

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2022-20083

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

03 June 2025

K. La M Manamela

In the matter between:

GOMO, MARLVEN

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DATE OF JUDGMENT: This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge's secretary. The date of the judgment is deemed to be 03 June 2025.

JUDGMENT

KHASHANE MANAMELA, AJ

Introduction

[1] The plaintiff, Mr Malvern Gomo, born on 25 June 1991, was injured in a motor vehicle accident which occurred around 23h00 on 26 February 2020. He met the accident whilst being ferried as a passenger in a motor vehicle driven by a certain Mr Thabang Hamilton Ngwenya ('the first insured vehicle') at or near the intersection of Honey Street and Joe Slovo Drive, Berea, Johannesburg. The first insured vehicle - in which the plaintiff was a passenger - collided with another motor vehicle with registration details C[...] ('the second insured vehicle') whose driver has not been identified.

[2] The plaintiff sustained injuries as follows due to the accident: (a) fracture of the cervical spine (i.e. C1, 2, 3 and 7); (b) fracture of the left shoulder scapula; (c) fracture of the right midshaft humerus; (d) sacrococcygeal fracture; (e) degloving of the left buttock; (f) head injury, and (g) blunt chest trauma with rib fractures and multiple chest contusion. He, consequently, suffered damages, due to the injuries and their *sequelae*, as set out below.

[3] On 9 June 2022, the plaintiff caused summons to be issued against the defendant, the Road Accident Fund ('the RAF'), in terms of the Road Accident Fund Act 56 of 1996 ('the RAF Act') for his compensation for the damages he suffered due to the accident. The plaintiff blamed the negligent driving of the insured driver (without specifying which of the drivers of the two insured vehicles he blamed) as the sole cause of the accident and, consequently, for his injuries and their *sequelae*. His claim against the RAF initially comprised the following heads of damages: (a) past and future medical and hospital expenses; (b) past and future loss of earnings and/or earning capacity, and (c) general damages. The RAF defended the matter, pleadings were exchanged and, ultimately, the matter was set down for trial.

[4] The matter came before me for a trial on 19 and 20 February 2025. Mr F Saint appeared for the plaintiff and Ms N Moyo appeared for the RAF. The trial proceeded on issues relating to quantum, specifically in relation to loss of earnings and/or earning capacity, and future medical and hospital expenses (with the RAF to be directed to furnish an undertaking for future treatment, if established). By the date of

hearing, the issues relating to the liability of the RAF to compensate the plaintiff for his damages had been settled in favour of the plaintiff with the RAF accepting 100% liability for the plaintiff's proven and/or agreed damages. The same applied to the head of claim for the plaintiff's general damages. I reserved this judgment at the conclusion of the trial on the second day after listening to oral submissions by counsel.

Brief background

[5] For a proper context to the matter, a brief narration of the issues in the background of the matter is necessary. This will be on the basis of the facts which are common cause between the parties, or not disputed.

[6] As stated above, the plaintiff was born on 25 June 1991 and was injured in the motor vehicle accident on 26 February 2020. He, therefore, was about 29 years old at the time of the accident and about 34 years of age at the time of trial. The plaintiff when admitted at the hospital had Glasgow Coma Scale or GCS reading of 14/15. The plaintiff is a Zimbabwean national and, also, went to school there. He is said to have passed A levels, but no further details are provided. As would appear below, the plaintiff did not have valid papers or authority to be in South Africa.

[7] At the date of the accident the plaintiff was employed at Amici Pizzeria in Waterfall, Midrand, Johannesburg environ. The plaintiff was hospitalised for one month following the accident. He, reportedly, was absent from work for six months following the accident, which would have been until around August 2020. He did not receive any income during this period of absence. According to the plaintiff, in November 2020 he resigned from Amici Pizzeria due to factors relating to the accident. This is disputed by the RAF and, thus, would receive further attention below. But it is undisputed that the pizza outlet closed in 2021, after the plaintiff's departure. The plaintiff was subsequently unemployed until July 2021. In August 2021, he obtained employment as a waiter at Jack Rose Hotel in Rosebank. He was still employed at the same workplace at the date of trial.

Plaintiff's immigration status

General

[8] The plaintiff, as already indicated, is a Zimbabwean national. A significant portion of the hearing was focussed on whether the plaintiff was legally in the country at the time of the accident. The corollary of this is whether the plaintiff had a valid visa or permit to be and work in South Africa. Documents placed before the Court suggested that the plaintiff had no valid papers to either work or stay in this country. This was also established when the plaintiff testified at the trial, especially during his cross-examination by counsel for the RAF.

Plaintiff's testimony

[9] The plaintiff testified (during the examination in chief by his counsel, Mr Saint) - through interpretation by Mr Peter Phiri, a sworn interpreter from Shona to English and vice versa - including as follows. He confirmed his employment - at the time of the accident – as a waiter at Amici Pizzeria in Waterfall, Midrand. He had started working there in 2018. He earned between R3 500 and R4 000 basic salary per month. He also received between R1 000 to R1 500 per week in the form of tips or gratuities as a waiter. He concluded a contract of employment with this employer.¹ The contract of employment was admitted into the record as Exhibit 1.

[10] The plaintiff also confirmed the salary or pay slips on record, from end of April 2018 onwards.² These documents reflect a monthly salary of R4 000. The plaintiff testified that, in addition to the monthly salary, he received gratuities or tips by way of cash. The salary or pay slips, generally, is/are not in dispute, save in minor respects, as would be further dealt with, below. What is disputed, as stated above, is whether the plaintiff was entitled to be employed in the first place due to his immigration status. The plaintiff told the Court that after Amici Pizzeria he got employment at Jack Rose Hotel in Rosebank in 2021. The latter employer pays his salary in cash. The pay slips (in respect of Amici Pizzeria) were admitted, collectively, as Exhibit 2 and the affidavit by the plaintiff deposed to at a police station as Exhibit 3. The

¹ Plaintiff's contract of employment at Amici Pizzeria, CaseLines 010-5 to 010-9.

² Plaintiff's pay slips from 30 April 2018 to 31 March 2020 for Amici Pizzeria, CaseLines 10-16 to 010-27.

plaintiff, when examined by his counsel, was referred to another or confirmatory affidavit he deposed to a week or so before the trial with regard to the accident.³ The affidavit dealt with issues relating to the merits and quantum of the damages allegedly suffered by the plaintiff. Of importance to the issue currently under discussion is that the affidavit stated that the plaintiff was a holder of passport number EN231948. The affidavit was admitted into the record as Exhibit 4.

[11] When cross-examined by Ms N Moyo for the RAF, the plaintiff's evidence included the following. The plaintiff was referred to the affidavit he deposed to on 1 February 2022 using Identity Number 6[...] KAS regarding his allegedly closed bank account ('the bank account affidavit').⁴ Further, the plaintiff was referred to the affidavit he deposed to when confirming his residential address ('the residential address affidavit').⁵ He acknowledged using his passport number (i.e. E[...]) in the residential address affidavit. The bank account affidavit and the residential address affidavit were admitted as Exhibits 5 and 6, respectively. The plaintiff, also, was referred to his employment contract with Amici Pizzeria (i.e. Exhibit 1).⁶ In the latter document the plaintiff had identified himself in terms of an asylum number P[...]. The plaintiff confirmed that his passport expired on 7 October 2024⁷ and that he does not have a new passport. He could not produce a copy or original ID issued to him by Zimbabwean authorities. He stated that he had only one passport. When asked by counsel the reason for using three different documents, the plaintiff simply said that on the day of the bank account affidavit he just decided to use his Zimbabwean ID Number 6[...]. On the contract of employment (i.e. Exhibit 1) he decided to use the asylum number. He then mentioned that, actually, it was the employer who decided to use the asylum number on the latter document. It would be later disputed by the plaintiff, when re-examined by his counsel, that he misled anybody with regard to his identification or passport. He had only one passport.

[12] Further in cross-examination by Ms Moyo for the RAF, the plaintiff whilst confirming that he earned between R3 500 and R4 000 per month and, thus, a

³ Plaintiff's confirmatory affidavit, dated 7 February 2025, CaseLines 019-1 to 019-3.

⁴ Plaintiff's bank account affidavit, CaseLines 010-3.

⁵ Plaintiff's residential address affidavit, CaseLines 010-4.

⁶ Par [9] above.

⁷ Plaintiff's passport, CaseLines 022-26.

variable income, was referred to another affidavit he deposed to on 7 February 2022 ('the R4 000 per month affidavit').⁸ Counsel for the RAF asked the plaintiff why in 'the R4 000 per month affidavit' the plaintiff did not state that his salary varied, but only stated his monthly income at R4 000. The plaintiff instead of answering the question merely insisted that his salary varied between R3 500 and R4 000 per month. He appeared to me to be avoiding the question or to concede a clear fact. Counsel, then, put it to him that the affidavit is incorrect to which the plaintiff responded that they just wrote R4 000, but I mentioned to them that it is R3 500 to R4 000 per month. I understood the reference to 'them' to be the police as the handwritten affidavit ('the R4 000 per month affidavit') was deposed to at the Roodepoort police station.

[13] Also the cross-examination of the plaintiff by Ms Moyo for the RAF included the following. The plaintiff confirmed that his last day of work at Amici Pizzeria was around November 2020. It was during the COVID pandemic, but the business was in operation. He also confirmed that he was seen by a number of medical experts for the injuries from the accident. When asked why the neurosurgeon said that he left work due to COVID and not laid off, the plaintiff stated that he left during the COVID era, but his reason for leaving was due to ill health.

Counsel's submissions

[14] The issue of the immigration status of the plaintiff and its implications to his damages' claim was also dealt with by way of oral submissions by counsel. The submissions or argument focussed on the documents referred to above and the plaintiff's testimony before the Court.

[15] I will start with the submissions by Ms Moyo on behalf of the RAF, as the RAF made the allegations that the plaintiff was an illegal immigrant and, thus, not entitled to compensation at all or as applicable to claimants with valid authority to sojourn in the country. Her submissions included the following. She argued that the plaintiff's passport did not include a work or visitation permit. This speaks to the Immigration

⁸ Plaintiff's 'R4 000 per month affidavit', CaseLines 010-33.

Act 13 of 2002, she argued. The plaintiff, also, had not applied for a work permit. Counsel referred to the Full Court decision in *Mudawo and Others v Minister of Transport and Another* ('*Mudawo*')⁹ where, among others, the RAF Management Directive dated 21 June 2022 titled 'Critical Validations to Confirm the Identity of South African Citizens and Claims Lodged by Foreigners' ('the Directive') was reviewed and set aside with the RAF held liable for costs.¹⁰ The Directive was set aside to the extent that: (a) it required proof of identity by foreign claimants, accompanied by documentary proof that the claimant was legally in South Africa when the material accident occurred; (b) it required foreign claimants to provide copies of their passports reflecting stamp at a point of entry and when they are claiming from outside of South Africa, stamp at point of exit (including proof of an approved visa for the RAF to register such claimants' claims, if they are still in the country). The decision in *Mudawo* is said to be pending appeal at the Supreme Court of Appeal ('the SCA'), with the leave of the SCA,¹¹ after this Division refused leave to appeal, with costs. Counsel submitted that because there is a pending appeal it would be a better approach to postpone the trial in the matter - with costs in the course - to await the SCA's decision in the appeal. Counsel submitted that this would accord with section 18¹² of the Superior Courts Act 10 of 2013. Counsel, further, relied on the decision in *Olufemi v Road Accident Fund* ('*Olufemi*')¹³ in support of the RAF's case that the plaintiff has no claim (or has a limited claim) for loss of earnings and/or earning capacity, due to his status as an illegal foreigner. Ms Moyo cited further cases in reply.

[16] Mr Saint, appearing for the plaintiff, made submissions which included the following on the immigration issue. He criticised reliance by the RAF on *Mudawo*, as

⁹ *Mudawo and Others v Minister of Transport and Another* (011795/2022) [2024] ZAGPPHC 258 (26 March 2024)), *coram*: Davis J, et Mnyovu et Kok AJJ.

¹⁰ *Mudawo* [51].

¹¹ *Charumbira v Road Accident Fund* (371/2024) [2025] ZAFSHC 122 (24 April 2025) ('*Charumbira*'), *per* Full Bench of the Free State Division, *coram*: Mbhele AJP et Opperman J [2], [4] where it is stated that the SCA granted the RAF leave to appeal to it on 20 September 2024.

¹² Section 18 of the Superior Courts Act provides for suspension of decisions pending appeal and reads as follows in the material part: '(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.'

¹³ *Olufemi v Road Accident Fund* (50498/2021) [2024] ZAGPJHC 1227 (15 November 2024), *per* Weideman, AJ.

the decision does not have the effect of binding other parties and is only binding between the parties involved therein. He also relied on or referred to section 18 of the Superior Courts Act to advance the aforesaid submission. Overall, one cannot be expected to sit back while awaiting the outcome of the SCA process, counsel's submission concluded.

Conclusion

[17] My views expressed during the hearing remain unaffected. I am still of the view that the pending appeal in *Mudawo* has no bearing on this matter. This is so even on a reading of the provisions of section 18 of the Superior Courts Act, which do not give a pending appeal a binding effect beyond the parties involved in the particular matter. I am also aware of the decision of a full bench of the Free State Division in *Charumbira* in which the Full Bench found the facts in *Mudawo* to be 'on all fours' with the matter it was seized with and, consequently, that it was 'more practical' to await the SCA appeal decision in *Mudawo* which it opined 'will bring legal certainty',¹⁴ before ordering that the matter be heard after the SCA appeal.¹⁵ To avoid doubt, I am not saying here that the fact that the plaintiff is an illegal foreigner in this country has no bearing on the award to be made in this matter. It will be a factor worthy of consideration, as would become clearer below.

Plaintiff's case and submissions (on the damages' claim)

General

[18] The plaintiff underwent medico-legal examinations by six experts retained on his behalf. They, subsequently, filed expert reports with regard to the injuries sustained by the plaintiff and their *sequelae*.

[19] At the commencement of the trial, counsel for the plaintiff moved an application in terms of Rule 38(2) of the Uniform Rules to proceed on the basis of the medico-legal reports filed on behalf of the plaintiff. The contents of the reports are confirmed under oath by the experts. The application also extended to the affidavit(s)

¹⁴ *Charumbira* [20].

¹⁵ *Charumbira* [22].

deposed to by the plaintiff. There was no objection by the RAF to the application and, consequently, it was granted, save with regard to the plaintiff's affidavit(s). Counsel for the RAF insisted that the plaintiff be put on the stand regarding some of the issues, particularly regarding his immigration status, as already dealt with above. The RAF did not file any reports or tender any evidence by any witness. The defence of the matter was solely based on the submissions made by Ms Moyo, appearing for the RAF.

Plaintiff's expert evidence and submissions

[20] The plaintiff's injuries, further from what appeared in the summons recorded above,¹⁶ are stated in the medical reports as follows: (a) head injury; (b) cervical spine fractures (C1, 2, 3 and C7); (c) lumbar spine soft tissue injuries; (d) left scapula injury and right scapula injury; (e) right humerus fracture; (f) blunt chest trauma; (g) sacrococcygeal fracture, and (h) left buttock degloving. The relevant opinions expressed by the plaintiff's experts regarding the plaintiff's injuries and *sequelae* are discussed, next.

Orthopaedic Surgeon

[21] On 12 July 2021, the plaintiff was examined by Dr G Read, an orthopaedic surgeon. He, subsequently, compiled a report on his assessment and opinions filed on 14 February 2025.¹⁷ He had access to hospital or medical records, as well as the RAF form completed by Dr D Latsky.

[22] Dr Read noted that the plaintiff complains of and/or suffers from, among others, the following due to his injuries: (a) nose bleeds, headaches and forgetfulness; (b) occasional mid- to lower cervical spine pain and lower back pain, when involved in activities and during cold weather; (c) stiffness in his neck and back, as well as, muscle spasm in the paraspinals and trapezii; (d) difficulty sitting or standing in one position for prolonged periods of time and some difficulty finding a comfortable position in which to lie; (e) occasional right scapula region pain; (f)

¹⁶ Par [2] above.

¹⁷ CaseLines 004-1 to 004-10.

symptoms suggestive of a post fracture syndrome of his right humerus; (g) occasional pain emanating from the fracture site and fixatives; (h) some difficulty lifting heavy items with his right hand, and (i) occasional right anterior chest wall pain. In addition to the aforesaid the plaintiff exhibits scars related to this accident, which would have been more relevant when determining issues relating to general damages, which issues have become settled.

[23] According to Dr Read, the plaintiff may require in future conservative treatment for orthopaedic symptoms related to the accident, which may consist of medication and consultations with a biokineticist and/or physiotherapist. Also, the internal fixatives can be surgically removed from the plaintiff's right humerus. Dr Read opined that, the plaintiff remains moderately disabled due to symptoms emanating from cervical spine, right shoulder region, right humerus, chest wall and lower back. Dr Read confirmed his opinions in a letter dated 22 January 2025 and mentioned that he does not think that the plaintiff requires re-assessment.¹⁸

Plastic Surgeon

[24] On 20 October 2021, Prof L.A. Chait, a plastic surgeon, assessed the plaintiff and compiled a report on the same date.¹⁹ The opinions of this expert, including that: (a) the various scars on parts of the plaintiff's body may require treatment in future for the scars which could improve a number of the scars; (b) the procedure would require repetition on some areas for optimum benefit, and (c) the plaintiff would require sunblock over the residual facial scars for the remainder of his life, were more relevant to the issue of general damages. However, they remain relevant to the issue of undertaking required from the RAF in terms of section 17(4)(a) of the RAF Act for the plaintiff's proven future medical, hospital and related expenses.

Neurosurgeon

¹⁸ CaseLines 004-184.

¹⁹ CaseLines 004-23 to 004-26.

[25] On 25 October 2021, the plaintiff was assessed by Dr. T.S. Mpotoane, a neurosurgeon. The report of this expert witness was filed in October 2022.²⁰ He had access to the reports and other medical records filed before. According to the neurosurgeon, the plaintiff sustained, among others, a head injury; multiple cervical spine fractures, and sacrococcygeal fracture. The expert also recorded the outcome diagnosis of the injuries including that the plaintiff suffered severe traumatic brain injury with post-traumatic neuropsychological disfunction and chronic headache. The neurosurgeon indicated that the plaintiff has a Whole Person Impairment ('WPI') of 41%. On 6 February 2025, Dr Mpotoane furnished a letter in terms of which he opined that the plaintiff 'has reached his period of maximum medical improvement and as such no further clinical improvement nor deterioration will be experienced' and, therefore, he abides by his report dated 25 October 2021, as there is no need to re-assess the plaintiff.²¹

Clinical & Neuropsychologist

[26] On 26 October 2021, the plaintiff was assessed by Ms A Cramer, a clinical and neuropsychologist. The clinical and neuropsychologist compiled a report dated 9 November 2021.²² She also had access to the reports of the other expert witnesses, referred to above. After conducting the relevant tests on the plaintiff, she opined, among others, that from a neuropsychological perspective, the plaintiff would have difficulty in any manner of work as a result of factors, which include the following: (a) ongoing experience of pain and discomfort could hamper his ability to perform work requiring extended periods of being on his feet during the day, such as being a barman; (b) inconsistent attention and slowing of his psychomotor and mental processing speeds; (c) narrative recall difficulties; (d) ongoing emotional distress related to the accident, and (e) self-consciousness and distress arising from his scarring.

Occupational Therapist

²⁰ CaseLines 004-36 to 004-64.

²¹ CaseLines 004-186.

²² CaseLines 004-74 to 004-97.

[27] On 13 July 2022, the plaintiff was assessed by an occupational therapist, Ms L. Jaquire. The report of this expert witness is dated 30 August 2021.²³ She had access to the reports of other experts and medical records relating to the plaintiff. She noted, among others, the following: (a) the plaintiff was away from work for about seven months following the accident; (b) when he returned to work he was re-allocated to work only as a barman; (c) he, reportedly, could not cope with the work requirements as a barman and he resigned after a month, and (d) has remained unemployed since. It is by now clear that the latter statement is incorrect. The occupational therapist also noted that the plaintiff complained of daily headaches; back pain; struggling to stand for prolonged periods; body fatigues after standing for longer than two hours; chest pain while walking; difficulty lifting heavy objects; weakness in the right arm; nose bleeds in the evenings, and travel-related anxiety.

[28] Further, the occupational therapist reports that the plaintiff was forgetful or had memory difficulties regarding recipes for mixing drinks and orders placed, when he worked as a barman post-accident. Consequently, he was only allowed to do light work by serving drinks only and exempted from serving food. He was also allowed to take sitting breaks between serving customers. The results from physical test were indicative of slight restriction in terms of overhead work and standing with the plaintiff displaying current restriction to low range medium work on overhead level. This expert draws the following conclusions regarding the plaintiff: (a) he meets most of the demands made on him as a waiter and barman, although he fails to meet the prolonged standing required of a barman and waiter on a full time basis; (b) he fails to meet the coordination demanded of a barman in his pre-accident position; (c) the right shoulder injury will probably affect execution of tasks with the required precision, as a barman, and (d) his work accuracy would improve when executing slower task, although this would probably negatively affect the plaintiff's productivity. Therefore, this expert opined that, the plaintiff's failure to return to his pre-accident position as a barman appears justified as a result of the injuries sustained to his spine and his right upper limb.²⁴

²³ CaseLines 004-100 to 004-121.

²⁴ Occupational therapist's report at par 31, CaseLines 004-114 to 004-115.

[29] Also, the occupational therapist referred to the medical treatment recommended by the orthopaedic surgeon which would restore the right and dominant arm's strength sufficiently to allow quick and coordinated movement for the plaintiff to return to work as a barman again in the future. According to this expert, the plaintiff would probably retain his capacity to perform work of a medium nature on overhead level in future and which will allow him to work as a waiter, yet he will probably never retain his suitability to work as a barman even following successful physical treatment.²⁵ This expert, subsequently, compiled an addendum report in which she, among others, expressed her agreement with the neurosurgeon, Dr Mpotoane, that the plaintiff would find it difficult to gain any employment for the remainder of his life.²⁶

Industrial Psychologist

[30] On 13 July 2021, the plaintiff was assessed by Ms M. Hough, an industrial psychologist, who subsequently compiled and furnished a report dated 8 September 2021.²⁷ She also had access to the reports of the other expert witnesses, referred to above.

[31] The industrial psychologist's opinions included the following for purposes of quantification of the plaintiff's claim:

[31.1] regarding career and earnings perspective:

From a career and earnings perspective, **Dr Read** opined that following further treatment, Mr Gomo's symptoms related to this accident should improve and should not preclude him from working or have any significant long-term effect on his income or employment prospects. **Dr Read** indicated that he will require a total of eight to twelve weeks to attend to the treatment recommended and that his age at retirement, if he works again in future, should not be affected by the orthopaedic injuries sustained in this accident (p.g. 9).²⁸

²⁵ Occupational therapist's report at par 31, CaseLines 004-115.

²⁶ Occupational therapist's addendum report, dated 13 January 2022, at par 4, CaseLines 004-129.

²⁷ CaseLines 004-131 to 004-169.

²⁸ Industrial psychologist's report, par 9.7, CaseLines 004-145 to 004-146.

[31.2] in respect of the plaintiff's past loss of earnings:

7.1.2 In November 2020 he resigned from working at Amici Pizzeria as he was feeling weak (refer to his affidavit). He then remained unemployed until July 2021. He should be compensated for this total past loss of income incurred, based on his likely pre-accident income.

7.1.3 In August 2021 Mr Gomo obtained employment as a Waiter at Jack Rose Hotel in Rosebank. He currently remains employed in this position at a basic salary of R3 500 per month/ R42 000 per annum. Factual proof defers regarding his earnings in-between from 2021 to 2024. He should be compensated for this partial loss of income incurred based on his likely pre-accident income.²⁹

[31.3] regarding likely future earnings or future loss of earnings are as follows:

7.2.1 Writer notes that following his involvement in this accident, Mr Gomo obtained employment as a Waiter at Jack Rose Hotel in Rosebank in August 2021. He currently remains employed in this position. However, Writer considers his current employer's comments regarding his current work ability as well as the poor reviews he has received from customers. Mr Coetzee indicated that he is *"very difficult to give instructions too" and that he "persist with him" as "his chances of finding employment elsewhere due to his disability is very, very low"*. Mr Coetzee further indicated that he keeps Mr Gomo employed as *"Being disabled myself I understand his plight yet persist with him despite the negative implications to the business."*

7.2.2 Based on the evidence provided it is therefore clear that Mr Gomo suffers with significant cognitive and behavioural issues at work, which has had, and continues to have a negative impact on the business which employs him. He only remains employed through sympathetic means.

²⁹ Industrial psychologist second addendum report, dated 12 February 2025, CaseLines 004-168.

7.2.3 Writer accepts that Mr Gomo's neuropsychological and neurological presentation (due to the severe traumatic brain injury suffered in this accident),

render him a markedly vulnerable employee, as evidenced afore.

7.2.4 Writer is ultimately of the opinion that Mr Gomo will most likely lose his current employment upon full and final settlement of this third-party claim, either through his resignation or through termination of employment.

7.2.5 At such time of losing his employment, taking expert opinion into consideration, in combination with his neurocognitive presentation, Writer is of the opinion that Mr Gomo will never again be able to secure any gainful employment in future and he will suffer a total future loss of earnings for which he should be compensated until the expected retirement age 65 years, based on the postulated pre-accident earnings scenario as stipulated in par. 4 of this 2nd addendum report.³⁰

Actuarial calculation

[32] Munro Forensic Actuaries furnished revised estimations of the plaintiff's past and future loss of earnings, as at 1 March 2025, in a report (revision) dated 13 February 2025.³¹ The calculations are furnished by way of two scenarios, with scenario 1 being on the basis that the plaintiff would have remained a barman/waiter and scenario 2 being on the basis that he would have become a manager. In both scenarios the plaintiff is projected to have retired at the age of 65. Mr Saint submitted that the plaintiff was not pursuing the pre-morbid manager scenario (i.e. scenario 2).

[33] The calculations are also on the basis that the plaintiff's monthly salary was in the amount of R4 000 and tips or gratuities in the amount of R1 000 per month. The total past loss is in the amount of R395 500 and future loss in the amount of

³⁰ Industrial psychologist second addendum report, CaseLines 004-168 to 004-169.

³¹ Actuarial report, CaseLines 004-213 to 004-218.

R2 597 800 and, therefore, a total loss of R2 993 300 for the waiter/barman scenario. These figures are without contingency deductions and the cap in terms of the RAF Amendment Act has no effect.

[34] Submissions by Mr Saint for the plaintiff on these aspects included the following. He suggested – on the basis of the industrial psychologist’s findings that a 25% contingency deduction be applied to the plaintiff’s uninjured future earnings, and a 15% contingency deduction be applied to the plaintiff’s past loss of earnings. The result of the aforesaid is a total loss of earnings in the amount of R2 284 525, he submitted. Counsel emphasised that according to medical opinion or the evidence of the expert witnesses the plaintiff will never secure employment. But counsel was alive to the following facts, that: (a) the plaintiff currently has a job and, if lost, he may secure a job as a car wash or guard, and (b) there was lack of collateral information. He suggested that these, conventionally, be addressed by way of contingency deductions.

Submissions on behalf of the RAF (and the plaintiff’s reply) (on the damages’ claim)

[35] Ms Moyo for the RAF, further, made the following submissions regarding the plaintiff’s claim for loss of earnings and/or earning capacity, in addition to disputing his claim based on his lack of a valid or legal immigration status.

[36] Counsel pointed out that the plaintiff had no other witnesses to testify in advancement of his case. He is an illegal immigrant in South Africa. He has different identity numbers and he was also untruthful about his asylum status. Further, his earnings were stated as R3 000 to R6 000 per month.³² Counsel, further, argued that there was discrepancy on how the plaintiff’s employment with Amici Pizzeria terminated: did he resign or did the place close down due to the COVID pandemic?³³ The latter differs with what the plaintiff stated when he testified before the Court. He had also told some of the experts, who examined him, that he resigned. Counsel

³² Neurosurgeon’s report at par 10.1, CaseLines 004-49.

³³ Neurosurgeon’s report at par 10.3, CaseLines 004-49.

submitted that this has a bearing on the plaintiff's past loss and, thus, contingency deductions ought to be effected on the basis that the employer closed down.

[37] Ms Moyo also submitted that the radiological X-rays for the orthopaedic injuries show normal results for the lumbar spine; shoulder; chest and ribs.³⁴ The right humerus is reported as a healed fracture.³⁵ The plaintiff's WPI is at 3%. It is also an opinion of the orthopaedic surgeon that the plaintiff is not precluded by the injuries or their *sequelae* from working or having any significant long term effect of his income and employment prospects.³⁶

[38] Counsel also submitted that the Court should consider a red flag the lack of collateral information for the new job. Further, counsel reiterated that the plaintiff is not entitled to compensation when the alleged loss is in respect of earnings derived from him working in the country without a work permit or even authority to be here. Reliance in this regard was placed on the decision of this Division in *Olufemi*. In *Olufemi* the learned judge Weideman AJ, among others, stated the following, quoted in the material part:

The plaintiff is a foreigner. It is logical that the evaluation and consideration of the plaintiff's claim cannot be done on the same basis as if he is a South African citizen. There are three documents that an industrial psychologist must address when considering the claim of a foreigner, especially a driver:

1 Passport: Is it valid? Has it expired? What is the process and requirements for renewing it?

2 Visa: Does the plaintiff have a work visa to legally work in South Africa? If so, was the work engaged in, in accordance with the visa requirements? If no visa, why not? Is it possible to secure a visa to work? If so, what are the requirements and does the plaintiff meet those requirements?

3 Driver's licence: For which categories? Is it valid in South Africa? Does it expire and if so, what are the requirements to renew it?

³⁴ Orthopaedic surgeon's report at par 5, CaseLines 004-6 to 004-7.

³⁵ Orthopaedic surgeon's report at par 5, CaseLines 004-7.

³⁶ Orthopaedic surgeon's report at par 10c, CaseLines 004-199.

When, as in the case here, the industrial psychologist is of the opinion that the plaintiff is 100 percent unemployable then the next question is whether the plaintiff is entitled to remain in South Africa and if so on what legal basis?

If the evidence suggests that the plaintiff will be obliged to return to his country of origin then the future loss of income if any, has to be determined in his own country and in accordance with the prevailing labour market in the country of origin. ...

In casu there is no evidence before Court of what the plaintiff's actual net income was, before the accident. The payslips provided gives guidance as to what his gross income would have been but there is no evidence before Court as to what his net income would have been.

The claim for past loss of earnings is therefore dismissed.

There is no evidence before Court whether the plaintiff would have been able to remain in South Africa indefinitely and to legally work here. His future loss of income must therefore be determined based on what he could have earned over the remainder of his working life in his country of origin, engaging in such economic pursuits as may be available to him there. The claim will be in the currency of his country of origin and based on the case law the date of conversion from South Africa Rand would be the date of payment.

There is no evidence before Court that would enable the Court to quantify any future impairment of earning capacity and the claim for future loss of earnings is also dismissed.³⁷

[39] Ms Moyo construed the essence of the above quoted *dicta* from *Olufemi* to mean that the learned judge nonsuited the plaintiff due to his status as an illegal

³⁷ *Olufemi* pp 5-8, CaseLines 025-5 to 025-8.

foreigner. Counsel referred to the part where the judge lamented the lack of evidence and alluded to the fact that compensation has to be in foreign currency and in consideration of the claimant's possible earnings in his country of origin. But these sentiments, with respect, would equally apply to a foreigner who meet a motor vehicle accident whilst legitimately in the country. Overall, I consider *Olufemi* to have been disposed of on the basis of lack of evidence to establish the material part of the claim and not on issues to do with immigration. For this would have rendered it to be contrary to *Mudawo*, the decision of the Full Court of this Division, discussed above.

[40] Regarding possible contingency deductions, counsel's submissions included the following. Counsel suggested that the Court apply 50% contingency deduction, as a starting point, due to the uncertainty regarding the plaintiff's future employment status. There should also be consideration of the fact that the plaintiff's monthly income is improperly fixed at R4 000 plus additional income in the form of gratuities. Also, the income from Jack Rose Hotel is unverified. The actual calculation has to be reworked or re-calculated as the plaintiff can still work in the future. Therefore, the pre-morbid and post-morbid income should be the same before the Court effect a 50% contingency deduction on the figures postulated for the loss. This is with regard to the plaintiff's future loss of earnings. Counsel submits that no past loss should be awarded as the loss is COVID related and not due to the injuries sustained in the accident.

[41] Counsel repeated the submissions regarding section 42 of the Immigration Act and urged the Court to declare that sections 19 and 25 of the Immigration Act are applicable. Counsel also criticised that despite the reported memory and recollection challenges said to be experienced by the plaintiff, when testifying before the Court, the plaintiff was able to recall everything going back to 2020. He was able to answer questions and could also follow instructions when testifying.

[42] Mr Saint's reply included the following. The issues regarding liability in this matter have been amicably resolved or settled between the parties and, thus, there is no room for illegality. The settlement agreement is uncontested. Counsel also dismissed the assertions as to the credibility of the plaintiff. He submitted that the plaintiff now earns less due to the accident. He was equally dismissive of Ms Moyo

assessment of the plaintiff appearing well and devoid of the deficits attributed to him by the expert witnesses.

Evidence and submissions (discussed)

[43] Under this part, I consider the evidence to establish the injuries sustained by the plaintiff and their *sequelae*, but I am unable to substantially rely on Ms Moyo's somewhat profound challenge. I also accept that the injuries and/or *sequelae* have a bearing on the plaintiff's performance or his ability to work as a barman or waitron. But, I agree with Ms Moyo that, the plaintiff was able to return to his work, although according to him he quit due to his injuries, despite having informed the experts that the company closed down due to COVID related challenges. He, subsequently, secured employment although he is reportedly only sympathetically employed. Therefore, I searched in vain for a basis or evidence to the effect that the plaintiff would be unemployed in the future.

[44] Another critical aspect to discuss is whether the plaintiff's illegal immigrant status precludes him from compensation for his injuries in terms of the RAF Act. Counsel for the RAF says this is so, not in terms of the Directive set aside by the Full Court of this Division, in *Mudawo*, dealt with above,³⁸ but on the provisions of the Immigration Act. In support of her submissions, she cited section 19, dealing with work visa issuable by the Director-General of Home Affairs to qualifying foreigners; section 25 dealing with rights, privileges, duties and obligations of the holder of a permanent residence permit equivalent to those of a citizen, save for the exceptions specified in terms of the law, and section 42 proscribing aiding and abetting illegal foreigners on a 'matter, conduct or transaction which violates such foreigner's status', which includes 'entering into an agreement with him or her for the conduct of any business or the carrying on of any profession or occupation'.³⁹ I appreciate the novelty of this argument, but it has no bearing on the loss of earnings and/or earning capacity of the plaintiff. The Immigration Act appears to carry internal enforcement and sanctions mechanisms which, no doubt, are applicable to those found in breach. The authorities are clear that an illegal foreigner qualifies as a claimant in terms of

³⁸ Pars [15]-[16] above.

³⁹ Section 42(1)(b)(iii) of the Immigration Act.

the RAF Act and the absence of a work permit or visa does not disqualify such claimant.⁴⁰ For the determination, primarily, is about the capacity to earn an income, which always extends into a person's future and, thus, cannot be limited to a point in one's life which may reveal blemishes as to adherence to the law.

[45] But the absence of a work permit or visa is not irrelevant to the determination of a claimant's loss, particularly loss of earnings or earning capacity. Relevant considerations in this regard include the following: (a) the nature of the job or work position to be used to calculate the loss; (b) whether such position require any formal qualifications, training or experience for a person to perform; (d) whether the claimant had the necessary qualifications, training or experience; (e) whether the claimant would qualify for a work visa or permit to obtain or apply for such position or job. Some of these considerations comport with those stated in *Olufemi*, referred to above.⁴¹ These considerations are conjunctive, but only illustrative and not exhaustive. When a claimant who is a foreign national fails to meet the requirements imbedded in these considerations, in my view, this would suggest that he or she is not entitled to earn a living, perform the work in question and therefore earnings from such work can only be considered a guide or of illustrative value by the Court. But the material figures may be utilised in the calculation of the claimant's loss with the aidful use of contingency deductions by the Court. It does not make any difference the fact that the RAF, as in this case, has admitted liability to compensate the claimant. The discretion of the Court to determine fair and equitable compensation remains intact.

[46] The plaintiff is said to have obtained A levels in 2014 through Uimbai High, probably in Zimbabwe. He unsuccessfully attempted a diploma in accounting in 2015.⁴² As indicated he worked from 2018 to 2020 at Amici Pizzeria as a barman. It is stated by the occupational therapist that the plaintiff 'started by filling the fridges, checking the stock levels and wiped the glasses' and progressed through other

⁴⁰ HB Klopper *RAF Practitioners Guide* (LexisNexis October 2024) at A-22, A-49 and C-5, and the cases cited there, including *Rumbidzai v Road Accident Fund* (83879/14) [2015] ZAGPPHC 1071 (2 September 2015) [21], per M Madima, AJ. The latter was cited with approval in *Mudawo* [42].

⁴¹ Par [38] above.

⁴² Occupational therapist report par 3, CaseLines 004-102.

chores to the position of barman.⁴³ The occupational therapist only indicated the 'physical requirements of a barman' and did not seem to suggest existence of other requirements, beyond those and the on-job training which the plaintiff appears to have underwent. There is no evidence that the plaintiff qualified for a work visa or permit and as to whether his asylum status, if any, referred to in his employment contract, allowed him to work in South Africa. Therefore, the actuarial calculations placed before the Court will be utilised as a basic guide for the Court to arrive at a fair award for the plaintiff's loss of earnings.

Conclusion and costs

[47] In terms of the revised actuarial calculation, the following is postulated to be the plaintiff's loss of earnings in the position of a barman/waiter (i.e. scenario 1): (a) R557 300 (uninjured earnings) less R161 800 (injured earnings) equalling R395 500 past loss of earnings, and (b) R2 597 800 (uninjured earnings) less R Nil (injured earnings) equalling R2 597 800 future loss of earnings. These figures are calculated using the monthly salary of R4 000 and gratuities of R1 000 for the loss after the date of the accident until August 2021, which is at R3 500 per month (but in 2025 terms).⁴⁴ Without applying contingencies the plaintiff's total loss of earnings is estimated to be in the amount of R2 993 300.

[48] To recap, Mr Saint for the plaintiff urged the Court to apply a 15% contingency deduction to both figures in respect of the past loss and 25% to the figure for pre-morbid earnings to equate to a total loss of R2 758 230 (albeit that it is reflected in the heads as R2 284 525).⁴⁵ And, Ms Moyo for the RAF urged the Court to award no past loss, as according to her the business had closed down for reasons to do with the COVID pandemic and not the accident. For the future loss, she submitted that figures for the pre-morbid and post-morbid loss should be the same and with 50% contingency applied to both. Her reasons for this approach appear above.

⁴³ Occupational therapist report par 3, CaseLines 004-102.

⁴⁴ Actuarial calculations (revised) dated 13 February 2025 par 4.2, CaseLines 004-214.

⁴⁵ Plaintiff's heads of argument par 7, CaseLines 020-27 to 020-28.

[49] In determining what would constitute an appropriate award the Court has to primarily consider the injuries sustained by the plaintiff and their *sequelae*, including the prognosis by the experts as to their amelioration or deterioration. This being loss of earnings the factors that primarily require consideration are the effect of the injuries sustained in the accident and *sequelae* on the ability of the claimant to achieve (in terms of earnings) his pre-morbid capacity and/or aspirations.

[50] In this matter, the Court deals with a claim concerning a middle-aged claimant of about 34 years of age at the time of trial. I have accepted above that given his circumstances he could have continued to be a waiter or barman without the impact of the injuries. And the plaintiff has continued to do so after the accident despite his reported constraints emanating from the injuries sustained in the accident. Evidence before the Court is to the effect that the plaintiff may have returned to his pre-morbid employment only to quit due to inability to cope due to his injuries and, also, that his employer may have closed down due to the pandemic. There is no need to pronounce on the latter discrepancy. There are other issues relating to the plaintiff's earnings, including what I have stated above regarding the absence of a work permit. Therefore, I will effect a 30% contingency deduction to both figures for pre-morbid and post-morbid income to arrive at a figure of R276 850 for past loss of earnings. And for the pre-morbid future income, projected at R2 597 700, I will effect a 50% contingency deduction to arrive at a figure of R1 298 900 for future loss of earnings. Therefore, the total award for the plaintiff's loss of earnings or earning capacity is in the amount of R1 575 750. I consider this amount fair and equitable considering the facts and evidence in this matter.

[51] I will also direct the RAF to furnish an undertaking in terms of section 17(4)(a) of the RAF Act for the plaintiff's proven future medical, hospital and related expenses. Costs will follow the result at party and party scale, with counsel's fees at scale B.

Order

[52] In the premises, I grant an order in the following terms, that:

1. the Defendant shall pay the Plaintiff an amount of R1 575 750 (one million five hundred and seventy five thousand seven hundred and fifty rand) in respect of the loss of earnings suffered as a result of the motor vehicle collision that occurred on the 26th of February 2020;

2. the amount as mentioned in paragraph 1 hereof is payable on or before 180 days from date of this order, in to the Trust account of the Plaintiff's attorneys of record with the following details:

KRUGER & POTTINGER ATTORNEYS

ABSA – TRUST ACCOUNT – CLEARWATER BRANCH

ACC. NR: 4[...]

BRANCH CODE: 6[...]

REF: T[...]

3. The Defendant shall furnish the Plaintiff with an undertaking as envisaged in section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for 100% of the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service, or supplying of goods to the Plaintiff arising out of the injuries sustained by the Plaintiff in the motor vehicle collision which occurred on the above-mentioned date, after such costs have been incurred and upon proof thereof;

4. the Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court Scale, which costs shall include the costs attendant upon the obtaining of all the Medico-Legal Reports, all Medico-Legal Addendum reports, all Serious Injury Assessment Reports, Translator Fees, Preparation Fees, and Reservation Fees (if any), as allowed by the taxing master;

5. the Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court Scale, particularly Scale B, which costs shall include full day fees, preparation fees, reservation fees and the attendance of counsel for the 18th of February 2025, the 19th of February 2025, and the 20th of February 2025, and as allowed by the court in terms of Rule 69 of the Uniform Rules of Court as amended in the Government Gazette No 50272 on the 8th of March 2024;

6. in the event that costs are not agreed between the Plaintiff and the Defendant:

6.1 the Plaintiff shall serve the notice of taxation on the Defendant or the Defendant's attorneys of record; and

6.2 the Plaintiff shall allow the Defendant one-hundred and eighty (180) days to make payment of the taxed costs.

Khashane La M. Manamela
Acting Judge of the High Court

Dates of Hearing: 19-20 February 2025

Date of Judgment: 03 June 2025

Appearances:

For the Plaintiff: Mr F Saint

Instructed by: Kruger & Pottinger Attorneys

For the Defendant: Ms Nomqhele Moyo

Defendant's Attorneys: State Attorney