

REPUBLIC OF SOUTH AFRICA



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

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

Signature: _____ Date: _____

CASE NO: 34481/2018

In the matter between:

JUSTINE PHIRI

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

NICHOLS AJ

Introduction

[1] This matter came before me as a trial in which the plaintiff, Mr Justine Phiri, (hereinafter the plaintiff) seeks judgment by default against the defendant, the Road Accident Fund (RAF), for loss suffered as a result of injuries arising out of or caused by the negligent driving of the insured driver.

[2] The issue of liability was settled at 80% in favour of the plaintiff on 5 February 2018. The plaintiff did not have or pursue a claim for past medical and hospital expenses. He

was provided with an undertaking certificate in terms of s 17(4) (a) of the Road Accident Fund Act 56 of 1996 (the Act), limited to 80% of his proven damages, in respect of his future medical and hospital expenses.

[3] The only issues which remained in dispute, and which require my consideration, are quantum pertaining to general damages and loss of earnings.

[4] The matter is proceeding on an unopposed basis pursuant to an order by Makola AJ granted on 13 May 2021. In terms of that order, the RAFs defense was struck out and it was barred from serving and filing any expert reports. The order also provided for the matter to proceed on an unopposed basis in respect of the plaintiff's expert reports only.

[5] At the commencement of proceedings, I queried from plaintiff's counsel, Ms Molo-pe-Madondo, whether I was entitled to adjudicate the aspect of quantum in relation to general damages, failing an acceptance by the RAF that the plaintiff was entitled to general damages or a Health Professions Council of South Africa (HPCSA) tribunal decision to this effect. Ms Molo-pe-Madondo confirmed that the plaintiff would not seek an adjournment of this aspect of his claim. It was contended that the plaintiff is entitled to seek judgment in respect of general damages.

General Damages

[6] Since 1 August 2008, the RAFs liability for general damages has been limited to claimants who have suffered serious injury. Our courts have held that it is the RAF that must determine whether a claimant's injuries are serious or not, so as to justify the award of compensation in the form of general damages. This determination is an administrative exercise that is performed by the RAF in the manner prescribed by the Regulations.

[7] The alternative body that is authorised to determine whether a claimant has suffered a serious injury that justifies the award of general damages is an appeal tribunal of the HPCSA. The Regulations, which prescribe the manner in which serious injury may be determined, provide for an appeal tribunal of three independent medical practitioners to be appointed by the registrar of the HPCSA.

[8] Unless and until the RAF or a HPCSA appeal tribunal has made a decision on or determined that the claimant's injuries qualify as serious, the court cannot adjudicate a claim for general damages. In the context of general damages, the court's role is now confined to determining quantum that is most appropriate in the circumstances of the case. Accordingly, I do not have jurisdiction, particularly as a court of first instance, to determine whether the claimant has suffered a serious injury justifying the award of general damages.

[9] Ms Molope-Madondo sought to persuade me that I was entitled to address the issue of general damages. It was contended that the issue of merits and liability had been settled at 80% in favour of the plaintiff. A serious injury assessment report, the RAF4 form, was completed and submitted on behalf of the plaintiff by an orthopaedic surgeon. This report confirmed the nature of the plaintiff's injuries as serious. As at the date of the hearing, there was no rejection by the RAF of the RAF4 form and the assessment of the plaintiff's injuries as serious. Lastly, it was contended that the RAF's special plea, in which it disputed that the plaintiff's injuries were serious or that he was entitled to general damages, was of no consequence in view of the RAF's defense having been struck off in terms of the court order granted on 13 May 2021.

[10] In support of these contentions, Ms Molope-Madondo relied on an extract from *Duma*.¹ I will not reproduce the extract, save to state that it appears at paragraphs 16 and 17 of the judgment. The quoted extract referred to the argument advanced by the respondents, who were the claimants against the RAF. The portion of the argument that is relevant for this matter was the argument that a court can proceed to decide whether the claimant's injury is serious if the RAF does not dispute that a claimant's injury is serious. This reliance is ill conceived and incorrect. Not least of all because Brand JA goes on in *Duma* to reject this argument.²

[11] *Duma* clarified the position that it is the RAF that must be satisfied that an injury is serious before a claimant can continue with a claim for general damages in court.³ Further,

¹ *Road Accident Fund v Duma, Road Accident Fund v Kubeka, Road Accident Fund v Meyer, Road Accident Fund v Mokoena* 2013 (6) SA 9 (SCA).

² *Duma* para 19.

³ *Duma* para 20.

that an appeal against the RAFs decision on whether an injury is serious is to a tribunal of medical specialists and not the courts, as provided for in terms of Regulation 3.⁴

[12] Ms Moloche-Madondo also argued that the court is entitled to determine the plaintiff's general damages because the RAF has not objected to the plaintiff's claim in this regard. This, she contended, was evidenced by its failure to reject the RAF4 form, which was submitted on behalf of the plaintiff. Ms Moloche-Madondo placed reliance for this argument on *RS v Road Accident Fund*⁵. In that matter the court was faced with a situation where the RAF sought to reject the plaintiff's injury as being a serious injury on the morning of the trial. The RAF also sought to have the matter referred to the HPCSA for determination. Ms Moloche-Madondo argued that the plaintiff's circumstances were similar to those of *RS* because the RAF has not rejected the plaintiff's RAF4 form and by parity of reasoning, I too should exercise my discretion and adjudicate the issue of general damages.

[13] The plaintiff's reliance on *RS* is also ill-conceived. Firstly, because that matter is distinguishable. The RAF was represented and the medical experts in *RS* had concluded joint minutes rendering it common cause that the plaintiff's injury was serious. Potterill J expressly noted that a '*court does not have jurisdiction to decide whether an injury is serious or not.*'⁶ Notably, the court did not determine whether the plaintiff's injury was serious entitling him to general damages. This aspect was considered common cause based on the joint minutes filed by the expert witnesses.

[14] Secondly, and most importantly, the judgment in *RS* did not take cognisance of the decision by the SCA in *Faria*⁷ in which the court held:

'The amendment Act read together with the regulations has introduced two 'paradigm shifts' that are relevant to the determination of this appeal: (i) general damages may only be awarded for injuries that have been assessed as 'serious' in terms of thereof; and (ii) the assessment of injuries as 'serious' has been an administrative rather than a judicial decision. In the past a joint minute prepared by experts chosen from the contending sides would ordinarily have been conclusive in deciding an issue between a third party and the RAF, including the nature of the third party's

⁴ *Duma* para 25.

⁵ *RS v Road Accident Fund* (49899/2017) [2020] ZAGPPHC 1 (21 January 2020).

⁶ *RS* para 32.

⁷ *Road Accident Fund vs Faria* 2014 (6) SA 19 (SCA).

*injuries. This is no longer the case. The assessment of damages as 'serious' is determined administratively in terms of the prescribed manner and not by the courts.*⁸

[15] The RAF took no part in these proceedings. It has not indicated that it is satisfied that the plaintiff's injury has been correctly assessed as serious. It has not rejected the plaintiff's RAF 4 form or directed him to submit himself to further assessment at the RAFs expense. There is no joint minute signed by the parties in which the RAF declares its stance on this issue. The RAF has not delivered any expert reports. The only pleading that indicates the RAFs attitude on this issue is the special plea in which the serious nature of the plaintiff's injury is placed in dispute as is the plaintiff's entitlement to general damages.

[16] Ms Molohe-Madondo argued that I should not take cognizance of the special plea because the RAFs defense was struck out by order of court dated 13 May 2021. The plea is therefore not before me and no consideration should be given to it at all. Since my ultimate conclusion does not turn on this point, I will ignore the RAFs special plea without deciding this point.

[17] Ms Molohe-Madondo also contended that the concession by the RAF of the merits in favour of the plaintiff at 80% and the provision of the s 17(4)(a) undertaking certificate for future medical expenses, were clear indications that the RAF considered the nature of the plaintiff's injury to be serious.

[18] This is a purely speculative contention. No explanation has been proffered for how this speculative acceptance by the RAF translates into an acceptance that accords with the requirements of the Act. I have not been referred to any authority that supports this argument. A concession of the merits, without more, means that the RAF has admitted that the negligence of the insured driver caused the accident and the plaintiff is entitled to claim from it.⁹ It is now trite that agreement on whether an injury is serious or not cannot be assumed and a court, which proceeds with a claim for general damages on this basis, will be exceeding its powers.¹⁰

⁸ *Faria* para 34.

⁹ *MS v Road Accident Fund* (10133/2018) [2019] ZAGPJHC 84; [2019] 3 ALL SA 626 (GJ) (25 March 2019) para 13.

¹⁰ *Road Accident Fund v Lebeko* (802/2011) [2012] ZASCA 159 (15 November 2012) para 20.

[19] Accordingly, I cannot find any basis, in the circumstances of this matter to conclude that the RAF has accepted that the nature of the plaintiff's injury is serious thereby entitling him to a claim for general damages. Failing such, this court cannot adjudicate on the quantum of general damages.

[20] In *Lebeko* the court upheld the RAF's special plea objecting to the plaintiff's claim for general damages on the basis that the plaintiff failed to comply with the prescribed regulations to seek a determination on the RAF4 assessment. The court determined that, the plaintiff's right to claim general damages remained extant provided he fulfilled the prescribed procedural requirements.¹¹ The approach was endorsed in *Faria*¹² and appears to be the most appropriate in these circumstances.

Loss of income: past loss of earnings and estimated future loss of earnings

[21] The plaintiff issued summons against the RAF in August 2018. The plaintiff's particulars of claim seek an amount of R900 000 for loss of earnings, which is detailed and made up as follows:

Estimated past loss of earnings:

(a) Prior to the collision, the plaintiff was employed as a labourer earning an amount of R3000 per month. The amount under this heading is R200 000.00.

Estimated future loss of earnings

(b) Prior to the collision plaintiff was employed as a labourer and he has not resumed work to date. He remains compromised in the open labour market due to his disability and his estimated loss under this heading is R700 000. The amount is not capitalised.

[22] A notice of amendment to amend the amount claimed for estimated future of loss earnings was filed in November 2020 but does not appear to have been served on the RAF and amended pages have not been filed.

[23] The plaintiff gave evidence in support of this claim. He testified that he was involved in a motor vehicle accident on 18 July 2012. He was a pedestrian crossing the road when he was hit by vehicle that disregarded the red robots against it.

¹¹ *Lebeko* para 32.

¹² *Faria* para 33.

[24] He sustained various injuries as a result of the accident. He suffered a broken shoulder and he hurt his head. He was taken to Rustenburg Paul Kruger hospital by ambulance after the accident. He stayed in hospital for seven to eight days. During this time, one operation was performed on him. When he was discharged, he had stitches on his right arm where he had been operated on.

[25] He testified that it took him almost two to three years to recuperate before he could get back to full working capacity. Once he was discharged from hospital, he attended about three sessions of physiotherapy at the hospital over a period of three months. These sessions ended because he was shown what to do at home and told he may get better. He did not go back to the hospital even though he did not feel better. He instead started purchasing painkillers from the chemist, which he stills uses to date.

[26] The plaintiff testified that his pre-accident employment was that of a self-employed hawker selling car materials like dashboard spray, polish, wipers, and air fresheners. He worked six days a week, Monday to Saturday. He earned R1000 per week selling these products. Of this amount, he estimated that R700 represented his profit per week. He sold 3 x dashboard sprays; 2 x polishes, 5 x wipers, and 3 x air fresheners each week.

[27] Post-accident and during his recuperation period of two to three years, he returned to work, as a hawker after two years (post discharge). He estimated that he only worked three to four days a week selling the same products as before. Whether he worked on a particular day would be determined by how he felt that day. He earned R300 to R500 per week and of this amount, he estimated his profit at R250 per week.

[28] He tried to find alternative employment post-accident but he was unsuccessful with the two opportunities that he tried to pursue in the mining sector and civil construction because his injuries rendered him physically unsuitable. In response to the clarifying questions posed to by the court, he testified that he has been self-employed as a hawker since 2006. Between 2006 and 2012, when the accident occurred, he tried several times to find employment but he was unsuccessful. One position was as a general worker at a school. He did not secure this employment because he did not have matric, which was a requirement. Another position was as an IT Technician assistant. He did not succeed here either because he did not have appropriate experience, which was a requirement.

[29] The plaintiff was asked to explain the discrepancies regarding his employment status at the time of the collision. The discrepancies and his response are the following:

(a) The RAF1 form is signed by the plaintiff and dated 12 May 2015. It was submitted on the plaintiff's behalf and records that he was unemployed. The plaintiff contended that the RAF1 form was completed on his behalf by the person who brought it to him in hospital. He had advised that he was not employed and could not provide employer's details because he meant to convey that he was self-employed. He also could not provide the requested proof of income and an employer's letter because he was a self-employed person. He was therefore recorded as being unemployed.

(b) The particulars of claim in this matter, dated August 2018, aver at paragraph 1 that the plaintiff is unemployed. They further aver at paragraph 8.3 and 8.4 that pre-collision the plaintiff was employed as a labourer earning R3000 per month. The plaintiff contended that this was referring to his self-employed status as a hawker. When queried if he was then earning R3000 per month as a hawker, he clarified that his pre-accident income per month was R4000 and his profit per month was probably R2800.

(c) The plaintiff deposed to an affidavit on 26 July 2012 at the Magaliesburg police station in which he set out his version regarding the manner in which the accident occurred. In this affidavit, his employment status is reflected as unemployed. He explained that he signed the affidavit but did not write it out. He told the policeman that he was self-employed as a hawker but the policeman said that self-employed is not the same as work, it is unemployed. The affidavit was not read back to him and he did not read it before signing it.

(d) The hospital registration and intake form that was completed for the plaintiff on 3 September 2012, records his employment status as unemployed. He explained that he told them he was self-employed during his interview but because he could not provide a payslip or job card number, he was considered as an unemployed person.

(e) As proof of income, the plaintiff deposed to an affidavit on 6 March 2020 in which he averred that during 2012 and prior to his accident, he was self-employed earning R1000 per day.

Expert witnesses

[30] There were a number of medico-legal experts who were appointed to assess the plaintiff and who submitted their respective reports, which form evidence before this court. I do not intend to traverse these expert reports in detail and shall merely refer to certain salient features of these reports in addition to the relevant aspects of that expert's oral evidence.

Orthopaedic Surgeon – Dr Makgabo John Tladi

[31] Dr Tladi described the injuries sustained by the plaintiff as abrasions around the head and a right humerus fracture that was managed surgically. The fracture has united with the nail that is longer proximally. The plaintiff has reduced range of shoulder movement and impingement of his shoulder. He will benefit from removal of the nail and rotator cuff debridement followed by physiotherapy.

[32] Dr Tladi's explanation of his evidence that 'the nail is longer' was that the nail, which had been inserted surgically, protrudes above the head of the humerus causing an impingement. The result is that whenever the plaintiff lifts his arm to a certain length, the protruding nail will make contact with bone and cause pain. The nail should have been inserted into the humerus and below the head of the humerus.

[33] He recommended surgery for the removal of the right humerus implants and rotator cuff debridement. The plaintiff will not regain 100% movement even after physiotherapy. The pain that the plaintiff experiences is as a result of the impingement on the bone caused by the protruding nail every time he moves his shoulder. This is common with these types of impingements this long after the surgery.

[34] He informed the court that there was no reason why the plaintiff could not have had the surgery to date to remove the implants followed by physiotherapy to strengthen the weakened rotator cuff muscles. He agreed that this would have reduced the plaintiff's sequelae.

Occupational Therapist - Ms Nokulunga Rachel India

[35] Ms India opined that the plaintiff's bilateral functions would be limited by the physical abilities of his right arm and hand. The plaintiff's description of his pre-accident work tasks were that he would be largely seated and only when there was a potential customer would he be required to walk to that customer to present the product. She noted that she did not know the weight of the products he sold. She categorised his job as light work and sedentary.

[36] Post-accident she opined that his physical abilities enabled him to participate in a sedentary occupation. The plaintiff demonstrated that he was only able to lift 3kg maximum from floor to waist level with pain and discomfort on his right shoulder. He was unable to lift the weight to eye level due to his right shoulder's limited range of movement.

[37] The plaintiff's upper limb physical abilities therefore enable him to perform up to sedentary work in the open labour market with reasonable accommodations for bilateral weight lifting that is equal to and above 3kg. She opined that he will not be able to compete in the open labour market and is therefore physically vulnerable.

[38] However, she confirmed that the plaintiff was qualified to continue with his stated pre-accident job. Her recommendation was for the plaintiff was to reduce the number of days that he worked per week and to carry no more than 3kg at a time. This recommendation accords with the plaintiff's apparent current employment. Should he handle objects, during his workday, that weigh more than 3kg, then he would find it difficult to continue with this job due to the pain that he would have to endure handling those objects.

[39] Ms India explained that she considered the plaintiff's employment as a hawker to be sedentary because it does not require a person to stand and walk for long and if they are carrying any object, it weighs between 0.5 and 4.5kgs. Even though her report concludes that, the plaintiff cannot carry 3kgs or more, she still maintained that being a hawker classifies as a sedentary job because the amount of weight that he can carry falls within the range of sedentary work.

Industrial Psychologist – Ms Katleho Mokgotla

[40] The plaintiff's pre-accident and post-accident employment history and income was based upon information provided by the plaintiff. The plaintiff was self-employed as a hawker from 2006 until the accident in 2012. The plaintiff's pre-accident income is recorded as R400 to R1000 per day working six days a week. The plaintiff's reported operating expenses included purchasing stock, transportation and security for his trading spot. The plaintiff's profit after taking into account all operating expenses was R700 to R1000 per week.

[41] Post-accident the plaintiff recuperated at home for one year and six months before resuming his self-employment as a hawker. As at the date of assessment in February 2020, he reported that he was still self-employed as a hawker and his income was R300 to R500 per day. The number of days he now works varies. Once his operating expenses are deducted, his profit is R400 to R500 per week. This decline in income is due to the fact that he works for a reduced number of days due to pain and he has also lost customers.

[42] The collateral information, which was relied on to reach the conclusions regarding the plaintiff's earnings, was an affidavit submitted by the plaintiff dated 6 March 2020 declaring his earnings as R1000 per day maximum and a telephone call with the Ms Mokgotla in May 2020 during which the plaintiff clarified the minimum and maximum amounts of his earnings and profit.

[43] Ms Mokgotla opined that the plaintiff is now disadvantaged in the open labour market because of the injuries he sustained as a result of the accident and his residual capacity. The plaintiff's occupational functioning has also been negatively impacted because of his injuries. Relying on the OTs report, Ms Mokgotla opined that the plaintiff will experience difficulty performing his pre-accident job and that he requires sedentary employment, with accommodation.

[44] The plaintiff will continue with reduced earnings because of his post-accident sequelae. His residual capacity means he will not obtain work in the open labour market in a sedentary capacity. Compared to his uninjured peers, the plaintiff is an unequal competitor in the open labour market and is likely to be rendered a vulnerable job seeker in his post-accident injured state.

[45] The projections of the plaintiff's earnings pre-accident and post-accident were based upon Ms Mokgotla's conclusions regarding the plaintiff's earnings and self-employment as a hawker selling car products.

[46] Ms Mokgotla concluded that the plaintiff's occupational limitations, limited work experience and skills, lower level of education and future required work accommodations all indicated cumulatively that the plaintiff's employment prospects in the open labour market are reduced significantly. He is unlikely to secure employment of a purely sedentary nature and should he discontinue his self-employment, he will be faced with extended periods of unemployment. He has therefore been rendered functionally unemployable in the open labour market.

[47] In response to clarifying questions by the court, Ms Mokgotla confirmed that the plaintiff's income was all self-reported. She confirmed her report and evidence that the plaintiff's pre-accident profit per month was R3400 on average. It was pointed out that the plaintiff had adduced evidence that his profit per month was R2800. In order to reconcile the discrepancies between the plaintiff's evidence and her report, Ms Mokgotla suggested that the court accept the plaintiff's evidence that was tendered in court as the correct version of his income since her conclusions regarding his income was based upon his self-report and his affidavit.

[48] Ms Mokgotla conceded that the same would apply to the discrepancies in relation the plaintiff's post-accident earnings and recuperation period. The evidence of the plaintiff must be preferred. His reported recuperation period to her of one year and six months factored into her findings and calculations with regard to his past loss of earnings. This calculation would be affected if his recuperation period was actually two to three years.

[49] She confirmed that there was no objective information to support or corroborate the plaintiff's self-reports on his income. The plaintiff did not have any banking to support his earnings hence the reason she relied on his memory and his declarations of earnings. Ms Mokgotla confirmed that she did not query or establish the details of the plaintiff's suppliers for stock and that he had only been asked to provide the contact details for customers.

[50] Ms Mokgotla also clarified that she had not been provided with any verifying information regarding the plaintiff's assertions that he attended two job interviews post-accident and was declared medically unfit for those positions. The reports of these uncorroborated interviews by the plaintiff, however led her to conclude that the plaintiff is an individual for accommodated employment so as to not exacerbate his injuries.

Application of the law

[51] The plaintiff bears the onus to prove his case on a balance of probabilities. He must adduce sufficient evidence of his income in order to enable the court to assess and quantify his loss of past earnings and future loss of earnings.¹³ The plaintiff is required to provide and prove the factual basis that allows for an actuarial calculation, which the court is then asked to use as the basis to determine the plaintiff's loss of earnings.¹⁴ Particularly since actuarial reports and calculations are premised upon the assumptions of the industrial psychologist or prepared on instructions.¹⁵

[52] In *Mlotshwa*, the court quoted with approval, the following from *Lazarus v Rand Steam Laundries (Pty) Ltd*:¹⁶

'... Bressler AJ, concurring with De Villiers J, elaborated on the duty of the appellant to prove her damages. At page 53 at para B-F:

*"...We were urged, on the authority of Turkstra Ltd V Richards, 1926 T.P.D. 276, to find that as there was 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 ... In Turkstra v Richards there was an actual valuation, 'an estimate of some sort', in the language of Stradford, J. (as he then was) ... It does not seem to me that Turkstra v Richards, supra, meant that, given one or two facts, including that of damages, a judicial officer should then be required to grope at large in order to come to the assistance of a litigant, especially one whose case has been presented in such a vague way. It seems to me that the judicial officer must be placed in such a position that he is not called upon to make an arbitrary or merely speculative assessment, a state of affairs which would result in injustice to one of the parties ..."*¹⁷

[53] The only source of evidence for the plaintiff's past income is the evidence of the plaintiff, unsupported by any documentary evidence and uncorroborated by the evidence

¹³ *Mlotshwa v Road Accident Fund* (9269/2014) [2017] ZAGPHC (29 March 2017) paras 14 to 17.

¹⁴ *Brink v Road Accident Fund* paras 21 to 24.

¹⁵ *MS* para 14.

¹⁶ *Lazarus v Rand Steam Laundries (Pty) Ltd* 1952 (3) SA 49 (T).

¹⁷ *Mlotshwa* para 19.

of any supporting witnesses. The industrial psychologist's report and opinion is premised upon the factual information provided to her by the plaintiff. There is no corroboration for any of the information provided regarding the plaintiff's pre-accident employment, regardless of whether that corroboration may be considered independent or not.

[54] Instead, there are number of glaring factual inconsistencies in the plaintiff's evidence, documentation and on the plaintiff's pleadings, which remain unresolved and for which the plaintiff has provided unsatisfactory responses. The plaintiff's responses for the discrepancies regarding his employment were not persuasive and came across as contrived.

[55] Ms Molohe-Madondo argued that I should accept the affidavit deposed by the plaintiff in support of his earnings in March 2020 as proof of his earnings because he had reduced this information to an affidavit. Conversely, it was contended that the affidavit deposed by the plaintiff, recording that he was unemployed, should be rejected as evidence because the plaintiff explained that he had not read this document before he signed it. I am not persuaded by this argument because it has no merit. Particularly when viewed against the totality of all the discrepancies and inconsistencies in the evidence and pleadings regarding the nature of the plaintiff's employment, pre-accident and post-accident earnings.

[56] The industrial psychologist's report reflects various assumptions, which were based on facts that were not corroborated, supported by any evidence or are inconsistent with the evidence led. The report is therefore not reliable and I cannot place reliance upon it.

[57] This report makes incorrect assumptions and contains incorrect information. No proper explanation was proffered for why attempts were not made to properly establish the plaintiff's pre-accident occupation or to verify even his stated expenses like the cost of his supplies from a supplier; whether he utilised a sole supplier for his supplies through the years; the cost of security for his trading spot and the costs of transport.

[58] The facts relied upon by the industrial psychologist are inconsistent with the evidence adduced by the plaintiff or set out in the pleadings. It is trite that the role of the

expert witness is to assist the court in reaching a decision. A court is not bound by, nor obliged to accept the opinion of any expert witness.¹⁸

[59] Although writing for the minority judgment, Seriti JA in *Bee* affirmed that:

*'The facts on which the expert witness expresses an opinion must be capable of being reconciled with all other evidence in the case. For an opinion to be underpinned by proper reasoning, it must be based on correct facts. Incorrect facts militates against proper reasoning and the correct analysis of the facts is paramount for proper reasoning, failing which the court will not be able to properly assess the cogency of that opinion. An expert opinion which lacks proper reasoning is not helpful to the court.'*¹⁹ (References omitted)

A court is entitled to reject an expert report and place no reliance upon it, if it is of the view that the expert report is based on incorrect facts, incorrect assumptions and is unconvincing and therefore unreliable.²⁰

[60] The oft-quoted *dictum* from *S v Mthethwa*²¹ is apposite and applicable to the industrial psychologist's report:

*'The weight attached to the testimony of the psychiatric expert witness is inextricably linked to the reliability of the subject in question. Where the subject is discredited the evidence of the expert witness who had relied on what he was told by the subject would be of no value.'*²²

[61] I am mindful and appreciative of the fact the plaintiff is averred to have been employed in the informal sector and that by its nature, self-employment in this sector is associated with cash transactions and non-existent record keeping. However, this does not impose a lesser onus upon a plaintiff who is so employed or duty upon an industrial psychologist who is tasked with assessing the plaintiff in order to assist the court.

[62] In this matter, the industrial psychologist could have investigated the plaintiff's assertions regarding his pre-accident employment more thoroughly. An affidavit by the plaintiff himself cannot be regarded as corroboration for the plaintiff's own assertions.

¹⁸ *Road Accident Appeal Tribunal & others v Gouws & another* [2017] ZASCA 188; [2018] 1 ALL SA 701 (SCA) para 33; *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA) para 22.

¹⁹ *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA) para 23.

²⁰ *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA) para 30 and 31. *Modise v Road Accident Fund* (10329/2019) para 4.12

²¹ (CC03/2014) [2017] ZAWCHC 28.

²² *Mthethwa* para 98.

[63] Our courts have declined to award damages for past loss of income and future loss of earnings in matters where plaintiffs, employed in the informal sector, have failed to establish and prove these heads of damages.

[64] In *Mlotshwa* the court found that the plaintiff had failed to prove his damages for past loss of income and future loss of earnings because of the paucity of evidence provided by the plaintiff to support the claim that he generated an average income of R19 000 per month.²³ Although the court was alive to the nature and prevalence of the informal sector as a source of income, this did not detract from litigants' obligations to the court. Proof of income is within the knowledge of the plaintiff and if the paucity of evidence required the court to '*embark upon conjecture and speculation in quantifying the damages*'²⁴ then the court was not entitled to do so.

[65] Peterson AJ in *Mlotshwa* also referred to the unreported appeal judgment in *Modise v Passenger Rail Agency of South Africa*,²⁵ which he regarded as analogous, where the court held:

'This is an unfortunate case. One suspects that the plaintiff did suffer a past loss of earnings and will suffer future loss of earnings. However, I may not allow a suspicion, nor my sympathy for the plaintiff, to translate into a basis for awarding damages where the evidence does not allow this. The variables in the equation are simply too many.'

[66] Whilst the plaintiff's experts' reports are uncontroverted, for the reasons provided, no reliance can be placed upon the opinion and conclusions of the Industrial Psychologist. This matter is not analogous to one where the best available evidence of the quantum of the plaintiff's established loss of income has been adduced thereby allowing me assess the amount and make the best use of the evidence before me.²⁶

[67] The SCA has confirmed that:

'Any claim for future loss of earning capacity requires a comparison of what a 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 value of the earning capacity immediately prior to the injury and immediately thereafter. This can never be a matter of exact mathematical calculation and is, of

²³ *Mlotshwa* para 20.

²⁴ *Mlotshwa* para 21.

²⁵ (A5023/2013) (11 June 2014) para 10.

²⁶ *RAF v CK* (1024/2017) [2018] ZASCA 151 (01 November 2018) para 25.

its nature, a highly speculative inquiry. All the court can do is make an estimate, which is often a very rough estimate, of the present value of the loss.

*Courts have used actuarial calculations in an attempt to estimate the monetary value of the loss. These calculations are obviously dependent on the accuracy of the factual information provided by the various witnesses.*²⁷

[68] Any attempt at quantification of the plaintiff's claim for past and future loss of earnings would be a highly speculative exercise without any factual basis or evidentiary support. The plaintiff has not proved that he was employed pre-accident; the nature of that employment as pleaded or the amount he earned during the relevant periods. The plaintiff has based his claim for past and future loss of earnings on the income and profit that he is alleged to have earned during the relevant period. He has failed to prove his earnings pre-accident and post-accident. The actuarial calculations which have been provided are therefore of no assistance to court.

[69] In the circumstances I make the following order:

- (a) The plaintiff's claim in respect of general damages is postponed *sine die*.
- (b) The plaintiff's request for judgment by default in respect of past loss of earnings and future loss of earnings is dismissed.
- (c) The plaintiff shall bear his own costs in respect of the trial.

T NICHOLS

ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via email, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 23 December 2021.

HEARD ON: 17 AND 18 May 2021

JUDGEMENT DATE: 23 December 2021

FOR THE PLAINTIFF: Adv Molo-pe-Madondo

²⁷ *CK ibid* paras 40 and 41.

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