REPUBLIC OF SOUTH AFRICA

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

Case Number: **A2025-089899**

(1)	REPORTABLE: **NO**
(2)	OF INTEREST TO OTHER JUDGES: **NO**
(3)	REVISED: **NO**
	4 May 2026 [redacted]
	DATE SIGNATURE

In the matter between:

ADVOCATE ZINHLE BUTHELEZI NO
NYATHI NHLANHLA HOPEWELL Appellant

and

ROAD ACCIDENT FUND Respondent

CORAM: MALI J, MODIBA J AND MITCHELL AJ

JUDGMENT

MITCHELL AJ (with whom MALI J and MODIBA J agree)

Introduction

[1] This appeal arises from an action for damages arising from personal injuries sustained by the Appellant in the motor vehicle accident of 8 September 2019. In that action the Appellant claimed damages for –

a. past hospital and future medical expenses;

b. future medical expenses;

c. past loss of income;

d. estimated future loss of income; and

e. general damages for pain and suffering, disablement and disfigurement and loss of amenities of life.

[2] On 8 September 2019, the vehicle in which the Appellant was travelling as a passenger was involved in a motor vehicle collision. The collision resulted from the negligent driving of the other vehicle. As a result of the collision, the Appellant sustained severe bodily injuries, most notably:

a. a severe diffuse traumatic brain injury; and

b. associated soft tissue injuries (including injuries to the wrist and forehead).

[3] He lost consciousness at the scene and was admitted to Sebokeng Hospital, where his Glasgow Coma Scale score was recorded as low as 6/15 on admission, with evidence of an intraparenchymal brain bleed on CT imaging. The Appellant required intensive medical treatment, including admission to the intensive care unit, ventilation, and prolonged hospitalisation. Post accident, the Appellant exhibited persistent neurocognitive, neuropsychological and behavioural impairments, including memory loss, poor concentration, irritability, and impaired executive functioning. Expert evidence which was accepted established that he has reached maximum medical improvement but has continued to suffer permanent residual deficits.

In the trial court

[4] Prior to the commencement of the trial, the Respondent conceded liability in full for Appellant's proven damages. The issues that the trial court was called upon to determine were -

a. whether the Appellant had established, on a balance of probabilities, that he had suffered a loss of earning capacity as a result of the injuries sustained in the motor vehicle accident;

b. if so, whether that loss translated into a patrimonial loss warranting compensation;

c. if established, the quantification of such loss;

d. whether the Appellant had proved an entitlement to compensation for future medical expenses;

e. whether the Appellant was entitled to an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act for the costs of future medical treatment, services, or care.

f. an appropriate costs order.

[5] On 6 November 2024, Botsi-Thulare AJ delivered judgment awarding the Appellant general damages in the amount of R1 350 000.00 and dismissing the Appellant's claim for damages for loss of past and future earnings. The Respondent was ordered to pay the Appellant's costs limited to the issues of liability and general damages while the Appellant was ordered to pay the Respondent's costs relating to the issue of loss of earnings.

[6] Although listing damages for future medical expenses as one of the issues for determination, the learned judge did not deal with this claim in the judgment and made no order in that regard.

[7] The trial court rejected the Appellant's claim for past and future loss of earnings holding that -

> *[34] In my view, I am not satisfied that with the opinion of the Industrial Psychologist that the earning capacity of the plaintiff had been lost to a point that his patrimony is reduced in due course.*
>
> *[35] To my mind, the opinion of the Industrial Psychologist is not properly motivated at all. It is unhelpful to this Court. In my view it is contradictory. In addition, the conclusion is based on information which the Industrial Psychologist was unable to verify. In other words, some of the Industrial Psychologist's conclusion were based merely on information which was supplied by the plaintiff only. Accordingly, it follows therefore that the actuarial calculations made by the Actuaries cannot stand since they arrived at using the opinion of the Industrial Psychologist which is contradictory and not properly motivated at all.*
>
> *[36] Another point which works against the plaintiff is that he indicated that he has been employed as a taxi driver without having obtained a driver's licence as well as the applicable Professional Driving Permit (PDP). This means that the plaintiff was operating a public vehicle transporting passengers without the required documentation to do so. Accordingly, it would be illogical for this Court to order the defendant to compensate the plaintiff for future loss of earnings based on an earning which he alleges to have been receiving without possessing the valid documents which by law he was required to possess in order to perform such a duty.*
>
> *[37] It was further confirmed in the expert opinion of the Industrial Psychologist that the plaintiff does not have past loss of earnings as he was unemployed time of the accident.*
>
> *[38] Therefore the claim for past and future loss of earnings falls away.*

[8] The Appellant applied for leave to appeal the judgment insofar as it related to the dismissal of the Appellant's' claims for damages for past and future loss of income and future medical expenses. This appeal comes before this full court as a result of leave to appeal that judgment having been granted by Botsi-Thulare AJ on 18 May 2025.

Before this court

[9] The issues for determination in this appeal are limited to the Respondent's liability for -

a. future medical expenses;

b. past and future loss of earnings; and

c. costs.

There was no appearance for the Respondent at the hearing of this appeal.

Future Medical Expenses

[10] In terms of section 17(4)(a) of the Road Accident Fund Act[1], where a claim includes future medical treatment, the Fund is entitled to furnish an undertaking for such costs once incurred and proven.

[11] The Appellant adduced uncontroverted evidence establishing the need for future medical treatment and expressly submitted that an undertaking was the appropriate form of compensation.

[12] In addition the Appellant's counsel informed this Court that Respondent conceded, on record, that the Appellant is entitled to an undertaking under section 17(4)(a) and that an offer to this effect was made and accepted. The Appellant is therefore entitled to an order in this regard.

Past and future Loss of Earnings

[13] In my opinion the learned judge has misinterpreted the evidence of the industrial psychologist ("Marais"). For example, it was not only the opinion of Marais that the Appellant's 'earning capacity' had been reduced. Both the clinical psychologist and the occupational therapist reported that the Appellant was unemployable. This evidence was unchallenged by the Respondent as was Mr Marais' evidence in this regard. The Respondent had not filed countervailing expert reports.

[14] Furthermore, while the calculations of the actuaries were based in part on Marais' report, the financial information was not based on the information given to Marais by the Appellant. The financial information was sourced by Mr Marais from the Quantum Yearbook and the Road Freight Industry[2]. The correctness or accuracy of this information was not challenged by the Respondent.

[15] As regards the fact that the Appellant did not possess a Professional Driving Permit, the question of the legality or otherwise of the claimant's earnings has

[1] No. 56 of 1996

[2] page 104 of the Appeal Record

been dealt with by the courts before. It has, for example, been held that illegal earnings such as illegal taxi-driving, may be taken into account as an indication of earning capacity and that a deduction of 30% should be made for the change-over from illegal to legal taxi driving[3].

[16] The evidence before the trial court was that –

a. the Appellant had a driver's licence and had worked as a driver;

b. due to the injuries sustained in the accident, the Appellant has been rendered unemployable in the open labour market.

[17] There was no evidence suggesting otherwise on either of these issues and the inescapable conclusion is, therefore, that the Appellant has suffered a loss of earning capacity and is entitled to damages as a result. In my opinion, therefore, the trial court erred in rejecting the Appellant's claim for loss of earnings.

[18] The assessment of these damages is not capable of precise mathematical calculation and is, by its nature, necessarily speculative. A court is required to make an estimate, often on a broad basis and, in doing so, the court enjoys a wide discretion as to the quantum to be awarded. While actuarial calculations provide a useful guide in quantifying the loss, they are not determinative, and the court remains at liberty to award such amount as it considers fair and just in the circumstances[4].

[19] To quantify his damages, the Appellant tendered actuarial evidence in support of his claim. The actuaries put forward three bases for calculating the damages. The first (Basis I) assumed '*Pre-accident ceiling at the median earnings for a Taxi Driver*', the second (Basis II) assumed '*Pre-accident ceiling at the upper quartile earnings for a Taxi Driver*' and the third (Basis III) assumed '*Pre-accident ceiling at the minimum wage for a Light Motor Vehicle Driver*'

[20] In all cases the actuaries split their calculations under the headings "*Past loss*" and "*Future loss*". The calculation of '*Past loss*" is not really a calculation of actual

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[3] *Dlamini v Multilateral Motorvoertuig Ongelukkefonds* 1992 (1) SA 802 (T); see also *Masiza v Road Accident Fund* 2014 JDR 1075 (GP)

[4] See *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA)

past loss of earnings. It was common cause that the Appellant was not working at the time of the accident. The '*Past loss*' calculation appears to be a calculation of the loss of earning capacity from the date of the accident to the actuaries' calculation date (which was 1 August 2023).

[21] Under the headings of '*Past loss*' and '*Future loss*" the actuaries provide calculations for '*Value of income uninjured*' and '*Value of income injured*' (which in each case was correctly nil) as well as a contingency to be applied to the '*Value of income uninjured*' amounts. The difference between '*Value of income uninjured*' and '*Value of income injured*', after applying the contingency, gives an estimate of the loss of earning capacity.

[22] The contingency used by the actuaries was 5% for '*Past loss*' and 17.5% for '*Future loss*'. Under these assumptions the actuaries calculated the Appellant's loss of earning capacity as follows –

a. Basis I - R886 125

b. Basis II - R1 247 357

c. Basis III - R1 904 013

[23] In arriving at a quantification of the Appellant's loss of earning capacity, I take into account the vicissitudes of life[5]; the fact that the Appellant was not working and had never had regular work; the Appellant did not possess a Professional Driving Permit; the work that the Appellant had consisted mainly of driving motor vehicles used to transport school children and workers often in family-run or informal arrangements; he did not have stable, long-term formal employment; and his work history was intermittent and informal in nature. While Basis I assumes median earnings for a taxi driver, the school children and transport work the Appellant had would have required shorter hours and commanded less income than a taxi driver or a light delivery van driver.

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[5] For example illness, life expectancy and other unforeseen factors *(see Road Accident Fund v Guedes p585 supra)*

[24] For these reasons, I am the view that, while Basis I is the appropriate starting point, the contingencies of 5% for '*Past loss*' and 17.5% for '*Future loss*' are too low and that a contingence of 25% should be applied to both '*Past loss*' and '*Future loss*'.

[25] The Appellant's total loss of earnings for '*Past loss*' and '*Future loss*" on Basis I, as calculated by the actuaries, was R1 057 765. Applying the contingency of 25% results in a loss of earning capacity and earnings and thus damages under this heading of R793 323.

Costs

[26] There is no reason why the costs should not follow the result.

Order

A. The appeal is upheld.

B. Paragraphs 2, 3 and 4 of the order of the trial court are set aside and replaced by the following:

"2

a) The Defendant shall pay to the Plaintiff an amount of R793 323 (seven hundred ninety-three thousand, three hundred twenty-three rands) in respect of the Plaintiff's claim for Past and Future Loss of Income.

b) The Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17 (4) (a) of the Road Accident Fund Act, 56 of 1996, to pay 100%, of the reasonable costs of future accommodation of the Plaintiff in a hospital or nursing home, treatment of, or rendering of a service to him, or supplying of goods to him arising out of the injuries he sustained in a motor vehicle collision on 08 September 2019 and the *sequelae* thereof after such costs have been incurred and upon proof thereof.

c) The attorneys for the Plaintiff:

   i) must cause a Trust (herein after referred to as "the trust") to be established in accordance with terms of the Trust Property Control Act 57 of 1988 and to pay all monies held in trust by them for the benefit of NHLANHLA HOPEWELL NYATHI to the Trust.

   ii) shall be entitled to deduct their fees and disbursements for professional services from the aforesaid capital amount, only after the taxation of the party and party bill of costs.

d) The Trust instrument shall make provision for NHLANHLA HOPEWELL NYATHI to be the sole beneficiary of the trust with the nomination and appointment of an employee of a banking or financial institution, as the trustee.

e) The Section 17(4)(a) undertaking shall include the costs incurred in the administration of the Trust, the appointment of trustee(s), the reasonable costs incurred in the administration of the award and costs incurred in providing security to the satisfaction of the Master of the High Court of South Africa.

f) The amount referred to in paragraph (a) above shall be paid into the Trust Account of the Plaintiff's Attorneys of record being JERRY NKELI & ASSOCIATES for the sole benefit of NHLANHLA HOPEWELL NYATHI, which amount shall be paid within 30 days of service of this order on the Defendant.

g) Should the Defendant fail to make payment within 30 days as aforesaid, the Defendant shall be liable to pay interest on the amount referred to in paragraph (a) above at the prescribed rate calculated from the 31st day after service of this order on the Defendant to date of payment.

3. The Defendant shall pay the Plaintiff's taxed party and party costs, on the High Court Scale B, including the qualifying fees of –

(a) Dr Tshepo P Moja
(b) Robert Macfarlane
(c) Lance Marais Incorporated
(d) Algorithm Consultants & Actuaries
(e) Alison Crosbie Inc."

C. The Respondent shall pay the party and party costs of the Appellant's application for leave to appeal and this appeal, taxed on High Court Scale B.

[redacted]

MALI J
Judge of the High Court

[redacted]

MODIBA J
Judge of the High Court

[redacted]

MITCHELL AJ
Acting Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 4 May 2026.

HEARD ON:	2 MARCH 2026
DECIDED ON:	4 May 2026
For the Applicant:	**KG Sadiki** Jerry Nkeli & Associates 011 838 7280 079 6321812 khuliso@jerrvnkelilaw.co.za
For Respondent;	**No appearance**