THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

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

24 March 2025
DATE

[redacted]
SIGNATURE

CASE NO: 2457 / 2022

In the matter between:

TEBOGO NELSON SEALETSA **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

J U D G M E N T

RATSHIBVUMO DJP:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be on 24 March 2025 at 10H00.

[1] Introduction.

This is a claim for loss of earnings following a motor vehicle accident in which the Plaintiff was involved, which took place on 05 June 2021. Merits were conceded 100% by the Defendant and future medical expenses were settled. The Court was informed that the general damages claim was rejected by the Defendant and that has since been referred to the HPCSA. The trial proceeded for the determination of loss of earnings. According to particulars of claim, the Plaintiff claims R147 065 in past loss of income and R1 398 855 in future loss of income. This figure changed through the heads of argument, without amendment of the particulars of claim, following the amended actuarial calculations to R1 960 816. The Defendant agreed to the handing in of expert reports contained in the affidavits in terms of Rule 38(2) of the Uniform Rules. The Plaintiff and the Industrial Psychologist were also called to testify, at the Defendant's request. The Defendant disputes that the Plaintiff suffered loss of earnings as a result of this accident.

[2] Evidence:

Tebogo Nelson Sealetsa: He is the Plaintiff. He testified that he was involved in a motor vehicle accident on 05 June 2021. At that time, he was working at McDonald in Acornhoek as maintenance officer. His duties involved receiving deliveries, cleaning the premises and the equipment and he was also in charge of allocating shifts and work to staff members. Following the accident he was admitted at Tintswalo Hospital with injuries to his head, right arm, and to his spinal cord. He was discharged after one week. He returned to work after three months. He did not receive a salary during this period.

[3] Upon his return to work, he tried doing the duties he did before the accident, but he could not. It was decided at work that he would be allocated light duties until his full recovery. He could no longer lift heavy objects and was too forgetful making it difficult for him to run the shifts. He suffers constant pains every now and then, forcing him to consult medically from time to time. Prior to the accident, there were prospects for him to become a shift manager which prospects were dashed by the accident as his employer is not always happy with his performance. At some stage, he was even asked by his employer as to why he did not resign after the accident to which he responded saying, he could not afford to resign.

[4] Under cross examination, the Plaintiff testified that he started working at McDonald in 2018 as a crew member before he was promoted to maintenance officer. He confirmed having consulted an Industrial Psychologist on 27 August 2022. He conceded that the said promotion is not reflected in the Industrial Psychologist's report. He attributed this to the fact that he did not divulge this information as he was not asked. He confirmed that according to the Industrial Psychologist's report, his duties prior to the accident, were identical to those after the accident. The reason for this was that it was only later after the employer realised his difficulties that his duties were changed to lighter.

[5] At the time of the accident, he was earning R6 480 per month as his salary. This was increased after the accident to R7 252 per month. This was as a result of a standard annual salary increase and not because of any promotion. When confronted with salary slips that were discovered between the parties, he confirmed that they reflect that he received his salaries for the months, June, July and August 2021, which are the months he spent away from work while recuperating after the accident. These were the very months during which he

claimed to have received no salary. He testified that he must have forgotten that he was paid when he testified that he was not paid. He conceded that he also informed the Industrial Psychologist that he was not paid for three months he was away from work. He testified that he was still working at McDonald although he now worked at the till while he also trains someone on maintenance.

[6] He conceded that the report received from his employer by the Industrial Psychologist was positive about him and not reflective of an employer who wanted him to resign. He also admitted that he was involved in another motor vehicle accident in March 2022 and that this accident took place prior to his consultation with all the expert witnesses. As a result of the second accident, he was out of work from March to December 2022 and he was not paid a salary during this period. He has lodged a claim against the Defendant as a result of the second accident and the claim is being handled by a different firm of attorneys.

[7] Patricia Gaungalelwe Baloyi: She is the Industrial Psychologist. She is the one who prepared the report referred to in the cross examination of the Plaintiff. She received collateral information from the Jerry Mathebe, the Plaintiff's boss (the employer), to the effect that had it not been for the accident, the Plaintiff had the potential to be promoted to the level of a shift manager in November 2021. She produced the said report on 26 October 2023 after she had assessed the Plaintiff on 27 August 2022. Before producing the report, she consulted with the Plaintiff's employer, to check if the Plaintiff's employment status has changed. The late production of the report was due to the late request from the attorneys. No additional information was received necessitating the report to be reviewed both at the time of production and at the time she gave evidence in court.

[8] She confirmed what she wrote in the report to the effect that the report was valid for 18 months and that should the matter not be settled in 18 months, a follow up assessment of the Plaintiff would be necessary. That follow up assessment did not take place as the information about the Plaintiff remained the same. On the day she received the subpoena to come to give evidence, she called the Plaintiff to confirm if he was still with the same employer and he confirmed. She also confirmed this with his employer.

[9] She testified further that contrary to what the Plaintiff told her, the salary slips she had at her disposal reflected that he was paid during the three months he was not working, following the accident. He however did not receive the salary on the level of a shift manager as he was not promoted. She prepared two scenarios reflecting the postulations of the earnings he would have earned without and with the promotion as Scenario 1 and 2.

[10] Under cross examination, she conceded that it was an error on her part to write in her report that the Plaintiff suffered past loss of income as he was paid for the months he was not at work. She testified that she should have just indicated that he suffered future loss of income due to the fact that he was not promoted as envisaged by his boss. The report should have indicated that the Plaintiff suffered no past loss of income. She testified that had the Plaintiff been promoted to the position of a manager, he would be supervising the staff members at the store. She admitted that such would be a light duty job compared to what he was doing before.

[11] Although she was informed that the Plaintiff missed an opportunity to be promoted to a position of a shift manager, she did not ask if there was such a vacancy at the store or if it has since been filled or who filled it. At the time she prepared a report or consulted, she had not had sight of the Plaintiff's

employment certificate. She only saw it shortly before giving evidence in court. She also conceded that the collateral information she received from the employer did not tally with the information in the employment certificate especially when it comes to benefits of a manager.

[12] She testified further that she was aware that at the time she consulted the Plaintiff, he was a victim of two motor vehicle accidents. The Plaintiff told him that the second accident caused him a leg fracture. Her assessment was to focus on the first accident. She did not even have the medical records of the second accident. For these reasons, she could not tell the court as to what impact the second accident had on the Plaintiff's loss of earnings.

[13] She confirmed that the Plaintiff's employment certificate reflected that he did not go to work from 26 March 2022 to 31 December 2022 as a result of the second accident and was not paid a salary for this period. She also admitted that it was only after the second accident that the Plaintiff suffered the past loss of income. She admitted that her report contained errors on this aspect and that this affected the actuarial calculations negatively as the Actuary relied on her report to compile the actuarial report. She was also critical of the Actuary's references in his report to a period from March to December 2022 during which, the Plaintiff was said to be on leave. She indicated that the Actuary should have focused on the impact of the first accident only.

[14] Before closing the case for the Plaintiff, affidavits by the following experts were handed in in terms of Rule 38(2): Affidavit by an Orthopaedic Surgeon, a Neurosurgeon, a Clinical Psychologist, an Occupational Therapist, an Industrial Psychologist and an Actuary. The Plaintiff's counsel referred to a document called an "addendum" which was prepared by the Actuary, the contents of which differ drastically from those in the affidavit handed in in

terms of Rule 38(2). Unlike the "addendum," all the reports handed in as exhibits were discovered by the Plaintiff in terms of Rule 36(9). The Plaintiff's counsel argued that the "addendum" was an attempt to rectify the errors exposed in the Industrial Psychologist's report to which she admitted during the trial. The "addendum" was only prepared while the trial was underway and that is the reason it was not discovered in terms of Rule 36(9). I will deal with the weight to be attached to the "addendum" later.

[15] With this evidence, case for the Plaintiff was closed and the Defendant also closed its case without leading evidence.

[16] Closing arguments.

In closing arguments, the Plaintiff's counsel submitted that the Court should award R1 960 816.00 in future loss of earnings based on Scenario 2, in favour of the Plaintiff, in view of the promotion possibility contained in collateral information referred to in the Industrial Psychologist's report. He submitted further that the moment the Defendant conceded the merits, there was no need for the Plaintiff to lead evidence. It was unfair therefore, for the Defendant to have raised questions about the impact of the second accident during the trial, as they had not pleaded that defence in the plea. He further submitted that the discrepancies around the Plaintiff's possible promotion and the benefits he would have received compared to the employment certificate should be addressed by the application of contingencies by the Court.

[17] The Defendant's counsel on the other hand submitted that the Court should attach no weight to the reports prepared by the Actuary and the Industrial Psychologist saying they were prepared based on the outcomes of second accident which is not the subject of the current claim. He further submitted that there was no sufficient evidence to sustain the postulation that the Plaintiff would have been promoted in November 2021. Contingencies, he argued,

cannot be used to address inconsistencies and discrepancies in the reports. For these reasons, he submitted that the Plaintiff's claim should be dismissed.

[18] It is trite that in claims for unliquidated damages the Plaintiff is expected to lead evidence to prove its loss.[1] This is the norm irrespective of whether the claim is defended or not. Regardless of the pleadings or concessions, the Plaintiff has a duty to prove damages by leading evidence.

[19] The role of experts.

Two issues are determinative of the outcome of this action: They are the impact of the second accident on the person of the Plaintiff and the expert reports. The second issue involves the weight to be attached on the experts' reports in light of the inaccurate or inadequate facts presented to their authors. This issue is intertwined with the first in respect of the impact of the second accident.

[20] Before unpacking the impact of the second accident, it is imperative to first explain the role of the experts in a trial. In *Michael and Another v Linksfield Park Clinic PTY LTD*[2] the Supreme Court of Appeal held,

> "[I]t is perhaps as well to re-emphasise that the question of reasonableness and negligence is one for the Court itself to determine on the basis of the various, and often conflicting, expert opinions presented. As a rule, that determination will not involve considerations of credibility but rather the examination of the opinions and the analysis of their essential reasoning, preparatory to the Court's reaching its own conclusion on the issues raised." This essential difference between the scientific and the judicial measure of proof was aptly highlighted by the House of Lords in the Scottish case of *Dingley v The Chief Constable, Strathclyde Police* 200 SC (HL) 77 and the warning given at 89D - E that:
>
> *'(o)*ne cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a Judge may be seduced into a position where he applies to the expert evidence the standards which the expert

[1] See *Knight v Harris* 1962 (2) SA 317 (SR) and *Economic Freedom Fighters v Manuel* 2021 (3) SA 425 (SCA).
[2] 2001 (3) SA 1188 (SCA) para 34 & 40.

himself will apply to the question whether a particular thesis has been proved or disproved - instead of assessing, as a Judge must do, where the balance of probabilities lies on a review of the whole of the evidence.' [My emphasis].

[21] Talking of about a role of an expert, Fisher J said the following in *MS v Road Accident Fund*,[3]

"Actuaries rely on look-up tables which are produced with reference to statistics. Such statistics are derived, *inter alia*, from surveys and studies done locally and internationally in order to establish norms, representativeness, and means. From these surveys and studies, baseline predictions as to the likely earning capacity of individuals in situations comparable to that of the plaintiff are set. These baseline predictions are then applied to a plaintiff's position using various assumptions and scenarios which should properly be gleaned from proven facts.

The general approach is to posit the plaintiff, as he is proven to have been in his uninjured state and then to apply assumptions as to his state with the proven injuries and their sequela. The deficits which arise between these scenarios (if any) are then translated with reference to the various baseline means and norms used. These exercises are designed with the aim of suggesting the various types of employment which would hypothetically be available to the plaintiff in both states. The loss would then be calculated as the difference in earnings derived between the pre- accident (or pre morbid state as it is often called) and post- accident or post morbid state.

41. In this exercise, uncertainty as to the departure from the norms, such as early death, the unemployment rate, illness, marriage, other accidents, and countless other factors unconnected with the plaintiff's injuries which would be likely, in the view of the court, to have a bearing both on the established baseline used by the actuary and on the manner in which the plaintiff, given his particular circumstances, would fare as compared the established norm are dealt with by way of "contingency" allowances. Given the purported mathematical and percentage-based inquiry of the actuarial assessment, these contingencies are expressed in percentages which are brought to bear on the mathematical reflections which have

[3] [2019] 3 All SA 626 (GJ) para 36-41.

> been derived from the assumptions used. In essence the platform for assessment is no more than one a technique which is offered to the court in a bid to allow it to exercise its discretion. This mechanism should not be understood as being prescriptive or confining of the assessment that the court is called on to make. The court has a wide discretion as to the assessment of loss. This task is judicial and is founded to a large extent on experience, intuition, and general right-thinking." [My emphasis].

[22] The challenge the experts faced in this claim is that at the time of their examination, they consulted a person who had been through two car accidents one of which was the subject of their examination, and the other was not. A period of nine months separated the two accidents. This claim is about loss of income, allegedly suffered by a person who at the time he was examined by the experts, he was himself the product or outcome of two accidents. The two accidents appear to have been very serious, with the first keeping him out of his job for at least three months, while the next one kept him away for about nine months.

[23] While each accident impacted the Plaintiff differently, the person who was examined by the experts had already been through all two accidents. The experts did not just complete the reports speculating how the Plaintiff could have performed, reacted and managed after the first accident. As demonstrated hereunder, they evaluated the Plaintiff's "current status," meaning, his performance at the time of examination. Therefore, it was rightly argued for the Defendant that the loss of earnings that the Plaintiff presented at the time he was examined by the experts, could have been the results of the first, the second or both accidents.

[24] To demonstrate the above assertions, the Plaintiff was examined by the Orthopaedic Surgeon on 15 April 2023. This was 22 months after the first

accident and 13 months after the second one. Although the medical records from the second accident are not before this Court, it was placed on record by the Industrial Psychologist and echoed by the Plaintiff's counsel that the injuries thereof involve left humerus fracture. The first accident impacted the Plaintiff on the head and the shoulder. Upon consultation with the Plaintiff, the Orthopaedic Surgeon noted in his reports, "left humerus fracture" as one of the injuries reflected in the medical records presented to him.[4]

[25] Under a heading, PRESENT MAIN COMPLAINTS, the Orthopaedic Surgeon noted amongst others the following: "1. Painful left shoulder and neck, 2. Aggravated by standing and walking for prolonged periods, 3. Struggles with lift[ing] any heavy objects."[5] He went on to note that the Plaintiff was unable to walk for longer distances.

[26] It appears to me then, that the same reports that the Plaintiff received to process this claim, could still be relevant in respect of the other claim he lodged following the second accident, at least for purposes of loss of earnings, as they are the reports prepared after examining the person who has been through the two car accidents. The approach in respect of this type of claim needs to be distinguished from the approach in respect of a claim for general damages wherein the damages suffered from each incident can be isolated. Here, the Court is seized with a claim for loss of earnings that are postulated on assumptions of what the Plaintiff would have earned until his retirement, had it not been for the accident. The two accidents did not produce two claimants in respect of loss of earnings, but one. They may however have produced two different bases for the claim in respect of that loss of which one person, being the Plaintiff, would have earned.

---

[4] See paragraph 3.3.2 on p. 535 of the paginated bundle.
[5] See paragraph 6.1 on p. 537 of the paginated bundle.

[27] The Plaintiff argues that his current claim for future loss of income has nothing to with the second accident. In *Choane v Road Accident Fund*[6] a case involving a claim in which the Plaintiff had been through two different motor vehicle accidents, the Court held that 'the experts had the obligation to give the Court the comfort that the earlier accident had no influence [on the current status of the claimant, whose claim was premised from the second accident].' Without this, the claim for future loss of earnings could not be sustained. I align myself with these sentiments. *In casu*, the experts would have to exclude the possible influence or role of the latter accident, something they could not even attempt to do without the medical records before them.

[28] Beside the approach above, to the extent that it may be argued or presumed that the possible loss of earning suffered from the first accident could be separated from the second one, I am of a view that such loss would have been suffered only up to the date of the second accident. This would entail that any calculation for the loss of earning would culminate with the second accident, as opposed to culminating on the date the Plaintiff retires. The calculation of possible loss of income from the second accident is the one that may culminate in the Plaintiff's retirement. Failure to do this may result in what the Plaintiff's counsel cautions against when he says in his heads of argument, 'it is a principle of the South African law that a person should not receive a compensation twice for the same loss.

[29] It is thus not surprising that claimants who find themselves in the position of the Plaintiff where their claims could be based on two separate accidents, consolidate their claims, to avoid situations where the possible result from one accident cannot be excluded as the cause of claim – see for example *Kruger v Road Accident Fund*[7]. In circumstances of this case where the Plaintiff chose

[6] (25807/2014) [2024] ZAGPJHC 1138 (7 November 2024).
[7] (30579/2008) [2014] ZAGPPHC 682 (3 September 2014).

not only to make separate claims, but to also lodge them using different attorneys, it makes it near impossible to consolidate the claims. I understand the reasoning behind the Defendant's argument that to deal with a possibility that there could be basis of a loss of income from the first accident, the Plaintiff may have to alert the court in respect of the claim based on the second accident about the outcome in the current claim, since he would have missed the opportunity to consolidate the claims.

[30] Evaluation of facts: Loss of income.

The closest that the facts of this case came to proving loss of earnings was when through collateral information, the Industrial Psychologist established from the Plaintiff's employer that due to his injuries, he missed out on an opportunity to a position of a shift manager in November 2021. This information was however not verified against the employment certificate. Had this been done, it would have reflected that the collateral information does not correspond with that in the employment certificate. No information was made available as to whether this position was vacant at any stage and whether it was to be filled in November of 2021. Similarly, no information was availed on whether it was filled and who filled it.

[31] It can be assumed, though that there was no such vacancy at the Plaintiff's place of work as he testified that he is the one currently training the staff at his employment, something that should be expected to be done by a manager, if there was one. According to the Industrial Psychologist, the Plaintiff worked for McDonald since 2018 without any promotion. Collateral information in the reports suggests that he missed out on an appointment to a managerial position, that was waiting to take place in the nine months' period between the two accidents, which appointment, for unexplained reasons did not happen. This version sounds to be too remote to be probable. To the extent that it could be

probable, applicable contingencies and the duration before the second accident would render the calculation of any possible loss of income, a futile exercise.

[32] At the commencement of the trial, and according to the particulars of claim, the claim against the Defendant is not just for future loss of income, but the past loss of income too. Counsel for the Plaintiff seems to still argue for these even though the existence of the basis for this claim was recanted by the Industrial Psychologist. The claim by the Plaintiff that he suffered such was false as it was disproved by his payslips. Not only did the Plaintiff mislead the Industrial Psychologist, but this Court too. The consequential result is that the Actuary was handed a report with wrong information causing him to make wrong calculations. It is immaterial to establish, for present purposes if the Plaintiff was deliberate in misleading the Court and the Industrial Psychologist as it is not about to make credibility findings. It suffices, rather to state that no evidence was led that establishes that there was past loss of income suffered by the Plaintiff.

[33] <u>The value of expert reports.</u>

The last aspect deserving the Court's attention is the weight to be attached to the reports prepared by the experts. All the expert reports handed in by the Plaintiff, were prepared following the consultations conducted after the second accident. While these reports remain relevant for the claims as a whole, the Court cannot attach the necessary weight to them as they are not able to exclude the impact of the second accident from the Plaintiff's current status being the status he was in at the time they consulted him.

[34] Over and above that, it appears that these reports were built on factual inaccuracies and improbabilities. The Industrial Psychologist testified that she was informed by the Plaintiff as much as he also testified, that he was not paid a salary for the period he was not at work following the first accident. For this

reason, the Industrial Psychologist concluded in her report that he suffered a past loss of income. As indicated above, this was false. The Plaintiff explains himself by saying he had just forgotten about this aspect. His explanation comes way too late as the Industrial Psychologist's report was already penned down and handed over to other experts who prepared their own reports based on hers.

[35] There is more reason to attach less weight to the Industrial Psychologist's report. The Industrial Psychologist indicated in the report that the report was valid for 18 months only and that should the claim not be settled in this period, a follow up assessment of the Plaintiff would be necessary. At the time she gave evidence, the 18 months' period had long lapsed, and there had not been a follow up assessment of the Plaintiff, which is a condition to revive the validity of the report.

[36] Clauses of this nature make sure that the information contained in the report remains accurate and talking to the present situation of the patient. This clause means that the Court cannot receive information in the report unless the condition to revive the validity is met. The fact that the author of the report gave a phone call to establish if the Plaintiff was still working for McDonald does not mean that the Plaintiff has been reassessed, unless the reassessment meant making a phone call to establish the aspect of change in the employment, in which case the condition should have stipulated that.

[37] When conditions are put in place, they bind even those who authored them. The Industrial Psychologist was authorised to change the rules while the game was on. She put in the condition under which the report may still be valid if the 18 months' expires, and she should adhere to it. The only difference is that she gave evidence under oath, but she made reference to the expired report.

[38] The Actuary on the other hand prepared his report based on inaccurate information presented to him in the Industrial Psychologist's report. He also made reference to the Plaintiff's circumstances after the second accident. Since he did not testify in person, nothing of the criticism levelled against him by the Industrial Psychologist could be verified. As indicated above, Plaintiff's counsel made reference to an "addendum" prepared by the Actuary, which was not made under oath. It could not as such be considered as evidence tendered in terms of Rule 38(2). There is equally no explanation in this document as to why the calculations in it differ drastically from those handed in by way of affidavit, by the same Actuary.

[39] The affidavit received as evidence prepared by this Actuary puts the total loss of income under Scenario 1 (semi-skilled worker) at R1 299 155 and under Scenario 2 (supervisor), at R1 545 920. From the addendum, the figure under Scenario 1 is now R975 089 whereas the figure under Scenario 2 is now even higher at R1 960 816. The differences are not explained. The date on the addendum, is 18 February 2025 and it reflects the calculation date as 01 March 2025, which suggests that the addendum was prepared recently.

[40] Same information that laid before the Actuary when he prepared the report dated 30 October 2023 was laid before him when preparing the addendum, including the Industrial Psychologist's report dated 26 October 2023. He also had the instruction email from the attorneys dated 18 February 2025, the contents of which are to the Court unknown. But the instruction email was also part of what the Actuary received when preparing the 2023 report. In actual fact, the addendum does not do what it is supposed to do which is to supplement, correct or clarify the earlier report. It instead gives a different information without any explanation thereto.

[41] From the submissions by the Plaintiff's counsel, it appears the Actuary was given new information to prepare a new calculation. It remains unknown as to what information this entails, or if it was contained in a report by the Industrial Psychologist or how the same was conveyed to him. It is apparent from the addendum, though, that the Actuary did not have a new or corrected report from the Industrial Psychologist. All that the "addendum" does is to contradict the calculations received under oath prepared by the same Actuary. As a result, the Court finds itself unable to attach the necessary weight to the report by the Actuary, which is evidence under oath, or the "addendum" he prepared when the trial was under way.

[42] For the reasons above, the Court finds that the Plaintiff's claim for loss of earnings has not been proved on balance of probabilities. It has not been satisfactorily proved that the possible loss of income may have been the result of the accident that took place on 05 June 2021.

[43] <u>The Order:</u>

For the aforesaid reasons, I make the following order:

The Plaintiff's claim is dismissed with costs.

TV RATSHIBVUMO

DEPUTY JUDGE PRESIDENT

MPUMALANGA DIVISION OF THE HIGH COURT

FOR THE PLAINTIFF:	**ADV. S MBHALATI**
INSTRUCTED BY:	**NGOMANA & ASSOCIATES ATT MBOMBELA**
FOR THE DEFENDANT	**MR. FG SILIGA**
INSTRUCTED BY:	**STATE ATTORNEY MBOMBELA**
DATES HEARD:	**17, 19 & 20 FEBRUARY 2025**
DATE HEADS OF ARGUMENT WERE SUBMITTED:	**04 MARCH 2025**
JUDGMENT DELIVERED:	**24 MARCH 2025**