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**IN THE NORTH WEST HIGH COURT, MAFIKENG**

CASE NO: RAF 285/2016

In the matter between:

**R[...], G[...] M[...] obo R[...], V[...] M[...]**

Plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

**DATE OF HEARING** : 31 JANUARY 2018

**DATE OF JUDGMENT** : 16 FEBRUARY 2018

**COUNSEL FOR THE PLAINTIFF** : ADV. SESHOKA

**COUNSEL FOR THE DEFENDANT** : ADV. MOTHIBI

**JUDGMENT**

**HENDRICKS J**

**Introduction**

- [1] Ms. V[...] M[...] R[...] (“V[...]”), a minor aged thirteen (13) years, sustained injuries as a result of a motorvehicle accident that occurred on the 31<sup>st</sup> October 2015. Her mother, on her behalf, instituted a claim for damages against the Road Accident Fund (RAF). The merits was contested on the basis of contributory negligence. This Court delivered judgment on 29<sup>th</sup> June 2017 and apportion contributory negligence on the basis of 90 – 10 in favour of V[...] (the plaintiff). It was ordered that the Road Accident Fund (the defendant) is liable to pay 90% of plaintiff’s proven damages. General damages are referred to the HPCSA tribunal. The defendant provided plaintiff with an undertaking in terms of section 17 (4) (a) of the Road Accident Fund Act 56 of 1996 limited to 90%. This Court was called upon to determine the loss of earning capacity of V [...], the plaintiff, which was set down for trial on 30<sup>th</sup> and 31<sup>st</sup> January 2018.
- [2] It is common cause between the parties that V[...] was a scholar at the time of the accident. She still attend school to date. She sustained injuries including mild head injuries as a result of the accident. There is a dispute between the parties with regard to V[...]’s future employability and loss of earning capacity.
- [3] Evidence was only tendered on behalf of plaintiff’s case during the trial. No evidence was tendered on behalf of the defendant during the trial. Ms. B[...] R[...], the aunt to V [...], testified that V[...] is currently staying with her because V[...]’s mother doesn’t care about V [...]. Before the accident, V[...] was doing just fine but the accident affected her. She testified that V[...] doesn’t listen when she talk to her and V[...] is too forgetful. Her schoolwork also deteriorated. She is now in high school and she doesn’t perform well to the extent that she failed her grade in 2017. V[...] often complain about fatigue and that she cannot sit for a long time. During cross-examination she said that V[...] also failed in a school grade before the accident occurred. This happened in 2010 when V[...] changed schools.

[4] Mr. W.M. Kumalo, an educational psychologist, was called as a witness on behalf of the plaintiff. He confirmed that he compiled a report which was handed in as an exhibit. The contents of the report was admitted by him as being correctly recorded. The salient aspects of this report can be succinctly summarized as follows:

*“Pre-accident functioning.*

*Pre-morbidly there has been no report of ill-health or any serious developmental delays. Available information suggests normal birth and milestone development, normal speech and language development and satisfactory fine and gross-motor development. Thus, in her case an assumption of normality would be made. In the writers view therefore she would have been of at least average intellectual potential.*

*In all likelihood she would have passed grade 12 and continued with tertiary education, either at a college or at university.*

*I defer to an industrial Psychologist regarding her premorbid job prospects.*

*Post-accident functioning*

*Post-accident she is experiencing recurrent headaches. The headache started after the accident and it is intermittent in nature. The headache is aggravated by walking in the sun. Her lower back pain started after the accident. The pain is made worse by playing and physical activity.*

*Her intellectual potential is estimated to fall in the below average range. Her performance on both the Verbal and Non-Verbal scales fell in the below average range.*

*Psycho-educational testing revealed mild neuro-cognitive deficits in the areas of attention, concentration, memory, processing speed and executive functioning. These deficits will impact negatively on her school performance. However, it is noted that she has passed every year since the accident. She will most likely not cope with increasing cognitive demands in senior grades. She will most likely obtain a grade 11 level of education with limited scholastic skills.”*

[5] Mr. Kumalo recommended that she should remain in a mainstream school but she will need extra classes. According to him, V[...]’s intellectual assessment was below average. She failed at school in the past (2010) before the accident occurred. He further testified that V[...]’s intellectual capacity was further affected by the accident. He testified that V[...] might encounter challenges with her school work particularly at high school level. This evidence coincide with the evidence of Ms. B[...] R[...] who testified that V[...] failed in 2017.

[6] Ms. Sandra Moses, an industrial psychologist, was called to give evidence for and on behalf of the plaintiff. She compiled a report which was handed in as an exhibit. She confirms the correctness of the content of her report. She testified that before the accident, there does not appear to have been any reason for V[...] not being able to complete Grade 12 and to continue at tertiary level. She would have been able to enter the open labour market at a semi-skilled level. The salient aspects of this report can be succinctly summarized as follows.

*“Post-Accident Scenario*

*Post-accident, given the age at which V[...] suffered a head injury which slows down her ability to learn and perform well at school, it is probable that she will not successfully achieve high academic qualifications. The writer is of the opinion that it is*

*unlikely that V[...] would be able to achieve a meaningful matric certificate and will not be able to compete with other job seekers who are more educated for the few available jobs. As she may have residual work capacity from an orthopaedic perspective (unskilled) V[...] may be able to work as an unskilled worker. However, as the open labour market is flooded with unskilled labour, her chances to secure employment could become problematic. In addition, her neuropsychological and behavioural problems discussed in 7.2 further adversely impact her employability to a point where she is unlikely to secure and sustain employment after leaving school.*

*V[...] suffers a loss of earning being the difference between her pre- and post-accident earning capacity.”*

- [7] Furthermore, according to Ms. Moses, V[...] will most likely progress up to grade 11 at school. Thereafter she would enter the labour market as an unskilled person. As a result of her mental and physical deficiencies, she will have to look for “sympathetic employment” which adversely impact upon her employability to a point where she is unlikely to secure and sustain employment and which makes her unemployable. She defer to the occupational therapist.
- [8] Although no witness was called to testify on behalf of the defendant, expert reports were filed on its behalf. There were even joint minutes compiled and filed by both parties. Joint minutes were filed by the neuro surgeons, clinical psychologists, occupational therapists and the educational psychologists. The joint minutes of the neurosurgeon states that V[...] suffered a mild head injury. (- Grade 3 concussion -). She has memory impairment. Her longevity is not affected.

- [9] The joint minutes of the clinical psychologist indicate that both experts conducted neuropsychological examinations. There was evidence of neuropsychological difficulties. V[...] was functioning at a lower level in comparison to her premorbid potential. She suffered a traumatic event which left her feeling psychologically vulnerable. Psychologically, they noted that she has become more anxious and there were significant changes in her mood. The psychological outcome was exacerbated by pain symptomology and the residual scarring she has retained from the injuries suffered in the accident.
- [10] They both agree that she suffered persistent post morbid psychological symptoms, including her cosmetic impairments paired with chronic pain, have negatively influenced her quality and enjoyment of life. They recommended that provision should be made for psychological treatment in order to aid V[...] to better adjust to the losses she has suffered. Such intervention must be augmented with psychiatric intervention.
- [11] The joint minutes of the occupational therapists states that V[...] will benefit from occupational therapy with regard to her school work ability, the following is stated in the joint minutes:

*“6.1.1 At the time of the accident under thought, she was a grade 6 scholar. Upon her return to school, she managed to progress to the next level with each grade over the years.*

*6.1.2 Post-accident, she indicated the following barriers:*

- Fatigue to the lower back after prolonged sitting in class.*
- She has become forgetful.*
- Headache after paying attention for long and she would as a result sleep.*

- 6.1.3 *In addition, she presented with cognitive, perceptual and psychological limitations at both consultations which are expected to negatively impact on her learning ability and future endeavors.*
- 6.1.4 *She requires academic assistance support and constant monitoring of school work. In light of this, allowance has been made for intensive occupational therapy intervention to address all problems that were identified during the assessments period. We have also made allowance for the cost of assistive devices, service of a tutor in subjects she finds difficult as well as vocational guidance.*
- 6.1.5 *Ms. Phasha has made allowance for placement in a remedial school should she no longer be able to cope in the mainstream.*
- 6.1.6 *Her future academic achievement and occupational prospects is thus dependent on multiple factors and this includes amongst others availability of recommended interventions by various experts and academic support as well as response thereof. This is also dependent on the severity of the learning difficulties over her schooling life. Deference is made to the opinion of an Educational Psychologist for further comment in this regard.*
- 6.1.7 *Ms. Phasha notes that it is now 3 years, 5 months post-accident and V[...] has not received any of the recommended interventions. Should this remain indicated in a long term, it is highly likely that future work will be at a low level considering the assessment results and experts opinions. Her working environment would also not have to require the demands of having to perform work under pressure and job tasks should also not be mentally challenging which in turn will affect her promotional opportunities.*
- 6.1.8 *She should from a physical point of view be able to cope with medium category of work. Reported headache and back pain may affect working outdoors as well as performing heavy and very heavy work. We defer to the opinion of an Orthopaedic Surgeon to comment on reported back pain.*

- 6.1.9 *Ms. Moagi notes that V[...] indicated that she aspires to be a Medical Doctor when she reaches adulthood which falls within light to medium types of work category. She deferred to an Educational Psychologist to comment on whether she will be trainable as a Medical Doctor.*
- 6.1.10 *Ms. Phasha opines that her psychological vulnerability may compromise her ability to retain work and ultimately lead to a poor work history and thus difficulty of being employed.*
- 6.1.11 *The accident in question has had an effect on most spheres of her life, that, is, future training and employment prospects due to presenting difficulties.*
- 6.1.12 *Deference is made to the Industrial Psychologist's opinion with regard to the impact of the accident on her realistic employment prospects, her career advancement prospects and her earning capacity.”*

[12] The joint minutes of the educational psychologists states the following with regard to the post-accident position.

- “3.1 *Mr Kumalo note that her intellectual potential is estimated to fall in the low average range.*
- 3.2 *Mr. Kumalo noted that Psycho-educational testing revealed a mild neuro-cognitive deficit in the areas of attention, concentration, memory, processing speed and executive functioning. These deficits will impact negatively on her school performance. However, it is noted that she passed every year since the accident. She will most likely not cope with increasing cognitive demands in senior grades. She will most likely obtain a grade 11 level of education with limited scholastic skills.*



3.3 *Ms van den Heever note the findings of Dr Chula that she sustained a mild head injury in the form of a concussion and Mr Mphuti and Mrs Maye that the injury is not expected to result in significant long-term residual neurocognitive deficits. No significant decline was observed in marks immediate pre- and post-accident and thus in the absence of a significant traumatic brain injury her learning potential appears to remain unchanged. The accident occurred to an already vulnerable individual emotionally and pain and discomfort as well as trauma suffered seem to affect her quality of life and she would benefit from psychotherapy. In terms of her learning potential she still have the capabilities to complete grade 12 without endorsement.*

3.4 *We defer to the Industrial Psychologist with regard to her future career post-accident job prospects and loss of earnings.”*

[13] The joint minutes of the industrial psychologists states post-accident

“3.1. **SM:** *is of the opinion based on the agreement among the experts that V[...]’s scholastic performance and future career options have been compromised by the accident. She would not be able to achieve post-accident the same level of functioning as she would have had the accident not happened. According to the Educational Psychologist, Mr Matome Khumalo, she will most likely not cope with increasing cognitive demands in senior grades. She will most likely obtain a grade 11 level of education with limited scholastic skills.’(P26)*

- 3.2. **SM:** *Competing for employment opportunities in the open labour market will become problematic for V[...]. In the first instance, her anxiety and depression are likely to hamper her motivation in terms of seeking employment she is likely, to be discriminated against in interviews due to her unsightly scars. Furthermore, it is probable that she would struggle to show assertiveness and confidence in interviews due to her poor self - esteem to which employers tend to shy away from. Should her scarring and poor self-esteem be Overlooked, a Grade 11 level of education would limit her to equally compete for Unskilled employment opportunities in the open labour market which is generally physically demanding in nature, requires prolonged standing and/or, walking and is generally performed outdoors however she experiences difficulties walking long distances and back pains.*
- 3.3. **SM:** *As she may have residual work capacity from an orthopaedic perspective unskilled) V[...] may be able to work as an unskilled worker. However, as the open labour market is flooded with unskilled labour, her chances to secure employment could become problematic. In addition, her neuropsychological and behavioural problems discussed in 7.2 further adversely impact her employability to a point where she is unlikely to secure and sustain employment after leaving school.*
- 3.4. **SM:** *V[...] suffers a loss of earning being the difference between her pre- and post-accident earning capacity.*

3.5: **MK:** V[...] reportedly sustained, a head injury which is accompanied by cognitive challenges.

- *Dr. N. D. Chula Neurosurgeon concluded that: "She suffered mild head injury, spine fracture and multiple lacerations with scarring. She has a resultant memory Impairment, anxiety and post-traumatic stress. No seizures or any further deterioration reported" Again, the expert alluded that there is no objective mental disturbance and no physical deformities. As such, a recommendation was made for simple analgesic which may be required intermittently.*
- *Samuel F. Mphuthl and Linda Mayo Clinical Psychologists concur to the above alluding that V[...] suffered mild head / brain injury at the time of this accident which is not expected to result in significant long-term residual neurocognitive deficits.*
- *Further Sunette van den Heever Educational Psychologist had this to say,*

*"Note is taken of the findings of Dr Chula that she sustained a mild head injury in the form of a concussion and Mr Mphuthi and Mrs Maye stated that the injury is not expected to result in significant long-term residual neurocognitive deficits. Thus, in the absence of a significant severe traumatic brain injury*

*her learning potential remains unchanged. The accident occurred to an already vulnerable individual considering her living circumstances and pain and discomfort seems to negatively affect her quality of life. In terms of her learning potential she still seems to have the capabilities, to complete grade 12 without endorsement"*

**SM:** *The Educational Psychologist reported that Ms Riet's intellectual level is estimated to fall in the below average range.*

**MK:** *Thus based on Sunette van den Heever Educational Psychologist's opinion, this accident seems to have not affected V[...] in any way in as far as career progression and earning potential is concerned. Her pre accident potential mirrors post-accident potential."*

[14] I have quoted extensively from the reports of the experts to illustrate the difference in opinion that underline the difference in the respective cases of the parties. Based on the respective expert reports, two actuaries filed their respective calculations in their reports. Plaintiff's actuary, Mr. Eddie Theron, calculated the loss of earning capacity on the basis that V[...] will be totally unemployable based on the report of the industrial psychologist Ms. Sandra Moses. The following appears in his report:

#### *"4.2 Future Uninjured Income*

*The information provided indicates that the claimant's career and income would have progressed as follows had the accident not occurred (2017 terms, unless stated otherwise):*

- *December 2021 - Completes grade 12*
  
- *December 2024 - Completes tertiary qualification –*
  
- *January 2025 - Paterson B2 (upper) at R 228 000 per year, increasing to*
  
- *May 2047 (age 45)- Paterson C3/C4 at R 510 500 per year*

*We have assumed that her income would have increased with earnings inflation until retirement age 62½.*

*No contingencies have been applied, and are left for the court to determine. Contingencies may be applied as usual since the RAF Amendment Act cap does not have an impact on this scenario.”*

The future loss of earnings is calculated at R6 335 100.00.

- [15] The actuary on behalf of the defendant, Mr. George Schwalb, concluded that V[...] will be employable and will earn an income of R2 024 475. V[...] will therefore in the future suffer no loss of earnings at all. To reiterate, no witness testified on behalf of the defendant to substantiate this conclusion. I do not agree with the proposition that V[...] is totally unaffected by the accident. I am of the view that the accident indeed affected V[...]’s future employability.

[16] Although in my view V[...] will not be totally unemployable due to the fact that she will most likely progress up to Grade 11 at school and thereafter enter the labour market as a semi-skilled worker, there is no evidence tendered on behalf of the defendant to substantiate such a conclusion and finding. I am bound to accept the evidence tendered and to give a ruling/judgment on the presented evidence and proven facts.

[17] Certain aspects should have been taken into account in determining what the loss of V[...]’s earning capacity is, had the defendant tendered such evidence. V[...] has a low intellectual average. This was so even before the accident occurred. She stays with her aunt because her mother deserted her. She therefore does not have a stable family life. She failed a school grade before the accident occurred (2010). I am unconvinced that the sole reason why she failed is because she had changed schools. According to Mr. Kumalo, V[...] will most likely progress to Grade 11 at high school and will most likely then drop out. This clearly indicate that it is not that she will be totally unemployable. She will be employable and can access the labour market as an unskilled person in the event that she does not complete her schooling and further qualify herself in a profession or trade. Such evidence could have been tendered by the defendant’s experts had they been called to testify.

[18] I am of bound to accept the evidence as tendered on behalf of the plaintiff that V[...] will be totally unemployable. I must also accept the calculations of the actuary, Mr. Eddie Theron, that because V[...] will be totally unemployable, she will suffer loss of earning capacity in the amount of R6 335 100.00 less contingencies and apportionment.

Thus: R6 335 100.00 less 25% contingencies, less 10% apportionment equals R4 276 192.00. The amount of R4 276 192.50 should be awarded as just, fair and reasonable for the future loss of earning capacity. Costs should also follow the result and be awarded in favour of the plaintiff.

**Order**

[19] Consequently, the following order is made:

- (i) The defendant (Road Accident Fund) is ordered to pay an amount of R4 276 192.50 to the plaintiff for the loss of future earning capacity of V[...].
- (ii) The defendant is ordered to pay the costs of suit.

**R D HENDRICKS**

**JUDGE OF THE HIGH COURT,**

**NORTH WEST DIVISION, MAHIKENG**