IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/**NO**
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/**NO**
(3) REVISED
DATE: **20 March 2025**
SIGNATURE: ……

Case No. A118/2023

In the matter between:

L[…], G[…] J[…] **FIRST APPELLANT**

L[…], L[…] **SECOND APPELLANT**

And

ROAD ACCIDENT FUND **RESPONDENT**

Coram: Mbongwe, Millar JJ *et* Mokoena AJ

Heard on: 12 March 2025

Delivered: 19 March 2025 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 19 March 2025.

JUDGMENT

MILLAR J (MBONGWE J *et* MOKOENA AJ CONCURRING)

[1] This is an appeal[1] which is to be decided on a single issue – upon what basis is loss of earnings and earning capacity together with the contingency deductions, if any, applicable thereto to be calculated in respect of a minor who has suffered injuries?

[2] The action before the Court *a quo* proceeded in the absence of the respondent whose defence to the action had previously been struck out. The respondent had neither obtained nor filed any report in opposition to those obtained and presented into evidence on the part of the appellants. The action was accordingly decided unopposed.

[3] The first appellant is the father of the second appellant who was at the time, she suffered injuries in a motor vehicle collision on 13 October 2018, a school going minor.

[4] The findings of the Court *a quo* regarding the liability on the part of the respondent as well as the admission into evidence of the reports of the experts who had examined the second appellant, were not challenged.

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[1] Leave to appeal against the decision of the Court *a quo* of this Division was granted by the Supreme Court of Appeal on 3 March 2023.

[5] Similarly, the finding of the Court *a quo* that the respondent should furnish the second appellant with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act[2] for her future medical and hospital expenses, pay past medical and hospital medical expenses in the sum of R67 818.14 and to pay the costs of the action with the claim for general damages[3] to be postponed *sine die* were also not challenged on appeal.

[6] The Court *a quo* accepted into evidence the findings and opinions of various medical experts whose evidence was placed before the Court on oath in terms of Rule 38(2) of the Uniform Rules of Court. The Court *a quo* dealt extensively with that evidence which included that of Dr H Volkersz (Orthopaedic Surgeon), Dr G Marus (Neurosurgeon), Ms M Lautenbach (Educational Psychologist), Mr. L Rosen (Industrial Psychologist) and Ms M Doran (Occupational Therapist). The Court also admitted into evidence the actuarial calculations of Mr. D Saksenberg (Actuary).

[7] Dr Volkersz and Dr Marus found that the second appellant had sustained, besides a concussive head injury, extensive spinal injuries which included compression factures of the T7, T8 and T12 vertebrae, a sprain and strain injury to the whole of the thoracic spine and a further fracture at the level of T1.

[8] Ms Lautenbach, Ms Doran and Mr. Rosen confirmed that the sequelae of the injuries sustained by the second appellant, had rendered her unable to engage in the field of endeavour that she had wished to follow – being a physiotherapist. It was their evidence that she would not, in consequence of the spinal injuries, be able to engage in any physically demanding vocation and that given the nature of the physical injuries, these would in any event likely impact on any field of endeavour chosen by her. This

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2 56 of 1996 (as amended).

3 In the initial order granted by the Court a quo, the postponement of the claim for general damages had been omitted as the respondent had failed to exercise its election to accept the seriousness or not of the injuries sustained by the second appellant. This omission was brought to the attention of the Court a quo when the application for leave to appeal was heard and that Court rectified the omission in terms of Rule 42.

impact had a psychological component, and which included a consequent delay in the completion of her schooling, exacerbated the consequences of the physical injuries with the result that she has in their view, suffered a definite future loss of earnings and earning capacity.

[9] The Court *a quo* accepted that the evidence that the totality of the injuries, both physical and psychological, would have an impact on the second appellant's ability to earn an income in the future.

[10] The crux of this appeal is the approach adopted by the Court *a quo* in evaluating the evidence that was admitted before it in determining the quantum of the second appellant's future loss of income, if anything, in consequence of the injuries sustained in the collision.

[11] Apposite to the present matter, the approach to be adopted is as follows:

> *"Disabled children do not have any earnings which may serve as a basis for establishing loss of earning capacity. In these circumstances the probable expected average earnings of the injured child has to be determined and is used to establish a child's earnings for the purpose of the assessment of loss of earning capacity. This is a difficult and highly speculative process but the degree of difficulty is somewhat tempered by the principle that the basis is the average probable income expected by the reasonable person."*[4]

[12] The report of Ms Lautenbach dealt pertinently with the second appellant's future educational prospects and compared her pre-injury prospects with those post injury. In this regard, it was found that had she not been injured, she would as a matter of probability been able to pursue her intended career of being a physiotherapist. Now that she has suffered injuries, she will no longer be able to achieve the same level of

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[4] Damages, HB Klopper, LexisNexis 2017 at page 118. See the authorities referred to in the footnotes therein.

education, one which would enable her to have pursued a career as a physiotherapist. This is an NQF8 qualification according to Ms Lautenbach.

[13] Her educational prospects were reduced in consequence of her injuries to an NQF7 level. The evidence of both Ms Doran and Mr. Rosen is that the sequelae of the physical injuries alone would have disqualified her from pursuing a career as a physiotherapist but that in any event, her future career prospects have also been further hampered in consequence of the combination of both the physical injuries and the reduced educational outcome.

[14] In formulating their opinions, the experts specifically took account of the prior medical history of the second appellant, prior educational achievement as well as the academic achievements of both her parents and sibling.[5]

[15] It will well accepted that:

> *"In order to arrive at a probable average expected earnings, the Court may consider the child's scholastic abilities and the parents' and close family's qualifications (academic or otherwise). Wage statistics may also be consulted to determine expected earnings in the absence of other information. Where there is no available evidence to make a realistic determination or where a large measure of uncertainty prevails, the Court may use its discretion to fix a lump sum as compensation."*[6] [My underlining].

[16] The former is the approach that was adopted by the experts and the appellants in the presentation of this case. The evidence before the Court *a quo* is clear an unequivocal insofar as the second appellant having suffered a loss is concerned. This loss is the difference between an NQF8 and NQF7 level of education together with the increased contingencies arising out of the sequelae of the spinal injuries suffered.

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[5] *Southern Insurance Association v Bailey* 1984 (1) SA 98 (A) at 115G.
[6] *Ibid* pages 118-119.

Having a basis upon which to calculate the loss suffered by the second appellant, the latter approach of a lump sum is not appropriate in the circumstances.

[17] Even though the second appellant was a school going minor who had no work history the Court *a quo* found that "*There are no guarantees that she would have been a physiotherapist and a successful one"* and that "*The actuarial calculations are not based on evidence such as in a situation where there is a pay slip or evidence that there was income."*

[18] It is trite that the standard of proof required in a civil action is on a *"balance of probabilities"* and that a guarantee or absolute certainty goes beyond what is required of a party to succeed in an action. Furthermore, cognizant of the fact that the action was one for damages suffered by a minor child, who had no work history and for that reason was unable to provide any documentary evidence of employment, the Court *a quo* misdirected itself in the approach to the assessment of the evidence and the award of damages.

[19] Once the evidence of the experts was accepted by the Court *a quo*, it was bound to decide the case on that evidence having regard to the probabilities. It was not open to the Court *a quo*, to adopt the approach that it did. If the Court *a quo* had any misgivings about any of the evidence that had been placed before it, it was incumbent upon it have raised this with the appellants' counsel and to have afforded the appellants an opportunity to have addressed those misgivings.[7]

[20] A calculation was prepared by Mr. Saksenberg setting out the earnings that would have been earned by the second appellant as a physiotherapist over the course of her working career. The total of this calculation, before the deduction of any contingencies is R13 628 937.00. A calculation was also prepared in respect of what it is expected the second appellant will now achieve and that calculation, before the deduction of contingencies is R8 714 710.00.

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[7] *Deixon Europe Ltd v Universal Storage Systems (Pty) Ltd 2003 (1) SA 31 (SCA) at para [15].*

[21] *"Even where it has not been proven on a preponderance of probabilities that an event, consequence or circumstance may occur or arise and any of these is in the view of the Court a possibility, the Court may under appropriate circumstances make allowance for the occurrence of any of these by making a suitable contingency allocation to allow a certain percentage of the projected future loss in accordance with the probability that it may occur."*[8]

And

"Contingency deductions are applied to the final amount awarded as damages. Essentially, contingencies neutralise any unfair advantage that may rise out of the fact that some assumptions made may not fully materialise. Contingencies do not always have a negative bearing and a contingency amount may thus also be added to the final award. In the application of contingencies the Court will not prejudice a plaintiff by applying contingencies unfavourable to the wronged party."[9]

[22] When the matter was argued in the Court *a quo* and this Court, the appellants argued that the appropriate contingency deductions, having regard to the evidence, was a 20% contingency deduction from the pre-injury calculation and a 30% deduction from the post-injury calculation.[10] The calculated loss once these contingencies were applied to the two scenarios, is the difference between the two and amounts to R4 802 852.00

[23] It was argued, correctly in my view, that while the ordinary contingency deduction for the hazards of life is 15%, an increased deduction of 20% from the pre-injury calculation was more appropriate. The factor which militates in favour of this, and which was considered by the experts are that the second appellant's school marks for science (although a pass) were not as good as her other marks.

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8 *Ibid* page 104.
9 *Ibid* pages 107-108.
10 Pre-injury - R13 628 937.00 minus 20% deduction of R2 725 787.00 = R10 903 149.00. Post-injury - R8 714 710.00 minus 30% = R2 614 413.00 = R6 100 297.00. The difference between them is R4 802 852.00.

[24] Since she was in grade 10 at the time of her injury and was forced subsequently and in consequence of her injuries, to change subjects, it is simply not possible on consideration of the science mark alone, given that her other marks were excellent, to exclude her from achieving an NQF8 qualification and pursuing a career as a physiotherapist hence the higher contingency.

[25] Similarly, on the post injury scenario the contingency to be deducted was something higher given that the effects of the spinal injuries on whatever endeavour she pursues must be accounted for. On consideration of the matter, it seems to me that a 20% preinjury and 30% post injury contingency applied to the two different earning scenarios is entirely appropriate.[11]

[26] On the evidence before the Court, the second appellant suffered a loss. Despite this and in the absence of any evidence to the contrary, the Court *a quo* was *"not convinced that there is a loss of earning capacity"* and that the second appellant "*will still be able to work and earn an income except she might not be able to compete with her peers."* These findings are contradictory. The contradiction is not only in respect of the evidence but in respect of the findings themselves. It is for this reason that the findings by the Court *a quo* do not withstand scrutiny.

[27] Despite the contradictory findings, the Court *a quo*, then went on to find "*I will however lean in favour of the claimant and give a 10% contingent differential in an amount of R548 429.99."* This amount bears no relation to what was argued in the Court *a quo* or what was subsequently awarded.

[28] This was the award of a lump sum for which there was no basis, in circumstances where the Court *a quo* had found that there was no loss. There is however evidence upon which a more realistic and accurate assessment on the evidence before the Court could and should have been made as set out above.

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[11] *Southern Insurance Association v Bailey* at 113F-114E.

[29] The approach adopted by the Court *a quo* in the assessment of the damages of the second appellant was for the reasons discussed flawed and it is for this reason that the appeal must succeed.

[30] The costs will follow the result.

[31] In the circumstances, I propose the following order –

[28.1] The appeal succeeds with costs, which costs include the costs of counsel on scale B.

[28.2] Paragraph 2 of the order of the Court *a quo* dated 15 June 2022 as amended on 31 August 2022, is set aside and replaced with the following:

"2 The Defendant shall pay to the Plaintiffs a capital amount of R4 870 670.14 (four million eight hundred and seventy thousand six hundred and seventy thousand and fourteen cents) made up as follows:

2.1 R4 802 852.00 in respect of loss of earnings.

2.2 R67 818.14 in respect of Past Hospital and Medical Expenses."

[28.3] Save as aforesaid, the order dated 15 June 2022, as amended on 31 August 2022, remains extant.

A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE AND IT IS SO ORDERED

M MBONGWE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE,

M MOKOENA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	12 MARCH 2025
JUDGMENT DELIVERED ON:	19 MARCH 2025
COUNSEL FOR THE APPELLANTS:	ADV. E SERFONTEIN
INSTRUCTED BY:	DE BROGLIO ATTORNEYS INC.
REFERENCE:	MS. D DELPORT

NO APPEARANCE FOR THE RESPONDENT