant also admitted the injuries of the plaintiff and that the plaintiff has a psychological problem.

[6] The parties agreed to argue the matter on the joint minutes. In respect of the joint minute produced by the Industrial Psychologists, the defendant admitted the joint minutes wherever the experts were in agreement, and as such, the parties agreed to lead *viva voce* evidence of their respective Industrial Psychologists where the experts disagreed as per their joint minutes. Various expert reports were admitted as exhibits.

[7] As aforesaid, the plaintiff was a five-year-old passenger. The neurosurgeon indicated in his report that at the time of the accident, the plaintiff was thrown forward; both seats slided backwards and hit

both his lower legs; he was then hit against the dashboard because he was unrestrained toddler. He diagnosed the plaintiff as having sustained a moderately severe closed head injury.

[8] At paragraph 5 of the plaintiff's particulars of claim it is averred that:

As a result of the aforesaid collision, the Plaintiff sustained the following injuries:

5.1 Head injury
5.2 Left comminuted fracture of the tibia and fibula
5.3 Right fracture tibia and fibula
5.4 Various abrasions, lacerations and contusions;
5.5 Emotional shock and trauma.

[9] **Joint Minutes of Orthopaedic Surgeons** reveal that:

Both Drs Prins and Enslin agree that the plaintiff sustained a minor head injury with loss of consciousness, a fracture of the left tibia and fracture of the right distal tibia. [Dr Enslin documented that the plaintiff also sustained an abrasion on his forehead]. He remains symptomatic in respect of both tibia, back and right knee. The doctors agreed that pain over his proximal tibia or his right knee as well as back are not accident related. Dr Enslin documented that the plaintiff was five years old when he was injured in the accident that occurred on 24 September 1999. He is currently a full-time student. He works at a pet shop on weekends and earns R 2000.0 a month. He passed all his academic years at school. He has not done very well at school or university. Mr Jonker has a benign prognosis.

His condition has stabilised. He forgets names. Dr Enslin does not foresee that Mr Jonker's earning capacity will be affected by the bilateral tibial fractures he sustained on 24 September 1999. He will be able to work under normal circumstances in the Information Technology sector with promotional prospects until his normal age of retirement. During the peri-accident time as well as the time spent convalescing the patient had difficulty in his activities of daily living. It is Dr Prins' opinion that at the present, as well as going forward the plaintiff should not have any difficulty in performing his activities of daily living. The injuries the plaintiff sustained and the *sequelae* thereof, physically or psychologically, will not hamper the plaintiff in the slightest, to complete his studies and be an equal competitor as an IT specialist. Maximum medical improvement has been reached.

[10] **Joint Minutes of the Clinical Psychologists** reveal that:

Pre-accident: Both experts were informed of an uncomplicated medical, psychological and psychiatric history prior to the accident. The plaintiff denied the presence of a prior head injury to both experts and also denied involvement in any prior motor vehicle accidents to both experts.
Points of agreement in terms of his psychological status: Both experts found that the plaintiff presented with symptoms of a Major Depressive Disorder related to his involvement in the accident. Mr Roper and Prof Els also found that he was suffering from symptoms of a Post-traumatic Stress Disorder, related to his involvement in the accident. The experts further agree that the plaintiff's recreational and interpersonal functioning has been negatively affected by accident related sequelae, such as his physical pain, increased anxiety and increased irritability. We therefore agree that he has been rendered psychologically more vulnerable as a result of the accident and its *sequelae*. Both doctors note that his grandfather had reportedly passed away in 2012 and that this event has likely exacerbated his depressive symptoms. We agree that the information gathered during our respective assessments suggests that the plaintiff sustained at most a mild head injury as a result of the accident. We agree that the mild head injury is not usually expected to result in significant long-term neuropsychological difficulties. We agree that the injury has, in all likelihood, not contributed significantly to the found cognitive deficits.

[11] Under the heading 'Impact and Loss of amenities', it is noted that: We share the opinion that the plaintiff's physical and psychological difficulties following the accident have contributed to a diminished quality and enjoyment of life. The experts agree that Mr Jonker's occupational functioning has been negatively influenced by the accident and its *sequelae*, with specific reference to his:

1. *Increased irritability* which could negatively impact his relationships at work, and lead to conflict and/or social isolation
2. *Memory difficulties* that are likely to render him more vulnerable to mistakes or negligence, which could impact his effectiveness and productivity at work.
3. *Anxiety related to travelling in a motor vehicle,* which may contribute to fatigue at work and which may keep him from applying for positions further away from home or that would require travelling long distances.
4. *Self-esteem difficulties* that could diminish his ability to market himself appropriately for promotional opportunities or to potential employers.

[12] The **Neurosurgeon,** Dr JH Kruger examined the plaintiff on the 28/10/2016 and compiled his report in 2017. He noted the following:

The plaintiff sustained head injury with loss of consciousness. X-rays of the face and CT scan of the brain showed no pathology – ie. a CT scan of the brain done on the day of the accident was recorded as normal. He has been complaining of muscle tension headaches and loss of short-term memory. The doctor noted that he does not suggest any further special investigation for evaluation of the head injury. Since the accident Mr Jonker has been complaining of lack of concentration. The above are signs of a moderately severely closed head injury. He however noted on page 121 that the plaintiff has no recollection of the accident and has no retrograde amnesia. He further noted that the plaintiff completed every grade at school. At the end of grade 12 he attained two distinctions (electronics and life orientation). Currently he is studying BSc. Information Technology at the University of Pretoria. He struggles at University and he has failed 3 subjects in 2016. He concluded that: from a neurosurgery perspective, the accident Mr Jonker was involved in, will not influence his life expectancy; his workability in the open labour market, or his retirement age.

[13] **Joint Minutes of Occupational Therapists** reveal that:

At the time of the assessment in 2016 he was in his third year of studying BSc IT degree and had one subject remaining to complete his degree. The experts agree that from a physical perspective, he meets the physical demands of his current employment as a software developer, and that he might experience pain in his lower back while working.

Evidence of the Industrial Psychologists.

[14] **Ms Louis Coetzee** (Coetzee) gave *viva voce* evidence on behalf of the plaintiff. She is a qualified industrial psychologist and her duties entail doing assessment for patients involved in motor vehicle accidents. She also lecturer industrial psychology, specifically focusing on psychological assessments; ethics of industrial psychology; and coaching in industrial psychology at the University of Pretoria and University of Johannesburg. Her duties also involve consulting with different organisations regarding assessing candidates for positions within these organisations. She testified that when she compiled her report, the documents in her possession were all the documents given to her by Mrs Megan Biffi, the industrial psychologist appointed on behalf of the plaintiff, which included among others, the

clinical and hospital records, RAF 1 form, RAF 4 form completed by Dr Enslin; medico-legal reports by Drs Enslin and Kruger.

[15] When she compiled the Joint Minutes with her counterpart Ms Schlebusch, they had already received the joint minutes of the Orthopaedic Surgeon, the Clinical Psychologists; the Occupational Therapists and the Educational Psychologist. The educational background of the plaintiff was reported to her – that the plaintiff passed grade 12 with endorsement and thereafter registered for a BSc degree at the University of Pretoria. Coetzee did not have the records of the plaintiff's tertiary education, but the plaintiff reported to her that he was struggling to pass as he had to repeat subjects. At the time of the interview, the plaintiff was doing his final year at the university and was left with two subjects on his BSc degree. The plaintiff reported to her that he wanted to do his honours degree on a part-time basis in the year 2020. She stated that if the plaintiff fails a subject for any reason and is not able to negotiate and extension, the Dean [of the faculty] has the right to remove him from the programme, and thus meaning that he will not be able to complete his honours degree at the same university.

[16] Coetzee said she had had insight of the joint minutes of the clinical psychologist as well as the report of the educational psychologist. She testified that according to the educational psychologist, 'the plaintiff has considerable cognitive potential and indicated that this is reflected in his high-average to above average marks he had obtained at the end of Grade 12. She also highlighted on what the educational psychologist noted that – with the marks the plaintiff was obtaining in school, one would not have expected him to experience significant difficulty in obtaining a degree at university. She said the plaintiff had a destructive and abusive relationship around the period when he had also encountered academic difficulty. The educational psychologist also noted that it is improbable for his involvement in the accident and the head injury he sustained, to have impacted significantly on the reported academic difficulties he had reportedly experienced at a university level. Coetzee explained that her understanding of this report meant that there has been an impact of the plaintiff's psychological functioning.

[17] Coetzee also testified that in her opinion, the plaintiff has not been able to pass any subject as he would have, had the accident not occurred. She said the plaintiff has not passed his degree as anticipated because he has been living with the symptoms since the age of five. She said the educational psychologist noted that the plaintiff had indicated to him that he wanted to complete his degree in 2017, but the university subsequently changed some of its regulations which had resulted in him having to prolong his studies with yet another year. The plaintiff indicated that he would probably finish his degree in 2018. The plaintiff had apparently started his degree in 2013 and was

supposed to finish his studies in the year 2016 but there was a 3-year delay because he had to disperse his subjects. Coetzee said the delay is justified considering the disorders the plaintiff is presenting with, as well as their impact as referred to by the clinical psychologist.

[18] Referring to the joint minutes between herself and her counterpart, she said they both agreed that the plaintiff would have been able to pass his honours degree, had the accident not occurred. He would also have worked on a part time basis during his studies prior to the accident as he did in the post-morbid case and earning the lower quartile of the semi-skilled scale at the time. She indicated that her counterpart opined that the plaintiff would have been able to secure employment on a Paterson B4/B5 Level, and then progress to Paterson D1. She also agreed with her counterpart as it appears in their Joint minutes that the plaintiff would have secured employment based on his honour's qualification within the field of Information Technology by 1 July 2019 and earning an entry level salary around the median of the B5 Paterson level. They further agreed that over the years the plaintiff could have increased his experience and training in order to qualify for either senior management or specialist IT positions and his earnings would probably have followed a straight-line progression to reach his earnings pinnacle around the median of the Paterson D3 level around the age of 45. Thereafter annual inflationary increases would have applied until retirement.

[19] She explained that if one looks at the type of jobs that require the skill set, meaning, the senior level jobs both of them anticipated the plaintiff would do, such as IT officer; the entry level point with an honour's degree, these sits in Paterson D1. If for example he gets managerial position, his earnings would also increase up to Paterson D3 level. However, if one takes the earnings as they are for the year 2019, these types of positions would be sitting at levels D2; D3 and D4 considering the seniority which both of them anticipated that he would have achieved. As a result, they both agreed that D3 would be a reasonable earnings pinnacle that he would achieve at the age of 45.

[20] On the Pre-Morbid scenario, she agreed with her counterpart on the progression and the salary scale, the annual guaranteed package. There was however a difference of opinion between the two IP's in their joint minutes regarding the possibility of the plaintiff having to work until age 70. She opined that his income would likely have been around the median of the Paterson C5 level until age 70, while her counterpart argues that it remains speculative that the plaintiff would have continued to work in a freelance capacity until the age of 70 age.

[21] Coetzee explained that given the strict programme in the degree which the plaintiff had registered for, it was not certain that he might be able to enrol for his honour's degree. She said it seems unlikely

that even if the plaintiff wants to register for an honour's degree, he will be able to complete it. She insists that the plaintiff was not only experiencing a delay in terms of his educational qualifications, but also a delay in terms of entering the labour market. According to her, the plaintiff will not be able to reach his pre-morbid potential and that if he does not complete his honours degree, the likelihood of him obtaining the same occupational growth at the same rate that he would have, had he completed an honours degree, is highly unlikely.

[22] Under cross-examination, she testified that in the year 2013, the plaintiff passed all his first-year subjects for a BSc degree, and in 2014 he had difficulty grasping concepts because his concentration had been poor, and he had also fallen behind. She said the plaintiff had to repeat approximately five of his subjects the following year in 2015 and in 2016, he had to repeat some of his second-year subjects and completed some of his third years subjects. Coetzee was confronted with a report compiled by Ms Grobbler that the plaintiff had reported to her that during the year when he failed five of his subjects, he was involved in an abusive relationship. It was put to her that the fact that the plaintiff failed or repeated his subjects, had nothing to do with the accident. Coetzee responded by saying that she agrees with what has been noted by Ms Grobbler. She said the clinical psychologists did not make a report on this aspect, but instead reported that this was as a result of his diagnosis of a major depressive disorder and post-traumatic stress disorder. She explained this translates to mean there are two different opinions as to why the plaintiff is encountering these difficulties. She finally admitted that personally, she cannot tell why the plaintiff was experiencing these difficulties.

[23] It was further put her that the educational psychologist made a report that there are other psychological effects which rendered the plaintiff unable to pass, and that those psychological effects had nothing to do with the accident. Coetzee responded that she cannot dispute that because this information was not disclosed to her. With regards to the aspect relating to the university changing its regulations which had resulted in the plaintiff having to prolong his studies with another year, it was put to her that this aspect had nothing to do with the accident and she responded in the affirmative.

[24] Regarding her opinion that the plaintiff would have been able to pass his honours degree, she said her opinion was based on her analysis of his past behaviour. She said the plaintiff has not received any optimal intervention, but could not say that: – (1) with the stringent nature of his degree as stipulated by University of Pretoria in terms of admission and management of that degree; (2) his current ways of how he is managing himself academically; (3) the added burden of working part-time and experiencing the various stresses; and (4) the opinion of the clinical psychologist that he might

struggle to complete the honours degree, - this might impede his ability to apply successfully for his honours degree because he keeps on dispersing his subjects over a period of time.

[25] It was put to her that the plaintiff did not suffer cognitively because the views of the educational psychological was that it is improbable that his involvement in the accident as well as the head injury he had sustained, have impacted significantly on the reported academic difficulties he had reportedly experienced at a university level. Coetzee responded in the affirmative. She insists that from the age of five, the plaintiff has since been having a psychological difficulty which remains untreated.

[26] **Ms Suzan Schleusch** also testified on behalf of the defendant. She is a registered industrial psychologist since 2003 and she is specifically involved in medico-legal claims and runs a private practice. This witness was referred to the Joint Minutes compiled by Drs Prins and Enslin where they both agreed that the plaintiff's proximal tibia or right knee as well as his back are not accident related. She interpreted that to be saying that with regards to the accident related injuries, the plaintiff is physically suited for his chosen occupational field and that the current pains experienced by the plaintiff are not related to the accident or the sequelae thereof. At the time of compiling the addendum report, she was not in possession of the report of the educational psychologist wherein it was stated that there are other factors involved that might have contributed to the psychological status of the plaintiff, other than accident related. In her opinion, the plaintiff's delay in entering the open labour market is not entirely related to the accident. She based her post-morbid scenario on what the educational psychologist postulated in her report. Schlebusch stated that if there were no other factors involved, then she would agree with Ms Coetzee in saying that the delay into the open labour market was accident related. She does not agree that the age of retirement would be 70 because that would be speculating. She submits that her colleague's conclusion that the plaintiff's age of retirement would be 70, was based on the research of the American job market, and not South Africa. He opinion was that the age of retirement would be 65, based on the normal retirement age which is used in the South African labour market.

[27] Under cross-examination, she testified that as an IP, her duties are to project the career scenario – that entails how the accident impacted on the plaintiff's ability to work. She also considered reports of all the experts before basing an opinion on the plaintiff's earning residual ability. She confirmed that, to date, she never had sight of the Neurosurgeon's report. She agreed that the neurosurgeon is at best to give an opinion on the sequelae of the head injuries. It was put to her that the plaintiff has

not received any medical intervention for a period of twenty years since the accident and as such, any delay is justified, irrespective of the other contributing factors. Schlebusch could not comment and said this aspect falls within the scope of the educational psychologists.

[28] A perusal of the report of the **educational psychologist**, Ms Grobler, which appears on paragraph 12.11 at page 113 of exhibit B, states that:

"*Now that the accident has occurred* and considering that Mr Jonker did not seem to have suffered a head injury that is considered to have contributed to significant long-term neuropsychological difficulties, *one would expect his cognitive abilities and academic potential to have remained essentially unchanged.* Therefore, Mr Jonker probably still has the potential to reach his pre-morbid academic potential permitting that the factors that could impact negatively on his academic performance are effectively addressed and compensated for. Mr Jonker had taken longer to obtain his degree than what could have been expected from an individual with similar cognitive and academic abilities. *Although deference is given to the opinion of a clinical psychologist for comment in this regard,* the academic difficulties he had reportedly experience are most likely related to psychological factors. His involvement in the accident and the psychological impact of this incident could possibly have played at least some role in this regard, although his reported academic difficulty is not considered directly related to his involvement in the accident".

Case for the plaintiff

[29] Advocate Coetzee on behalf of the plaintiff submitted that the plaintiff's case is based on the *sequelae* of the head injuries, as well as the findings of the Clinical Psychologists that the plaintiff presented with symptoms of a Major Depressive Disorder which is related to his involvement in the accident. She argued that since the report compiled by the educational psychologist and Dr Kruger have been admitted by the defendant, there can be no dispute regarding the injuries and the *sequelae* thereof. She insists that the accident of the 13th August 1999 is the source of the current memory and anxiety related difficulties which the plaintiff has. She insisted further that, the fact that the plaintiff has not received treatment, he could face periods of unemployment and have difficulty in completing his further studies. She submitted that it is probable and likely that the plaintiff would not be able to complete his honours degree. She stated that the problems which the plaintiff faces are that some events might have played a role in the psychological difficulties which the plaintiff now experiences,

such as the passing of his grandfather and that the abusive love relationship he had. With regards to the accidents which occurred in 2006 and 2008 respectively, counsel submitted that the injuries of these accidents had no impact on the plaintiff. She argued that Dr Roupert have indicated that he did the neuropsychological tests on the plaintiff and then reported that the plaintiff is experiencing memory difficulty; self-esteem difficulty; and anxiety.

Case for the defendant

[30] Advocate Thabede on the other hand argued that it cannot be true that the accident which occurred 19 years ago affected the plaintiff when he had never failed any Grade and even managed to pass matric with distinction. He argued that the two accidents which the plaintiff was involved in during the year 2006 and 2008 cannot be ignored by the court while focus is only placed on the accident that took place in 1999. He further argues that the CT scans and x-rays that were done for the head injury, - support his submission that the head injury did not have a serious effect as concluded by the clinical psychologist. He insists that the psychological problems; memory difficulty; and anxiety which the plaintiff is experiencing never came up when he was doing well in the mainstream schooling, but only now that he is failing university. Counsel submitted that the court should take into consideration the plaintiff's educational background, as it shows that the plaintiff was not affected by the accident. He submitted that the effect of the accident has nothing to do with the plaintiff failing to obtain his degree on record time.

[31] **Issues of common cause**:

1. That the plaintiff was involved in an accident at the age of 5 years old
2. That notwithstanding the motor vehicle accident in 1999, the plaintiff managed to pass all his grades very well and obtained two distinctions in matric.
   2.1 He reported to the Educational Psychologist that he completed Grade 1 to 7 without failing any grades and that he had performed within the high-average range.
   2.2 He completed Grade 8 to 12 without failing, and the individual subject marks are as follows: Afrikaans (70); English (75); Mathematics (69); Life Orientation (83); Electrical Technology (80); Information Technology (70); and Physical Science (56).
3. In 2012 the plaintiff lost his grandfather, and this seriously affected him.
4. The plaintiff registered for a BSc degree at the university of Pretoria and had reportedly passed all his subjects during his first year in 2013.

5. The plaintiff was involved in an abusive relationship in 2013. He had apparently reported to the Educational Psychologist that he had been involved in a destructive and abusive relationship. He indicated that his previous relationships had impacted negatively on his studies. He also indicated that this had continued for approximately between 2015 and 2016.
6. During the year 2014; 2015 and 2016 he had trouble with regards to poor concentration and grasping concepts and as such, failed some of the subjects which had to be repeated.
7. At the time of being interviewed by the industrial psychologist, he was doing his final year at the university and was only left with two subjects on his BSc degree.

[32] **Issues for determination**

The first issue relates to whether the plaintiff's delay in completing his honours degree and entering the labour market, is a result of the injuries sustained during the accident which occurred in 1999. The second issue relates to whether the plaintiff would have retired at age 65 or 70. Counsel for the plaintiff argued that, had the accident not occurred, the plaintiff's earning capacity would have been Paterson Level D3 at the age of 45 and progressed to Paterson Level C5 until age 70. The defendant on the other hand argued in favour of Paterson Level B4, B5. The last issue relates to the contingency deduction that should be applied to loss of earnings.

[33] This matter revolves around the difference of opinion expressed by the Industrial Psychologists with reference to their joint minutes in relation to the plaintiff's pre- and post-accident career path. The two witnesses were to assist the court in relation to the issues of postulations as pronounced by the Educational Psychologist. They both gave an opinion regarding the age of retirement and the reasons thereto. With regards to the plaintiff's educational aspects, as to whether or not the delay in obtaining his honours degree – [which decision will be made by the court], would have an impact on the amount to be awarded to the plaintiff and the contingency to be deducted, Ms Coetzee testified that in her opinion, the plaintiff has not been able to pass any subject as he would have, had the accident not occurred. She said the plaintiff has not passed his degree as anticipated because he has been living with the symptoms since the age of five. Counsel on behalf of the plaintiff also argued and submitted that the plaintiff has lived with the symptoms of the injuries sustained during the 1999 accident and has not been treated for almost twenty years. She further submitted that the accident is the source of the current memory and anxiety related difficulties which the plaintiff has.

[34] The plaintiff bears the onus of proving on a balance of probability that any pathology emanating from the accident, explains his current complaints which disables him from obtaining his honours degree and thus causing a delay for him to enter the labour market.

[35] I have from the beginning indicated that counsel on behalf of the plaintiff submitted that the plaintiff's case is based on the *sequelae* of the head injuries. A perusal of the hospital record where the plaintiff was admitted and treated after the accident, which appears on page 22 of exhibit A reflects the diagnosis done by Dr Waldo E. Scribante, wherein he noted that an examination of the plaintiff on the 24 September 1999 shows 'no intracranial haemorrhage or haematoma, and that the contents of posterior fossa were intact – in other words, there were no fractures or intracranial bleeding'. These were the results of the CT scan taken of the plaintiff.

[36] I interpose to mention that this hospital record comprises of four pages,- the first two being the diagnosis relating to the X-ray and CT scan taken on 24/09/1999 as it appears on pages 21 and 22; and the other two pages relates to the examination of the fractures on the plaintiff's tibia and fibula which was conducted on 27/09/1999 and 5/11/1999 respectively. According to the RAF 1 form completed by Dr Enslin on 12/04/2016 when he assessed the plaintiff, as well as the medical report completed by Professor Coetzee, the X-ray and CT brain scan did not reveal any abnormalities. No reference to any significant alterations in his levels of consciousness or neurological fallouts could be found. The severity of the head injury was recorded as minor, by Professor Coetzee. Though the plaintiff reported to Dr Enslin that he has been experiencing muscle tension headaches and loss of short-term memory, Dr Enslin did not see a need for any further special investigation for the evaluation of the head injury. The clinical psychologists on the other hand noted that the plaintiff presented with symptoms of a Major Depressive Disorder related to his involvement in the accident. Mr Roper and Professor Els also found that he was suffering from symptoms of a Post-traumatic Stress Disorder, related to his involvement in the accident and agreed that the plaintiff has been rendered psychologically more vulnerable as a result of the accident and its *sequelae.* No explanation or basis for this conclusion has been given.

[37] The defendant submitted that it does not dispute the expertise of all the experts and accepted the nature of the injuries sustained by the plaintiff. However, I have difficulty finding a nexus between the plaintiff's cognitive *sequelae* or cognitive deficit and a finding that the accident is the sole cause of the of the plaintiff's memory and anxiety related difficulties, which have caused him the delay in obtaining an honours degree, and possibly an entry into the labour market.

[38] The general principles in evaluating expert medical evidence and the opinions of expert witnesses is that what is required, is to determine whether, and to what extent their opinions advanced are founded on logical reasoning. The court must also be satisfied that such opinion has a logical basis and determine whether the judicial standard of proof has been met[1].

[39] The Supreme Court of Appeal in ***The Road Accident Fund v S M***[2] stated that:

> *"In a trial action it is fundamental that the opinion of an expert must be based on facts that are established by the evidence and the court assesses the opinions of experts on the basis of "whether and to what extent their opinions advanced are founded on logical reasoning.*
>
> *An opinion of an expert must therefore be based on facts which have been proven before the court. An opinion based on facts not in evidence has no value for the court. A court must ascertain whether the opinions expressed by the experts are based upon facts proved to it by way of admissible evidence. It is with this principle in mind that the facts of the matter, as well as an analysis of the experts' evidence, must be considered".*

[40] In ***Life Healthcare Group (Pty) Ltd v Dr Suliman***[3] the court stated that:

> *"Judges must be careful not to accept too readily isolated statements by experts, especially when dealing with a field where medical certainty is virtually impossible. Their evidence must be weighed as a whole, and it is the exclusive duty of the court to make the final decision on the evaluation of expert opinion".*

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[1] Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another 2001 (3) SA 1188 (SCA) at para 36
[2] (1270/2018) [2019] ZASCA 103 (22 August 2019)
[3] (529/17) [2018] ZASCA 118 (20 September 2018) at 15

[41] In dealing with the expert's reports, the court in ***Glenn Marc Bee v The Road Accident Fund***[4] referred with approval to - ***The State v Thomas, (CC 19/2015) [2016] NAHCMD 320 (19 October 2016)*** where two psychiatrist enquired on the mental condition of the accused, and their reports were produced, and the court at para 29 said:

> *"When dealing with expert evidence the court is guided by the expert witness when deciding issues falling outside the knowledge of the court but within the expert's field of expertise; information the court otherwise does not have access to. It is however of great importance that the value of the expert opinion should be capable of being tested. This would not be possible when the grounds on which the opinion is based is stated. It remains ultimately the decision of the court and, although it would pay high regard to the views and opinions of the expert, the court must, by considering all the evidence and circumstances in the particular case, still decide whether the expert opinion is correct and reliable".*

This court at para 30 stated that:

> *"In my view these pronouncements indicate that if an expert witness cannot convince the court of the reliability of the opinion, and his report and the opinion will not be admitted. The joint report of experts is a document which encapsulates the opinions of the experts and it does not lose the characteristics of expert opinion. The joint report must therefore be treated as expert opinion. The fact that it is signed by two or more experts does not alter its characteristics of expert opinion. The principles applicable to expert evidence or reports are also applicable to a joint report. The joint report before the court is consequently part of evidential material which the court must consider in order to arrive at a just decision. The court, in such instance, will be entitled to test the reliability of the joint opinion, and if the court finds the joint opinion to be unreliable, the court will be entitled to reject the joint opinion. The court is entitled to reject the joint report or agreed opinion if the court is of the view that the joint report or opinion is based on incorrect facts, incorrect assumptions or is unconvincing".*

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[4] (093/2017) [2018] ZASCA 52 (29 March 2018) para 29

[31] The court cannot base its decision on unreliable evidence. There is no valid reason why a court should be precluded from considering and taking into account reliable evidence placed before it. For the court to ignore reliable and credible evidence tendered, in my view, defeats the ends of justice. The purpose of the Road Accident Fund Act 56 of 1996 is to compensate victims of motor vehicle accidents for loss or damage cause by the driving of a motor vehicle. The court can only make a proper determination of the appropriate compensation to award if it takes into account all the relevant evidential material and not be restricted to the joint minutes of experts, which joint minute is based on erroneous assumptions and incorrect fact. If the court ignores reliable and credible evidence placed before it, that would undermine the purpose of the Road Accident Fund. The Road Accident Fund is a State organ which is funded by a fuel levy and it must disburse its fund strictly in accordance with its enabling legislation".

[42] The facts in **RAF v *S M*[5]** *(supra)* are as follows: The respondent was 12 years old when he was a passenger in a motor vehicle collision on 10 July 2006. The claim against the appellant (the RAF) was originally instituted by his mother in 2009. When he attained majority in 2012, he was substituted as plaintiff. A full neurological examination found no abnormalities. The report of a neuropsychologist Dr Hardy, related to the sequelae of a mild to moderate brain injury, which she opined resulted in neurocognitive deficits. The respondent's case during trial was conducted solely on the basis that he had suffered a mild to moderate traumatic brain injury (TBI), which manifested in deficits many years after the collision and which appeared to still be present at the time of the trial in 2016, some ten years later.

RAF accepted that it was liable to compensate the plaintiff for any damages he had suffered arising out of the motor accident and tendered a certificate in respect of his future medical expenses. Neither did the respondent nor his mother gave evidence. The case was based purely upon the expert reports and the medical and hospital records, which served before the court, none of which were proven. Common cause issues or facts in the case were that the respondent was 12 years and 6 months old at the time of the accident and was doing Grade 7; he obtained an average of 60% with the best marks in mathematics and technology; he passed Grade 10 with

[5] (1270/2018) [2019] ZASCA 103 (22 August 2019)

69% a aggregate and scoring 84% in mathematics and was awarded half-colours for mathematics; in Grade 11 he scored a 72% average and obtained 88% in mathematics and accounting; in 2011 when doing Grade 12 his June results displayed further improvement in mathematics and accounting and he was again awarded a certificate for effort, passing matric with 5 distinctions and obtained a 78% aggregate. The following year in 2012 he enrolled at the university of Pretoria to study for a BSc degree in Actuarial and Financial Mathematics. He obtained two distinctions and passed 14 out of 16 modules. In 2013 he passed two remaining first year subjects but failed all his second-year subjects. During 2014 and 2015 he struggled, and he combined his second and third-year subjects.

The respondent also complained of frequent headaches and poor concentration. Dr Wilkinson who noted these complains opined that a moderate brain injury would lead to psychological problems, and that low self-esteem; depression; anxiety and other psychological effects would hamper functioning and would not reach his potential and would function at a lower level. He ultimately attributed the respondent's academic decline at university, - solely to a moderate brain injury. The court stated in paragraph 20 that:

> *"It was difficult to ascertain from Dr Wilkinson's evidence whether his conclusion was that the injury must have been moderate because the alleged problems had manifested so many years later, or because they were still present so many years later. If the former, Dr Wilkinson did not explain how these deficits lay dormant for so many years. If the latter, he did not explain how Mr M (ie. Respondent) scholastic results improved up until 2012".*

[43] It is on this basis, as I stated above, that I have difficulty finding a nexus between the plaintiff's cognitive *sequelae* or cognitive deficit and a finding that the accident under discussion is the sole cause of the memory difficulties. As such, I can find no basis on the opinion of the experts (ie. Drs Enslin and Kruger; the clinical psychologists) to reconcile the cognitive deficits and the scholastic and first year university results and the long period of delay before the deficit manifested.

[44] The plaintiff obtained an above average *statine* score during the basic academic skill assessment done by the educational psychologist. With regards to a psycho-educational assessment, he obtained a high average performance IQ score of 116. He proved to have intact simple auditory attention

abilities and intact working memory and double tracking abilities. In addition to this, adequate sustained attention and psychomotor and/or information processing speed abilities were also indicated. From an educational psychological perspective, the results of the evaluation indicated that the plaintiff have considerable cognitive potential. Ms Grobler's opinion was that the plaintiff did not suffer a head injury from which any significant long-term neuropsychological *sequela* could be expected. She noted: - 'now that the accident has occurred and considering that the plaintiff did not seem to have suffered a head injury that is considered to have contributed to significant long-term neuropsychological difficulties, one would expect his cognitive abilities and academic potential essentially unchanged. He probably still has the potential to reach his pre-morbid academic potential'.

[45] She concluded that his performance during the psychometric evaluation suggesting him (the plaintiff) to have average to high average cognitive ability with well-developed basic academic skills and without evidence of any significant learning difficulty, the plaintiff would have at least obtained an NQF Level 7 (university degree) or NQF Level 8 (honours degree). When the evaluation or assessment of the plaintiff was done, Ms Grobler already had in her possession, the hospital record which I mentioned earlier, the RAF 1 form; and the medical report of Professor Coetzee.

[46] Having said this, the fact that the plaintiff was involved in a destructive and abusive relationship around the same period when he had also encountered academic difficulty cannot be ignored. He had himself indicated that his previous relationships had impacted negatively on his studies. It was during 2014 when he failed five of his subjects at the university. Not only did Ms Grobbler make a note of this, but she also opines that there are other psychological effects which rendered the plaintiff unable to pass, but that the academic difficulty the plaintiff experienced was not directly related to his involvement in the accident. Ms Coetzee testified that she accepts and agrees with what has been noted by Ms Grobbler and that she does not know why the plaintiff was experiencing difficulties.

[47] With regards to the plaintiff not completing his honours degree, advocate Coetzee argued and submitted that it is probable and likely that the plaintiff will not be able to complete his honours degree, and can as a result, face unemployment and have difficulty in completing his further studies. It is important to note that the evidence of Ms Coetzee was that the University of Pretoria has at some stage, changed its program. This aspect in my view, contributed or added to the plaintiff not being able to finish his degree program at the anticipated time. To this, Ms Schlebush on behalf of the defendant is of the opinion that if the Dean of the University is made aware of this problem, the

University may give a leeway and extend the plaintiffs period of study. This in my view is a more practical solution than what has been testified to by Ms Coetzee on behalf of the plaintiff.

[48] It is trite that experts are required to assist the court, and in so doing, they are required to lay a factual basis for their conclusions and explain their reasoning. The court must also satisfy itself as to the correctness of the expert's reasoning. As indicated above, both Mr Roper and Prof Els agreed that the plaintiff was suffering from symptoms of PTSD which is related to his involvement in the accident and agreed that he has been rendered psychologically more vulnerable as a result of the accident and its *sequelae*. Having come to this conclusion, they did not give any reasons, explanation or the basis for their conclusion. There is also no indication from Dr Kruger regarding the impact and long-term effect of the accident on the head injury (ie. From the time of the accident to date), save to say that he does not suggest any special investigation for evaluation of the head injury.

[49] It has also become apparent that there is a difference of opinion between the educational psychologist and what was agreed upon by the clinical psychologists with regards to the *sequelae*. Ms Grobler has in her report indicated that the plaintiff did not suffer a head injury that would be considered to have contributed to neuropsychological difficulties. But most importantly, after doing a psycho-educational assessment on the plaintiff, she concluded that the academic difficulties the plaintiff was experiencing, were not directly related to his involvement in the accident and further that his reported academic difficulty is not directly related to his involvement in the accident". This conclusion was reached after an extensive evaluation which has been clearly recorded and explained by Ms Grobler.

[50] Ms Coetzee and counsel on behalf of the plaintiff submitted that 20 years after the accident, the plaintiff has still not received any treatment and could as such, face periods of unemployment and have difficulty in completing his further studies. There is no evidence supporting the submission that the plaintiff has not received treatment. The plaintiff might have experienced increased irritability and memory loss, but none of the experts have explained the causal link between the accident and the difficulties the plaintiff is experiencing now. I say this, bearing in mind the unexplained puzzle of how the plaintiff have managed to pass [without difficulties] all his grades in school and obtained two distinctions in matric, and still pass his first year courses at university, but when he starts underperforming, the conclusion is reached that his memory difficulty and the delay in completing his university studies are attributed to the accident that happened 20 years ago. There is also no medical evidence confirming that the plaintiff has throughout the years, been suffering from constant muscle tension headaches; lack of concentration and short-term memory.

[51] It is therefore not clear as to whether, despite the plaintiff progressing well at school throughout his schooling career, the problems he is experiencing now, were present but remained hidden or dormant, only to resurface now, or whether he was experiencing them during the years he has been progressing well at school. This is a *lacuna* which has not been closed by the experts. Dr Kruger indicated that the plaintiff suffered a severe head injury. In my view, if he did, the probability is that any deficits would have manifested immediately or within days or weeks of the injury. Unfortunately, the plaintiff did not testify either, as this mystery would have been solved[6]. In my view, had the accident been the sole cause of the head injuries, one would have expected the plaintiff to have struggled throughout his schooling years.

[52] In ***RAF v Zulu***[7], the court dealt with the approach to be adopted when dealing with expert evidence and reaffirmed the principles set out ***in Michael v Linksfield Clinic (Pty) Ltd***[8] that:

> *"what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning".*

[53] In ***Louwrens v Oldwage***[9] the court stated:

> *"What was required of the trial Judge was to determine to what extent the opinions advanced by the experts were founded on logical reasoning and how the competing sets of evidence stood in relation to one another, viewed in the light of the probabilities."*

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[6] Glenn Marc Bee v The Road Accident Fund – at para 41: There is no basis to find that the symptoms suddenly appeared some seven to ten years later. If the brain injury was more significant, the probability is that any such deficits would have manifested immediately or within days or weeks of the injury. The failure of Mr M or his mother to give evidence in relation to his present condition leaves a deficit in Mr M's case, which cannot be cured by the opinions of the psychologists.

[7] [2011] ZASCA 223

[8] 2001(3) SA 188 SCA

[9] 2006 (2) SA 161 (SCA) at para 27

[54] It is trite that the responsibility for the evaluation of the reliability of facts and/or evidence lies in the domain of the court. It is therefore important that courts should stick to the approach and legal principles that govern the role and value of expert evidence.

[55] In making an assessment of the weight to be attached to the conclusions of the experts, and applying the above principles, I am of the view that the plaintiff's delay in finalizing his study program at the University cannot be a contributing factor which might be connected to his *sequelae* or the delay in entering the job market. The delay in my view, cannot be attributed to the accident which occurred 19 years ago when he was 5 years old.

[56] The two witnesses before court were to assist the court regarding the issue of postulations. However, much focus was placed on the issues that fell outside the scope of their expertise, which related to the sequelae of the plaintiff's head injuries and the reasons why the plaintiff was experiencing memory difficulties for example, - to which Ms Coetzee on many occasions was very insistent and placed them as a fact. These included the allegation that the plaintiff has not received any medical attention for twenty years - and that being interpreted to be the reason for the plaintiff's academic difficulties and psychological defects. Though Ms Coetzee stated that she read the report of Ms Grobler, the educational psychologist, she seemed not to have taken cognisance that Ms Grobler had noted that there are other psychological effects which rendered the plaintiff unable to pass, and that those psychological effects had nothing to do with the accident. These psychological effects included the fact that the plaintiff's grandfather had passed on; and the destructive and abusive relationship he had during the period when he encountered academic difficulty. Ms Coetzee said these were not disclosed to her and conceded under cross-examination, to the opinion of Ms Grobler, that plaintiff's academic difficulty is not related to his involvement in the accident. When Mrs Schlebush was confronted with the aspects stated above, she indicated that both aspects fell outside her scope of expertise and that only the neurosurgeon is at best to give an opinion on the sequelae of the head injury and the educational psychologist is the expert who is best qualified to tell the court why the plaintiff was struggling to finish his academic program and whether the delay is justified.

[57] Besides the evidence of the two witnesses, this case is based purely on the expert reports which have been accepted by both parties but none of which were proven. In giving evidence, Ms Coetzee placed much reliance on the opinion of the other experts. Put differently, her opinion was based on the opinion and conclusions of other experts, which have not been tested. I have earlier indicated that the basis or grounds for the decision that the accident of 24 September 1999, is the cause of the

sequelae of the head injuries, [which in turn have impacted on the plaintiff not being able to finalize his university programme and enter the job market], have not been explained to the court.

[58] A report compiled by an expert is a document which encapsulates the opinions of the expert and it does not lose the characteristics of expert opinion. It must therefore be treated as expert opinion, and consequently, it is evidential material which the court must consider in order to arrive at a just decision. However, the court is entitled to reject it, if it is of the view that the report is based on incorrect assumptions; or is unconvincing and therefore unreliable.

[59] In ***Moloi v The State***[10], the court also dealt with the admissibility of expert witnesses. The court said that such witnesses must speak in detail to the facts upon which their opinions and conclusions are based. The court referred with approval to ***R v Jacobs 1940 TPD 142 at 14,*** where it is stated that:

> *"Expert witnesses are witnesses who are allowed to speak as to their opinion, but they are not the judges of the fact in relation to which they express an opinion, the court is the judge of the fact. In cases of this sort it is of the greatest importance that the value of the opinion should be capable of being tested, and unless the expert witness states the grounds upon which he bases his opinion, it is not possible to test its correctness, so as to form a proper judgment upon it.*

[60] In ***Road Accident Appeal Tribunal & Others v Gouws and another***[11] the court said:

> *"Courts are not bound by the view of any expert. They make the ultimate decision on issues on which experts provide an opinion".*

[61] In ***Glenn Marc Bee*** *(supra)* at para 23 the court said:

> *"The facts on which the expert witness expresses their 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 facts.*

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[10] [1995] BWCA 30; 1995 BLR 439 (CA)
[11] [2017] ZASCA 188; [2018] 1 ALL SA 701 (SCA) para 33

[62] Given the totality of the evidence presented before this court, I am of the view that the evidence presented before me lacks the requisite factual foundation that our courts have consistently demanded should be the basis for the expression of opinions by an expert. I have already found that the experts did not lay the basis for their conclusions or explain their reasoning. This court therefore rejects the evidence of Ms Coetzee, and the other expert's opinion as presented before court. These expert reports (ie. Expert opinion) in my view, were based on incorrect assumptions and were unconvincing, and they are therefore rejected as unreliable.

[63] I am of the view that the plaintiff has not discharged his onus by presenting reliable evidence of an expert nature in proving his claim for loss of earning and/or earning capacity. It therefore follows that, with the first issue for determination not being proven, the remaining issues for determination falls off.

In the circumstance, I make the following order:

1. The plaintiff's claim for loss of earnings is dismissed.
2. No order as to costs is made.

P. D PHAHLANE
Acting Judge of the High Court, Gauteng Division, Pretoria

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Date of Judgment	: