



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: A17/2024

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: NOVEMBER 2025

SIGNATURE

In the matter between:

JABULA JOSEPH KUBHEKA

Appellant

and

THE ROAD ACCIDENT FUND

Respondent

Summary: *Claim against Road Accident Fund – claim for loss of earnings refused in court a quo – on appeal, confirmed that appellant had failed to satisfy onus and had failed to provide sufficient evidence, despite having been prompted by court a quo. Appeal dismissed.*

ORDER

The appeal is dismissed. No order is made as to costs.

JUDGMENT

The matter was heard in open court and the judgment was prepared and authored by the judge whose name is reflected herein and was handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date of handing-down is deemed to be November 2025.

DAVIS, J (with BAM J (Ms) and MOOKI J concurring)

Introduction

[1] The appellant's claim for loss of earnings against the Road Accident Fund (the RAF) was refused in the court *a quo* by Makhoba J. The basis for the refusal was a lack of evidence confirming the postulations of the experts relied on by the appellant.

[2] The appeal against the refusal came before us with the leave of the court *a quo*.

Background facts

[3] The appellant was born on 18 September 1987. On 16 July 2016, he was involved in a motor vehicle accident. He sustained a left pelvis fracture, a right clavicle fracture, some soft tissue injuries and abrasions.

[4] The appellant had instituted action against the RAF on 24 May 2017 and on 13 May 2019 the merits were conceded 100% in favour of the appellant.

[5] Subsequent to the above, the RAF has also accepted the seriousness of the appellant's injuries, entitling the appellant to claim non-patrimonial damages.

[6] The matter came before Makhoba J on the civil trial roll on 14 August 2023. After having heard the matter, he handed down judgment on 6 September 2023.

The proceedings in the court a quo

[7] Makhoba J recorded in his judgment that the matter proceeded before him by way of default of appearance on behalf of the RAF.

[8] The appellant led no evidence and counsel representing him addressed the court with reference to his heads of argument and asked the court to “... *decide the matter on the papers*”¹.

[9] The appellant consequently relied on the opinions of experts, as contained in their reports. Each of the experts has furnished an affidavit in which they had confirmed their reports. The experts were: two orthopaedic surgeons, a neurologist, a clinical psychologist, an occupational therapist and an industrial psychologist.

¹ Par [37] of the judgment.

[10] Based on the opinions expressed by the experts, an actuary calculated the appellant's claim for loss of earnings at R3 670 570.00.

[11] The assumption on which the actuary worked for the pre-accident earnings, was recorded by him as follows: *"According to the report of the industrial psychologist ... [the appellant] earned, as a front end operator R11 000 per month in 2016/07/16 monetary terms ..."*. In respect of post-accident income, the actuary noted *"According to the report of the industrial psychologist ... we project no income ... as he was unable to return to his pre-morbid employment following the accident and remains unemployed to date"*.

[12] The relevant part of the judgment pertaining to the loss of earnings and the adjudication thereof, reads as follows:

"[8] In regard to the loss of earnings the plaintiff in his affidavit ... says the following: "...I was unable to resume my work duties as a front-end loader operator".

[9] It is trite that the onus rests on the plaintiff to prove his case on the balance of probabilities see Pillay v Krishna SA 946. Thus therefore the duty is on the plaintiff to produce evidence on a balance of probabilities that because of the injury, he has suffered loss of income.

[10] The only issue remaining is whether this court after hearing counsel and reading the papers, this court should grant the amount as requested on behalf of the plaintiff in respect of loss of earning. During the proceedings, I did ask counsel to address me on all issues to the best of his abilities because I am going to reserve judgment.

[11] *The evaluation of the amount to be awarded for loss of income does not involve proof on a balance of probabilities. It is matter of estimation. The general approach is to posit the plaintiff, as he is proven to have been in his uninjured state and then to apply assumptions to his case with the proven injuries and their sequela.*

[12] *I am called upon to perform a delicate judicial duty in that I must decide what is the reasonable amount the plaintiff would have earned but for the injuries and the consequent disability. Furthermore, I must determine the plaintiff future income, if any, having regard to the disability.*

[13] *The issue of loss earnings is intrinsically linked with the merit of the matter. To determine whether there was any loss of earning the court had first to determine whether the plaintiff had sustained any injury and, if so, the extent of such injury. It is not sufficient to place actuarial calculations before the court and ask the court to determine the loss of earning without any reference to the merits of the matter.*

[14] *There is no proof of employment by the plaintiff. The mere mentioning of employment by him in his affidavit is not enough.*

[15] *Furthermore, he does not indicate the address and names of his former employer or even telephone number.*

[16] *In my view, the plaintiff has failed in his duty to satisfy the court that he has lost any earning or stands to lose any earnings as a consequence of the motor vehicle accident in question”.*

[13] The relevant part of the affidavit referred to in the above quoted par [8] reads as follows:

- “3. Near Delmas Collieries I slowed down for a pothole in the road. A truck travelling behind me (the insured motor vehicle), driven by an unknown person (the insured driver) failed to keep a proper look-out and collided with my motor vehicle from behind. As a result of the impact, I lost control of the motor vehicle and rolled.*
- 4. I lost consciousness during the accident and only regained consciousness the following day in Heidelberg Hospital.*
- 5. I was later informed that the insured driver did not stop at the scene of the accident and that I was transported to Heidelberg Hospital by ambulance for medical treatment.*
- 6. I was on 18 July 2016 transferred to Natalspruit Hospital for further specialized medical treatment.*
- 7. I confirm that the sole cause of the accident was the negligence of the insured driver.*
- 8. I confirm that I sustained serious injuries in the accident as a result of which I was unable to resume my work duties as a front-end loader operator.*
- 9. That is all I wish to declare”.*

The order in the court a quo

[14] The order in the court a quo was as follows:

- “1. *The defendant shall pay the plaintiff the sum of R800 000.00 (eight hundred thousand Rand only) in respect of general damages.*
2. *The plaintiff's claim for loss of earnings is dismissed.*
3. *Costs of suit*”.

[15] At a later stage the order was varied to include an erroneously omitted order, directing the RAF to provide the statutory undertaking provided for in section 17(4)(a) of the Road Accident Fund Act².

[16] The appellant appealed the order whereby the claim for loss of earnings was dismissed.

The appellant's arguments

[17] In his notice of appeal, the appellant averred that the appellant's employment history and earnings “as reported by the industrial psychologist” remained “*uncontroverted, unchallenged and uncontradicted and at no state did the Honourable Judge indicate, request and/or afford to plaintiff [the opportunity] to confirm his employment history ...*”.

[18] The issue was taken further in the notice of appeal in respect of the experts' opinions relating to the loss of earnings as follows: “*The Honourable Court ... failed to indicate to or afford the plaintiff [the opportunity] to call the experts to testify to clarify any uncertainty that the Honourable Judge might have had ...*”.

[19] The argument then went further, alleging a number of misdirections, all in the same vein as the above, but including the following argument: “*The learned judge erred and misdirected himself by dismissing the plaintiff's claim for loss of*

² 56 of 1996.

earnings and not adhering to the legal principle as set out in the Supreme Court of Appeal matter of Goliath v RAF, as referred to in the Heads of Argument for the plaintiff, specifically. It is important to bear in mind that in a civil case it is not necessary for a plaintiff to prove that an inference that she asked the Court to draw is the only reasonable inference. It suffices for the plaintiff to convince the court that the inference that the advocates is the most readily apparent and acceptable inference from a number of possible inferences”.

[20] In argument before us, the appellant reiterated these contentions.

Evaluation

[21] On the issue of “uncontroverted evidence”, it is common cause that the onus remained throughout on the appellant in respect of all aspects of his claim³.

[22] The fact that the appellant had been entitled to proceed by way of default of appearance on behalf of the RAF and after the RAF’s defence had been struck out, did not alter the incidence of the onus.

[23] The fact that there had not been any evidence led or presented on behalf of the RAF, also did not mean that the court was bound to accept the evidence presented by the appellant. The court *a quo* had to satisfy itself that the appellant had discharged the onus.

[24] In *Nelson v March*⁴ the court said: “*The fact that there was no evidence to contradict the evidence given by the defendant does not mean that the court is bound to accept the defendant’s evidence ... The question is whether it can be said that the defendant proved his defence. His story, as was pointed out by the magistrate, was an improbable story ... The defendant’s evidence read as a*

³ *Pillay v Krishna and Another* 1946 AD 946.

⁴ [1952] 3 All SA 161 (A) 169; 1952 (3) SA 140 (A) 149A-D.

whole does not bear the imprint of truth and in these circumstances, it cannot be held that he succeeded in discharging the onus resting upon him”.

[25] In *Kentz (Pty) Ltd v Power*⁵ the full court reviewed the position as follows:

“[15] There are other cases, directly in point, which deal with the principle that uncontradicted evidence is not necessarily sufficient to discharge an onus and it is to those cases which regard must be had in determining whether the trial court can be said to have been incorrect in deciding whether the plaintiff had discharged the onus of proving his case on those issues on which he bore the onus.

[16] Perhaps the most succinct statement of the position is to be found in Siffman v Kriel 1909 TS 538 where Innes CJ said at 543: “It does not follow, because evidence is uncontradicted, that therefore it is true ... The story told by the person on whom the onus rests may be so improbable as to not discharge it”.

[26] In *McDonald v Young*⁶ the position was put beyond doubt by the SCA, which confirmed both the above cases as follows:

“[6] It is settled that uncontradicted evidence is not necessarily acceptable or sufficient to discharge an onus. In Kentz (Pty) Ltd v Power Cloete J undertook a careful review of relevant cases where this principle was endorsed and applied. The learned judge pointed out that the most succinct statement of the law in this regard is to be found in Siffman v Kriel, where Innes CJ said: “ It does not follow, because evidence is uncontradicted, that therefore is true ... The

⁵ [2002] 1 All SA 605 (W) paras [15] – [20]/

⁶ 2012 (3) SA 1 (SCA)

story told by the person on whom the onus rests may be so improbable as to not discharge it”.

[27] It is not for the court to invite a litigant to present or supplement evidence. A litigant is required to present such evidence as is required to satisfy its onus. The court then adjudicates such evidence.⁷.

[28] Although no application for leave to present evidence by way of affidavit could be found in the record, it appears that the appellant accepted that he may rely on the documents uploaded as evidence. These included the affidavits of the experts and his own affidavit in terms of section 19(f) of the RAF Act (referred to in paragraph [13] above).

[29] Rule 38(2) provides as follows in this regard: *“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 condition as to it may seem meet ...”*.

[30] Both in the court a quo and at the hearing of the appeal, Adv Bam, who appeared on behalf of the appellant, referred to what he called a “status quo” affidavit, apparently deposed to by the appellant. All that the appellant said in that affidavit regarding his loss of earnings, was the following: *“Prior to the accident I was employed as a Forklift Loader, however since the accident I did not resume my duties because of the constant pains I experience on my pelvis. I am still unable to execute my duties as a driver whether motor vehicle or a bakkie due to the pain and I am currently still unemployed. I received a SASSA unemployment grant”*.

⁷ See Rule 38 and 39(1).

[31] Bank statements of the appellant had been discovered, confirming the SASSA payments but there was no confirmation before the court *a quo* of the appellant's employment or the conditions thereof at the time of the accident, nor any proof or confirmation of his salary or income at the time.

[32] The position regarding the reliance on affidavits in this fashion, has been determined to be the following: *"The approach to rule 38(2) may be summarized as follows. A trial court has a discretion to depart from the position that, in a trial, oral evidence is the norm. When that discretion is exercised, two important factors will inevitably be the saving of costs and the saving of time, especially the time of the court in this era of congested court rolls and stretched judicial resources. More importantly, the exercise of the discretion will be conditioned by whether it is appropriate and suitable in the circumstances to allow a deviation from the norm. that requires a consideration of the following factors: the nature of the proceedings; the nature of the evidence; whether the application for evidence to be adduced by way of affidavit is by agreement; and ultimately, whether, in all the circumstances, it is fair to allow evidence on affidavit"*⁸.

[33] The above principle applied equally to this matter. In fact even where a claim for unliquidated damages features in an unopposed application for default judgment, the requirement is that oral evidence is needed unless otherwise ordered by a court⁹.

[34] Even where a plaintiff elected to proceed by way of evidence on affidavit, this court has cautioned that, in case of doubt or where the affidavit is unclear, viva voce evidence will be needed¹⁰. It appears from the record, that although the

⁸ *Madibeng Local Authority v Public Investment Corporation Ltd* 2018 (6) SA 55 (SCA) at 61F-H.

⁹ See Rule 31(2)(a) and *Havenga v Parker* 1993 (3) SA 724 (T).

¹⁰ *Havenga v Parker* (supra) at 726H-I.

court *a quo* had allowed the appellant to rely on affidavit evidence, it expressed doubt as to whether that evidence was sufficient.

[35] It is in this regard that I turn to the topic which featured in the appellant's notice of appeal and when the matter was argued before us, namely the claim that the court *a quo* neither alerted the appellant's counsel to the court's concern over a lack of evidence nor gave counsel the opportunity to address those concerns. The following extracts from, and references to the record, in my view, sufficiently dispose with these contentions and show them to be without foundation:

- After counsel had referred the court *a quo* to the appellant's "status quo affidavit" and the report of the occupational therapist, he referred to summaries of the reports of the other experts in his heads of argument and then presented argument on the contingencies to be applied, based on the actuarial report.
- Thereafter, the record reads as follows:

"Mr Bam: I do not know whether Your Lordship wishes me to address you further on any aspect of the loss of earnings?"

Court: You know, where is proof of employment?"

- The answer to the question by the court was both unsatisfactory and made from the bar as follows:

"Mr Bam: The proof of employment is reported. He does not have proof. He worked for a farmer for I believe over a period of 10 years or 15 years. He was employed there as a forklift driver and a machine operator"

- After that, counsel's statement "*subsequent to that, that is incorporated in the industrial psychologist's report*", prompted the following question by Makhoba J: "*Is there no previous salary advice?*".
- Counsel responded as follows: "*He received cash. That is as per his affidavit, he receives cash or received cash as payment*".
- Counsel then proceeded with a curious line of reasoning as follows: "*Your Lordship, the level of earnings is not so substantial as to query any further concern that cannot be addressed by applying the appropriate contingency*". This was done vaguely on the basis that the industrial psychologist had referred to surveys and statistics indicating "*various remuneration surveys as well as wholesale and retail minimum wage guides*".
- The appellant's claim was, as indicated above, not based on minimum wage calculations but on an alleged fixed income of R11 000,00 per month in July 2016. When this claim was presented to the court *a quo*, it prompted some queries regarding the calculations contained in counsel's heads of argument.
- After general damages had been argued, the court again expressed its discomfort as follows: "*Okay, Mr Bam, I am particularly concerned about the fact that he has no proof of employment. You have addressed me. I am, for that going to reserve judgment and I am going to ask you to please address me further if you want to*".
- In response to this invitation, counsel contented himself with a reference to the amount of general damages argued for and indicated that same would be added to the amount of loss of earnings indicated in the heads of

argument, the totality of which would be included in a draft order which the attorney would upload.

[36] The record therefore indicates that the appellant, through his counsel, had been made aware of the court's misgivings regarding the lack of evidence. Counsel was given sufficient opportunity to address the misgivings.

[37] I interpose to point out that there exists a second "status quo" affidavit, which, if one trawls through the documents uploaded into the matter's Caselines profile, one would find as the last item uploaded under the heading "Memorandum of Settlement". The relevant part of this four-paragraph affidavit reads as follows: "*I confirm that prior to the accident I was employed as a forklift loader and received salary as stipulated by the industrial psychologist in cash. I further confirm that such amount is true and correct*". This might have been the affidavit to which counsel had referred to in his argument before the court *a quo*.

[38] This affidavit displays a number of disturbing features: it is dated the day of the hearing and was deposed to in Pretoria, yet there is no evidence as to why it and no oral evidence was presented. It contains a signature, purportedly of the appellant, which markedly differs from those on his previous affidavits.

[39] Be that as it may, and far be it for the court to dispute the authenticity of a document without evidence, when regard is had to the contents of the affidavit, it is strange that the relevant issue in dispute, namely that of employment, is formulated in a confirmatory and not in a direct fashion. What is then confirmed? The industrial psychologist's report contains the following in this regard: in a tabular form, it was noted that the appellant had been working for "Umumo" from 2015 to date of the accident, as a "front end operator". The appellant's salary was noted as R11 000 per month, with the annotation "*- did not received (sic) salary*

advice". A further note was added: "*recuperated for 4 months without pay. One-year contract*".

[40] Later in his report (at par 8.1.4 thereof) the industrial psychologist recorded the following "*Mr Kubheka reported that he earned R11 000 per month (not verified) at the time of the accident, which equates to R132 000 per annum. Deference is given to factual information in this regard*".

[41] After having furnished general information regarding estimated earnings in a corporate environment, the industrial psychologist opined: "*Mr Kubhela could not supply contact information for his pre-accident employer, consequently the writer was unable to confirm employment or determine any possible promotional opportunities. Deference is given to any factual information in this regard*". Despite this, postulations were based on continuous employment with inflationary increases and a career ceiling between 45 – 48 years old. No reference was made to the fact that the appellant only had a year's contract in place at the time of the accident.

[42] The industrial psychologist also relied on the report of the occupational therapist. She, in turn had noted the following regarding the appellant's occupation and employment at the time of the accident: "*Mr Kubheka has a work history as a welder assistant, general worker and an operator. At the time of the accident, he was working for Muraai Boerdery as an operator. He did not return to work after the accident.*"

[43] During the argument before us, counsel conceded that no factual evidence other than that which I have referred to, was presented to the court *a quo*. It follows that the "confirmation" provided by the appellant is, apart from the allegation of a cash income, no confirmation at all. The references to each other between the industrial psychologist (and the occupational therapist) and the

appellant, go round and round in a circular fashion. The only thing that breaks the circle, is the refrain that “deference is made to factual information”, which was never furnished.

[44] This brings me to the next topic raised on behalf of the appellant in the notice of appeal, namely that the learned judge had failed to draw the necessary inferences, in conflict with the law.

[45] In this regard, the appellant relied on the decision in *Goliath v MEC for Health, Eastern Cape*¹¹ (*Goliath*, incorrectly referred to as *Goliath v RAF*) and specifically par [11] thereof from which the following finding by Holmes JA in *Sardi v Standard & General Insurance Co.*¹²(*Sardi*). was extracted: “*At the end of the case, the court has to decide whether, on all of the evidence and the probabilities and the inferences, the plaintiff had discharged the onus of proof on the pleadings on a preponderance of probabilities*”.

[46] The reliance on the aforementioned extract is somewhat misplaced: the learned judges of appeal in both *Goliath* and *Sardi*, were dealing with the issue of determining negligence. This was done by piecing the various portions of evidence together and determining which inferences could be drawn from those pieces.

[47] The argument before us was to the effect that where the experts had relied on hearsay evidence produced by the appellant, and where the appellant had confirmed the aspects thereof to the extent that he had in his second “status quo-affidavit”, it should be inferred that the facts had sufficiently been proven. That is not how an inference is drawn.

¹¹ 2015 (2) SA 97 (SCA).

¹² 1977 (3) SA 776 (A).

[48] The summary of the applicable principle has been formulated to be the following: “*Where there is no direct evidence on a particular issue, the court may nevertheless make a factual finding pertinent to that issue by drawing an inference. Our courts have emphasized however, that an inference may only be drawn from properly established objective facts*”¹³.

[49] In *Skilya Property Investments (Pty) Ltd v Lloyds of London*¹⁴ this court summed up the position even more succinctly (at 781 A-B): “*the inference sought to be drawn must comply with the first rule of logic stated in R v Blom 1939 AD 188 at 2020-3: the inference to be drawn must be consistent with all the proven facts. If it is not, it cannot be drawn*”.

[50] In the present matter, the appellant claimed past loss of earnings based on an alleged fixed cash income of R11 000.00 per month and future loss of income at inflationary increases of the same (or replacing) employment. Only the allegation of cash income had been stated directly on oath by the appellant. None of the other elements of his calculations, including the permanence or not, of his employment had been proven. There are, accordingly, no objective facts from which inferences could have been drawn. The criticism of the judgment in the court *a quo* is thus without justification.

Conclusions

[51] Although it might be that, during his assessment and his interview with the industrial psychologist, the appellant could not then furnish the contact number of his erstwhile employer, there was no explanation why this could not have been done since the action was instituted. There was no clarification as to whether the employer was “Umomo” or “Muraai Boerdery” as reflected in the

¹³ Southwood, *Essential Judicial Reasoning*, Lexis Nexis, at 51.

¹⁴ 2002 (3) SA 765 (T).

respective reports of different experts. There was absolutely no information as to how much of the one year contract still had to run at the time of the accident or what the appellant's prospects were once the contract had expired. The experts' and the appellant's referral to his occupation interchangeably as a "forklift loader", a "machine operator" or a "front end loader driver", is another contradiction which has never been resolved.

[52] Counsel could furnish no explanation when questioned about these shortcomings and discrepancies in the appellant's evidence. Counsel had, at some point, told the court *a quo* that the appellant had been working for a farm for a period of 10 or 15 years. There was no factual support for the statement.

[53] There is another feature of the appellant's case which bears a brief mention. When faced with the concerns the court *a quo* had expressed regarding a lack of factual evidence, counsel sought to address those concerns as follows: "*Just on a last note if I may, I believe that if your Lordship is inclined to address the issue with regard to the proof of earnings with a higher contingency, I address that to an extent in my heads by applying the five percent*". This attempt at plugging the holes in the appellant's case, as opposed to simply leading evidence, is without foundation. Contingencies are not a mechanism to cater for a lack of evidence. It is trite that the application of contingencies is used for a different purpose, primarily to seek to reach a fair postulation of some future event or circumstance, taking into account probabilities and the vagaries of life and the permutations of an unknown future¹⁵.

[54] On a conspectus of all the issues, we cannot find that the court *a quo* erred in finding that the appellant failed to discharge the onus of proving his claim for loss of earnings. It must follow that the appeal should be dismissed. The

¹⁵ *Southern Insurance Association Ltd v Bailey* NO 1984(1)SA 98(A) and *Road Accident Fund v Guedes* 2006(5)SA 583(A).

customary principle is that cost should follow the success or failure of a matter, but in this instance the RAF had not participated in the appeal and we find that it would be fair that we make no order as to costs, despite the appeal not succeeding.

Order

[55] In the premises, an order is made in the following terms:

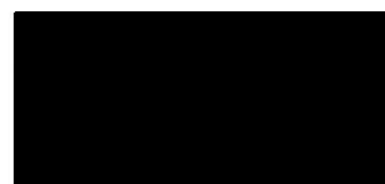
The appeal is dismissed. No order is made as to costs.


N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

I agree


N N BAM
Judge of the High Court
Gauteng Division, Pretoria

I agree


O MOOKI
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 13 August 2025

Judgment delivered: 5 November 2025

APPEARANCES:

For the Appellant:	Adv J Bam
Attorney for the Appellant:	N. S. Swan Attorneys, Pretoria
For the Respondent:	No appearance
Attorney for the Respondent:	The State Attorneys, Pretoria