REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 29281/22

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

6/5/24
DATE

[redacted]
SIGNATURE

In the matter between:

M[redacted] Z[redacted] P[redacted] Plaintiff

and

THE ROAD ACCIDENT FUND Respondent

Summary: Default judgment for a claim of loss of earning capacity. A Court is not bound by an opinion of an expert. The Court must be presented with evidence to prove the loss of earning capacity. In the absence of proof, a Court is entitled to refuse a claim for loss of earning capacity even where the claim is by way of default. The Court is not satisfied that the plaintiff has lost his earning capacity as a result of the injuries sustained in the accident. Held: (1) The plaintiff's claim for loss of earning capacity is dismissed. Held: (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] The melancholy that accentuate the conundrum faced by Courts in matters of these nature, is the perspicuous supinity displayed by the Road Accident Fund (RAF). Even in instances where the State Attorney's services are enlisted to assist the RAF, counsel who accept briefs stand and inform a Court, with such temerity, that they hold no instructions. It baffles this Court as to how counsel can accept a brief in the morning of the trial only to rise and inform the Court that he or she has no instructions from the RAF. In my view, counsel who has no instructions must not accept a brief only to appear before a Court and inform the Court about lack of instructions. That said, the matter before me involves a request for default judgment against the perennially supine RAF. The plaintiff seeks a judgment for a substantial amount of R 3 959 140 in respect of loss of income or earning capacity. The only objective evidence placed before the Court is opinion evidence of certain experts. This Court was informed that the RAF has conceded the issue of liability to compensate the plaintiff his proven damages. The issue that was left for determination is one of quantum in respect of loss of earning capacity.

Pertinent background facts to the present default action

[2] The plaintiff is Mr. Z[redacted] P[redacted] M[redacted] (P[redacted] a 21 years old male, having turned that age on 05 February 2024. At the time when he was 17 years of age, he, as a pedestrian, was knocked by an unknown motor vehicle. Resultantly, he sustained injuries on his left arm and the right leg. He was admitted at Legae Mediclinic on 02 January 2019 at 19:25 pm. On admission, the hospital diagnosed a fracture of medial malleolus (a fracture of the lowest part of the tibia). According to the accident report (AR) the alleged collision happened on 02 January 2020 at 06:15 am at Biutekant road and an unknown white Toyota bakkie was involved. This was confirmed by P[redacted] in his merits affidavit as well as in the particulars of claim. It is unclear to this Court as to what accounts for the discrepancy in terms of dates and times.

[3] Sadly, on 01 June 2022, the RAF, on a without prejudice basis, offered to settle the issue of negligence *vis-à-vis* the occurrence of the motor vehicle collision on the basis that the insured driver was solely negligent in causing the motor vehicle collision. On 23 June 2023, this Court per Acting Justice Kehrhahn made an order to the effect that the RAF is 100% liable to pay P[redacted] proven damages. Furthermore, the learned Acting Justice ordered the RAF to pay an amount of R400 000 in respect of general damages head. The loss of earnings claim was postponed *sine die*. It is curious for this Court to note that the order does not record the reasons why the loss of earning capacity claim was postponed, nor did counsel disclose any reason for that before me. It remains curious for this Court because all the relevant reports in relation to the quantum of damages heads were available as at 29 May 2023 and provision was made in the order for the costs attendant to all the reports. Could it be that the learned Acting Judge expressed dissatisfaction around the loss of earning capacity claim? This Court would leave it at that.

[4] Ultimately, the case emerged before this Court for the determination of the damages head mentioned at the inception of this judgment. P[redacted] presented damages affidavits (Dr N Ndzungu, an Occupational Therapist; Ms C Botha, an Industrial Psychologist; Ms Julie Valentini, an Actuary; and Ms Sepenyane, an educational psychologist) with a prayer that this Court must admit them within the contemplation of rule 38(2) of the Uniform Rules of this Court. Notably, no damages affidavits were availed nor uploaded on Caselines for Dr Peta and Dr Ngobeni. Additionally, P[redacted] availed reports prepared by Dr R S Ngobeni (Orthopaedic Surgeon); (Dr Ndzungu, an Occupational Therapist); (Dr A Peta a Clinical Psychologist); (Ms T A Sepenyane an Educational Psychologist); (Ms C Botha an Industrial Psychologist); and (Munro Forensic Actuaries).

[5] In Court a debate ensued between the Court and Ms Nodada, counsel for P[redacted] This Court expressed a dissatisfaction around the probity of the opinion evidence with regard to loss of earning capacity. Since this Court was not satisfied, after hearing legal submissions, its judgment on the default judgment sought by P[redacted] was reserved.

Analysis

[6] As a departure point, rule 31(2) of the Uniform Rules provides that in an action claim, a Court may, after hearing evidence, grant judgment against the defendant or make such order as it seems meet. In *casu*, this Court did not hear any oral evidence. However, what P[redacted] sought to do was to invoke the provisions of rule 38(2) of the Uniform Rules. The rule provides as follows:

> "(2) The witness at the trial of any action shall be examined *viva voce*, 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 require 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."

[7] The default position at any trial is that of *viva voce* evidence being adduced. A practice seems to have developed, where parties come to Court with an assumption that a Court shall order that evidence be given on affidavit. Such an assumption is wrong. The jurisdictional requirements for a Court to make an order that evidence be given on affidavit is the demonstration of sufficient reason. A sufficient reason shares similarities with sufficient cause or good cause which simply refers to a legal determination being made that there exists sufficient reason to support a case or decision. Law reports are replete with decisions which deals with good or sufficient cause. The common thread that runs through the avalanche of those cases is that where good cause has to be shown in order to obtain a ruling, obtaining such a ruling is not there for the mere taking. Accordingly, in my view, an order that evidence be given on affidavit is not there for a mere taking. Absent sufficient reason, it is incompetent for a Court to make such an order.

[8] During the debate with P[redacted] counsel, this Court made it abundantly clear that it was not willing to accept evidence on affidavit particularly on the issue of the alleged loss of earning capacity. The Court desired to put certain questions, on the findings, arrived at by the experts as exposed in their reports. Despite this

clarion call, counsel persistently continued to make legal submissions on the issue of loss of earning capacity. This Court, without firmly deciding, takes a view that rule 38(2) procedure is being abused in order to deny the Court an opportunity to question the medico-legal reports issued by the experts, which more often than not, with due respect to the authors thereof, appear to be a copy and paste. Most if not all are biased towards the party the report is prepared for. Nevertheless, even in an instance where a Court makes an order contemplated in the rule, such does not transmute into acceptance of such evidence. Depending on where the onus of proof lies, a Court is still required to evaluate the evidence in order to establish that an onus has been discharged to obtain the relief sought.

[9] In *casu*, the overall onus lies on P[redacted] to prove (a) that his earning capacity has been negatively impacted because of the injuries sustained at the accident; and (b) that a sufficient possibility of an event occurring that will result in a loss of earnings is present. Once that is shown, then the quantification process may be assessed and determined. It is in this last process that the issue of contingencies to be applied may arise. It is of cardinal importance to point out that there is a difference between loss of earning capacity and future loss of earnings. What ought to be determined in this case is the former as opposed to the latter. Boberg argued that the loss of the capacity and therefore the diminution of the plaintiff's patrimony or estate occurs immediately after the commission of the delict and not when the future income would have been earned[1]. Therefore, the determination of P[redacted] loss of earning capacity must occur at the point of after the motor vehicle collision. In due course, it shall be demonstrated that if educational achievement is the platform to determine the earning capacity, P[redacted] achieved a pass result after the accident happened. Such is a demonstration of the ability to meet his earning capacity irrespective of the injuries. The British Court of Columbia in *Vincent v Abu-Bakare* (*Vincent*)[2] usefully stated that the earnings approach is often appropriate where there is an identifiable loss of income at the time of trial. It also stated that this frequently happens when a

[1] I P Gough *The lost years: The claim for loss of earnings* 1983 De Rebus October and Boberg 77 *SALJ* 438.
[2] 2003 NBCA 42.

plaintiff has an established work history and a clear career trajectory. Where there has been no loss of income, the Court of Appeal suggested the capital asset test, which equates the loss of earning capacity. In order to deal with the capital asset test, the Court suggested a tripartite test. That test entails presence of three requirements, namely:

(a) There must be evidence which discloses a potential future event that could lead to a loss of capacity;
(b) There must be real and substantial possibility that the future event in question will cause a loss;
(c) The value of that possible future loss be assessed.

[10] The Court of Appeal concluded that the trial Court was found wanting in that the trial judge failed to sufficiently analyse the likelihood of potential events; whether the plaintiff had demonstrated and proven that her injuries would restrict her future earning capacity; and whether there was evidence supporting that the plaintiff was capable of completing full-time work. The Court of Appeal confirmed that the evidentiary burden is high in the capital asset test, as the plaintiff must meet each step of the tripartite test by presenting sufficient evidence of the real and substantial possibility that the future event in question will cause a pecuniary loss[3]. The Court in *Vincent* confirmed that with regard to the first requirement of the tripartite test if the possibility of such a loss is speculative or negligible, the Court need go no further, as the claim has not been proven. The South African situation which mirrors the one discussed above is apparent in *Rudman v Road Accident Fund* (*Rudman*)[4], where the Court stated the following:

> "I believe this conclusion is correct. The fallacy in *Mr Eksteen's* criticism is that it assumes that Rudman suffers loss once he proves that his physical disabilities bring about a reduction in his earning capacity; thereafter all that remains is to quantify the loss. This assumption cannot be made. A physical disability which

[3] See also *Ploskon-Ciesla v Brophy* 2022 BCCA 217, where the Court cautioned that evidence of loss of capacity alone is insufficient to successfully warrant for a future loss of earning capacity claim. More recently, the cases of *Rab v Prescott*, 2021 BCCA 345 and *Deegan v L'Heurex* 2023 BCCA 159 reaffirmed the application of the tripartite test.

[4] [2002] 4 All SA 422 (SCA) at para 11. See also *Kannenberg v Road Accident Fund* (45549/16) [2018] ZAGPPHC 630 (20 August 2018).

impacts upon capacity to earn does not necessarily reduce the estate or patrimony of the person injured. It may in some cases follow quite readily that it does, but not on the facts of this case. There must be proof that the reduction in earning capacity indeed gives rise to pecuniary loss." [Own emphasis]

[11] This Court does accept that P[redacted] sustained injuries out of a motor vehicle accident. The Radiologist report, following an X-ray examination on 14 March 2022, reflects that on the right ankle there is a previous fracture of the medial malleolus with fixating orthopaedic hardware in situ. There were no complications around the hardware. Normally, a fixating hardware is used to provide stability and maintain the alignment of bone fragments during the healing process. There can be no doubt that P[redacted] suffered orthopaedic injuries. Commonly, such injuries include fractures, ligament tears, tendon tears, and joint dislocation. According to Dr Ngobeni, as at 23 March 2022, P[redacted] had reached Maximum Medical Improvement (MMI). This means that the medical condition has stabilized. In Dr Ngobeni's unqualified opinion (which is not evidence before me as recently confirmed to be the legal position by the Constitutional Court in the matter of *Mafisa v Road Accident Fund (Mafisa)*[5], the injuries sustained by P[redacted] will adversely affect his working ability in duties that involve long hour of standing or walking. He is not a fair and good competitor to his peers for general duties. He will be incapacitated for 2 weeks to recover after removal of screws. Correctly, Dr Ngobeni's assessment defers to the occupational therapist and the industrial psychologist on the issue of future work capacity. With regard to permanent disability, he opined that P[redacted] has impairment of the right ankle.

[12] Clearly, the evidence of Dr Ngobeni on the work capacity of P[redacted] is of no material use for the Court. It proves nothing. No damage affidavit was submitted in respect of his report, and as confirmed in *Mafisa*, his report does not constitute evidence before Court. The evidence of Dr Ndzungu is suspect. With regard to residual work capacity, he records that P[redacted] "was employed as a scholar at Soshanguve Secondary School". To my mind this is evidence of a "cut and paste" that this Court alluded to earlier. P[redacted] was never employed. With regard

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[5] *Mafisa v Road Accident Fund* [2024] ZACC 4 (25 April 2024).

to the injury on the ankle, Dr Ndzungu opines that P[redacted] is prone to unemployment. However, should he secure employment he will be a vulnerable employee who is disadvantaged from career growth, advancements and promotions. He is rendered an unfair competitor in the open labour market. These assumptions are based on the fact that the only work P[redacted] can secure is one that require high physical demand. In the Court's view there is no sustainable evidence that a grade 12 person can only be employed in employment that requires high physical demand. There are other forms of employment that a semi-skilled grade 12 person may be employed in. For instance, a shelf packer at a groceries store does not require a high physical demand. It is recorded by the industrial psychologist that he had aspiration to study a Diploma in Marketing but could not do so because of funding and not the injuries sustained. The funding was allegedly withdrawn because of not reaching sufficient marks. Nevertheless, it was a fact that he obtained a grade 12 pass with Diploma studies post-accident.

[13] On the other hand, a completely diametrical opinion is expressed by the educational psychologist, who stated the following:

> "... The writer notes that with the noted emotional dysfunctions by the clinical psychologist Mr Mtumunye will likely be unproductive, he will not function effectively in the workplace if he gets employed. PSTD is reported to interrupt the emotional and social functioning of an individual."

[14] It is clear that the educational psychologist bases her claim of emotional dysfunctions on the findings of a clinical psychologist. Dr Peta on the other hand opined thus:

> "Pain: Mr Mtumunye reported the experience of right ankle pain during psychological assessment. The experience of pain could possibly have negative impact upon psychological assessment results, as Mtumunye may be distracted by the pain and consequently struggle to pay attention and concentrate."

[15] As a point of departure, the pain allegedly being experienced is one reported by P[redacted]. Based on that reported pain, she reached a conclusion that such pain will make him struggle to pay attention. This Court must mention that Dr Peta did not depose to a damages affidavit. Her report does not constitute evidence. When this Court compares the reports of these three experts, it emerges with divergent consequences that the injuries may bring forth for P[redacted]. According to Dr Ndzungu, the injury makes him unsuitable for work of high physical demand. According to the educational psychologist the emotional dysfunctions will render him unproductive. Whilst Dr Peta suggests that the pain will cause nothing but a distraction and a struggle to pay attention. This Court remains none the wiser with regard to the earning capacity of P[redacted]. There is no proof that the earning capacity of P[redacted] has been compromised nor reduced in any manner whatsoever. Nevertheless, the educational psychologist report deferred to the Industrial psychologist with regard to the employability of P[redacted]. This Court fails to understand an opinion by the Industrial psychologist that P[redacted] educational capacity has been significantly compromised due to his involvement in the accident. According to the report of the educational psychologist, in 2018, a year before the accident, P[redacted] failed grade 10. In 2020, the year of the accident he passed grade 11. The following year 2021, he passed grade 12 and obtained Diploma studies. On any assessment, there is no evidence of a demonstrable and significant compromise or decline educationally post-accident. On the contrary, there was an improvement taking into account what happened in 2018.

[16] There is no logical reasoning that a person who acquired a pass of grade 12 with a Diploma studies post-accident, would suddenly be a TVET (NQF4) material because of lack of pain management. According to the educational psychologist, his grade 12 pass, which happened a year after the accident, would allow him to register a Diploma in office administration. Strangely, that possibility disappears because of "no treatment been given". It is unclear what treatment is being referred to when P[redacted] managed to acquire a Diploma studies status at grade 12 without such alleged treatment. Accordingly, there is no objective evidence that P[redacted] was a TVET material. This is sheer speculation predicated on nothingness. This Court is not convinced by such conclusions. The conclusions on decreased earning capacity reached by the Industrial Psychologist is, in my

view, premised on a wrong footing. The footing being that from being a Diploma studies (NQ6) material P[redacted] because of lack of unspecified treatment, degenerated from NQ6 to a TVET (NQ4) material. It must axiomatically follow that the opinion that the earning capacity of P[redacted] is affected to a point of causing a diminution in his patrimony is, with respect, baseless, flawed and unreliable.

[17] The following statement by the educational psychologist is illogical and is not supported by any observable evidence:

> "Considering that he has already passed Grade 12 (NQF4) with admission to Diploma studies (NQF6), he could consider registering for Diploma in Office Administration. However, as it stands no treatment has been given since the accident and the years have passed. This then suggest TVET qualification in line with his conditions, and for this he would require a career specialist to guide and support. He would further require pain and emotional management as these could affect his schooling and/or work in the future. The reasonable and possible postulation is TVET (NQ4)."

[18] In the Court's view, it is an illogical and unsupported statement that drove the Industrial Psychologist into a wonderland. All her conclusions on the earning capacity of P[redacted] flows from that. Yet the issue regarding the treatment P[redacted] is referring to is unknown to this Court. Furthermore, what is baffling to this Court is how such absence of treatment caused a sudden change of P[redacted] being a Diploma studies material, which feat was achieved post-accident, to a TVET studies material. This Court is unable to rely on this illogical reasoning to reach a conclusion that P[redacted] lost earning capacity. This is too speculative and most unhelpful to the Court.

[19] The Supreme Court of Appeal (SCA) in *MEC for Health and Social Development, Gauteng v MM on behalf of OM* (*MEC*)[6] had the following to say with regard to opinion evidence:

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[6] (Case no 697/2020) [2021] ZASCA 128 (30 September 2021) at para 17.

"...The opinion must be properly motivated so that the court can arrive at its own view on the issue. Where the opinions of experts differ, the underlying reasoning of the various experts must be weighed by the court so as to choose which, if any, of the opinions to adopt and to what extent. The opinion of an expert does not bind a court. It does no more than assist a court to itself arrive at an informed opinion in an area where it has little or no knowledge due to the specialised field of knowledge bearing the issues." [Own emphasis]

[20] To my mind, the opinion of the educational psychologist is not properly motivated at all. It is unhelpful to the Court. Since it is not binding on this Court it is rejected by this Court. In this Court's view, it is illogical for orthopaedic injuries, which reached MMI, to affect the educational capabilities of a person. On Dr Ngobeni's version, as at 2022, P[redacted] had reached the MMI. However long before reaching MMI, P[redacted] managed to obtain a grade 12 pass with Diploma studies. This exaggerated, in my view, Post Traumatic Stress Disorder (PTSD) has no basis when regard is had to the fact that post-accident, P[redacted] managed to progress educationally to a point of acquiring a Diploma studies.

[21] In *NSS obo AS v MEC for Health, Eastern Cape Province* (*NSS*)[7], the SCA with similar sagacity stated the following:

"It is settled principle that in order to evaluate expert evidence, the Court must be appraised of and analyse the process of reasoning which led to the expert's conclusion, including the premises from which that reasoning proceeds. The court must be satisfied that the opinion is based on facts and that the expert has reached a defensible conclusion on the matter. The purported admission by the defendant cannot, and does not, absolve the court from this duty..." [Own emphasis]

[22] This Court might add that even in instances where there is no opposing report, it remains the duty of this Court to analyse the report and be satisfied. Accordingly, this Court is not satisfied that the opinion that the earning capacity of P[redacted] had been lost to a point that his patrimony is reduced in due course. It is common

[7] 2023 (6) SA 408 (SCA) at para 25.

cause that P[redacted] never worked and may not work, not because of him not being able to achieve NQ6 but because of other independent factors. The Supreme Court of Appeal in *Road Accident Fund v Kerridge* (*Kerridge*)[8] confirmed that any claim for future loss of earning capacity requires a comparison of what the claimant would have earned had the accident not occurred, with what a claimant is likely to earn thereafter. The loss is the difference between the monetary values of earning capacity immediately prior to the injury and immediately thereafter.

[23] In *Mvundle v Road Accident Fund* (*Mvundle*)[9] Kubushi AJ, as she then was, correctly stated damages for loss of income can be granted where a person has in fact suffered or will suffer a true patrimonial loss in that his employment situation has manifestly changed. She further stated that plaintiff's performance can also influence his patrimony if there was a possibility that he could lose his current job and or be limited in the number and quality of his or her choices should he decide to find other employment. In the final analysis the claim for loss of earning capacity must fail.

[24] In *Grewal v Nauman* (*Grewal*)[10] the Court of Appeal for British Columbia, *per* the Honourable Mr. Justice Goepel approved the following sentiments as expressed by the trial judge:

> "The essential purpose of an award for past loss of opportunity diminished earning capacity is to provide the plaintiff with full compensation for all of his pecuniary losses, subject to rules of remoteness...
> As an initial threshold issue, the plaintiff must demonstrate both impairment to his or her earing capacity and that, in this case there is a real and substantial possibility that diminishment in earning capacity will result in a pecuniary loss." [Own emphasis]

[25] In *Brown v Golaiy* (*Brown*), Finch J stated that:

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[8] 2019 (2) SA 233 (SCA) para 40-44.
[9] (63500/09) 2012 (NG).
[10] 2017 BCCA 158 at para 134 and 135.

"The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have not been open to him, had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market."

[26] In *Grewal*, the Court also mentioned that:

"The onus is on Mr. Grewal to prove that there is a substantial possibility of an event occurring which will result in a loss of earnings..." [Own emphasis]

[27] In her heads of argument, counsel for P[redacted] sought to place reliance on the judgment of *Ramanand v Department of Labour: Compensation Commissioner* (*Ramanand*)[11]. Unfortunately, this case does not support the case of P[redacted] Of significance the Court mentioned that PSTD is always difficult to pinpoint a single stressful event. Unlike in this matter, parties there accepted that there was a single stressful event. Also, in that matter a finding was made that the appellant was permanently disabled due to PTSD. In this matter, the educational psychologist opined that symptoms of anxiety and depression are not permanent. The clinical psychologist reached the same conclusion about P[redacted] and suggested 10 sessions of psychotherapeutic intervention.

[28] With regard to costs, the order of 23 June 2023 already made provisions for costs in this default judgment application. With regard to the costs of the day the matter was argued before me, it is appropriate to make no order as to costs given the fact that no success was achieved with regard to the loss of earning capacity claim.

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[11] (2023) 44 ILJ 1816 (KZP).

Order

[29] For all the above reasons, I make the following order:

1. The claim for the loss of earning capacity is dismissed.
2. There is no order as to costs.

[redacted]
OANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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 6 May 2024.*

APPEARANCES

For the Plaintiff:	Ms B Nodada
Instructed by:	Mashiyi S Attorneys, Pretoria
For Defendant:	No appearance.