

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 40232/2017

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
29 April 2025	
DATE	SIGNATURE

Type text here

In the matter between:

ROSEMARY BOTHA

Plaintiff

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 and for hand-down is deemed to be 29 April 2025.*

Summary: Loss of earning capacity – loss of business profits attributable to the owner of the business. The Court is not compelled to accept the valuation of the loss made by an expert. The Court is empowered to award damages that are fair and reasonable taking into account the applicable contingencies. Held: (1) A reasonable and fair amount of loss of earning capacity awarded.

JUDGMENT

MOSHOANA, J

Introduction

- [1] This is an action for delictual damages suffered by the plaintiff Mrs Rosemary Botha. The action came before Court as an undefended one. An order was made by this Court dealing with other aspects of the present claim. A judgment on the claim of loss of income claim was reserved. Accordingly, the singular issue to be considered in this judgment is that of loss of earning capacity. As at 15 April 2025, the plaintiff amended her particulars of claim and claimed an amount of R6 000 000.00 for loss of income against the Road Accident Fund (RAF).
- [2] This Court admitted into evidence reports of various experts in terms of rule 38(2) of the Uniform Rules of this Court. This Court was not satisfied with the conclusions reached by one Mr Kyle Stemmett (Mr Stemmett) and ordered that he should in addition deliver oral evidence before Court. The calculations made by one Mr Johan Sauer (Mr Sauer) in respect of loss of earnings were entirely predicated on the conclusions reached by Mr Stemmett. Mr Sauer presented to this Court two scenarios. The first postulated 5 years early retirement and presented a loss of R5 579 626.00. The second postulated 10 years early retirement and presented a similar loss.
- [3] Mr Stemmett evaluated the loss of earning capacity by deducting the salary expenses of three and later two staff members that the plaintiff's business engaged to assist it owing to the limitations suffered by the plaintiff as a consequence of the accident.

Brief factual exposition

- [4] In view of the remaining issue for determination, it is unnecessary for this judgment to provide a full rendition of the factual exposition appertaining this

action. It suffices to state that the plaintiff was involved in a motor vehicle accident as a result of which she sustained serious bodily injuries.

- [5] At the time of the accident, the plaintiff was one of the members of a registered close corporation. According to the plaintiff, the other member of the corporation is her mother, who is not actively involved although she helped out in some instances. As such, she takes 100% of the corporation's profits. Prior to the accident, the plaintiff actively managed the business of the corporation, which was involved in cooking and catering food for functions. She did all of the cooking and managed catering functions on her own.
- [6] Post the accident, she had to hire two kitchen staff at a monthly salary of R6000 each in order to assist with the cooking. Also, she had to hire a manager and had to pay approximately R20 000 a month to that manager. She could not stand due to the injuries sustained in the accident. She returned to the business in January 2017. Her salary that she drew from the business was never affected. During the Covid19 lockdown the business slowed down. This resulted in the manager leaving the business with the two kitchen staff employees remaining. As at 11 February 2025, when she was interviewed by Mr Stemmett, the two kitchen staff members were still employed.
- [7] Mr Stemmett is a Chartered Accountant (CA) by profession. In order to conduct an evaluation of the loss of earning capacity of the plaintiff, he was furnished with financial records for the business for the period 2014 to 2024 for analysis purposes. He was also furnished with payslips of the plaintiff for the period 2019-2025. He was however not furnished with IRP5s of the additional employees to verify the alleged salaries of R20 000 and R6 000 respectively. He calculated the loss of earning capacity by taking the alleged salaries and multiplied them by 12 months and increased them by inflationary growth year-on-year. He apportioned the additional employee costs since the business was closed for approximately 83 days during the Covid19 lockdown.
- [8] Ultimately he valued the lost earning capacity of the plaintiff as follows; (a) past loss-business' profits (100%) = R1 550, 895; and (b) total injured business profits at R40,057 a month. In his oral testimony he testified that he deducted the

additional employees' salaries from the possible dividends or profits that the plaintiff would have drawn from the business. On his analysis of the financials, he could not find any evidence of dividends drawn other than a loan account of the plaintiff.

- [9] Based on the valuations achieved by Mr Stemmett, Mr Sauer arrived at the loss mentioned at the dawn of this judgment after applying 10% and 30% contingencies on the past and future loss respectively.

Evaluation

- [10] Before the merits of this action are considered, it is apposite to first and foremost affirm that admission of evidence in terms of rule 38(2) does not transmute into automatic acceptance of such evidence. The purpose of this rule is to regulate admission of evidence in other forms other than the customary *viva voce* form. The default position is that evidence must be delivered orally. Evidence admitted in the form contemplated in the rule, still requires evaluation and assessment to ensure compliance with rule 39(1) of the Uniform Rules. The onus to prove loss of earning capacity remains with the plaintiff. S/he who alleges is saddled with the onus of proof.

- [11] Involved herein is an alleged loss of earning capacity as opposed to loss of income. After the accident, the plaintiff did not lose any of her salaries she earned from the business entity. She continued to earn the same way she earned pre and post the accident. According to Mr Stemmett, the loss that was suffered is the loss to the business. Put differently, the business had to incur additional expenses which ate up into the profits of the business and ultimately affected the 100% dividends due to the plaintiff. The plaintiff's case is that owing to the injuries, she could no longer perform optimally in order to assist the business to achieve profitability. As such in order to maintain the profitability of the business she had to replace her performance with a salary expense of approximately R32 000.00 for a certain period and thereafter R12 000.00.

- [12] Accordingly, the said business expense amounts to her loss of earning capacity. The legal question to be addressed herein is whether the loss suffered by the *alter ego* of the plaintiff, the business, could be attributable to a loss of earning

capacity or not. As a departure point the RAF legislation is aimed at compensating for bodily injuries. At first blush this alleged loss of business profits does not appear to be connected to the bodily injuries. Despite her bodily injuries, the plaintiff continued to earn her income. Accordingly, there is no case made for loss of income.

[13] For the purposes of this judgment, this Court finds it befitting to deal with the esoteric distinction between loss of income and loss of earning capacity. A loss of earning capacity is an award based on the recognition that the plaintiff's capacity to earn money was an asset which has been taken away. It is the value of the loss of earning capacity, a capital asset, for which the RAF must pay compensation for. On the other hand, loss of earnings simply entails the money that a plaintiff loses as opposed to the capacity to make, as it were, that money. In the present instance, there is no evidence to demonstrate that the plaintiff did lose any income.

[14] In an instance where loss of earning capacity is involved, firstly, there must be proof of a loss of earning capacity before there can be any future loss of earnings. The actual loss of earnings is then a manifestation of the inability of a person to earn the same income as before because of the damage-causing event. Secondly, once it has been established that there is, in fact, a definite loss of earning capacity, an amount must be attached to the incapacity. Effectively, earning capacity is a diminution of a claimant's ability to generate income.

[15] It is by now trite that there are two methods that a Court may employ, to calculate the amount to be attached to an incapacity. However, before the Court reaches there, there must be evidence that there was indeed loss of earning capacity. In the absence of any evidence to the contrary, this Court accepts that the accident injuries did in fact affect the earning capacity of the plaintiff. The key question is what value is to be attached to such a loss. The value of a particular plaintiff's capacity to earn is equivalent to the value of earnings she or he would have received over time had the delict not been committed. In *Arthur Robinson*

*(Grafton) Pty Ltd v Carter (Carter)*¹, Barwick CJ expressed himself in the following terms:

“The respondent is not to be compensated for loss of earnings but for loss of earning capacity. However much the valuation of the loss of earning capacity involves the consideration of what moneys could have been produced by the exercise of the respondent’s former earning capacity, **it is the loss of capacity, and not the failure to receive wages for the future**, which is to be the subject of fair compensation...”

[16] In *Medlin v SGIC (Medlin)*², McHugh J stated the following:

“Earning capacity is an intangible asset. Its value depends on what it is capable of producing. Earnings are evidence of the value of earning capacity but they are not synonymous with its value.”

[17] Based on the above legal expositions, which this Court accepts with less hesitation, this Court has a difficulty in accepting the valuation of Mr Stemmett. It is not based on what the asset is capable of producing but it is based on what the business lost due to the alleged absence of the capacity of the plaintiff. Nevertheless, there was no cogent evidence to support that indeed R20 000 and R12 000 respectively was expended for the additional staff. Most importantly, there was no evidence that the alleged R32 000 equates the lost asset. When regard is had to the report of Mr Sauer, the calculations were based on the earnings of the plaintiff from 2017 to 2024. As indicated in *Carter* the compensation is not based on lost earnings but on loss of earning capacity. This case is distinguished from the case of *Rowe v Bobell Express Ltd (Rowe)*³, where the Court of Appeal of British Columbia awarded an amount for loss of earning capacity in respect of loss of business profits.

[18] Briefly, the facts in *Rowe* are that in October 2005, Mr Rowe, a business man was seriously injured in a motor vehicle accident. Due to his ailment as a consequence of the accident, he was unable to look after the interests of his

¹ (1968) 122 C.L.R 649 at 658, [1968] H.C.A 9

² (1995) 69 ALJR 118 at 126.

³ 2005 BCCA 141 (CanLII)

business. He had to raise a loan from one of his companies, in order to, inject profitability in the other. Mr Rowe claimed back that which he injected into the ailing company as loss of earning capacity. In dealing with such a claim, the Court of Appeal under the hand of the Honourable Mr Justice Smith, expressed itself in the following terms:

“[38] I agree with Mr Rowe that this loan is more properly considered a reasonable attempt by him to mitigate his loss of earning capacity. By injecting the monies into the business, he was attempting to return the company to profitability in order that, amongst other things, it could resume its payments to him. In my view, the loss of this money therefore reflects his loss of earning capacity.”

[19] In the present matter, the additional salary expense was not incurred in order to return the company to the situation where the business could resume its payments to the plaintiff. She continued to earn her salary. There is no evidence that the additional expenses would amount to dividends or profits. A dividend is a sum of money paid regularly by a company to its shareholders out of its profits or reserves. A profit is a financial gain comprised by the difference between the amount earned and the amount spent. A salary is not a business gain but an expense. Accordingly, this Court is unable to agree with the valuation that turns business expense into a profit. Notionally, if the three employees were not employed, the business would not have attracted a salary expense and as such its financial gain would not be affected.

[20] As indicated, this Court does accept that the plaintiff's work ability was compromised. In the absence of proper evidence as to what the monetary value of that lost capacity is, this Court must award what is a fair and reasonable compensation. The plaintiff was incapacitated for a period of time and this Court does accept that his patrimony, indeed, suffered during the period of incapacitation. In *Sandler v Wholesale Coal Suppliers (Sandler)*⁴, the Court remarked as follows:

⁴ 1941 AD 194.

“When the owner of a business of this nature, who works in it in the ordinary way in which the appellant worked, is confined to hospital for four months and unable to do work which he previously did, the business as a profit-earning concern must necessarily suffer. **It seems reasonable to assume that the appellant’s skill and energy and his activities in the affairs of the business were a source of some profit to the business.**”

[21] The Court in *Sandler* went further and stated that:

“I considering that question it must be recognised that although the law attempts to repair the wrong done to the sufferer who has received personal injuries in an accident by compensating him money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach of certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge’s view of what is fair in all the circumstances of the case.

[22] Therefore, taking into account all the circumstances, and that the plaintiff was hands-on prior to the accident, a globular amount of R2 000 000 would be fair and reasonable to compensate for the loss of the work she could have produced had she been capacitated. This Court is not satisfied with the mathematical valuation and calculations provided to it. These calculations appear to be overly inflated, unfair and unreasonable. In *Gillbanks v Sigournay (Gillbanks)*⁵, the Court expressed itself in the following terms:

“Actuarial expert evidence is in such cases always of considerable assistance, but the **Court is not bound by such evidence**; it **retains its discretion** and its assessment of contingencies is still necessary...”

[23] As indicated above, this Court is unable to observe logic and acceptability in the proposed method. Contingencies ought to be applied to this amount taking into account the vicissitudes of life. In the circumstances an overall 30% contingencies must apply to both pre and post morbid situations.

⁵ 1959 2 SA 11 (N)

[24] In the premises, the following award is to be made by this Court:

Loss of earning capacity	R2 000 000.00
Less 30% contingencies	R600 000.00
Total award	R1 400 000.00

[25] On account of all the above reasons, I make the following order:

Order

- 1. The plaintiff is to be compensated by the Road Accident Fund with an amount of R1 400 000.00 in respect of the loss for earning capacity.**

G N MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the Plaintiff:	Ms L Mastoroudes
Instructed by:	VZLR Inc, Pretoria
Date of the hearing:	22 and 24 April 2025
Date of judgment:	29 April 2025