REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 027972/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES:NO
(3) REVISED: YES

DATE: 10/04/2025 SIGNATURE

GAMBU THULANI MESHACK **Applicant/Plaintiff**

And

THE ROAD ACCIDENT FUND **Respondent/Defendant**

Coram: Weideman AJ

Heard on: 20 March 2025

Delivered: 10 April 2025

Summary: Application for leave to appeal – s 17(1)(a)(i) of the Superior Courts Act 10 of 2013 – an applicant now faces a higher and a more stringent threshold – leave to appeal refused.

JUDGMENT [APPLICATION FOR LEAVE TO APPEAL]

WEIDEMAN AJ:

[1] This matter served before me on the 29th October 2024. On the 31st October 2024 I handed down a short *ex tempore* judgment culminating in the following order:

1. The plaintiff's application to lead evidence by way of affidavit in terms of rule 38(2) is granted.
2. The defendant shall pay the plaintiff the sum of R42 000 in respect of accrued or past loss of income.
3. The defendant shall pay the plaintiff the sum of R279 130.60 in respect of future impairment of earning capacity.
4. The defendant shall pay the plaintiff the sum of R750 000 in respect of general damages.
5. The defendant shall provide the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act in respect of all future hospital, medical or/and ancillary expenses that the plaintiff may require as a result of the injuries sustained in this accident.
6. The plaintiff shall remain entitled to his party and party costs as taxed or agreed. Counsel's fees to be confined to scale A.

[2] The plaintiff now seeks leave to appeal against the whole of the judgment and the orders made by this court on the 31st October 2024. For purposes of this

judgment I shall henceforth refer to the parties as the plaintiff and the defendant, as in the action.

The test for leave to appeal:

[3] The test for leave to appeal is well established. Section 17(1)(a) of the Superior Courts Act 10 of 2013 provides that leave to appeal may only be granted on one of two grounds:

> *"(i) the appeal would have a reasonable prospect of success;*
>
> *or*
>
> *(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration".*

[4] There has been some debate about whether the requirement that "*the appeal would have a reasonable prospect of success*" imposes a higher standard for leave to appeal to be granted that what the case was before the amendment of the section. The SCA settled this issue in *Ramakatsa v African National Congress (724/2019) [2021] ZASCA 31 (31 March 2021)* when it expressed itself as follows at para [8]:

> *"I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted…*
>
> *The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of*

appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist."

[5] Based on the above the principles may be summarised as follows:

The fact that a matter is of public importance is not in itself a reason to grant leave to appeal. It must also be clear that the matter will *"have an effect on future disputes"*. Even if the matter reaches this threshold, this court may only grant leave to appeal if there is some prospect of success, as "*the merits remain decisive*".

Applicants for leave to appeal must demonstrate that their prospects of success are not remote and that a court of appeal would reasonably arrive at a conclusion different to that of the court below.

Grounds for leave to appeal:

[6] If I understand the application correctly then, despite it being against the whole of the judgment and order, the salient points are the following:

a) The plaintiff is dissatisfied with the amount awarded for general damages;

b) The plaintiff is of the opinion that once the court in default judgment proceedings has allowed the plaintiff's experts to testify on affidavit

following a Rule 38(2) application, the contents of the medico-legal reports stand as *prima facie* evidence and cannot be challenged, hardening into conclusive proof. That being the case, it is not open to the court to criticise, challenge or reject the evidence and in the event that the court was not satisfied with the veracity of the plaintiff's evidence, the court was obliged to put this to the plaintiff and the court accordingly erred by granting the Rule 38(2) application.

Put differently, by rejecting the contents of the expert's evidence after allowing the Rule 38(2) application without calling the expert *mero motu*, the court has misdirected itself as to the law.

(c) Having rejected the plaintiff's and his experts evidence in respect of his business, the court in arriving at a figure for loss of earning capacity, erred in referring to the actuarial calculation to clarify how the figure awarded for loss of earning capacity was calculated.

The injuries:

[7] According to paragraph 6 of the plaintiff's particulars of claim he *"...suffered permanent serious and severe multiple body injuries"*.

[8] The only guidance as to the meaning of the above in the particulars of claim is found under the heading *"7.1 Hospital and medical treatment"* and where one finds the following sentence: *"According to the hospital records, the plaintiff sustained head injury, left femur fracture, chest rib injury and lower back injury."*

Expert evidence:

[9] The basis on which a court should deal with expert evidence has been fully canvassed by our courts and it is not necessary to do more than to briefly refer to the guiding decisions:

In *Bee v Road Accident Fund*[1], the court held:

> *"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."*

In Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd [2015] ZASCA 164; 2016 (2) SA 586 (SCA) para [15], this court said:

> *"[l]astly, the expert evidence lacked any reasoning. An expert's opinion must be underpinned by proper reasoning in order for a court to assess the cogency of that opinion. Absent any reasoning the opinion is inadmissible". In Road Accident Appeal Tribunal & others v Gouws & another [2017] ZASCA 188; [2018] 1 ALL SA 701 (SCA) para [33], this court said "[c]ourts are not bound by the view of any expert. They make the ultimate decision on issues on which experts provide an opinion". (See also Michael & another v Linksfield Park Clinic (Pty) Ltd & another [2002] 1 All SA 384 (A) para [34].)*

[1] (093/2017) [2018] ZASCA 52; 2018 (4) SA 366 (SCA) (29 March 2018) at paragraphs 22 to 24

The facts on which an expert witness expresses an opinion must be capable of being reconciled with all other evidence in the case. For an opinion to be underpinned by proper reasoning, it must be based on correct facts. Incorrect facts, militate against proper reasoning. The correct analysis of the facts is paramount for proper reasoning, failing which the court will not be able to properly assess the cogency of that opinion. An expert opinion which lacks proper reasoning is not helpful to the court. (See also Jacobs v Transnet Ltd t/Metrorail [2014] ZASCA113; 2015 (1) SA 139 (SCA) paras [15] and [16]; see also Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung mbH 1976 (3) SA 352 (A) at 371F."

[10] Whether the expert testified in court on the contents of his or her medico-legal report and counsel takes the expert through the report or whether the same report is presented to court on affidavit, the evidence before court is the same. The plaintiff, in electing not to call the expert but to rather present the evidence contained in the report on affidavit, has considered the contents of the report and has taken a view that it meets the criteria for an expert report, as has been clearly set out in the case law referred to above.

[11] In considering whether the sworn evidence presented on affidavit meets the criteria of the law as defined above one has to determine whether there is a factual basis, supported by collateral evidence, which could be used by the court to evaluate the reasoning and conclusions of the expert. In my consideration the following collateral evidence ought to have been available:

a) the plaintiff's business reportedly existed for eight years, pre- and post the accident, yet not a single document was made available to substantiate its existence;

b) no collateral evidence of any kind was made available to any of the experts briefed by the plaintiff;

c) neither the occupational therapist nor the industrial psychologist did a home/work visit (it is the same premises) to confirm that the business existed and to assess how it functioned;

d) no bank statements, business books or purchasing invoices were made available to the court or to any of the experts;

g) neither the plaintiff nor his business were apparently registered with SARS;

h) no VAT returns were available;

i) no proof was provided of capital expenditure although the plaintiff allegedly bought and sold movable assets;

j) the report of the industrial psychologist contains no indication as to how profit was determined and the plaintiff's verbal statement of what his profit was, was accepted without any interrogation of the statement or determination whether the plaintiff understood gross and net profit. The fact that the plaintiff was not tax compliant should have been raised by the expert. The failure to do so mitigates against the report complying with Rule 36(9)(b).

[12] Whether the evidence was presented orally or on affidavit following a Rule 38(2) application matters not. Factually there is no foundation for the opinion of the expert and thus the opinion was not of any assistance to the court. The fact that the opinion was presented on affidavit and not orally cannot change the opinion. This baseless opinion can never constitute *prima facie* evidence and can never harden into conclusive proof. It is no more than an opinion and a court is never bound by the opinion of an expert.

[13] The argument of the plaintiff continues as follows: Once the court has rejected the evidence of the industrial psychologist it is prohibited from taking any cognisance of the actuarial calculations. Having done so the court has misdirected itself both in law and in fact. In debating the matter with counsel, the plaintiff's position was that once the industrial psychologist' report was rejected the court had no option but to dismiss the claim for loss of income.

[14] I disagree. Once the industrial psychologist's report has been rejected it is no longer possible to evaluate and quantify a claim for direct future loss of income but that is not the only basis on which a claim for future losses may be determined. It is always open to a court to consider and award a globular amount for loss of or impairment of earning capacity.

[15] In considering what a fair and reasonable amount for impairment of earning capacity might be it is open to a court to consider all available information before reaching a decision, including the actuarial report. The award was made in respect of *"some possible impairment of his earning capacity"* and in considering the value of the award the court had regard to the actuarial report, qualifying that it was *"for this purpose only."*

[16] The award was for impairment of earning capacity, as is stipulated in the judgment, and there is no reasonable prospect that any other court would interfere with the discretion of this court, as exercised.

General damages:

[17] In *Minister of Safety and Security v Seymour*[2], the approach to the assessment of damages was stated by Nugent JA, as follows: -

> *"The assessment of awards of general damages with reference to awards made on previous cases is fraught with difficult. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that."*

In *Pitt v Economic Insurance Company Ltd*[3] Holmes J stated in regard to an award for general damages:

> *"I have only to add that the Court must take care to see that its award is fair to both sides- it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expenses."*

Although there is a tendency to increase awards for general damages, the assessment of the quantum of general damages primarily remains within the discretion of the trial court. In *RAF v Marunga*[4], Navsa J stated:

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[2] 2006 (6) SA 320 (SCA) at paragraph 17

[3] 1957 (3) SA 284 (D) at 287 E–F

[4] (144/2002) [2003] ZASCA 19; [2003] 2 All SA 148 (SCA); 2003 (5) SA 164 (SCA) (26 March 2003) at paragraphs 23 and 24

"This Court has repeatedly stated that in cases in which the question of general damages comprising pain and suffering, disfigurement, permanent disability and loss of amenities of life arises a trial court in considering all the facts and circumstances of a case has a wide discretion to award what it considers to be fair and adequate compensation to the injured party.

...After considering dicta in several decisions of this Court the learned judge of appeal stated that there was no hard and fast rule of general application requiring a trial court or a court of appeal to consider past awards. He pointed out that it would be difficult to find a case on all fours with the one being heard but nevertheless concluded that awards in decided cases might be of some use and guidance."

[18] Part of the application for leave to appeal is that I departed from comparable awards when there is no reason to do so and have failed to give reasons for the award made.

[19] The injuries and their sequalae were considered. On CaseLines under Pocket 011 and which is headed "*Offer and Acceptance*" and at CL 011-5 the plaintiff disclosed a "*without prejudice*" offer of settlement, in contravention of Rule 34(10) and (13) and which was for the amount of R600 000.

[20] The offer of settlement was not accepted and the plaintiff submitted a counter proposal, CL 011-9, in the sum of R900 000. In considering the aspect of general damages I took note of the case law quoted by the plaintiff in his counter proposal to the defendant.

[21] Prior to and during the hearing of the matter I considered and took notice of the case law quoted by the plaintiff in his heads of argument at CL 016-10, paragraphs 38 to 44, which contained some of the matters referred to in the counter proposal, but still motivated for an award of R900 000.

[22] As indicated in my judgment I also looked at the reported cases in the electronic version of the Quantum of Damages. The primary reason for doing so was that I am of the opinion that there is a reason why matters remain unreported. No two people are ever injured in exactly the same way nor are their circumstances, age, social status, sex, intellectual ability, occupation, and other determining qualities exactly the same. It is due to this very individualisation of injuries and sequalae that matters are marked unreportable.

[23] Having considered the plaintiff's injuries and their sequelae as dealt with by the experts in their reports, it was my opinion that it would not be remiss to exercise my discretion and award a sum of R750 000 as this would be fair to both parties. I do not believe that any other court will come to a different conclusion.

[24] But for the matter of *Chutterpaul v Road Accident Fund,* none of the cases which counsel referred me to in the application for leave to appeal overlap with the cases quoted in the counter proposal or heads of argument. In both the heads of argument and the application for leave to appeal the same original value is given for *Chutterpaul,* i.e. R600 000, however in the heads of argument the current value is given as R846 543.68 and in the application for leave to appeal as R1 272 000.

[25] In conclusion: I am of the opinion that there is no reasonable prospect of any other court coming to a different finding and leave to appeal is therefore refused.

Order:

[1]. The application for leave to appeal is refused.

[2]. The application for leave to appeal was unopposed and I therefore make no order as to costs.

WEIDEMAN AJ

JUDGE OF THE HIGH COURT
JOHANNESBURG

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Respondent/Defendant : No appearance.