IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: KP 124/2018

Reportable: **NO**

Circulate to Judges: **NO**

Circulate to Magistrates: **NO**

Circulate to Regional Magistrates: **NO**

In the matter between:

D[...] J[...] J[...]	Plaintiff
OBO O[...] M[...]	
AND	
THE MEC FOR DEPARTMENT OF EDUCATION NORTH WEST PROVINCE	Defendant

DATE OF HEARING	**:**	**08 OCTOBER 2024**
DATE OF JUDGMENT	**:**	**10 DECEMBER 2024**

FOR THE APPLICANT	**:**	**ADV. TJIANA**

FOR THE RESPONDENT : ADV. MASIKE

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives *via* email. The date and time for hand-down is deemed to be 10H00 on 10 December 2024.

ORDER

Resultantly, the following order is made:

(i) The defendant is liable for 100% of the plaintiff's proven damages.

(ii) The defendant shall pay to the plaintiff an amount of R 30 000.00 for damages suffered as a result of the assault.

(iii) The defendant shall pay the costs of suit on a party and party basis on the Magistrate Court scale, to be taxed.

JUDGMENT

HENDRICKS JP

Introduction

[1] On 18 June 2018 Ms. J[...] J[...] issued summons out of this Court against the Member of the Executive Council for Education, North West Province (MEC), claiming damages on behalf of her son, O[...], in the amount of R 7 000 000.00 (seven million rand) for future medical expenses, loss of amenities of life, and pain and suffering. This is based on an incident that allegedly occurred on 06 August 2015, when O[...] was assaulted with a stick on his hand by Mrs. Bonolo Bonokwane, a teacher at G[...] Primary School, where O[...] was a Grade R learner.

[2] The trial commenced on 26 February 2024. Ms J[...] testified that O[...] came home during the afternoon of 04 August 2015 and reported that he was assaulted with a knobkierie on his hand by his teacher. She questioned him about what happened and left it there. On 08 August 2015 O[...]'s hand changed colour and turned blue. On 10 August 2015 she took him to the clinic for medical treatment. There was however no improvement. On 19 August 2015 she took him back to the clinic and was referred to a hospital, for further medical treatment. She also reported the incident at the school.

[3] Mr. Jeremiah Kganakgomo, a teacher at the school, testified and confirmed that Ms. Bonolo Bonokwane was employed on contract at the school as a child-minder. Approximately one to two weeks after the alleged incident, Ms. J[...] reported to him about the incident. He referred her to the principal of the foundation phase of the school. He did not confront Mrs. Bonolo Bonokwane about the incident. That concluded the evidence tendered on 26 February 2024. The matter was adjourned until the following day for further evidence to be led. It must be mentioned that on 26 February 2024 there was no appearance on behalf of the defendant, the MEC.

[4] On 27 February 2024 there was appearance on behalf of the defendant. An application was made from the bar for the postponement of the matter. This informal application for a postponement was unopposed. This Court granted a postponement until 07 and 08 October 2024. Costs were reserved. On 07 October 2024, the matter was once more postponed until 08 October 2024, at the request of

the defendant. Both Ms. J[...] and Mr. Kgamakgomo were subjected to cross-examination on 08 October 2024.

[5] Ms. J[...] was confronted with what she told one Dr. Pienaar, namely that she (Ms. J[...]) was informed about the incident by her niece and not by O[...], which she confirmed. She however reiterated that she was also told by O[...]. Furthermore, she denied that O[...] sustained a burn mark on his hand and that his hand was injured because of the burn sustained and not the assault. She was also confronted with the fact that in her statement to the police, she mentioned a stick and not a knobkierie, to which she replied that O[...] told her that it was a knobkierie. It was put to this witness that Mrs. Bonolo Bonokwane will deny that she assaulted O[...]. Not much turns on the cross-examination of this witness and her evidence is accepted by this Court.

[6] Mr. Kganakgomo was also subjected to cross-examination. He was asked whether he reported the incident to his seniors. He confirmed that he referred Ms. J[...] to the principal. He had no knowledge of the alleged assault incident nor did he see the child after the incident. He heard about the incident approximately a week or two after it allegedly happened, when Ms. J[...] informed him about it. As with the evidence of Ms. J[...], not much really turns on the cross-examination of this witness.

[7] Ms. Monyela, an educational psychologist, testified as an expert witness for the plaintiff. Her expertise was not disputed and based on her qualifications and experience she was declared an expert witness by this Court. Her evidence was to the effect that on 16 January 2023, she compiled an assessment report about a consultation with O[...]. She also compiled a joint minute together with Dr. Pienaar, the educational psychologist of the defendant. She testified that O[...] was a child of average intelligence, based on the tests she conducted. He was injured at a vulnerable stage of his development. This resulted in him performing far below the accepted level for his age. He could spell the alphabet instead of words.

[8] The incident affected his emotional functioning. He is fearful and does not feel safe. He cannot write nor spell words. The more years go by, the more his performance drops. He can count but cannot apply numbers. He does not cope. She identified him for placement in a special school. This incident negatively impacted his future development. Whereas he would have achieved matric pre-incident, he would only achieve Grade 9 post-incident. He lost out on the foundational phase of learning. He has no educational potential.

[9] During cross-examination she denied that Ms J[...] told her that O[...] had delayed language development; only started walking at the age of sixteen months; said new words only at the age of three years; and was potty-trained only at the age of five years. Asked if she was told this by the mother, would she still have the same opinion that because of the incident, O[...] was identified to go to a special school. To this, she replied that one must look at other things if it was not for the incident. Things can still change, and the child can still learn. However, this incident happened at a very vulnerable stage of O[...]'s development. She was steadfast in her opinion. She stated that Dr. Pienaar's opinion, insofar as it differs from hers, is wrong.

[10] Ms. Van Der Schyff, an industrial psychologist, was called as an expert witness for the plaintiff. Likewise, her expertise was not disputed and based on her qualifications and experience, she was declared an expert witness by this Court. She testified that she assessed the consequences that the incident had on O[...] and she provided an expert opinion on the *sequelae*. During consultation, O[...] allowed his mother to answer the questions posed to him. His mother was over-bearing. She would pose questions in English, and he would answer in Setswana. His mother said pre-incident when he was five years of age, he was fine. He obtained a certificate of competence in Grade R. Looking at the report compiled by Ms. Monyela, O[...] would pass Grade 12 and would go on to obtain a diploma at level NQF 6, between the medium to upper quartile. He would easily have qualified,

because of his average intellectual ability and she would place him at Paterson Level B.

[11] According to her, this incident happened when O[...] was at the tender age of six years. It negatively affected his psychological well-being. Post-incident, he will struggle to obtain Grade 12. He needs to be placed in a special school. He failed Grade 3. He will only be employed in the informal sector doing unskilled labour and mostly light work. During cross-examination, she testified that she did not see Dr. Pienaar's report. What the mother, Ms. J[...], told her differs from what she told Dr. Pienaar. However, despite this, even if she was told, her opinion would still be the same. She stands by her opinion and report. Being confronted by the fact that whilst O[...] passed Grade 1 and 2 but failed Grade 3, she replied that this is still in the foundation phase. The school should answer that. However, he can still develop. When she asked Ms. J[...] whether there were developmental delays, she said that there were none. She disagrees with Van Zyl who opined that O[...] would follow his mother and amount to nothing in life. She stands by her opinion and the reports she compiled.

[12] On behalf of the plaintiff, an attempt was made to hand in an actuarial report, without the proper procedure being followed. An objection was raised because it was handed in on the morning of the trial, at court, to the defence. There was no explanation proffered why the actuary could not testify and why his/her report should be accepted on affidavit in terms of Rule 38(2). No explanation was also advanced why the report was not timeously filed and served. Because the correct procedure was not followed, this Court refused the acceptance of the actuarial report into evidence. The case on behalf of the plaintiff was closed. An application for absolution from the instance was made, which was refused by this Court, based on the overwhelming evidence presented during the case for the plaintiff.

[13] On behalf of the defendant, an informal application was once more made from the bar by counsel for the postponement of the matter, which was refused by this Court.

It is not difficult to comprehend why an unmeritorious application was made for absolution from the instance, followed by an unsubstantiated informal application for a postponement from the bar. Reason being simply because the defendant was once again not ready to proceed with the trial. The defendant had no witnesses available to proceed and the defendant then closed its case without presenting any evidence.

[14] It is trite that a postponement is not for the mere asking. In **Myburgh Transport v Botha t/a S.A Truck Bodies** 1991 (3) SA 310 (NMS), Mohamed AJA at paragraph [8] outlined the relevant legal principles in considering a postponement as follows:

> *"1. The trial Judge has a discretion as to whether an application for a postponement should be granted or refused (R v Zackey 1945 AD 505).*
>
> *2. That discretion must be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons. (R v Zackey (supra); Madnitsky v Rosenberg 1949 (2) SA 392 (A) at 398 - 9; Joshua v Joshua 1961 (1) SA 455 (GW) at 457D.)*
>
> *3. An appeal Court is not entitled to set aside the decision of a trial Court granting or refusing a postponement in the exercise of its discretion merely on the ground that if the members of the Court of appeal had been sitting as a trial Court they would have exercised their discretion differently.*
>
> *4. An appeal Court is, however, entitled to, and will in an appropriate case, set aside the decision of a trial Court granting or refusing a postponement where it appears that the trial Court had not exercised its discretion judicially, or that it had been influenced by wrong*

principles or a misdirection on the facts, or that it has reached a decision which in the result could not reasonably have been made by a Court properly directing itself to all the relevant facts and principles. (Prinsloo v Saaiman 1984 (2) SA 56 (O); cf Northwest Townships (Pty) Ltd v Administrator, Transvaal, and Another 1975 (4) SA 1 (T) at 8E - G; Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 (A) at 152.)

5. *A Court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics and where justice demands that he should have further time for the purpose of presenting his case. Madnitsky v Rosenberg (supra at 398 - 9).*

6. *An application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. Greyvenstein v Neethling 1952 (1) SA 463 (C). Where, however, fundamental fairness and justice justifies a postponement, the Court may in an appropriate case allow such an application for postponement, even if the application was not so timeously made. Greyvenstein v Neethling (supra at 467F).*

7. *An application for postponement must always be bona fide and not used simply as a tactical manoeuvre for the purposes of obtaining an advantage to which the applicant is not legitimately entitled.*

8. *Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of a Court will be exercised. What the Court has primarily to consider is whether any prejudice caused by a postponement to the adversary of*

the applicant for a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanisms. (Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa 3rd ed at 453.)

9. *The Court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not.*

10. *Where the applicant for a postponement has not made his application timeously, or is otherwise to blame with respect to the procedure which he has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the Court in its discretion might allow the postponement but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such a respondent on the scale of attorney and client. Such an applicant might even be directed to pay the costs of his adversary before he is allowed to proceed with his action or defence in the action, as the case may be. Van Dyk v Conradie and Another 1963 (2) SA 413 (C) at 418; Tarry & Co Ltd v Matatiele Municipality 1965 (3) SA 131 (E) at 137."*

[15] The issue of liability is best considered, having regard to what was said by the Supreme Court of Appeal in **Centre for Child Law and Others v South African Council for Educators and Others** (1289/2022) [2024] ZASCA 45; 2024 (4) SA 473 (SCA) (9 April 2024):

"[1] This appeal finds its genesis in an application brought primarily by the first appellant, the Centre for Child Law, to review and set aside the decision of the first respondent, the South African Council for Educators (SACE) in disciplinary proceedings against two educators, who

assaulted children in the school environment. The complaint was that the 2016 Mandatory Sanctions that applied at the time were unlawful, as they did not provide for the exercise of any discretion when imposing a sanction and did not provide for any rehabilitative or corrective sanctions. The disciplinary proceedings also fell short as they did not allow for meaningful participation by the learners and their parents in the hearings. During 2020, SACE revised the mandatory sanctions but the appellant and the Children's Institute, that was admitted as amicus curiae, were still not satisfied that the amended mandatory sanctions catered for the best interests of the child. In addition, they failed to follow a child centred approach and the sanctions to be imposed did not provide for any rehabilitative measures to address the unlawful conduct of the educators.

…

Background

[5] This case concerns the disciplinary proceedings by SACE of two educators. Ms Mokoena assaulted TZ and NT, during August 2015, with a piece of PVC pipe; both learners were in grade two at the time. TZ allegedly started having headaches that became progressively worse and was eventually hospitalised for two weeks and had to undergo emergency surgery for a brain haemorrhage. During his hospital stay Ms Mokoena visited him and allegedly threatened him not to tell anyone of the assault. TZ's mother set out in a supporting affidavit how this incident had negatively impacted on TZ's life. The other incident concerns Ms Sathekge who assaulted MPM by hitting her on the head. Her mother said she bled from her ear, was taken for several medical examinations, and was admitted to hospital twice. Her mother also explained how this incident negatively impacted on MPM's life. SACE

disputed that these injuries were caused by the assaults as well as the severity and consequences of the assaults.

[6] During 2019 the mothers of both children were assisted by their attorneys in lodging formal complaints with SACE against the two teachers. SACE investigated the matters and recommended that both teachers be charged with assault. Ms Mokoena pleaded guilty to four breaches of SACE's Code of Professional Ethics (the Code), which included two charges of assault and two charges of threatening the children not to report the assault. Ms Sathekge pleaded guilty on one charge of assault. Ms Sathekge's disciplinary hearing occurred on 18 September 2019 and Ms Mokoena's hearing was on 20 September 2019.

…

*[18] **The South African Schools Act 84 of 1996 in s 10 outlawed corporal punishment in all schools and by doing so ensured that no child should be subjected to any form of physical violence in the school environment. This legislative prohibition should have been the end of any notion that an educator is allowed or justified to use any form of physical violence against a learner. Sadly, as illustrated by the incidents that form the subject matter of this case and the expert evidence provided by the amicus, corporal punishment is still rife in the school environment**.*

*[19] **In a society besieged by violence this must be of grave concern, and it cannot be gainsaid that violence as a form of ensuring corrective behaviour should be addressed at its roots. In the process of creating an environment that is conducive to the protection and development of children as citizens who will not resort to violence as a solution to conflict. It is imperative that educators not only be prohibited to resort to physical violence as***

a form of discipline, but also be assisted to develop the necessary skills to discipline appropriately and with the required measure of personal control. It is by example that children are taught to navigate a complex conflict-ridden world, without resorting to violence as a solution*." (own emphasis)*

[16] This Court must, in the absence of evidence from the MEC, decide this matter solely on the evidence presented during the plaintiff's case. The evidence that O[...] was assaulted by Ms. Bonolo Bonokwane which by the way is also a contravention of section 10 of the Schools Act 84 of 1996, was not gainsaid by the MEC. The evidence of the plaintiff on the issue of liability is therefore accepted by this Court.

[17] I now turn to the issue of quantum on general damages and loss of earning capacity. In the absence of an actuarial report, this Court is called upon to weigh up all the facts and circumstances inherent in the case for the plaintiff. Comparable cases may serve as a useful guide without constituting a rigid tariff. This Court needs to determine the quantum of damages suffered based on what is fair, just and equitable under the circumstances of this case.

See: **Sigournay v Gilbanks** 1960 (2) SA 552 (A).
Corbett: The Quantum of Damages. Vol I. Fourth Edition by Gauntlett on page 33.

[18] The quantification of an award for general damages should not pose a problem. This Court as duty bound to do, will take into account all the relevant peculiar facts, factors and circumstances germane to this case to determine an appropriate amount of compensation, as a *solatium* for general damages.

[19] In **The MEC for Education, Eastern Cape Province v AM obo KP** 2017 (7C4) QOD 9 (ECG), as per the Quantum of Damages Juta, a claim was instituted by the plaintiff mother on behalf of her minor son, a Grade 9 learner against the MEC for

Education Eastern Cape. The claim arose from an assault by an educator employed by appellant. On the day in question the learner was in a classroom in a secondary school with other learners. The noisy learners were admonished by the educator to keep quiet and he departed from the classroom. Upon the educator's return to the classroom he found the learner in a spot where he was not normally seated. He kicked the learner on his back, causing him to slouch. The learner experienced pain on his back and had to be assisted by a friend to carry his bag home. He was unable to move his left arm and was in pain, forcing him to stay away from school for three days. His back was still painful two years down the line and he experienced significant distress for approximately 10 months after the incident. Although the experts disagreed, the court found that the learner was correctly diagnosed by respondent's expert with Adjustment Disorder with Depressed mood. It also found that the assault was the critical event that led to the learner's psychological downward spiral. He even attempted to commit suicide. The appeal against the decision of the Magistrates' Court, awarding general damages of R130 000.00, was upheld and an award of R40 000.00 was made in favour of the plaintiff.

[20] In **Bennet v Minister of Police** 1980 (3) SA 24 (C) the plaintiff's hands were beaten by the police officer with a wooden baton resulting in two broken fingers. The plaintiff claimed R2000.00 for general damages arising from his bodily injuries and R1500.00 for general damages for *iniuria*. The court awarded R600.00 and R50.00 under these respective heads. The R600.00 monetary value equates to R17 000.00 in 2017.

[21] In **Njoko v Minister of Safety and Security and Another** 2011 (5) SA 512 KZP the plaintiff was shot in the right upper arm and chest. An amount of R250 000.00 was awarded for general damages.

[22] In **Nel v Sun Insurance** 1950 (1) Corbett and Buchanan at page 362, the plaintiff suffered fractures to her right wrist and fingers and a disorganization of the carpal

bones. The plaintiff developed osteo-dystrophy. The wrist had to be fixed in a permanent position. The plaintiff relied mainly on the left hand and became left-handed. For pain and suffering, loss of amenities of life and disfigurement, the plaintiff was awarded £250, a figure which equates to R62 000.00 in 2017.

[23] In **Pretorius v Ocean Accident & Guarantee Corporation Ltd** 1951 (1) Corbett & Buchanan page 367, the plaintiff suffered a fracture of the bone of the fifth metacarpal of her left hand together with a chip fracture of the bone of the fourth metacarpal, and a fracture of the articular surface of her radius. The injuries healed but she was left with a partial permanent disability of the left wrist and hand. Damages equating to R116 000.00 in 2017 were awarded.

[24] In **Jordan v Eagle Star Insurance Company** 1955 (1) Corbett & Buchanan on page 359, the plaintiff, an elderly lady, fell from a bus and fractured her right wrist, rendering her hand virtually useless. Damages equating to R78 000.00 in 2017 were awarded.

[25] In **Botha v Miodownik & Co. (Pty) Ltd** 1966 (3) SA 82 (W), the plaintiff sustained a serious fracture to his left wrist necessitating two operations. He was unable to play rugby and to do gymnastics and be a body builder. Damages equating to R80 000.00 in 2017 were awarded.

[26] The injuries suffered by the plaintiff in this case are comparatively considered, less severe to the injuries sustained in the aforementioned cases. This must be taken into consideration in the award of an amount for general damages.

[27] In respect of the claim for loss of earning capacity, the onus remains on the plaintiff to prove her case on a balance of probabilities. This by implication requires of the plaintiff to adduce sufficient evidence on the *sequalae* of the injury causing event, to enable this Court to assess and quantify the loss of earning capacity of O[...], as alleged by the plaintiff.

[28] In **Pretorius v Road Accident Fund** (49425/2014) [2017] ZAGPPHC 353 (29 March 2017), Petersen AJ (as he then was) opined as follows on the issue of earning capacity:

> *"[13] It is accepted that earning capacity may constitute an asset in a person's patrimonial estate. If loss of earnings is proven the loss may be compensated if it is quantifiable as a diminution in the value of the estate. The law in this regard is trite as is demonstrated in a very useful exposition of the law related to a claim for diminished earning capacity, where the learned Judge in Prinsloo v Road Accident Fund 2009 5 SA 406 (SECLD) at 409C-41QA, quotes extracts from locus classicus on the subject:*
> *Santam Versekeringsmaatskappy Bpk v Byleveldt 1973 2 SA 146 (A) where the following was said at 1508-D:*
>
> > *"In 'n saak soos die onderhawige word daar namens die benadeelde skadevergoeding geeis en skade beteken die verskil tussen die vermoensposisie van die benadeelde vir die onregmatige daad en daarna. Kyk, bv, Union Government v Warneke 1911 AD 657 op bl 665 ... Skade is die ongunstige verskil wat deur die onregmatige daad ontstaan het. Die vermoensvermindering moet wees ten opsigte van iets wat op geld waardeerbaar is en sou insluit die vermindering veroorsaak deur 'n besering as gevolg waarvan die benadeelde nie meer enige inkomste kan verdien nie of alleen maar 'n laer inkomste verdien."*
>
> *Dippenaar v Shield Insurance Co Ltd 1979 2 SA 904 (A) the following was said at 9178-D:*

"In our law, under the lex Aquilia, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate."

[14] The difficulty in quantifying the monetary value of loss in claims of this nature is succinctly stated in Terblanche v Minister of Safety and Security and Another 2016 (2) SA 109 (SCA) at para [14]:

"The difficulty with claims of this nature is generally not so much the recognition that earning capacity constitutes an asset in a person's estate, but rather the quantification of the monetary value of the loss of earning capacity by a trial court. Each case naturally depends on its own facts and circumstances, as well as the evidence before the trial court concerned."

[15] The approach to adjudicating loss of earnings is often argued from the perspective of the passage found at 113F-114E of the locus classicus of Southern Insurance Association v Bailey NO 1984 1 SA 98 where it was said:

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

It has open to it two possible approaches.

One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guess-work, a blind plunge into the unknown.

*The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. **The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative**.*

It is manifest that either approach involves guess-work to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award. See Hersman v Shapiro and Company 1926 TPD 367 at 379 per Stratford J:

"Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages."

[16] I agree with the salutary practice proposed in the above quoted paragraphs of Bailey. It has mustered approval in numerous judicial pronouncements and is widely accepted as the best practice available. I wish to add however, what the learned judge said further at page 379, which is omitted in Bailey. The two sentences which follow immediately upon the quote in Bailey are apposite:

"…It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit a mathematical calculation of the damage suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based on it."

[17] In Lazarus v Rand Steam Laundries (1946) (PTY) LTD 1952 (3) SA49 (T), Bressler AJ, concurring with De Villiers J, elaborated on the duty of the appellant to prove her damages. At page 53 at paras B-F:

"... We were urged, on the authority of Turkstra Ltd v Richards, 1926 T.P.D. 276, to find that, as there was an admission of damage, the Court should not be deterred by reason of the difficulty of computing an exact figure from making an award of damages...In Turkstra v Richards there was an actual valuation, 'an estimate of some sort', in the language of Stradford, J.(as he then was)...It does not seem to me that Turkstra v Richards, supra, meant that, given one or two facts, including that of damages, a judicial officer should then be required to grope at large in order to come to the assistance of a litigant, especially one whose case has been presented in such a vague way. It seems to me that the judicial officer must be placed in such a position that he is not called upon to make an arbitrary or merely speculative

assessment, a state of affairs which would result in injustice to one of the parties..."

[29] It was contended on behalf of the plaintiff that in the absence of the actuarial report, this Court should approach the calculation of damages suffered, based on the report and postulations provided by the industrial psychologist. It was further contended that "*there is no reason for the court not to agree with Ms. Van der Schyff's opinion and conclusions and the court should therefore follow her postulations in determining the amount of compensation for the damages suffered by the child."*

[30] The following postulations were submitted:

"• *He would obtain a diploma in 2030, aged 21 and earn a minimum wage of R50 755.00 per annum; After gaining occupational experience, likely at the age of 22 in 2031, he would earn R72 100.00 per annum;*

• *His earnings would progress via straight line on par with skilled workers with earnings of R191 000.00 by the time he reaches the age of 30;*

• *At the age of 31, he would have gained experience related to his qualification and secured employment in the corporate sector with earnings comparable to a Patterson Level B3 of R218 000.00 per annum;*

• *With time and experience and the acquisition of additional skills, he could have progressed further in his career via straight line increases to reach his career and earning pinnacle by the age of 45, with comparable earnings to a Patterson Level C4 of R624 000.00 per annum;*

- *In the scenario it is assumed that the child would have proceeded to receive straight line increases until he reached the normal retirement age of 65;*

- *In the absence of the actuarial calculations the determination of the amount by the court must be guided by the uncontested and tested evidence of Ms. Van Der Schyff. Following Ms. Van Der Schyffs postulations in her report and her figures as referred to above, we submit that the calculations should be as follows:*

<u>Pre-morbid earning capacity</u>

- *Age 21 - R50 755,00 (p/a) X 1 year= R50 755.00;*
- *Age 22 to age 30 - R72 100.00 (p/a) X 8 years= R576 800.00;*
- *Age 31 to age 45 - R218 000.00 (p/a) X 14 years = R3 052 000.00;*
- *Age 46 to age 65 - R624 000.00 (p/a) X 19 years = R11 856.000.00;*

Total = R15 535 555.00.

<u>Post-morbid earning capacity</u>

- *Age 22 to 25 - R50 755,00 (p/a) X 4 years = R 203 020.00;*
- *Age 26 to age 31 - R131 000.00 (p/a) X 6 years = R786 000.00;*
- *Age 32 to age 47 - R196 000.00 (p/a) X 16 years = R3 136 000.00;*
- *Age 48 to age 65 - R439 000.00 (p/a) X 18 years R7 902 000.00;*

Total = R12 027 020.00.

The difference = R15 535 555.00 (pre-morbid)
= R12 0270.00 (post-morbid)
= R3 508 535.00 (the loss)"

[31] I differ with the aforesaid contentions. Ms. Van der Schyff is not an actuary. Much as this opinion may well be a guide, this Court is not bound to slavishly follow it. This Court has an unfettered discretion, to be exercised judiciously, to determine an amount of damages that is just, fair and equitable, as already alluded to earlier. Sight should not be lost of the fact that O[...] did not lose the use of his hand and neither has he been rendered disabled in that regard. He suffered pain and discomfort for approximately two weeks in total, received medical treatment at a clinic and in hospital, and there is no evidence of any permanent disability.

[32] There is also no evidence that O[...] in future will not overcome his fear and anxiety. The fact that he failed Grade 3 cannot be ascribed to what happened to him in Grade R, as he passed Grade 1 and 2 after the incident. Ms. Monyela conceded that “things can still change” and “he is a child of average intelligence” and “the child can still learn.” O[...]’s future is definitely not destined for doom. He has retained his learning ability and is described as a child of average intelligence. Being asked if her opinion would still be the same had she been told of O[...]’s late development, she replied that one has to look at other things, if this incident did not happen at such a vulnerable stage of his development. What those “other things” are were not postulated by Ms. Monyela.

[33] The postulations of Ms. Monyela and Ms. Van der Schyff, respectively moves from the premise that O[...] is psychologically scarred which will affect his future prospects in life. Glaringly absent from their reports is the collateral information that O[...], prior to the incident, suffered developmental milestones pointing to late development. The general speculative hypotheses that O[...] will be affected by the incident in future, does not favour the case for the plaintiff, that O[...]’s earning capacity will be so detrimentally and adversely affected because of this single incident.

[34] The only answer Ms. Monyela could proffer regarding O[...]’s slow developmental milestones, as indicated above, is that one would have to then look at “other

things", which have not been explained to this Court. Ms Van der Schyff equally provides no cogent answer to this conundrum. This Court is not swayed by the evidence of these experts and does not accept the offer by the plaintiff to equally embark on conjecture and speculation in quantifying damages on O[...]'s alleged reduced earning capacity.

[35] As referred to in **Pretorius v RAF** *supra* at paragraph 19 of that judgment:

> *"[19] In conclusion, an analogous situation arose in an unreported appeal of the Gauteng Local Division, Boy Petrus Modise and Passenger Rail Agency of South Africa Case number A5023/2013 (11 June 2014) at para [10]. On appeal against the dismissal of a claim for damages for loss of earnings and damages for future loss of earnings, Wright J, Carelse J concurring, held:*
>
> > *"This is an unfortunate case. One suspects that the plaintiff did suffer a past loss of earnings and will suffer future loss of earnings. However, I may not allow a suspicion, nor my sympathy for the plaintiff, to translate into a basis for awarding damages where the evidence does not allow this. The variables in the equation are simply too many."*
> > *(own emphasis)*

[36] The plaintiff has failed to prove that O[...] will suffer a reduction in his earning capacity. No award will therefore be made for loss of earning capacity based on the evidence of Ms. Monyela in particular, and the evidence as a whole in general.

Order

[37] Resultantly, the following order is made:

(i) The defendant is liable for 100% of the plaintiff's proven damages.

(ii) The defendant shall pay to the plaintiff an amount of R 30 000.00 for damages suffered as a result of the assault.

(iii) The defendant shall pay the costs of suit on a party and party basis on the Magistrate Court scale, to be taxed.

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R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG