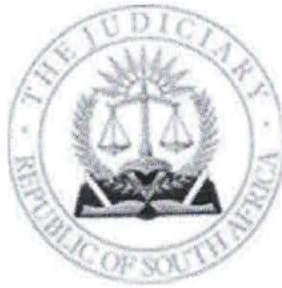
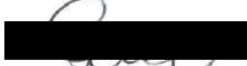


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 78908/2018

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
30/7/24	
DATE	SIGNATURE

In the matter between:

LAURA NTHABISENG

MOFOKENG

Applicant

and

ROAD ACCIDENT FUND

Defendant

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 10:00 am on 30 July 2024.

Summary: Application for leave to appeal – The decision is not appealable. The legislated and applicable test is not met. The application for leave to appeal is refused with no order as to costs.

JUDGMENT- LEAVE TO APPEAL

MOSHOANA, J

Introduction

[1] The present application pertains to a relief for leave to appeal against a decision not to give default judgement on the claim for loss of earning capacity. As expected, this application remains unopposed. This despite the application been served and notification been given. It is important to highlight at this very early stage that the defence of the Road Accident Fund (RAF) in the main action was struck out. The implication thereof being that the matter proceeded before this Court on a default basis. However, the present being a new application seeking a relief for leave to appeal, there was nothing that prevented the RAF to have opposed it. The fact that the defence of the RAF was struck out at some stage does not mean that the RAF cannot argue that the impugned decision is not appealable and that the test contemplated in section 17(1) of the Superior Courts Act¹ has not been met.

[2] That notwithstanding, this Court did not expect the RAF, given its unpalatable popular stance, to oppose the present application. This Court must again emphasis that absence of opposition does not transmute into the impugned decision being rendered appealable and the satisfaction of the legislated test. The applicant remains saddled with the obligation to demonstrate that the impugned decision is appealable and that the legislated test has been met.

Background facts appertaining the present application

[3] On 13 June 2024, in a written judgment, this Court refused to make an award of the special damages claim in respect of the loss of earning capacity that was sought by way of a default judgment by the applicant. The applicant was only aggrieved by a

¹ Act 10 of 2013 as amended

decision to refuse to give default judgment in respect of the loss of earning capacity claim.

Analysis

[4] Given the limited basis of the present application, it is unnecessary for the purposes of this judgment to regurgitate the applicable test in an application of this nature. It suffices to mention that, in my opinion, the impugned decision is not appealable and another Court will not reach a different conclusion other than the one reached by this Court; namely of refusing to give a default judgment in respect of the claim for the loss of earning capacity. The applicant, in her application for leave to appeal, wrongly contends that this Court dismissed her claim for loss of earning capacity. As argued by Mr Bam, appearing for the applicant, the basis of the contention is what the summary (headnote) records. A summary is not part of the order. The order of this Court is very clear. Nowhere in the order does the Court dismiss the claim for loss of support. However, what is apparent is that this Court indeed refused to give a default judgment in respect of the claim for the loss of earning capacity. It is by now settled law that an appeal lies against an order as opposed to the reasons of the order². Similarly, no appeal shall lie against the summary of the impugned judgment.

[5] This Court, contrary to the assertion of the applicant, did not dismiss the loss of earning capacity claim but simply refused to give judgment on it by default and reasoned that there was no sufficient evidence adduced to support the claim. It is indeed so that a Court judgment may be subjected to the same interpretative exercise developed and perfected by the *Endumeni* case. *Apropos* the impugned judgment when considered as a whole, it being a default judgment, it follows that this Court refused to give judgment in favour of the applicant on the claim of loss of earning capacity.

[6] The veritable question to be addressed in the present application is whether the refusal to give default judgment or better still to dismiss a default judgment claim is appealable or not. I promptly turn to that question. As a prelude, before I make the proposed turn, I must point out that in terms of section 16(1) of the Superior Courts

² *Neotel (Pty) Ltd v Telkom SA SOC Ltd and others* [2017] ZASCA 47 (31 March 2017).

Act an appeal lies against a decision. The Supreme Court of Appeal in the matter of *Zweni v Minister of Law and Order of the Republic of South Africa*³ usefully resolved that a decision that is appealable is one that (i) is final in effect and not susceptible to alteration by Court of first instance; (ii) is definitive of the rights of the parties, it must grant definitive and distinct relief; (iii) is having the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings⁴. For the purpose of this judgment, it is unnecessary to enter the debate as to whether the *Zweni* test was jettisoned or supplemented by the 'interests of justice' requirement when it comes to appealability of a decision. What this Court did in this instance was to refuse to give a default judgment in respect of a claim for loss of earning capacity. Refusing to grant a default judgment is indeed a decision, however, the question is, is it an appealable decision or not?

The law on default judgments.

[7] As always, the departing premise is the supreme law. Section 34 of the Constitution of the Republic of South Africa, 1996 (Constitution) provides that everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a Court. It has long been held that every law or conduct must be interpreted or viewed within the prism of the Bill of Rights⁵. Section 23 of the Superior Courts Act decrees that a judgment by default may be granted and entered by the registrar of a Division in the manner and in the circumstances prescribed in the rules, and a judgment so entered is deemed to be a judgment of a Court of the division. *Absa Bank Ltd v Mkhize*⁶ decision found that a judgment by default is a judgment entered or given in the absence of the party against whom it is made. Without a scintilla of doubt, had this Court given judgment in favour of the loss of earning capacity claim, such would have been a default judgment.

[8] Rule 39(1) of the Uniform Rules of Court provides that if, when the trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him or [her] and judgment shall be given

³ 1993 (1) SA 523 (A).

⁴ See *Marsay v Dilley* 1992 (3) SA 944 (A).

⁵ See *Khumalo v Holomisa* 2002 (8) BCLR 771 (CC) at para 21.

⁶ 2014 (5) SA 16 (SCA).

accordingly, in so far as he [she] has discharged such burden. Properly understood, this rule empowers a Court to give judgment, in the absence of the defendant (default judgment), only in instances where the burden of proof is discharged by the plaintiff. The opposite is that where a Court is not satisfied that the burden of proof has been discharged, it shall not give a favourable judgment. The burden of proof contemplated in this rule is one where a duty is cast upon a litigant to finally satisfy the Court that he or she is entitled to succeed on his or her claim⁷. Typically, absent the defendant party, who ordinarily pray for the dismissal of a claim, a Court, in an instance where the burden of proof is not discharged, will simply not give the relief sought.

[9] What obtained in *casu* is that the Court was not satisfied that the applicant had discharged her burden of proof in so far as the claim for the loss of earning capacity is concerned. This, which the Court did in the present instance equates an absolution from the instance within the contemplation of subrule 39(6). Like an absolution from the instance order, the effect of what this Court did is to leave the parties, in so far as the loss of earning capacity claim is concerned, in the same position as if the case had never been brought, as such this “decision” not to give judgment on the loss of earning capacity claim does not amount to *res judicata* and the applicant, if so advised, is entitled to proceed afresh⁸.

[10] To my mind, this Court had not given a default judgment sought by the applicant but refused to give a default judgment. It can also not be said that this Court had issued an order granting an absolution from the instance. The RAF was not in Court to have applied for such an order. In the circumstances, the cardinal question is, is the refusal to give a default judgment appealable or not. This is the question I now turn to.

Is the decision not to give judgment by default appealable?

[11] This question is akin to the question whether refusal to grant a summary judgment is appealable or not. In *Luke Jim v Active Power (Pty) Ltd*⁹ the appeal Court of the Mpumalanga Division of the High Court of South Africa, as beacons by the

⁷ See *Pillay v Krishna* 1946 AD 946 at 952; *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548A.

⁸ See *Minister of Police v Gasa* 1980 (3) SA 387 (N) at 389D-E and *Sparks v Sparks* 1998 (4) SA 714 (W) 721A-H

⁹ Unreported judgment case number A121/2018 dated 21 June 2019

erudite Ratshibvumo AJ and Langa AJ, guided by *Kgatlhe v Metcash Trading Ltd*¹⁰ held that as a general rule, an order refusing a summary judgment is not appealable for reason that it is an interlocutory order that does not have the effect of a final order. *Mutatis mutandis*, this Court reaches a conclusion that a refusal to give a default judgment is interlocutory in nature and has no final effect, thus unappealable. On this singular basis alone, the present application falls to be refused. Should it not lead to a refusal, the next question is whether the present application satisfies the legislated test. This is the question I turn to next.

Does the present application satisfy the test in section 17(1)?

[12] Even if the decision not to give a default judgment is appealable, this Court takes a view that the present application fails to meet the legislated test. A claim for loss of earning capacity simply implies that a person has lost a capacity to earn an income. The legal concept of earning capacity considers the ability of a person to choose occupations he or she is already qualified to perform or will be qualified to perform at some time in the future. It is the ability of a person to earn money. In *Tyler*¹¹, the learned Honourable Madam Justice Macdonald stated that in determining a claim for loss of future earning capacity, the Court must consider two questions. First, has the plaintiff's earning capacity been impaired by the injuries? To answer this question in the affirmative, there must be sufficient evidence that there is real and substantial possibility of future loss. This Court found that on the evidence presented before it in the main action, there was no evidence demonstrating real and substantial possibility of future loss of income. The orthopaedic surgeon opined that such a possibility is not real and substantial.

[13] There are instances where a person may completely lose the capacity to earn and there are instances where a person's earning capacity may be reduced. In this instance, the applicant did not adduce any evidence before this Court with regard to her alleged unemployability. What the reports reflected is that she resigned her job and such an act was opined to be one that is reasonable. Even if this Court were to have assumed that she resigned because of the chronic pain or some psychological and cognitive impairments, which is the sequelae of the accident she was involved in,

¹⁰ 2004 (6) SA 410 (T) at 416C

¹¹ *Ibid* fn 12.

this Court could not reach a conclusion that she was incapacitated to earn an income as in being unemployable, in the circumstances where there was objective evidence gainsaying unemployability until the applicant's unilateral act of resignation. There must be a marked difference between losing earning capacity and leaving a secured employment within one's capacity. The applicant pre-morbid had an earning capacity by being in employment. Post-morbid she retained the same employment or earning capacity. There was information that for a short duration after the accident her earning capacity was impaired. She was unable to go to work. She nevertheless did not lose any income during that period. However, for a period of three years she had regained her earning capacity. The only earning capacity she had was her employment. It became common cause that she lost her earning capacity through her unilateral act. There was no satisfactory evidence to connect her unilateral act to resign and her injuries. With these objective facts it was difficult for this Court to accept the opinions of the experts regarding the applicant's capacity to earn being impaired.

[14] During argument, counsel for the applicant placed a huge store on the decision of the full Court of this division, in the unreported judgment of *Advocate Sayed N.O Curator ad litem of B Tlokwa v Road Accident Fund (Tlokwa)*¹². The *Tlokwa* judgment is hugely distinguishable from the facts of the present case. It involved a minor child who was involved in an accident at the age of 9 years. Most importantly, he suffered severe head injuries which included a skull fracture, a haematoma in the temporal parietal region, a diffuse axonal injury and bleeding from the ear. The present applicant did not suffer any head injuries. Given the head injuries, the full Court accepted an opinion that the minor child will leave school early and will not possibly find employment. This Court concludes that the principle adopted in *Tlokwa* finds no application in the present case.

[15] This Court was not bound by the expert opinions, particularly in an instance where it can itself reach a conclusion without the appreciable help from the experts that the applicant was incapacitated to earn an income or unemployable¹³. The only person who could testify as to why she resigned after three years of having been

¹² Case number A187/2021 (15 November 2022)

¹³ See *Griffiths v Tui (UK) Ltd* (Rev1) [2021 EWCA Civ 1442 (07 October 2021)]; *Glenister v President of the Republic of South Africa* 2013 (1) BCLR 1246 (CC) paras 7-9; and *Tyler v Sowniski (Tyler)* 2022 BCSC 878 (CanLII).

gainfully employed, which equates capacity to earn, was the applicant herself. No such testimony was tendered. As to how she was coping or not coping, the experts may only relate what she told them, which of necessity constitute inadmissible hearsay evidence. In *Tyler* the Court correctly held that with regard to psychological injuries the medical experts ordinarily rely on the subjective complaints of the injured. The reliability and the credibility of such complaints depends on the evidence of the injured (See *Sandhu v Braich* (1991) 61 BCLR (2d) 273 at para 49 and *Samuel v Chrysler Credit Canada Ltd* 2007 BCCA 431 at para 44). Unlike in the *Tyler* judgment there was no evidence from the applicant with regard to the psychological injuries and their impact on her. A submission that there was best evidence by way of the inadmissible hearsay evidence of the experts does not hold water. In order to discharge an onus, admissible evidence is required.

[16] In the circumstances, another Court will equally not be bound by experts' opinions if appreciable help does not arise in order for itself to answer the following relevant questions as outlined in *Brown v Golaiy (Brown)*, where Finch J stated that:

"The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

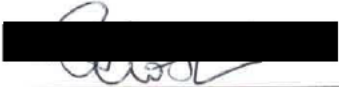
1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have not been open to him, had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market

[17] A Court would not necessarily require the help of an expert in order to make the assessment outlined above. Sight cannot be lost that expert findings, even where they are supported by uncontroverted evidence, they remain speculative hence they are referred to as opinion evidence. Generally, opinion evidence is

inadmissible primarily because of its speculative nature. In an instance where the speculation is defeated by a factual situation, such as the applicant being capable of earning income for a solid three years period after the accident, such a speculation remains unhelpful to a Court. It remains the duty of a Court and not an expert to reach a conclusion that a particular litigant has lost capacity to earn an income regard being had to all the prevailing circumstances. The factual position that obtained was that the applicant returned to employment and earned income for three years before resigning. Accordingly, this Court is not of an opinion that another Court will reach a different outcome and that there are compelling reasons for an appeal to be heard. For all the above reasons, I make the following order:

Order

1. The application for leave to appeal is refused with no order as to costs.



GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For Plaintiff:	Mr J Bam
Instructed by:	Ehlers Attorneys, Pretoria.
For Defendant:	No appearance
Date of the hearing:	26 July 2024
Date of judgment:	30 July 2024