IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION

MBOMBELA (MAIN SEAT)

CASE NUMBER 2453/2022

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

01 August 2025
DATE SIGNATURE

MNQOBI NGAMLA MNCWANGO **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

SHAI AJ

Introduction

[1] This is a claim for damages arising from an accident on the 27th July 2020. When the matter came before court merits had already been settled between the parties. The settlement is such that the Defendant conceded that the insured driver was solely negligent in causing the motor vehicle collision.

[2] Plaintiff's general damages and future medical expenses were also settled, with future medical expenses settled by way of the Defendant providing the plaintiff with an undertaking in terms of section 17(4)(a) of Act 56 of 1996, as amended.

[3] The court was called upon to make a determination on compensation for past and future loss of earnings.

[4] In proving their case, Plaintiff made an application for evidence to be placed before the court in accordance with the provisions of Rule 38 (2). The application was granted.

[5] Plaintiff then filed reports by the following experts:

5.1 Dr Masipa, an orthopaedic surgeon;

5.2 Dr Mkhonza, a neurosurgeon;

5.3 Dr Modiba, a clinical psychologist;

5.4 Ms Molemi, an Occupational Therapist;

5.5 Itai Brian Karidza, an actuary of Tsebo actuaries.

[6] By agreement between the parties, the plaintiff filed confirmatory affidavits by all of the aforesaid experts which affidavits are received as exhibits. The Plaintiff's expert reports are received into evidence in terms of rule 38(2) by agreement between the parties.

[7] Plaintiff also led the viva voce evidence of Ms Esther Monyela, an educational therapist, and Ms Patricia Baloyi, an Industrial psychologist. Their reports were also admitted as exhibits for ease of reference.

[8] Plaintiff also testified in his own case.

[9] Thereafter Counsel for both parties made well-reasoned and thorough submissions which I found helpful and for which I express my sincere appreciation.

Facts

[10] The admitted evidence can be summarised as follows:

Plaintiff

10.1 Plaintiff was a learner doing grade 10 at the time of the accident. He passed grades 1 to 9 on his first attempt. He repeated grade 10 and he was in his year of repetition when the accident occurred.

10.2 He did not return to school after the accident.

10.3 He briefly worked at a braai place ("chisa nyama") in the year 2022 but left as he could not withstand the heat and pain.

Educational therapist

10.4 She testified that but for the accident, plaintiff could have attained an NQF level 6. Post-morbid, although plaintiff has the potential to attain an NQF level 4, he dropped out of school.

10.5 It was suggested to her during her cross-examination that she could not adequately opine on the educational potential of the plaintiff as she had only a grade 10 school report during the assessment. She replied that the grade 10 report was sufficient for her to make the postulations as she did.

Industrial Psychologist

[11] The Industrial Psychologist, in her postulations gave two scenarios. The first scenario is based on the postulations by the educational psychologist. The second scenario is postulated on the fact that the plaintiff has quit school and, therefore, will no longer realise the potential NQF level 4, post-morbid, postulated by the educational psychologist.

[12] In the first scenario, the plaintiff would have entered the labour market, post-morbid, at Paterson Paterson B3. In the second scenario, the plaintiff is rendered unemployable.

<u>Expert reports admitted in terms of Rule 38(2)</u>

[13] The admitted reports could be summarised as follows:

13.1 Plaintiff suffered a head injury and fracture of the base of skull.

13.2 As a result of the sustained injuries:

13.2.1 His employability has been affected in that, whereas pre-accident he had the potential to attain NQF level 6, post-accident he only has the potential to attain NQF level 4.

13.2.2 His residual physical, cognitive and psychological limitations have had and will continue to have a negative effect on academic performance and work performance. these had rendered him a vulnerable and an unequal competitor in the open labour market when compared to his uninjured peers

13.2.3 The accident has left the Plaintiff vulnerable and at a significant disadvantage in seeking alternative employment.

<u>Issue</u>

[14] The issue for determination is whether the plaintiff should be compensated for suffered loss of earning capacity occasioned by the sustained injuries.

14.1 If found that loss of earning/earning capacity was suffered, it should be determined whether it is total or partial loss.

Onus

[15] The Plaintiff should discharge the onus resting upon him to show that he has to be compensated for the injuries sustained and that his earning capacity has been compromised by his injury.

Rule 38(2)

[16] The evidence adduced herein was given on affidavit in terms of rule 38(2). Rule 38(2) provides:

> "38(2) The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit."

[17] Ordinarily. the consent by the Defendant that affidavits may be filed should not be misconstrued or interpreted by the Plaintiff as the defendant's admission of evidence. The Defendant is still entitled to highlight issues arising out of the evidence, refer to contradictions between witnesses and deal with improbabilities.

[18] The postulation, however, is that the parties directly or indirectly agree to submit the expert reports by way of affidavit and then *ex lege* agree that the defendant will be able to build an argument based on the plaintiff's expert reports

and will be able to dissect the said expert reports. However, once an expert report is admitted into evidence there is no room for submissions that the expert reports are flawed in any way and are inadmissible.

[19] Submissions regarding the law of evidence and admissibility of evidence must be done before expert reports are admitted into evidence and marked as exhibits. It is at this stage that the credibility of the witnesses should be attacked.

[20] Once the reports are admitted as evidence, the defendant has to forego the right or opportunity to attack the credibility of the plaintiff's witnesses, bearing in mind that there was no cross-examination put forth affording the experts an opportunity to defend their opinions.

[21] The credibility of the expert witnesses cannot be simply attacked in heads of argument or oral submissions. If the parties agree that the deponent to the affidavit will not be cross-examined, the factual allegations in the affidavit stand unchallenged and no dispute of fact in regard thereto arises.

[22] It was held in *Road Accident Fund v Zulu and Others (50/11) [2011] ZASCA 223 (30 November 2011]* that:

> "[14] …A useful guide to the approach of expert evidence is found in Michael v Linksfield Park clinic (Pty)Ltd where the court stated:
>
> '…what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning"

<u>Loss of earnings/earning capacity</u>

[23] The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if that loss diminishes the estate.[1]

[1] Dippenaar v Shield Insurance Co Ltd 1979 (2) 904 AD at 917 A-B

[24] The defendant should, therefore, if the onus has been discharged, make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed.[2]

[25] In a case of personal injury, the court must calculate on the one hand the present monetary value of all that the Plaintiff would have brought into her estate had she not been injured, and, on the other hand, the total present monetary value of all that the Plaintiff would be able to bring into her estate whilst incapacitated by her injury.[3]

[26] The court, in determining any loss suffered, is entitled to take into account the claimant's home background.[4]

[27] It is worth noting that in some instances, the evidence may establish that an injury may in fact have no appreciable effect on earning capacity, in which event the damage would be nil.[5]

[28] The evidence in this matter is based on expert reports of seven experts, two of whom gave viva voce evidence. As alluded hereinbefore, what is required in the evaluation of such evidence is to determine whether or to what extent their opinions advanced are founded on logical reasoning.[6]

[29] They stand as single experts in each of their fields of expertise as no experts were called by the defendant.

<u>Quantum and contingencies</u>

[30] In the event that the court finds that there is a loss, quantum should be determined.

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[2] Ibid.
[3] Dippenaar supra, at 917 D-E
[4] Southern Insurance Association v Bailey NO 1984 (1) 98 AD
[5] Prinsloo v Road Accident Fund 2009 (5) SA 406 (SECLD) at 410 D
[6] Michael and Another v Linksfield Park Clinic (pty) Ltd and Another 2001 (3) SA 1188 (SCA) at 1200 I

[31] An enquiry into damages for loss of earning capacity ‘is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate of the present value of the loss.[7] The court, in this enquiry, can refer to actuarial calculations, which are an informed guess as opposed to a trial judge’s blind guess.[8]

[32] There are two approaches to determining loss of income:

32.1 one is for the judge to make a sound estimate of an amount which seems to him to be fair and reasonable.

32.2 The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence.[9]

[33] If there is an admission of damage, the Court should not be deterred by reason of the difficulty of computing an exact figure from making an award of damages.[10] The question that must be answered in the assessment of damages is and what must be determined is whether there is a disability which is likely to impair the injured person’s earning capacity.[11]

[34] It is sometimes simply not possible to place evidence of potential earning before Court and there may be no evidence upon which a mathematical calculation can be made.[12]

[7] Southern Insurance Association v Bailey NO 1984 (1) SA 98 (A) at 113F-113E
[8] Ibid, at 114C-D
[9] Mlotshwa v Road Accident Fund (9269/2014)[2017]ZAGPPHC 109 (29 March 2017), at paragraph 17 referring to *Bailey supra*
[10] Lazarus v Rand Steam Laundries 1952 (3) SA 49 (T) at page 53, 8-F
[11] Ibid, at page 30
[12] Griffiths v Mutual and Federal Insurance Co Limited 1994 (1) SA 535 (A)

[35] Once the court is satisfied that pecuniary damage has been suffered, it must make an award of an arbitrary amount of what seems to be fair and reasonable even though the result might be more than an informed guess.[13]

Evaluation

[36] I will not, herein, deal with the detail of the expert reports. I have considered the contents of the said reports, together with the viva voce evidence, in light of the submissions by both Counsel. There is no basis for rejecting the evidence and conclusions of the experts. The experts made their conclusions based on facts and applicable data. I accept their respective opinions.

[37] There is a thread that runs through all the reports, which is to the effect that, in my view, Plaintiff has indeed been rendered vulnerable and that the accident-related sequelae have had significant life-changing implications for his future employability and overall functioning.

[38] It is evident from the reports that Plaintiff suffered a head injury and fracture of the base of skull.

[39] It is postulated that:

39.1 Plaintiff's employability has been affected in that whereas pre-accident he had the potential to attain an NQF level 6, post-accident he only has the potential to attain NQF level 4.

39.2 He, however, dropped out of school, thereby not realising the postulated potential of attaining an NQF level 4. In my view, any loss based on the postulation that the plaintiff has dropped out of school should be rejected as this goes against his potential.

39.3 He is not considered an equal competitor in the open labour market

[13] supra, at 546F-G

39.4 The accident has left the Plaintiff vulnerable and at a significant disadvantage in seeking alternative employment.

Conclusion

[40] I am satisfied that the Plaintiff successfully proved, on a balance of probabilities that he has to be compensated for loss of earnings/earning capacity.

[41] It is clear from the evidence that the plaintiff indeed suffered loss of earnings/earning capacity.

[42] On scenario 1, the actuary calculated future pre-morbid income to be R10 043 439 and future post-morbid income to be R4 114 521. I applied a contingency allowance of 15% on pre-morbid and 25% on post-morbid, to arrive at a figure of R5 451 032.40

[43] Consequently, the following order is made:

1. The Defendant is ordered to pay to the Plaintiff a total amount of R 5 451 032.40

2. Defendant is ordered to pay costs of suit, including costs of Counsel, on a party and party Scale C.

[redacted]

SHAI AJ

DATE OF HEARING: : 10 March 2025

DATE OF JUDGMENT : 01 August 2025

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 **15h00** on **01 August 2025.**

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