

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 039384/22

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
30/6/2025	
DATE	SIGNATURE

In the matter between:

KHAYIKAZI SHAYIMBVU

Applicant

and

ROAD ACCIDENT FUND

Respondent

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 30 June 2025.

Summary: A claim for loss of earning capacity. The onus to prove on the preponderance of probabilities that a claimant has lost capacity to earn an income lies with the claimant. A Court must be satisfied that a claimant has indeed lost capacity to earn. A Court is not bound by opinions of experts who baselessly opine that less serious injuries have affected the earning capacity of a claimant. The plaintiff has failed to discharge the onus that she lost her earning

capacity. Held: (1) The claim for loss of earning capacity and income is dismissed.

JUDGMENT

MOSHOANA, J

Introduction

- [1] There must come a time when this Court must direct the Health Professions Council of South Africa (HPCSA) to take serious disciplinary measures against its professional members who seek to mislead a Court with regard to injuries allegedly sustained by claimants in road accident claims. This Court observes that injuries not mentioned in the hospital records of the first hospital that treated the claimants are manufactured by the professionals who see or assess claimants' years after the date of sustaining injuries.
- [2] This is done in order to opine about certain sequelae aimed at suggesting to a Court that a claimant has lost earning capacity. This Court takes a dim view of this manufacturing of injuries not mentioned in hospital records. Hospital records of the first treating hospital remains the only reliable source of the injuries sustained in a motor vehicle accident.
- [3] This Court has already remarked that the loss of earning capacity claim has become the new general damages claim in an instance where the Road Accident Fund (RAF) does not make an election that serious injuries are involved or reject the seriousness of the injuries. It just seem illogical, unless some exaggeration by professionals is involved, that less serious injuries would lead to a loss of earning capacity. A time shall and must arrive where this Court must adopt an approach that where an election regarding serious injuries is not made, claims for loss of earning capacity should not be separately enrolled for trial. The civil trial roll is unduly occupied with matters where parties seek audience on a loss of earning capacity claims in the circumstances where an election is not made or the seriousness of the injuries have been rejected.

- [4] Instead of following the bespoke procedure to challenge the non-election or rejection, claimants without hesitation swiftly turn to pursuing a claim of loss of earning capacity only. Inasmuch as this Court accepts that a loss of earning capacity and income is a disparate special head of damages, it is inextricably linked to presence of serious injuries. Loss of earning capacity and income and the seriousness of injuries are, in my considered view, joined to the hip. Should that time arrive, where the approach of refusing separate enrolment is adopted, such will, in my fervently held view, significantly reduce the burgeoning civil trial roll. I take a view that this contemplated approach of not enrolling separate heads of damages for determination augurs well with the once for all rules.
- [5] The action before this Court is one of those where the seriousness of the injuries has not been accepted by the RAF. Additionally, this is one of those matters where injuries are manufactured when the hospital records do not reflect the manufactured injuries.
- [6] That said, this is an action instituted by Ms Khayikazi Shayimvubu ("Plaintiff") seeking before this Court an award of damages for loss of earning capacity and earnings. This Court must remark in passing that accident involved herein occurred at Bizana in the Eastern Cape Province, yet it is not instituted in the Divisions in the Eastern Cape but in the Gauteng Division. This Court must also remark that it is observing a growing tendency for actions that arose in far flung Provinces being instituted in the Gauteng Division. It is difficult for this Court to fathom as to what accounts for such a growing tendency. As it is customary, the RAF failed to appear at the trial of the present action. This judgment shall only address the claim for the loss of capacity and earnings.

Brief factual exposition

- [7] Owing to the fact that this judgment concerns itself with the claim for the loss of capacity and earnings, it shall be obsolete to punctiliously narrate all the facts appertaining this action. The salient facts are that on 22 May 2021, the plaintiff was involved in a motor vehicle accident. She was a passenger in the motor vehicle in question. As a result she sustained injuries and received medical attention at Greenville Hospital.

- [8] It is of significance at this point to record what the hospital records reflect. The following was recorded:

“20 years old female patient warded in OPD brought by EMR’s Ambulance. Client not on chronic illness RX C/O with a history of painful (L) ear have been taken out 1 piece involved in MVA at about +- 10h00 this late in the afternoon involved by a car +- 16H00 late. Nil allergies, would clean with normal...

Pain, ATT 0,5mls given...

Panado¹ ... given

Diclofenac² 75 mg IMI given.

Ceftriaxone³ given

Involved in MVA around 16H00. She was a passenger. O/E Dirty clothes Blood stained. ... Dirty on the ... No evidence of alcohol use.

C/O Lower back

Lt Ear lobe cut off (picture of the ear lobe drawn depicting a cut at the top – marked as “missing part”)

No active bleeding.

- [9] Perusal of the availed hospital records does not reflect any admission at the hospital. On the available evidence she was attended to as an outpatient. On 17 January 2024, more than a year after the injuries, Dr NL Mabaso assessed her. During the assessment, Dr Mabaso had, as recorded in his medico-legal report, in his possession the hospital records from Greenville Hospital. For reasons that are not altogether clear, he reported the injuries sustained as Lower back injury; Ear laceration; and Head injury. These injuries are not consistent with the records extracted above. On 13 April 2024, the plaintiff was assessed by Dr SS Selahle.

¹ Used to treat pain.

² Nonsteroidal anti-inflammatory drug used to treat mild to moderate pain.

³ Used to treat bacterial infections in many different parts of the body.

Dr Selahle records the injuries sustained as left ear injury/partial amputation⁴ of the ear helix⁵.

[10] On 1 March 2024, the plaintiff was assessed by Dr Segwapa. According to his report the hospital records he reviewed reveal injuries as Head-Partial amputation of the left ear. On 17 January 2024, she was assessed by Dr Madlabane who reported injuries as lower back injury; soft tissue injuries on the right earlobe; head injury; and partial traumatic amputation of the left pinna⁶ (sic)/left ear injury. Dr Phakoane assessed the plaintiff on 28 April 2025. He recorded the injuries as soft tissue injuries on the right ear (erroneously as the injury was to the left ear). On 15 May 2025, the plaintiff was assessed by Dr Fakude. In his report he recorded injury to the left ear; bilateral knees and abdominal injuries. Interestingly, she records that the plaintiff was admitted for three days at Greenville Hospital. Mr Temane does not record in his report as to when he assessed the plaintiff, however he records avulsion⁷ injury in the left ear.

[11] According to the report of Ms Ngubane, the Clinical Psychologist who assessed the plaintiff on 01 March 2024, the plaintiff reported to her that she had shards of glass in her head and sustained a head and ear injury and she could not receive treatment at the hospital because she was pregnant.

[12] Plaintiff started education at the age of 6 enrolled at grade R. At the age of 18, in 2019 three years before the accident she failed grade 11 and at age 19, she dropped out of school. At age 21 she passed grade 12 in 2022, the year of the accident. At age 23 she enrolled at a TVET college and dropped out at first year. She had financial difficulties and had expressed to Dr Fakude that she intends returning to the college to proceed with her Electrical Engineering Diploma. She never returned to college and she is currently unemployed.

⁴ In medical parlance, an amputation is a surgical procedure involving the removal of a body part, usually a limb, due to injury, disease, or infection.

⁵ Helix is the outer curved rim of cartilage on the ear, extending from the top of the ear down to the earlobe.

⁶ A pinna is the visible fleshy part of the outer ear. It is also known as an auricle.

⁷ Avulsion is an injury in which a body structure is torn off.

Evaluation

- [13] In terms of rule 39(1) of the Uniform Rules of Court, the plaintiff bears the burden to prove that she has lost her earning capacity. A judgment shall be given if she discharges that burden. When regard is had to the injuries sustained by the plaintiff, this Court is unable to reach a conclusion that she had actually lost any earning capacity. She was injured in May 2022 and at the end of 2022, she passed grade 12 with a Diploma pass. The following year she commenced her studies of Diploma Electrical Engineering. She dropped out due to financial difficulties and had expressed in 2024 her desire to return.
- [14] This Court almost daily is faced with experts' opinions which suggests all manner of deficiencies regarding the earning capacities of claimants. All the experts in this case were instructed by the plaintiff's attorney to provide an opinion. Their reports are replete with inconsistencies regarding the injuries sustained by the plaintiff. The hospital records reveal no head injuries. A head injury also known as a traumatic brain injury (TBI) is any trauma to the scalp, skull or brain that causes damage or impairment. An ear, nose and mouth are body parts attached to the head. But a tear of a nose, mouth or ear is not a head injury. Such injuries are incapable of resulting in cognitive deficits. According to Dr Segwapa minor head injuries are not expected to result in cognitive deficits. Cognitive deficits may be caused by various factors. There can be no doubt that the plaintiff lost a helix. This Court is unable to accept that loss of a helix is capable of directly impacting an ability to hear. A helix only helps to collect and funnel sound waves into the ear canal. Its removal may only affect sound localisation which is an ability to tell where the sound is coming from. Only the inner and middle ear are responsible for the actual processing of sound waves and transmitting them to the brain. Regarding the lower back injury, no details were provided in the hospital records as to the extent of the alleged injury. Therefore, the only conclusion to be reached by this Court is that the injury is not serious to impact on the earning capacity of the plaintiff.

[15] Most recently, the erudite Mangena AJ in the matter of *Nkosi v RAF (Nkosi)*⁸ after surveying relevant binding authorities confirmed that a Court is not bound by the opinions of experts. Similarly, in this matter this Court is not persuaded by the opinion of experts that the plaintiff has lost capacity to earn. It is disappointing to note that professional doctors refer to amputation of an ear. When the plaintiff attended to Greenville Hospital, he already had a missing part of the helix. Therefore, it cannot be said that the motor vehicle accident amputated the helix of the plaintiff. Such is absurd in medical parlance. Amputation is a surgical procedure. It is apparent to this Court that these professionals used the term amputation in an attempt to give undue weight to the seriousness of the injuries of the plaintiff so as to give impetus to the pursued claim of loss of earning capacity.

[16] To my mind, the plaintiff has failed to discharge her onus contemplated in rule 39(1). Having failed to discharge her onus, the plaintiff must in my view fail in her claim. The appropriate order in my mind is one of dismissing the claim of loss of earning capacity and income.

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

Order

- 1. The claim for loss of earning capacity and income is dismissed.**



**GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

⁸ (4671/2023) [2025] ZAMPMBHC 46 (4 June 2025)

APPEARANCES:

For the Plaintiff:

Mr Mosala (Heads drafted by Mr Singo)

Instructed by:

Sontsele Attorneys, Pretoria.

For the Defendant:

No appearance

Date of Hearing

05 June 2025

Date of judgment:

30 June 2025