THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

APPEAL CASE NO: A40 / 2022

CASE NO: 2729 / 2018

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE **06 June 2025**

SIGNATURE

In the matter between:

R[...] M[...] OBO V[...] **APPELLANT**

And

ROAD ACCIDENT FUND **RESPONDENT**

J U D G M E N T

RATSHIBVUMO DJP:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be on 06 June 2025 at 10H00.

[1] Introduction.

This is an appeal against a judgment and order by Mashile J of this Division (court *a quo*), whereby he dismissed the Appellant's claim against the Respondent. The claim was for damages emanating from loss of earning capacity. In dismissing the claim with costs, the court a *quo* held that "the minor child (the claimant) did not suffer a head injury of the magnitude described by the neurosurgeon and/or the neurologist, alternatively, the injuries are not causally linked to the sequelae set out in the reports." The appeal is not opposed by the Respondent.

[2] Grounds of appeal.

The Appellant set out the grounds of appeal as follows:

2.1 The court *a quo* erred in describing the Appellant as the mother and natural guardian of "14-year-old V[...] M[...]." Based on the incorrect calculation of V[...]'s age, the court *a quo* held that the finding that he is not as stupid as the experts would have the court believe, squares-up with his scholastic performance since the accident. The court was told that he failed once in Grade 4, and he is now in Grade 8. The scholastic performance record suggests that he did very well in Grade 4. The court should have found that V[...] was born on 06 July 2005 and was 16 years old at the time of the trial in August 2021. Accordingly, when V[...]'s age is correctly computed it means he repeated a grade more than once.

2.2 The court *a quo* erred in holding that to decide the issues the court must decide whether there was a connection between V[...]'s injuries and the sequelae as described by the various experts. The court should have found that:

a) The Respondent initially pleaded that it had no knowledge of the injuries sustained by V[...] and the sequelae thereof.

b) The Respondent had filed its own medico-legal reports from various experts. All the reports filed on behalf of the Respondent confirmed the injuries sustained in the sequelae thereof.

c) The Respondent never disavowed any of its expert reports. Consequently the injuries sustained and the sequelae thereof were common cause between the parties.

d) The Respondent settled the general damages based on mild concussive brain injury.

e) Accordingly by the time the general damages were resolved the injuries and the sequelae thereof were common cause between the parties.

2.3 The court *a quo* erred in holding that the Appellant had to demonstrate on a balance of probabilities that V[...] was born without any congenital cognitive deficits. The court *a quo* should have found that:

a) It is trite law that in civil actions the issues are defined by the pleadings. Relevance is determined by the issues raised in the pleadings and a party cannot be allowed to direct the attention of the other party to one issue and then at the trial attempt to canvass another.

b) The Respondent did not plead that V[...] was born with congenital deficit.

c) None of the medical legal reports served by the parties suggested that V[...] was born with congenital deficits.

d) Ms. Steyn testified that V[...] reached normal milestone and he was a normal child before the accident which reflected that he did not have challenges.

e) Dr. Voster, a Forensic Psychiatrist, testified that if V[...] had challenges pre-accident it was going to be noticeable as his condition is bad. According to Dr. Voster, in the absence of contrary information, V[...]'s challenges are because of injuries sustained in the accident in question.

f) There was no factual basis to hold or suspect that V[...] suffered from pre-existing neurocognitive deficits.

g) There was no requirement for the Appellant to prove that V[...] what's born without congenital deficits.

2.4 The court *a quo* erred in finding that there is no causal link between his poor performance and the accident. The court should have concluded that:

a) Dr Mhlongo, the Respondent's Orthopedic Surgeon, found that V[...] suffered lumbar spine soft tissue injury and has residual

backache. He also suffered a head injury and has residual backaches and emotional problems.

b) The Appellant's Occupational Therapist reported that during the occupational therapy session, V[...] showed the limitations with tasks requiring prolonged bending and dynamic postural position due to pain on the lower back. This will highly impact negatively on his ability to compete fairly in the open labour market for occupations with such physical demands.

c) Dr. Eksteen, the Plastic Surgeon, also reported that V[...] may struggle to obtain employment because of the scars on his head. Therefore, the court *a quo* should have found that even without the head injury V[...] still qualified to be compensated for loss of earning capacity.

2.5 The court *a quo* erred in finding that if one removes the loss of consciousness the only injuries that the minor sustained are the scalp laceration facial and back abrasions, all of which cannot have led to the cognitive challenges with which the minor now presents. The court *a quo* should have found that loss of consciousness is not a requirement for head injury. This is confirmed by the Respondent's expert Dr. Chula who reported that his GCS was not recorded but he was awake and responsive. Dr. Chula also found that V[...] sustained mild head injury and multiple soft tissue injuries which resulted in anxiety, memory impairment, poor school performance and post-traumatic stress disorder. The sequelae of the injuries sustained therefore was common cause between the parties.

[3] Before the court *a quo*.

Evidence led before the court *a quo* was well captured and summarised into 24 pages of the judgment by the court *a quo*.[1] It shall therefore not be repeated here unless it is necessary for purposes of this appeal. According to the amended particulars of claim, the Appellant's claim was for future loss of earnings that was

[1] See the judgement by the court *a quo* on p. 509 of the appeal bundle.

estimated at R5 100 000.00.[2] Initially, the Respondent's approach as reflected in the plea, was to deny that the accident occurred on the date as per the particulars of claim.[3] On the date of trial, the court *a quo* was informed by the Appellant's counsel that merits and general damages were settled and that the trial was to proceed only in respect of future loss of earnings. Although the Respondent had acquired and discovered numerous experts' reports, it chose not to appear before the court *a quo*, meaning the trial proceeded against it by default.

[4] The Plaintiff led *viva voce* evidence of the following expert witnesses and also had their reports handed in as evidence. Mr. Jose Teixeira, the Clinical Psychologist, Dr. Rodney Mudau, the Neurologist, Ms. Paula Steyn, the Educational Psychologist, Dr. Merryll Voster, the Forensic Psychiatrist, Dr. Frans Segwapa, the Neurosurgeon, Ms. Talifhani Ntsieni, the Industrial Psychologist, Dr. Cronje Eksteen, the Plastic and Reconstructive Surgeon, Ms. Julie-Ann Valentini, the Actuary and Ms. Ncumisa Ndzungu, the Occupational Therapist. The Plaintiff, R[...] M[...] also gave evidence.

[5] The following evidence, which is relevant to the court *a quo*'s findings was led uncontested. The claimant, on whose behalf the claim was launched by the Appellant (the Plaintiff in the court *a quo*), was born on 06 July 2005 and was in Grade R at the time of the accident. His schooling progression was fine, and he could write and draw. It was only after the accident that his mother started receiving calls from the teachers who complained about his behaviour which included fighting other learners.

[6] Dr. Mudau gave evidence to the effect that the child suffered head injuries. He reached this conclusion based on his clinical findings and perusal of the hospital records. He also observed a significant scar on the right parietal frontal area. In his report,[4] the following appears under the heading, Examination. 5x2 cm scar on the right side of parietal frontal area. Deformities: Indentation of the skull on the right

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[2] See p. 357 of the appeal bundle. Although the figure reflected is R51 000 000.00, this appears to have been a typo as the total amount claimed including R500 000.00 for future medical expenses and R1000 000.00 for general damages, is put at R6 600 000.00

[3] See p. 15 of the appeal bundle.

[4] See Dr. Mudau's report on p. 161 of the appeal bundle.

side of parietal frontal area. Under Neurological Examination, the following was noted: MSE was slow and had poor memory. Pain and suffering: The claimant suffered acute pain from injuries sustained, currently suffers from chronic post traumatic headaches.

[7] Dr. Mudau further noted the following under Mental and Physical impairment: From the available information and current evaluation the claimant sustained a moderate head injury as evidenced by significant wounds to the head and the sequelae of the accident. The injury has resulted in moderate cognitive difficulties, change in behavior, personality and post traumatic headaches. Routine MSE revealed poor concentration and memory. The above has led to cognitive and social impairment of moderate nature. He further noted that according to the Neuropsychologist report, the claimant had numerous gross neurocognitive deficits, forgetfulness and has decreased concentration. He also had significant emotional disturbances. The claimant was also unable to play soccer and to do heavy physical activities.

[8] Ms. Ndzungu testified that the claimant's level of functioning lifestyle and enjoyment of life has been affected by the accident in question. Since the accident, he has been suffering from pain on his lower back as well as headaches. Due to pain he also struggles to participate in sporting activities. This may negatively impact on his lifestyle as he is likely to adopt a more sedentary lifestyle which will have a detrimental impact on his general health outcomes. The accident left him with a scar which seemed to affect his self-esteem and self-image. Due to pain and physical limitations, loss of potential future earnings must be considered in terms of his future career pathing as he will not be able to cope with physical strenuous occupation; his preparation for occupational training and earning potential is also affected.

[9] It was further noted in her report that during the Occupational Therapy session, the claimant showed limitations with tasks requiring prolonged bending and dynamic postural position due to pain on the lower back. This will highly impact negatively on his ability to compete fairly in the open labour market for occupations with such physical demands. It is a fact that due to his physical challenges he will always be disadvantaged in most aspects of life compared with other people of his age,

gender and qualifications who are without physical limitations. His job options will be curtailed due to his physical injuries.

[10] She concluded therefore that the claimant was precluded from competing for medium and heavy occupations as well as duties which require prolonged bending and dynamic postural positions. Cognitive evaluation revealed that he has reduced ability and is easily distractible with perceptual challenges. He also suffers from recurring headaches. He is expected to have a restricted level of education that will restrict his academic aspirations.

[11] Of some importance is the joint minutes between the parties' Educational Psychologist completed on 14 February 2020, before the tender on settlement of merits was made. The said Educational Psychologists are Ms. P Steyn who was hired by the Appellant and Mr. Z Kubheka, who was hired by the Respondent. After noting that Dr. Segwapa voiced that the claimant sustained a mild concussive head injury, as opposed to Dr. Mudau's view that the head injury was rather moderate, the two experts wrote the following as points in which they agreed:

11.1 The child was born in a milieu impeded environment but was never in any serious accident or had any illness.

11.2 After consultation and deliberation, the two agreed that the child probably had the potential to complete a great 12 level of education (NQF level 4) but for the accident.

11.3 The child will benefit from medication, psychotherapy as well as educational intervention. He will benefit from receiving career counselling after passing grade 9. Given his poor scholastic skills it is recommended that he be enrolled at TVET college where he will be able to complete a national certificate vocational Level 3/4. If he stays in the current scholastic environment he might fail only once in the senior phase but will still leave school with a Grade 10 or Grade 11 certificate but with little skills.

[12] Approach by the court *a quo*.

As pointed out already, the Respondent presented no evidence and did not challenge the evidence presented by the Appellant either by countering it through expert reports or by way of cross examination. The court *a quo* rejected

uncontested experts' evidence as being unhelpful. It also identified issues to be determined, to include a question on whether the Appellant "proved on balance of probabilities that the claimant was not born with any congenital cognitive deficits." This approach appears to be in contrast with the joint minutes by the Educational Psychologists referred to above.

[13] In disregarding the experts' opinion, the court *a quo* relied on the judgment of *Twine and Another v Naidoo and Another*[5] where Vally J quoted with approval the phrase from *R v Turner*[6] where it was said,

> "If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour with the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does."

[14] The court a *quo* further quoted from *Twine* [7]with approval where Vally J held,

> "In certain cases of neurological, psychological and psychiatric evidence the expert is dependent on the honesty of the person who is the subject of the assessment for their evidence to be of any probative value to the court. This problem has manifested itself many times and the approach of the courts is succinctly captured in the following *dictum,* which while dealing with the evidence of an expert in psychiatry is no less applicable to an expert in the sciences of neurology or psychology: *"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."*[8]

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[5] [2018] 1 All SA 297 (GJ) at paragraph 18.
[6] [1975] 1 All ER 70 at 74D-E.
[7] *Supra*.
[8] *S v Mthethwa* (CC03/2014) [2017] ZAWCHC 28 at paragraph 98.

[15] The court *a quo*'s approach suggests that the expert evidence had to be rejected because it was based on discredited evidence by the Appellant. Presuming that the Appellant was a discredited witness, this approach flies in the face of the decision by the Supreme Court of Appeal (the SCA) in *Bee v Road Accident Fund*[9] where the court at paragraph 64 onwards held:

> "64. This raises the question as to the effect of an agreement recorded by experts in a joint minute. The appellant's counsel referred us to the judgment of Sutherland J in *Thomas v BD Sarens (Pty) Ltd*[10]. The learned judge said that where certain facts are agreed between the parties in civil litigation, the court is bound by such agreement, even if it is sceptical about those facts (para 9). Where the parties engage experts who investigate the facts, and where those experts meet and agree upon those facts, a litigant may not repudiate the agreement 'unless it does so clearly and, at the very latest, at the outset of the trial' (para 11). In the absence of a timeous repudiation, the facts agreed by the experts enjoy the same status as facts which are common cause on the pleadings or facts agreed in a pre-trial conference (para 12). Where the experts reach agreement on a matter of opinion, the litigants are likewise not at liberty to repudiate the agreement. The trial court is not bound to adopt the opinion but the circumstances in which it would not do so are likely to be rare (para 13). Sutherland J's exposition has been approved in several subsequent cases including in a decision of the full court of the Gauteng Division, Pretoria, in *Malema v The Road Accident Fund* [2017] ZAGPHC 275 para 92.
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> 65. In my view, we should in general endorse Sutherland J's approach, subject to the qualifications which follow. A fundamental feature of case management, here and abroad, is that litigants are required to reach agreement on as many matters as possible so as to limit the issues to be tried. Where the matters in question fall within the realm of the experts rather than lay witnesses, it is entirely appropriate to insist that experts in like disciplines meet and sign joint minutes. Effective case management would be undermined if there were an unconstrained liberty to depart from agreements

[9] 2018 (4) SA 366 (SCA) paras 64-66. See also *NJ v MEC of Health Eastern Cape* [2023] 4 All SA 72 (ECB) (20 July 2023) at paragraph 84.
[10] [2012] ZAGPJHC 161.

reached during the course of pre-trial procedures, including those reached by the litigants' respective experts. There would be no incentive for parties and experts to agree matters because, despite such agreement, a litigant would have to prepare as if all matters were in issue. In the present case the litigants agreed, in their pre-trial minute of 14 March 2014, that the purpose of the meeting of the experts was to identify areas of common ground and to identify those issues which called for resolution.

66. Facts and opinions on which the litigants' experts agree are not quite the same as admissions by or agreements between the litigants themselves (whether directly or, more commonly, through their legal representatives) because a witness is not an agent of the litigant who engages him or her. Expert witnesses nevertheless stand on a different footing from other witnesses.

[16] Moreover, there are no factual basis for concluding that the Appellant was not an honest witness or why she had to prove that the claimant had no pre-existing congenital cognitive deficits. These issues were not pleaded or raised by the Respondent during trial. As Milne J held in *Kali v Incorporated General Insurances LTD*[11], the purpose of pleading is to clarify the issues between the parties and a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another. The SCA amplified this principle in *Imprefed (PTY) LTD v Nationa Transport Commission*[12] when it said "[T]his fundamental principle is similarly stressed in Odgers' *Principles of Pleading and Practice in Civil Actions in the High Court of Justice* 22nd Ed at 113: 'The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision.'

[17] The reason parties must be held to their pleadings is to avoid trial by ambush. In *casu*, the Appellant must have been surprised to hear of issues she had to prove only at the stage of judgment, as these were not pleaded. Had these been pleaded

[11] 1976 (2) SA 179 (D) at 182A. See also *Nyandeni* v *Natal Motor Industries Ltd*., 1974 (2) SA 274 (D) at p. 279B.
[12] (3) SA 94 (AD); at 107D-E.

properly, she could have presented evidence enough to prove her claim, to the satisfaction of the trial court. Courts should be cautious of implying a defence that is not pleaded or canvassed by the litigants during the trial. Failure to guard against this resulted in the Appellant attempting to present evidence, now on appeal, of the reports compiled by the experts commissioned by the Respondent, to prove that unbeknown to the court *a quo*, the issues it determined were already common cause between the parties. Presenting such evidence at this stage of proceedings cannot not be allowed. It suffices to state that when the defendant chooses not to defend the action, it does so at its own peril.

[18] Matters involving loss of income earning capacity by a person who is yet to enter the labour market industry are complex and not easy to determine. They cannot be classified as those identified in *Twine*[13] when it was held that 'if on the proven facts the court can form its own conclusions without help, then the opinion of an expert can be discarded.' The Appellant must have been mindful of the complex nature of the claim when she called no less than nine experts to prove the case against the Respondent. It follows therefore that in rejecting the experts' opinion, the principles laid down in *Bee*[14] were disregarded, in view of the joint minutes. I also find that, the Appellant's claim was dismissed on issues that were not pleaded. For these reasons, this court is entitled to interfere with the court *a quo*'s findings.

[19] Furthermore, the totality of the reports presented during the trial, proved that owing to injuries sustained in a car accident, uncontested evidence is to the effect that the claimant would no longer be able to compete in open labour market as an equal contender. This is due to fact that he suffered head injuries which impacted negatively on his scholastic performance. Even without the head injuries, experts opined that the claimant would not be abled to perform heavy duty responsibilities including those requiring bending for extended periods. This piece of evidence is also undisputed. This Court is satisfied that the Appellant proved on balance of probabilities that the claimant suffered future loss of earning capacity.

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[13] *Supra*.
[14] *Supra*.

[20] What remains is the determination of the quantum and the application of the necessary contingencies. As Fisher J observed, the evaluation of the amount to be awarded for the loss does not involve proof on a balance of probabilities. It is a matter of estimation. Where a court is dealing with damages which are dependent upon uncertain future events - which is generally the case in claims for loss of earning capacity – the plaintiff does not have to provide proof on a balance of probabilities (by contrast with questions of causation) and is entitled to rely on the court's assessment of how he should be compensated for his loss.[15]

[21] After taking into consideration all the reports presented to her, Ms. Valentini prepared the following postulations in respect of the claimant's future loss of earnings. She put the uninjured earnings without any contingencies at R6 820 000 and the injured earnings at R422 600, leaving the application of the contingencies to the court.

[22] It is trite that contingencies are at the discretion of the court having taken into consideration what may and may not happen in the life the claimant. As the exercise of determining the loss of earnings is in essence speculative in nature and devoid of any certainty, contingencies are applied by the Court to align the actuarial calculation with the circumstances of the case and life as it unfolds in each particular case. The Appellate Division (as it then was called) held as follows in *Southern Insurance Association Ltd v Bailey NO:*[16]

> "Where the method of actuarial compensation is adopted in assessing damages for loss of earning capacity, it does not mean that the trial judge is 'tied down by inexorable actuarial calculations.' He has 'a large discretion to award what he considers right'. One of the elements in exercising that discretion is the making of a discount for 'contingencies' or differently put the 'vicissitudes of life'. These include such matters as the possibility that the plaintiff may in the result have less than a 'normal' expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic

[15] See *MS v RAF* (10133/2018) [2019] ZA GPJHC at paragraph 36.
[16] *Southern Insurance Association v Bailey* 1984 (1) SA 98 (A) at 116G to117A.

conditions. The amount of any discount may vary, depending upon the circumstances of the case."

[23] Some of the aspects taken into consideration for purposes of contingencies in this case include the high unemployment rate in the country in which the claimant would have been exposed to with or without the injuries, the fact that he has been compensated in respect of general damages and from that, he would be able to improve himself in terms of scholastic performance as recommended in the joint minutes prepared by the Educational Psychologists. That gives him a potential to recover so much lost ground in respect of the possible loss of earning capacity.

[24] Having considered all these, I am of the view that contingencies of 55% in respect of the uninjured earnings and 15% in respect of injured earnings would take care of all the necessary speculations in the postulations. That would bring the figure to R6 820 000, less 55% = R3 069 000, minus R422 600, less 15% which is R359 210. The sum thereof is R3 069 000 – R359 210 totalling **R2 709 790.00**.

[25] The Order:

We therefore make the following order:

23.1 The appeal is upheld.

23.2 The order of the court *a quo* is set aside and replaced with the following:

23.2.1 The Defendant is ordered to pay **R2 709 790.00** as compensation for loss of future earning capacity.

23.2.2 The Defendant is ordered to pay the Plaintiff's costs on party and party scale.

TV RATSHIBVUMO
DEPUTY JUDGE PRESIDENT

I agree.

MR MOLELEKI
ACTING JUDGE OF THE HIGH COURT

I agree.

HF FOURIE
ACTING JUDGE OF THE HIGH COURT

FOR THE APPELLANT:	**ADV. ST SESHOKA**
INSTRUCTED BY:	**M MASHIGO ATTORNEYS**
	C/O MABUNDA ATTORNEYS
	MBOMBELA
FOR THE RESPONDENT:	**NO APPEARANCE**
DATE JUDGMENT WAS:	**02 MAY 2025**
	RESERVED
DATE OF JUDGMENT:	**06 JUNE 2025**