



**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA**

CASE: 323/2022

(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHER JUDGES: NO	
(3) REVISED	
31/03/2026	
DATE	SIGNATURE

In the matter between:

LAWRENCE XOLANI BULUNGA

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

LINK NO: 5273898

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 31 March 2026 at 12H30.

JUDGMENT

MANGENA AJ:

[1] This is a judgment on the application for leave to appeal a judgment delivered on 23 February 2026.

[2] The grounds upon which leave is sought are listed in the application and can be summarized as follows: The court erred in adjudicating a factual point which was common cause upon the parties. In this regard, it was submitted that the court violated the principle espoused in *Mafisa v RAf*, 2024 (4) SA 426 (CC), where it was held that courts should not second-guess parties' decision to settle issues as defined by their pleadings. It was submitted that the issue regarding the plaintiff's income was common cause and the court erred in making a contrary determination on this point.

[3] It was also submitted that the court erred by rejecting the plaintiff's evidence that he was out of work for two years before returning to work. It was argued that this is factually incorrect as the evidence of the two experts was never challenged. On this basis, it was contended that the court misconstrued the facts and arrived at an incongruous conclusion.

[4] It was also submitted on behalf of the applicant that the court applied *Rudman* in circumstances where it is inappropriate to do so because the plaintiff was self employed while *Rudman* was employed by a juristic person. In this regard, it was argued that the plaintiff was required to perform the work himself unlike *Rudman* who could employ other people.

[5] The application is opposed by the defendant who also advanced argument in support of the judgment and urged me to dismiss the application with costs on the basis that the applicant failed to meet the requisite threshold for leave to appeal.

[6] The principles governing leave to appeal are trite. In *MEC for Health, Eastern Cape v Mkhita*, 2016 JDR 2214 (SCA) the court expressed itself as follows regarding the test for leave to appeal:

"[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there is a reasonable prospect of success. Section 17 (1) (a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where a judge concerned is of the opinion that the appeal would have reasonable prospect of success; or there is some other compelling reason why it should be heard.

[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be sound, rational basis to conclude that there is a reasonable prospect of success on appeal."

[7] Against the above test, I proceed to consider whether the applicant has succeeded to convince the court on good grounds that there are reasonable prospects of success.

[8] To start off, regarding factual inaccuracies, it is not correct that the issue regarding plaintiff's income was common cause. It was clearly not and no point would have been served by requiring plaintiff together with his experts to testify on the loss of income both past and future. As I understood the defendant's case, the plaintiff never earned any income as a traditional healer and whatever information he relayed to the experts was not correct. Indeed the two experts testified that they could not obtain any collateral information to support the averment that there was an income generated. Consequently, I reject applicant's contention that there was an agreement between the parties. If there was, same would have been properly recorded in either the pre-trial minutes or detailed statement of issues signed by the parties. The fact that it was never agreed upon is demonstrated strongly by the defendant's insistence to have oral evidence tendered on this aspect.

[9] On the misapplication of Rudman, I do not think that the submissions are correct. The approach adopted in that judgment does not differentiate between a self employed person and one who is employed by a company. The test for determining loss of earning capacity is the same. The defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value he would have earned if the delict had not occurred. Therefore, where it is clear that a person's earning capacity has been compromised, that incapacity constitute a loss, if it diminishes his or her patrimony.

[10] Mr Moukangwe, counsel for the applicant, makes a point that the occupational therapist testified that plaintiff's earning capacity reduced by no less than 45 percent as a result of the accident. He says that this evidence was not challenged. According to him, evidence is challenged only when counter evidence is presented by an equally competent expert. This is not correct. An expert witness is not an advocate of the party which called him or her to court. An expert is required to provide an independent assistance to the court by way of an

unbiased opinion which is objective. The opinion should have evidential foundation. The experts did not have any veritable independent facts upon which to base their opinion and for that reason I did not accept it.

[11] I have perused the reports admitted into evidence in terms of Rule 38(2) of the Uniform Rules of Court. The report by the occupational therapist was not based on any objective and independent facts. A reading of the report reveals that it was based on what she was told by the applicant. There was no objective evidence that plaintiff was a trainer of initiates and indeed rendered services as a traditional healer and therefore suffered loss or will suffer loss in the future as a result of the accident. Plaintiff had an onus to satisfy the court on a balance of probabilities regarding his loss of income and reduced earning capacity. He failed to do so.

[12] I had regard to comparable cases mentioned in the heads of argument, namely Gwebu v RAF and Tjiane v RAF referred to in applicant's heads of argument. At the outset, I should indicate that I do note that the matters dealt with traditional healers, but the findings made were based on the evidence presented including collateral information obtained, which is not the case here. The difference in opinion is therefore not legal but factual based on the evidence presented in each case. A court of appeal does not deal with factual disputes.

[13] In the result, I am not persuaded that there are reasonable prospect of success or compelling reason why leave should be granted.

[14] Consequently, application for leave to appeal is dismissed with costs.



M I MANGENA

ACTING JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION, MBOMBELA

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Date of Hearing: 30 March 2026

Date of delivery: 31 March 2026