

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 065430/2024

DATE: 21-02-2025

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

DATE 21/2/2025

SIGNATURE [REDACTED]

10 In the matter between

HOSANA LAWRENCE NGOBENI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

WEIDEMAN, AJ: The plaintiff in this matter instituted
action against the Road Accident Fund (RAF) for injuries
20 sustained in a motor vehicle accident as a pedestrian.

Earlier discussions between the plaintiff and the RAF had
led to the aspect of liability becoming settled on the basis
of a 90% apportionment in favour of the plaintiff. This
settlement agreement is on CaseLines at 26-1.

Shortly thereafter a further offer of settlement was made and which led to the settlement of the aspect of general damages in an amount of R900 000. After the apportionment on liability, the nett amount was R810 000.

Plaintiff's claim for future medical expenses was settled on the basis of the awarding of an undertaking, limited to 90% of the plaintiff's future hospital, medical and ancillary expenses in terms of section 17(4)(a) of the Road Accident
10 Fund Act.

On 18 February, when this matter was called, the only outstanding aspect of the claim before court was loss of income and/or impairment of earning capacity.

At the commencement of the hearing, plaintiff's application in terms of Rule 38(2) for the evidence of four experts to be led on affidavit was heard and granted. These experts were Dr Kumbirai, an orthopaedic surgeon, Mr Sekati, an
20 occupation therapist, Mrs Kheswa an industrial psychologist and Mr Waisberg, an actuary.

In paragraph 7 of the particulars of claim, the plaintiff's injuries are tabulated as follows:

A fracture of the pelvis;

A fracture of the left acetabulum; and
A hematoma to the forehead.

The claim, as set out in paragraph 9 of the particulars of claim, is of historical interest only, given the settlements to which I have referred above.

In the heads of argument, the claim was reformulated on the basis that the plaintiff's claim for past loss of income
10 amounts to R234 662 and the claim for future loss of income and/or impairment of earning capacity amounts to R3 904 752.

Looking briefly at the reports of Dr Kumbirai and Mr Sekati, both confirm that the injuries and the sequelae of the injuries sustained in the accident would have long-term detrimental effects on the plaintiff's ability to earn an income. Both state that the sequelae of the injuries would limit the plaintiff's choices of employment in future.

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The court asked counsel to address it on the fact that, albeit that both experts state that the plaintiff is limited in his choices of future career or employment options, neither expresses the opinion that he will not be able to drive or work as a driver.

This is important as, but for a short stint as an ambulance assistant, all of the plaintiff's employment experience was as a driver. Counsel's response was that it is not for the orthopaedic surgeon or occupational therapist to express opinions as to whether the plaintiff would be capable of earning an income in future as a driver. The question then arises, if not them, then who? Who would be in a position to assess whether the plaintiff will be able to earn an
10 income as a driver in future?

The next report, and which is of crucial importance in the consideration of a claim for loss of income, is the report of the industrial psychologist, Mrs Kheswa. Mrs Kheswa sets out the plaintiff's employment history on CaseLines Pocket 08, pages 38, 39 and 40. Excluding the names of the individual employers, the periods of employment are tabulated as follows:

- December 2013 to June 2014;
- 20 August 2014 to January 2015;
- Unemployed for approximately two years;
- March 2017 to November 2017;
- November 2017 to April 2018;
- Fired for theft in April 2018, following which he was unemployed for approximately 3 years;

January 2022 to April 2022;

April 2022 to June 2022 (date of accident).

The above contradicts Mrs Kheswa's statement that the plaintiff had a positive and productive employment history. Factually, out of nine possible years of employment, the plaintiff was unemployed for five. This, in the court's opinion, does not constitute an exemplary employment history.

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An issue that was also raised with counsel, and in respect of which there was no satisfactory explanation, relates to what is referred to in the industrial psychologist's report as "*Employment Seven*" - CaseLines 08-40. This portion of her report relating to employment after the accident, is in conflict with itself.

It records that the plaintiff earned a salary of R500 per week, however in the following paragraph, next to a *nota bene* note, the following is recorded.

20

*"He would take 3000 to 3500 per week,
give the employer R1200"*

The implication of this statement on the plaintiff's post-accident income during the period of February 2024 to June

2024 is that the plaintiff's nett earning capacity, as a driver, after the accident, was between R1800 and R2300 per week. This statement by the plaintiff must be compared to his earnings affidavit, in which the plaintiff states that his pre-accident income fluctuated between R2000 and R2500 per week. The earnings affidavit seems to have been an afterthought as it was only signed on 28 January 2025 and uploaded on CaseLines on 14 February 2025, bearing in mind that the matter was called on 18 February 2025.

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Factually, the known post-accident income is the same as the income which the plaintiff averred in his affidavit to have earned before the accident. It is also important to note that the industrial psychologist was the only expert to whom the plaintiff conveyed that he terminated his employment with Taxify after the accident due his injuries. The version which the plaintiff gave to the orthopaedic specialist and occupational therapist, was that he left Taxify due to non-accident-related reasons.

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There must therefore be a question mark relating to the real reason why the plaintiff terminated his employment with Taxify and whether the expert evidence statements of limitation of future employment choices, without specifically excluding driving, must not be compared to the factual

evidence that he did work as a driver post-accident and terminated his employment due to non-accident related reasons.

It is important to note that there is no collateral information at all as to the plaintiff's pre or post-employment or income. To the extent that the plaintiff's averment is that he was employed by Bolt and by Taxify, both of which fall in the category of e-taxi services, records of his employment must
10 be available on the "Apps".

The fact that no attempt was made to obtain these records or to make them available to the industrial psychologist or the court and that no collateral information was provided must be taken into consideration when looking at the matter as a whole. The industrial psychologist's opinion and income predictions in respect of the plaintiff's current and future income were done on the basis that his income was in line with that of a taxi driver.

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On CaseLines at 8-43, when the 25th percentile median and 75th percentile of the income of a driver is given, the figures start with R2 000 per week and which is in line with the evidence or the averments made by the plaintiff, both to the industrial psychologist and in his earnings affidavit.

From R2 000 per week, the median (50th percentile) is reflected as R32 000 per month and which is clearly not correct. (4.1 x R2 000 is R8 200, not R32 000) From here it jumps to an annualised income of R96 000 per annum, which is also not correct. The figure of R96 000 per annum however correlates well with the plaintiff's averment that he earned R2 000 per week which renders an annualised income of R104 000. This figure was confirmed by the
10 actuary on CaseLines 08-57.

The problem arises with the theoretical projection thereafter. The plaintiff indicated to the industrial psychologist that it was his dream to be a driver-owner of a taxi. The industrial psychologist took this aspiration and projected it forward as if it would have been a certainty. Utilising the income figures recorded in Koch for taxi driver-owners, she therefore escalated the income of R104 000 per annum to R404 000 per annum by the time he reaches
20 the age of 45.

I asked counsel which of his injuries prevented him from owning a taxi, proposing that, if he wanted to own a taxi, then the claim for impairment of capacity should equate the value of a taxi. As soon as he purchased the taxi the

plaintiff would be in the same income earning position as he would have been had the accident not occurred. Counsel did not agree that that would be an adequate manner in which to address the claim for future loss of income.

In addition to the fact that there is no evidence that the plaintiff's aspirations of becoming an owner-driver of a taxi would have ever realised, the plaintiff's calculation is based on research relating to the minibus taxi industry. In
10 addition, there is no basis laid for accepting that the income of driver-owners of minibus taxis, can be extrapolated to the e-taxi industry, and that the same income would be applicable to a driver-owners of a Bolt or Taxify vehicle.

The plaintiff's employment history consists only of driving for a funeral home, delivering bread and driving as a Bolt or Taxify driver. The projection of the plaintiff from the e-taxi trade to the minibus taxi industry with its corresponding income streams therefore requires at least a rational
20 underlying motivation or a factual basis to support the contention that he would have had the means, ability and opportunity to achieve this aspiration.

The result is that the figures proposed by the industrial psychologist constitute no more than an opinion without any

factual basis. As was said in the matter of *Bee v The Road Accident Fund 2018 (4) SA 366 (SCA)*:

"It is trite that an expert witness is required to assist the court and not to usurp the function of the court. Expert witnesses are required to lay a factual basis for their conclusions and explain their reasoning to the court. The court must satisfy itself as to the correctness of the expert's reasoning".

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There is no evidence, of any nature, that could serve as a factual basis on which the industrial psychologist could have prepared her projections in respect of the plaintiffs' but-for-the-accident future income. There is nothing to indicate how the research on the income in the minibus taxi industry could be extrapolated into the e-taxi industry.

20 There is no explanation given why, under the same heading of "*Employment 7*" on CaseLines 08-40, two different income figures are given in two consecutive paragraphs (R500 per week versus R3 000 to R3 500 per week) and why, in projecting the plaintiff's post-injury future income, the figure of R500 per week is used and not the figure in the next paragraph, which renders a nett result of R2 300

per week.

The industrial psychologist's report regrettably is of limited assistance, given the manner in which it had been prepared. In light of the lack of collateral information and the lack of motivation for the basis on which the calculations were done, the figures presented by the plaintiff cannot be accepted.

- 10 Although the court does believe that the conclusions of the orthopaedic surgeon and occupational therapist, that the injuries limit the plaintiff's choices of future occupations, has resulted in a loss which can be actuarially calculated, the industrial psychologist did not include these limitations of choices as a loss and it was therefore not actuarially calculated.

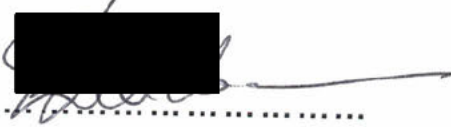
What had been calculated is a projection of a career path for the plaintiff which the court does not accept. Because
20 of the acceptance that there will be a limitation of career choices, the court is not inclined to dismiss the claim but to simply refuse default judgement.

My order is therefore as follows.

1. The plaintiff's application in terms of rule 38(2) is

granted.

2. The plaintiff's application for default judgement is refused.

A black rectangular redaction box covers the signature of the judge. A horizontal line extends from the right side of the box, and a dotted line is visible below the signature area.

WEIDEMAN, AJ

JUDGE OF THE HIGH COURT

DATE: 21/2/2025