

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 85369/2019

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

(3) REVISED: NO

Date: 11 September 2023
Acting Judge FHH Kehrhahn

A handwritten signature in black ink, appearing to read 'FHH Kehrhahn', written over a faint circular stamp.

In the matter between:

MOLAUDIKGOTLA KINGSLEY MATHAMELO

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

Coram: FHH KEHRHAHN (AJ)

Heard: 20 June 2023

ORDER

1. The Defendant is ordered to pay 100% of the Plaintiff's proven or agreed damages.
2. The Defendant is ordered to provide the Plaintiff, within 10 days of this order, with a section 17(4)(a) undertaking, which adopts the wording of s17(4)(a) of the Road Accident Fund Act 56 of 1996 (as amended).
3. The Plaintiff's claim for past and future loss of income is dismissed.
4. The Plaintiff's claim for general damages is postponed *sine die*.
5. The Defendant is ordered to pay the Plaintiff's party and party High Court costs, including the cost of experts employed and the cost of counsel.

JUDGEMENT

Coram: KEHRHAHN AJ

Introduction: The Defendant's default

1. The Plaintiff instituted action against the Defendant in terms of section 17 of the Road Accident Fund Act 56 of 1996, as amended ('the Act'), pursuant to injuries suffered by the Plaintiff in a motor vehicle accident.

2. The Defendant, the Road Accident Fund, a juristic person established in terms of the Act, failed to defend the action despite proper service of the summons.
3. I refer to the parties as the Plaintiff and the Defendant, as they are in the main action.
4. The matter came before me on the default judgement trial roll. The Plaintiff applied for default judgment by way of a substantive application in terms of Rule 31(2)(a). In the Notice of Motion, the Plaintiff, who is the Applicant in the default judgement application, seeks R7 000 000.00 in damages and a section 17(4)(a) undertaking in terms of the Road Accident Fund Act 56 of 1996, as amended. In the Plaintiff's Rule 28 notice of intention to amend, an amount of R6 037 602 is claimed.
5. The evidence was presented by way of an affidavit as contemplated by Rule 38(2). The only evidence was the founding affidavit in the default judgement application, deposed to by the Plaintiff and the expert affidavits.
6. I deal next with the merits of the Plaintiff's case.

Negligence

7. As for the negligence on the part of the insured driver, the Plaintiff relied on his affidavit, submitted in compliance with section 19(f) of the Act and the founding affidavit. From these affidavits it is apparent that the Plaintiff was a passenger in a vehicle with registration numbers DB 94 RD GP (the insured vehicle), driven at the time by Ms Lindiwe Carol Lekgetho on the Augrabis road, Brakpan. The driver swerved out when she saw a pedestrian '*trying*' to cross the road. She lost control of

the vehicle and the vehicle overturned. The driver of the vehicle then crashed into a tree. The accident occurred at night in an area lit by streetlights.

8. The question is whether the driver of the vehicle drove negligently in some way. The slightest degree of negligence is sufficient to satisfy the requirements of negligence under section 17(1) of the Act and consequently to render the RAF liable.¹

9. The insured vehicle, travelling on Augrabis street, in a residential area, had enough momentum to capsize, move off the road surface and to collide into a tree. It is reasonable to draw the inference² from the proven facts, and it is plausible, that the driver drove too fast in a residential area and did not keep a proper lookout given the prevailing circumstances.³

¹ See *Ntaka v Road Accident Fund* (19868/13) [2018] ZAGPPHC 536 (6 February 2018) at para 27.

² The inference that is drawn must be consistent with all the proved facts; if it is not, then the inference cannot be drawn: See *SA Post Office v Delacy and Another* 2009 (5) SA 255 (SCA) at para 35; *R v Blom* 1939 AD 188 at 202-203. The court in *SA Post Office* held at para 35:

'The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be "consistent with all the proved facts. If it is not, then the inference cannot be drawn" and it must be the "more natural or plausible, conclusion from among several conceivable ones" when measured against the probabilities.'

³ 'Plausible' in this context means 'acceptable, credible or suitable': See *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159B-D. Also see generally *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A); *Cooper and Another v Merchant Trade Finance Ltd* (474/97) [1999] ZASCA 97 (1 December 1999) at para 7; *Govan v Skidmore* 1952 (1) SA 732 (N) at 734C-E.

10. The Plaintiff's claim being a passenger claim, it is axiomatic that a modicum of negligence on the part of the insured driver (the proverbial 1%) will suffice to render the Defendant liable for 100% of the Plaintiff's proven or agreed damages.⁴ The insured driver was at least 1% negligent and I find that the Defendant is liable for 100% of the Plaintiff's proven damages.

11. The remaining issue is the quantification of the damages. The Plaintiff persists with the claim for general damages, loss of income and future medical expenses. The Plaintiff relies on expert evidence. The experts filed affidavits which elevated their reports to evidence before the court. The first issue that I must consider is if Judge Vally (J) introduced a new admissibility requirement for expert evidence in *Twine and Another v Naidoo and another*.⁵

A new admissibility requirement?

12. Expert evidence had always been admitted if the evidence to be so admitted is relevant. Expert evidence is relevant where expert witnesses, by virtue of the nature of the dispute, are in a better position than the court to draw competent and reasoned inferences from the facts.⁶

⁴ *Hanekom v MMF* 1998 (1) SA 634 (T) at 635-636; *Mojiki v RAF* (21612/2005) [2008] ZAGPHC 19 (29 January 2008) at para 6.

⁵ [2018] 1 All SA 297 (GJ) at para 18(c).

⁶ *Coopers v Deutsche Gesellschaft* 1976 (3) SA 353 (A) at 370; *S v Engelbrecht* 2005 (2) SACR 41 (W) at para 26; *AM v MEC for Health, Western Cape* 2021 (3) SA 337 (SCA) at para 17.

13. In most American states, more than mere relevance is necessary for expert evidence to be admitted. The expert evidence must additionally be reliable.⁷ Reliability of the expert evidence is tested in that the court considers:⁸

13.1. Whether the technique or theory in question can be and has been tested.

13.2. Whether it has been subjected to publication and peer review.

13.3. Its known or potential error rate.

13.4. The existence and maintenance of standards controlling its operation; and

13.5. Whether it has attracted widespread acceptance within a relevant scientific community.

14. Judge Vally (J) in *Twine and Another v Naidoo and another*⁹ held that expert evidence must be relevant AND reliable for it to be admissible. The impression is created that a further admissibility requirement had been established, specifically that it must be shown that the opinion is reliable. At para 18(q) of the judgement, judge Vally (J), under the heading of established principles with regard to the '*basic principles involved in the admission of expert evidence*' and the '*requirements with regard to expert witnesses*', deal with the American Supreme Court case of *Daubert*¹⁰ which goes to the reliability and the falsifiability of expert evidence. At para 18(t) the court considered if the court must not admit junky science as held in the American case of *Kumbo Tire Co v Carmichael* [1999] USSC 19.

⁷ *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US (1993).

⁸ *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US (1993).

⁹ [2018] 1 All SA 297 (GJ) at para 18(c).

¹⁰ *Daubert v Merril Dow Pharmaceuticals Inc* [1993] USSC 99.

15. In my view the above *dicta* is not authority that an additional test for the admissibility test was established by the court, namely that the expert evidence must be reliable. This is clear from a reading of the judgement as a whole and the fact that the court merely sets out existing and established principles. To be admissible, the expert opinion must be relevant and any doubt as to the reliability of the evidence must go to the weight that the court is to attach to the evidence.

16. I now turn to the first head of damages, general damages.

General damages

17. The Plaintiff suffered numerous injuries, some more serious than others. Judge Sardiwalla J, in this division, on 6 December 2018, in the matter of *Vusi Petros Skosana v Road Accident Fund* (3204/2015), correctly in my view, made the following declaration:

'It is declared that, as there exists a serious injury in terms of Act 56 of 1996 and the Regulations promulgated thereon, the Plaintiff is entitled to general/ non-pecuniary damages for all his accident related injuries and sequelae and not solely in respect of that serious injury'.

18. The Defendant had not yet made a decision on the seriousness of the injuries, singularly or collectively, and given this lack of a decision, I have no jurisdiction to make an award in respect of the general damages.¹¹ This head of damage is accordingly postponed *sine die*.

¹¹ See *Road Accident Fund v Duma*, *Road Accident Fund v Kubeka*, *Road Accident Fund v Meyer*, *Road Accident Fund v Mokoena* [2013] 1 All SA 543 (SCA); 2013 (6) SA 9 (SCA) at para 19; *Road Accident Fund v Faria* 2014 (6) SA 19 (SCA); [2014] 4 All SA 168 (SCA) at para 35.

19. I will now consider the Plaintiff's claim for future medical expenses.

Future medical expenses

20. As for the claim for future medical expenses, recoverable are those future costs which are reasonable required to remedy a condition occasioned by the collision or ameliorate it.¹² The expert reports which is before the court anticipate future medical expenses as a direct result of the accident.

21. Before a full court of this division, the Defendant placed on record that it had made a blanket election to compensate claims for future medical expenses by way of a section 17(4)(a) undertaking in terms of the Road Accident Fund Act 56 of 1996.¹³

22. As for the wording or content of this undertaking, it must follow the wording of the Act.

The SCA in *Katz*¹⁴ held that:

'...without such consent, the trial court cannot direct that the undertaking should specify or detail any particular kind of hospital accommodation, treatment, services, or goods covered by those categories. Any elaboration of that kind could well give rise to lengthy and expensive disputes between the parties at the trial, and, in any event, may still necessitate speculation or guesswork by the trial Court about what hospitalisation, treatment, etc will become necessary in the future.'

¹² *Dhlamini v Government of RSA* (3) C & B 554 (W) 582.

¹³ See *Knoetze obo Malinga and Another v Road Accident Fund* [2023] 1 All SA 708 (GP); 2023 (3) SA 125 (GP) at para 26.

¹⁴ *Marine & Trade Ins Co Ltd v Katz* NO 1979 (4) SA 961 (A) at 971.

23. The Defendant must provide the Plaintiff with a section 17(4)(a) undertaking which adopts the wording of section 17(4)(a). This order is in line with the declaratory order issued by Judge Van der Westhuizen J to the following effect:¹⁵

'It is declared that Respondent, when invoking section 17(4)(a) of the Road Accident Fund Act 56 of 1996 as amended, and electing to compensate a road accident victim with an undertaking, that such undertaking should adopt the wording of section 17(4)(a) and must be free from any limitations, caveats, restrictions and specifications...'

24. I turn now to the loss of earnings.

Loss of earnings

25. The Plaintiff was about 49 years old at the time of the accident and is currently 53 years of age. The nub of the contention *in casu* is the Plaintiff's lack of factual evidence. The court was given only inadmissible hearsay evidence plagued by unexplained discrepancies and inconsistencies. The court was expected to make bricks with straw. I raised the lack of evidence, specifically regarding the income, with counsel for the Plaintiff, who submitted to the court that the court must do the best it can to determine a figure on the loss of income on the available evidence and proposed that a significant contingency be deducted. Counsel suggested I reduce the claim for past loss by 25% (uninjured scenario) and the claim for future loss by 50% (uninjured scenario). These are significant contingencies given the age of the Plaintiff.

26. After I reserved judgement, the Plaintiff uploaded onto Case Lines a notice in terms of Rule 35(9) attaching bank statements for 2020, 2021 and 2022. These bank

¹⁵ Para 1 of the order made on 8 September 2023 in *Muller obo Human & 2 Others v The Road Accident Fund* [Case number 2023/066777], Gauteng Division, Pretoria.

statements have not been placed in evidence and does not assist the Plaintiff at all. No basis had been laid for its admission into evidence.

27. This submission, that I should do the best I can on the available evidence, to make an award, is indeed in line with the case law, but this can only be the case if the Plaintiff presented all available evidence and my decision is then based on reliable facts.¹⁶ Only if it is clear that an actual loss has been suffered, a fair award can be made, even in the absence of proper financial records, but then only with regard to other reliable facts.¹⁷ In this case I had absolutely no facts at all, let alone *some* reliable facts, but I return to this later.

28. Dr Kumbirai (Orthopaedic Surgeon) diagnosed the Plaintiff with a left proximal femur fracture with detachment from the femoral neck and a supero-lateral displacement. The Plaintiff also suffered blunt abdominal trauma. He was admitted to the Sunshine Hospital. The left femur fracture was treated with traction and he underwent a surgical open reduction and internal fixation and a bone graft of the left femur. He was further treated with physiotherapy. The Plaintiff was hospitalized for about 5 days.

29. Dr Kumbirai diagnosed, additionally to the above injuries, a soft tissue right shoulder injury. Dr Kumbirai reported that the Plaintiff has a 10 cm scar on the left buttock and a 2cm scar on the left thigh where the left femur fracture was treated with an intramedullary nail but recent x-rays revealed that the fracture united with the femur

¹⁶ *Syed v Metaf Limited t/a Metro Cash & Carry* (CA356/2016) [2018] ZAECGHC 80 (13 March 2018) para 71.

¹⁷ See *Griffiths v Mutual and Federal Insurance Co Ltd* 1994 (1) SA 355 (AD) at 546.

nail still in situ. Dr Kumbirai is of the opinion that the Plaintiff's Whole Person Impairment (WPI) is only 3%.

30. The only surgery which Dr Kumbirai anticipates in the future is for the removal of the implants, and this will only be necessary to prevent the metalware from acting as a focus for sepsis, in the event that the Plaintiff become immune-compromised.

31. Dr Selahle (Plastic Surgeon) reported scarring of 3.5cm to the scalp, 6cm to the forehead, 1.5cm to the nose and forehead and a 19cm scar of the left thigh. Dr Segwapa (Neuro Surgeon) diagnosed a mild brain injury with headaches and memory problems. The Plaintiff's case had several contentions and I deal with them in turn next.

No factual evidence

32. Dr Kumbirai, in his report, relies on factual information, obviously solicited from the Plaintiff or the Plaintiff's legal representatives, specifically that the Plaintiff was the self-employed owner of Pholo Human Capital and Bonang Trading and Development, a Human Relations and Training Company. Dr Kumbirai further relies on the allegation that the Plaintiff's highest level of education is an MBA (Masters in Business Administration). Dr Kumbirai was informed that the Plaintiff is now unemployed as the company closed down. Dr Kumbirai is mute on the reasons for the alleged closing of the business or businesses.

33. Similarly, Dr Maluleke-Baloyi (Physiotherapist) submitted that the Plaintiff additionally have a Grade 12 level of education, a BSc in Mathematics and Statistics and a National Diploma in Police Administration.

34. Dr Maluleke-Baloyi (Physiotherapist) further sets out the Plaintiff's work history. She reports that the Plaintiff was working for the Silverton SAPS from 1991-1995. He moved to National Intelligence in 1999 to 2000 and commenced with Pholo Holdings as an executive director (training facilitator) in 2002 until January 2019, when he met with the accident. His monthly '*stipend*' was R40 000 (which would amount to R480 000/annum). I pause to point out that this income is contradicted by Mr Oscar Sechudi (Industrial Psychologist) who alleges that the Plaintiff earned R320 000/annum.

35. None of these factual allegations, or any other facts for that matter, supporting the quantification of the Plaintiff's claim, was placed in evidence by the Plaintiff. My concern does not only go to the lack of corroboration or lack of attaching the supporting source documents. Nowhere in the Plaintiff's own founding affidavit does he deal with his education, work history and income at all.

36. At best for the Plaintiff, he attaches '*proof of employment*' to the founding affidavit, and without more omits to confirm that the attachment is factually correct and accurate. This '*proof*', which was so attached, is a letter from Magabane & Associates Inc, a law firm, dated 8 February 2021, stating that the Plaintiff was in the employ of this law firm on a temporary basis, depending on the availability of work, from 1 November 2020 to 29 January 2021. This employment as a cost consultant commenced post-accident. The letter says that the Plaintiff's resigned due to the difficulty to continue with the work.

37. The first contention with this evidence is that it is inadmissible hearsay evidence.¹⁸ It is advanced by the Plaintiff, but the probative value of the evidence depends on the

¹⁸ Section 3(1) of the Law of Evidence Amendment Act provide that:

author if this letter, which author did not depose to a confirmatory affidavit. Although the Plaintiff could easily have done so, he did not himself place this employment into evidence and merely attached the letter. The second contention is that the author resorted to inadmissible opinion evidence, the opinion being that the Plaintiff resigned (from this temporary work) on the basis that it was difficult to do the work. Even if I were to accept the contents of this letter into evidence, it would be of very little probative value given that it does not deal with the Plaintiff's income so derived from the employment, what the nature of the work entailed, the Plaintiff's job description, the availability of the 'available' work and physical requirements of the position.

38. The experts' reliance on the *ipse dixit* of the Plaintiff, regarding his education, employment history and income, among others, is similarly inadmissible hearsay evidence as the Plaintiff himself did not present these facts into evidence.

39. Although hearsay evidence may be permissibly included in an expert's written report, this inclusion in the report is purely for convenience and practicality, and such inclusion does not elevate the hearsay evidence to proven facts.¹⁹ Expert witnesses, just like lay witnesses may not give hearsay evidence.²⁰ The SCA held in *PWC* that

Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

...

Section 3(4) defines hearsay evidence as:

'evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence'.

¹⁹ *Godi v S* (A683/09) [2011] ZAWCHC 247 (31 May 2011) at para 20.

²⁰ *Mathebula v RAF* (05967/05) [2006] ZAGPPHC 261 (8 November 2006) at para 13; *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) at 772.

before a court can attach weight to an expert opinion, the facts on which it is based must be proven, which facts may be observed by the expert witness personally, failing which it is of no value to the court.²¹ The court is ultimately bound by the four corners of the proven facts and may not consider unproven facts or speculate about its existence.²²

40. An expert witness has a duty to give clear and cogent reasoning for their opinions which must be premised on a relevant and reliable factual basis.²³ This will allow the court to test the cogency of the expert's reasoning.²⁴ There is a duty on the expert to present the opinion in such a fashion that allows the court to make its own observations and to consider if the experts conclusions are sound.²⁵

41. *In casu*, the Plaintiff presented no evidence about his pre- and post-accident work history, his education, his pre- and post-accident income, the nature of his work and/or business and his job description and duties at the business, the income and expenses of the business or any other collateral facts which are crucial markers to guide and assist the court in negotiating the rough terrain that is quantifying and awarding damages.

²¹ *PWC v National Potato Co-Op* [2015] All SA 403 (SCA) paras 326-330.

²² *S v Ndlovu* 1987 1 PH H37 (A) at 68.

²³ *Motor Vehicle Assurance Fund v Dubuzane* 1984 (1) SA 700 (A) at 706; *Great River Shipping v Sunnyface Marine* 1994 (1) SA 65 (C) at 75; *R v Theunissen* 1948 (4) SA 43 (C) at 46; *R v Dembo* 1952 (2) SA 244 (T) at 249E.

²⁴ *R v Sibanda* 1963 (4) SA 182 (SR) at 190; *R v Nyamayaro* 1967 (4) SA 263 (RA) at 264.

²⁵ *Powernet Services 1988 v Government of the Republic of South Africa* 1998 (2) SA 8 (SCA) at 19; *S v Armstrong* 1998 (1) SACR 698 (SE) at 703.

42. It can hardly be disputed that these 'markers' are also relied on heavily by the medico legal experts, in formulating an opinion about the Plaintiff's pre- and post-accident career projection. If the court has any doubt as to the credibility and the veracity of these 'markers', the probative value of the experts' opinions is adversely reduced. In this context where the expert relies heavily on an incorrect factual basis, as they do, as will become more apparent later, the simple narrative of '*garbage in, garbage out*' or 'GIGO' finds application.

43. Dr Kumbirai (Orthopaedic Surgeon) relied on x-rays taken for the purposes of his report. The x-rays revealed, according to the medico legal report of Dr Kumbirai, that the right shoulder is radiologically normal. The radiologist report, attached to the report, by Dr Mkhabele Zulu (a Radiologist), however reveals radiological fallout in the right shoulder, specifically irregularity of the greater tuberosity of the humerus with narrowing of the acromio-humeral distance, suggestive of impingement. This radiologist report was similarly not supported by an affidavit from the radiologist, reducing this to inadmissible hearsay evidence, given that it was not properly established into evidence. Dr Kumbirai seemingly relied only on the radiologist report and does not state in his report that he personally studies the x-ray images.

44. The Clinical Psychologist, Ms Mokgathe, relied on psychometric tests conducted by Ms Elizabeth Mokoena (Registered Psychometrist). There is no affidavit from Ms Mokoena (Psychometrist), confirming her qualifications and experience and that she indeed conducted the tests and that the results relied on by Ms Mokgathe are accurate.

45. Generally, there is no explanation as to why the factual basis on which the Plaintiff relies, as the foundation of his case, was not presented into evidence. The failure of the Road Accident Fund to participate in litigation is not an excuse to disregard the Rules and Laws of Evidence. In fact, these Rules and Laws of Evidence are even more vigorously enforced by this court owing to the Road Accident Fund's absence, not to aid or assist a particular litigant but to ensure that a proper case is made out for the requested relief. This is a duty of the court.

46. The court in *Ndlovu v RAF*²⁶ held:

A court's decision cannot be based on speculation or reservations gathered from documents which, although placed before it, were not admitted as to truth of content; nor were they used in the present case to test the veracity of the plaintiff's testimony and the author was not called to testify. Moreover, a court cannot itself go beyond obtaining clarification of the evidence placed before it. On the authorities, it should not transcend this line and open up an avenue of enquiry not raised by opposing counsel nor should a court descend into the arena and engage in a process of questioning, even if its object is directed at the pursuit of truth, as this may otherwise be perceived as demonstrating bias or may imperceptibly cloud the judge's assessment.

47. There must be in any running enterprise a legio of documentary evidence which could have been placed before the court to substantiate the Plaintiff's claim, including financial statements, bank statements, business contracts with clients and SARS tax returns. There was simply no factual evidence before the court in relation to the issue of the loss of income claim and the Plaintiff elected not to present this evidence at his own peril. I simply cannot make an award for damages, specifically loss of income, in the absence of admissible evidence.

²⁶ *Ndlovu v RAF* (1) SA 415 (GSJ) at para 104.

48. The lack of evidence in respect of the supporting facts is not the Plaintiff's only hurdle.

The hearsay evidence advanced by the experts are riddled with factual discrepancies and inconsistencies.

Mutually destructive factual hearsay versions in expert reports

49. The version, which was narrated by Dr Kumbirai, specifically that the Plaintiff had lost his self-employment post-accident is mutually destructive to the version narrated by Ms Matsapa (Occupational Therapist). She recorded that the Plaintiff's '*present occupation*' (as at 8 September 2022- the date of her report) is '*self employed*'. Under the heading '*work history*', it is recorded that the Plaintiff's was self-employed (Training Development) from 2003 '*till now*'.

50. Both these experts would have obtained these direct material facts from the Plaintiff's *ipse dixit* and they obviously received mutually destructive versions. Neither of the two versions had been canvassed by the Plaintiff in the default judgement founding affidavit and the court is left to its own devices and to resort to speculation and conjecture: Which one is it?

51. The work history which the Clinical Psychologist (Mrs Mokgatlhe) sets out differs from that of Dr Malulele-Baloyi (Physiotherapist) as set out above. To this end, she reports that the Plaintiff commenced work for the National Intelligence Agency in 1996 and not 1999, as reported by the physiotherapist.

52. Dr Maluleke-Baloyi (Physiotherapist) alluded to a motor vehicle in which the Plaintiff was involved in, some time ago in 1996, which necessitated hospital treatment. Dr

Maluleke-Baloyi, without any supporting facts and without investigating the veracity of the Plaintiff's *ipse dixit*, records in her report that in the previous accident, the Plaintiff suffered only bruises and was treated at the Kopanong hospital but not admitted. Dr Kumbirai, to the contrary, recorded in his report that '*the claimant informs me that this is his first motor vehicle accident*'. Dr Segwapa (Neuro Surgeon) similarly recorded that '*this is the only accident he was ever involved in*'. To the clinical psychologist, Mrs Banti Mokgathe, the Plaintiff '*reported that he has not been involved in any other accident except for the one under discussion*'.

53. Were the Plaintiff to file an affidavit, placing the collateral and other facts advanced to the experts into evidence, these discrepancies would have adversely affected the credibility of the Plaintiff. The Plaintiff did however file affidavits, placing the experts' opinions before the court, and these experts' opinions contain discrepancies. Some discrepancies are more material than others, but most adverse is the occupational therapist's opinion which advances that the Plaintiff returned to his pre-accident employment, where his case advanced was to the contrary, that he had been rendered unemployable by the accident, which discrepancy remained unexplained.

Experts must give opinion related to their own disciplines and expertise

54. Dr Maluleke Baloyi (Physiotherapist) reported that the Plaintiff did not return to his pre-accident employment owing to blurry vision and disabling headaches. There is no expert evidence before the court to the effect that the Plaintiff's eye pathology is accident related. Despite this, Dr Maluleke-Baloyi goes on to report under the heading '*diagnosis*' that the Plaintiff suffered a '*left eye soft tissue injury with broken glasses*', despite the fact that she is not qualified to make such a diagnosis and despite the fact

that she did point out that an expert opinion is necessary regarding the headaches and the left eye blurry vision. Even if it is to be accepted, in fairness to the expert, that she did mention in her report that an opinion from the relevant expert is outstanding, she does not qualify her report to be an interim report, to be revisited once such an opinion, presumably by an ophthalmologist, had been solicited.

55. To the clinical psychologist, Mrs Banti Mokgathe, the Plaintiff reported to have suffered *inter alia*, a left pelvic fracture and a closed fracture of the left arm. Neither of these injuries have been diagnosed by the orthopaedic surgeon, whose report was not provided to the clinical psychologist. Without these injuries appearing in the hospital records, and without an opinion by an orthopaedic surgeon, Mrs Banti Mokgathe was content to accept these injuries without more and similarly did not suggest that an orthopaedic opinion be solicited. Her report was also a final one.

56. An experts may not go beyond the logic which underwrites the scientific knowledge of the expert's discipline.²⁷ This will detract from the value of the evidence.²⁸ An expert has a duty to inform the court if a specific aspect of the report falls beyond the expertise of the expert.²⁹ Dr Maluleke-Baloyi (Physiotherapist) deals with radiological reports of the shoulder and the eye injury and doesn't say that these issues fall outside the scope of her expertise. At best, she later on in her report, suggests an expert opinion be obtained from a neurologist regarding the headaches and blurry

²⁷ *Schneider v Aspeling* 2010 (5) SA 203 (WCC) 211.

²⁸ See *Nicholson v Road Accident Fund (07/11453) [2012] ZAGPJHC 137 (30 March 2012)* para 17.

²⁹ *National Justice Compania Naviera SA v Prudential Assurance (The 'Ikarian Reefer')* 1993 (2) Lloyd's Reports 68 at 81 applied in *National Justice Cia Naviera SA v Prudential Assurance* [1995] 1 Lloyd's Rep 455 at 496.

vision. This does not detract from her actual '*diagnosis*'. Without more, and despite not having received the further reports which she suggested be secured, she ascribes the Plaintiff's '*level of changes*' owing to the accident which changes include the closing down of the Plaintiff's company and his loss of income. This finding not only usurp the function of the court but can hardly fall within the expertise of a physiotherapist.

57. Dr Maluleke-Baloyi was also content to allude to and accept the radiological fallout in the left shoulder as narrated by the radiologist, despite Dr Kumbirai (orthopaedic surgeon) being of the opinion that the right shoulder is '*normal*'. Again, the orthopaedic pathology in the Plaintiff's right shoulder does not fall within this expert's expertise.

Reports to be marked preliminary is crucial facts outstanding

58. This brings me to my next concern. None of the expert's made their reports a preliminary one, despite the gaping and patently obvious absent foundational facts on which the experts based their opinions and despite discrepancies in the various reports, which inevitably called for clarity, prior to a competent final report being produced. As one example, how could the industrial psychologist finally conclude that the Plaintiff would remain unemployable under circumstances where he was confronted with an opinion by the occupational therapist that the Plaintiff returned to work post-accident?

59. Mr Sechudi chose to ignore this fact and to proceed with the narrative that the Plaintiff lost his employment post-accident.

60. Mr Sechudi says in his report that '*The opinions and recommendations made in this report is based on the expert reports, collateral information, as well as self reported information made available during the interview*'.

61. This offends an overriding duty which the expert has towards the court. An expert cannot assert the correctness of his/her opinion without a qualification, such as where insufficient research or data is available to reach a conclusion, and instead the expert must indicate that the opinion is provisional.³⁰ Experts must draw the court's attention to anomalies and obtain sufficient clarity before formulating an opinion.³¹

62. By marking a report as 'provisional', the court would from the onset know that further data or clarity is required before the report can be relied. If such outstanding data cannot be secured for whatever reason, this must be placed on record by the expert and the court would be in a position to consider the probative value of the evidence and attached the appropriate weight to the evidence.

63. Experts should not omit material facts which may have detract from the final opinions.³² Where the expert knows that there is a lack of research or insufficient data available, or if further facts is required, then the expert is duty bound to state this in the opinion: The opinion must be subjected to a caveat or be declared provisional.³³

³⁰ Judgement by Sir Peter Cresswell in *National Justice Cia Naviera SA v Prudential Assurance Co Ltd* (The Ikarian Reefer) [1993] 2 Lloyd's Rep 68, 81- 82; [1993] F.S.R. 563; [1993] 37 E.G. 15881 quoted with approval by the SCA in *PWC v National Potato Co-Op* [2015] All SA 403 (SCA) para 98; *Schneider v Aspeling* 2010 (5) SA 203 (WCC) at 211.

³¹ *Ndlovu v RAF* (1) SA 415 (GSJ) at 437-438. Also see *P v P* 2007 (5) SA 94 (SCA) 98.

³² *Twine v Naidoo* [2018] 1 All SA 297 (GJ) at 18(i).

³³ *Twine v Naidoo* [2018] 1 All SA 297 (GJ) at para 18(j).

64. Some of the experts also relied on academic literature and research which the experts did not conduct personally. I turn to this next.

Relying on the expertise of others

65. Dr Kumbirai relied on the expertise of others in his report, more specifically on the work of *Koostra, Hullenberg & Finsen* on the one hand and *Zetterberg et al* on the other. Mr Sechudi (Industrial Psychologist) relies on the work of *Foxcroft and Roodt*. Dr Segwapa (Neuro Surgeon) opine that '*It is well documented in the neurosurgical literature that +/- 80% of patient (sic) suffering from post-concussive headaches recover within 2-3 years...*'. The court is not informed as to the specific literature that Dr Segwapa relies on.

66. An expert must either personally have the knowledge or experience in a field or rely on the experience and knowledge of others, who are known to be acceptable experts in the field.³⁴ It is easier for the court to make a ruling where the expert opinion is based on actual or direct knowledge of the testifying expert, as opposed to relying on acknowledged authors or authority, even though it also is an accepted method.³⁵

67. An expert may refer to the writing/opinion of others in support of his/her own opinion or for purposes of refreshing his/her memory, provided that the expert has sufficient personal knowledge in relation to the subject to express an opinion.³⁶ Experts, relying on facts known to them only by their reliance on the authority of others, such as textbooks, technically give hearsay evidence, where the author of the book is not

³⁴ *Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (E) at 569.

³⁵ *S v Van As* 1991 (2) SACR 74 (W) at 86.

³⁶ *Van Heerden v SA Pulp and Paper Industries* 1945 (2) PH J14.

called as a witness.³⁷ To reject an expert's opinion on this basis would set impossible standards, because it is practically unrealistic and repudiates accepted methods of professionalism.³⁸

68. Experts can thus competently rely on textbooks if it is established that the expert relying on the textbook or academic literature:

68.1. Can, by virtue of his/her own training, at least in principle, affirm the correctness and trustworthiness of the content of the passage.

68.2. By personal observation, the expert is competent to affirm that the referenced text is plausible, probable, sound and/or reliable and has been written by a reputable and experienced person in the relevant discipline;³⁹ and

68.3. It is impossible to secure the data otherwise.⁴⁰

69. Where an expert refers to what has been written, the referenced material becomes part of his/her opinion and not the other portions of the material, unless such material was the subject of cross examination.⁴¹ The court cannot rely on publications (or part thereof) if the expert did not approve or refer to it.⁴²

³⁷ PJ Schwikkard & SE Van der Merwe (2016) *Principles of Evidence* (3ed) 108.

³⁸ *S v Kimimbi* 1963 (3) SA 250 (C) at 251.

³⁹ In *S v Collop* 1981 (1) SA 150 (A), at 167B-C, the actual textbook did not become evidence. An expert may refer to data garnered from other experts, provided that the expert has the prerequisite qualifications to analyse the data or find reliable sources: See *S v Kimimbi* 1963 (3) SA 250 (C) at 252.

⁴⁰ *S v Kimimbi* 1963 (3) SA 250 (C) at 251.

⁴¹ *S v De Leeuw* 1990 (2) SACR 165 (NC) at 174; *R v Mofokeng* 1928 AD 132 at 136; *R v Basson* 1946 CPD 479 at 479; *R v Phillips* 1949 (2) SA 671 (O) at 676; *S v Henning* 1972 1 PH H42 (N).

⁴² *S v Jones* 2004 (1) SACR 420 (C) at 425.

70. In *casu*, the experts merely referred to the academic work or literature without more, almost like referencing the sources used in a bibliography. The experts completely disregarded the above criteria. The court is left guessing what the significance of the work is and to what extent this work had impacted on the opinions of the experts.

71. Apart from the arbitrary and elementary referral to the mentioned authors, citing only their surname and a year, presumably the year of publication, the court had been favoured with no further guidance. Accordingly, I could not establish if the above criteria for relying on the expertise of others had been met. I would at the very least have expected Dr Kumbirai and the other experts mentioned, to provide the court with the full citation of the publication, the essential biographical details of the author and the minimum information which will assist the court to establish if the expert before the court can affirm the correctness and trustworthiness of the quoted passage, to affirm if the passage is plausible and why the experts had the need to rely on the expertise of others and not their own expertise.

72. It is clear that the experts pay lip service in their duty towards the court where experts rely on the academic work and literature of others.

Using statistics in reaching a conclusion

73. Just like Dr Segwapa (Neurosurgeon), Dr Kumbirai also relies on literature containing statistical data. Dr Kumbirai relies on data from research, which looked at a sample of people with femur fractures and then recorded certain statistics including that 1% of

patients with a proximal femur fracture is unable to work, 2.5% had to change their occupation, many complain of pain and 44% has a reduced work capacity.

74. Evidence of such a statistical nature cannot be relevant to a damages case dealing with the individual facts of the Plaintiff. I highlight that this finding does not equate to all statistical data and there may be circumstances where statistics are relevant to the quantification of damages.

75. This method of reasoning, specifically using statistical data from a pool of people with a femur fracture and superimposing the average of such data on the Plaintiff, without more can be criticized on three fronts:

75.1. When confronted with a personal injury case in respect of loss of earnings, except perhaps in the context of contingency deductions,⁴³ the court should look into the individual circumstances of the Plaintiff and not into general statistics or averages.⁴⁴ The court is more concerned with the Plaintiff's specific chances of undergoing surgery or suffering a reduced work capacity than that of the average person with a femur fracture. The Plaintiff's case may be less or more severe than the average person with a femur fracture. Such deduced reasoning has no probative value and cannot competently be applied to predict the impact on the Plaintiff's earnings, as the expert endeavoured to do in this case. Compensating the Plaintiff for damages has the purpose of placing the Plaintiff in the position that he, the Plaintiff, would have been in was it not for the accident. Statistical data of this context is not helpful at all.

⁴³ *L D v Road Accident Fund* (14606/2016) [2018] ZAGPPHC 181 (5 February 2018) at para 29.

⁴⁴ *Griffiths v Mutual & Federal Insurance Company Ltd* 1994 (1) SA 535 (AD) 567.

75.2. When the work of a statistical nature is so outdated, as it probably is *in casu*, the court cannot place any reliance thereon.⁴⁵

75.3. The sample size of the study is nowhere disclosed by Dr Kumbirai.

76. Justice Millar (AJ) [as he then was], seized with a loss of support case and dealing with remarriage contingencies, held in at para 32:

'Proper statistics ... may well be useful in assessing an appropriate contingency, but statistics are only assistive if they are derived from a sufficiently large and representative sample. Furthermore, the statistics should at least be derived from data collected within a reasonable frame of time relative to when the contingency is to be applied, so as to provide some validity to the specific social and other circumstances which would influence marriage and remarriage trends prevailing at the time'.

The basis of the loss of earnings

77. Mr Sechudi suggests that the Plaintiff was earning a profit of R320 000/annum from his self-employed business. The expert notes that the Plaintiff's business focussed on a wide spectrum of business activities, which included property development, events and catering as well as mining related projects.

78. The expert did not have the benefit of financial statements, company registration documents, business contracts, tax returns or any other objective sources which would have guided the expert on the nature and income of the business. The expert did refer to factual information but no source documents or corroboration evidence

⁴⁵ Outdated statistics was criticized in: *LD v Road Accident Fund* 14606/2016) [2018] ZAGPPHC 181 (5 February 2018) at para 29 & 37; *Kekana obo Motshwaede v Road Accident Fund* (2019/26724) [2023] ZAGPJHC 495 (16 May 2023) at para 65.

was ever advanced to Mr Sechudi. Undeterred by the absence of the information which I imagine would be readily ascertainable, the expert submitted a final report and was content to submit an affidavit to elevate his written report into evidence, stating that '*...the medico-legal report is correct and has been completed and compiled by me in accordance with the required standards*'. Mr Sechudi did not say in his affidavit that the factual information remained outstanding and that his report should be deemed an interim one.

79. Mr Sechudi used the alleged income of R320 000/annum and then matched the earnings to the Patterson Scales, despite actual earnings being known, and opined that the Plaintiff's alleged earnings is levelled at Patterson B5 (Median Quartile), total package. Mr Sechudi then opines, without a factual basis which would inform or justify this opinion, that the Plaintiff's earning would grow to Patterson C1 (median quartile) or R403 000/a at the age of 50 years. The Plaintiff would then retire at the age of 70.

80. Without a factual basis to support this increase in income of more than 25%, in such a short space of time, I reject Mr Sechudi's pre-morbid career postulation. The Plaintiff is clearly past the age where one generally reaches a career ceiling, widely accepted at the age of 45 years.

81. There is no evidence to support that a career increase was possible or likely in the future. There is no factual basis on which Mr Sechudi could have reached the conclusion that the Plaintiff's income would have increased to R403 000/a.

82. The *ipse dixit* or conclusions of an expert is not enough to move the court to place reliance on the opinion: This is so, even where only one party appointed experts and

there is no opposing opinion.⁴⁶ The expert is not to usurp the court's function⁴⁷ who decides the case and the court may not abdicate its duty to find the facts, to an expert.⁴⁸

⁴⁶ *Twine v Naidoo* [2018] 1 All SA 297 (GJ) at para 18(s) quoting with approval *Davie v Magistrate of Edinburg* [1953] SC 34 at 40.

⁴⁷ In *Twine v Naidoo* [2018] 1 All SA 297 (GJ) at fn 23 the court held:

'...unlike an expert witness, a judicial officer is often tasked to balance the probabilities derived from the admitted factual evidence, something the expert witness must never do or be allowed to do. The focus here is on admitted evidence. It is trite that not all evidence is admissible. However, the decision as to which evidence is admissible and which not is something that is not often appreciated by non-legal persons. Experts who trespass into this area are in danger of finding themselves unable to appreciate the nuances involved, in for example, accepting or rejecting hearsay evidence, and then ignore admissible, or include inadmissible, evidence in the balancing exercise- thus indelibly staining their evidence and rendering their conclusions nugatory.'

In *Davie v Magistrate of Edinburg* [1953] SC 34 at 40 the court held:

"Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the functions of the jury or judge sitting as a jury, any more than a technical assessor can substitute his advice for the judgment of the court. Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the judge or the jury. In particular the bare ipse dixit of a scientist, however eminent, upon the issue in controversy, will normally carry little weight, for it cannot be tested by cross-examination nor independently appraised, and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert.

83. Wessels JA held in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH*⁴⁹ at 371 that:

‘... an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.

84. Something more than the mere *ipse dixit* of the expert is required. The opinion must be supported by logical and cogent reasoning⁵⁰ which also may require of the expert to consider comparative or alternative scenarios.⁵¹ A proper evaluation depends on the process of reasoning which resulted in the final opinion, the grounds on which the opinion is premised.⁵² Additionally, the opinion must be reasonable considering the *prima facie* facts on which the opinion is founded.⁵³

⁴⁸ *Twine v Naidoo* [2018] 1 All SA 297 (GJ) at para 18(k).

⁴⁹ 1976 (3) SA 352 (A).

⁵⁰ See *Bee v RAF* 2018 (4) SA 366 SCA at para 22; *Stock v Stock* 1981 (3) SA 1280 (A) at 1296.

⁵¹ *Michael v Linksfeld Park Clinic* 2001 (3) SA 1188 (SCA) at para 36-38.

⁵² *R v Jacobs* 1940 TPD 142 at 147; *S v Nala* 1965 (4) SA360 (A) at 362; *S v Blom* 1992 (1) SA 649 (EC) at 655; *S v Mkhize* 1999 (1) SACR 256 (W) at 263-264.

⁵³ *MV Pasquale Della Gatta MV Flippo Lembo Imperial Marine v Deiulemar Compagnia Di Navigazione SPA* 2012 (1) SA 58 (SCA) at para 26; *Maloney v RAF* 9468/20180 [2022] ZAWCHC 51 (4 April 2022) at para 101-103.

85. I am not bound or obliged to accept the evidence of an expert witness and instead I must premise my findings on the experts' opinions which is properly premised upon the foundations which justifies the formation of the opinion.⁵⁴

86. Post morbidly, Mr Sechudi concludes that the Plaintiff had never returned to his self-employment and will now remain unemployable. He opines that re-entry into the open labour market is unlikely. Mr Sechudi elects to completely disregard the facts advanced by the occupational therapist, who said in her report that the Plaintiff did factually return to work. Instead, Mr Sechudi opines that re-entry into the open labour market is unlikely.

87. Mr Sechudi was on the face of it also not informed about the Plaintiff's post-accident employment on a temporary basis as a cost-consultant.

88. This post morbid scenario of having been rendered unemployable post-accident is the case that is being advanced by the Plaintiff. There is no evidence before the court which can justify this scenario and it is rejected.

A damages award without any factual evidence

89. As promised, I now return to the issue of how I should go about in making an award, if any, given the lack of admissible and reliable factual evidence.

90. After I reserved judgement, counsel submitted supplementary heads of argument, inviting the court to consider the *dicta* of *Southern Insurance Association v Bailey NO*⁵⁵

⁵⁴ *R v Theunissen 1948* (4) SA 43 (C) at 46; *Twine v Naidoo* [2018] 1 All SA 297 (GJ) at para 18(r).

⁵⁵ 1984 (1) SA 98 (A) at 113.

which is authority for loss of earnings being speculative by its very nature and all that a court can do is to make an estimate which seems fair and reasonable and that the court cannot adopt a possumus attitude and make no award. Counsel relied on authorities such as *AA Mutual Insurance v Maqula*⁵⁶ in arguing that a higher contingency should be applied.

91. It is so that where an injured victim, who is prosecuting a claim, has no proof of income, the court has at its disposal, the option to deduct a higher pre-morbid contingency, which has the effect of reducing the ultimate amount awarded.⁵⁷ The court must do the best it can with the available evidence even if this means making bricks from straw.⁵⁸ But the SCA held that this approach only finds application where the Plaintiff presented all available evidence failing which the court is justified in giving absolution from the instance.⁵⁹

⁵⁶ 1978 (1) SA 805 (A).

⁵⁷ See *AA Mutual Insurance Association Ltd v Maqula* 1978 (1) SA 805 (A); *Nonzinyana v Road Accident Fund* (59682/13) [2015] ZAGPPHC 345 (15 May 2015); *Ndaba v Road Accident Fund* (EL 321/08) [2011] ZAECELL 6 (30 June 2011); *L v Road Accident Fund* (69050/2013) [2017] ZAGPPHC 690 (27 October 2017); *H v Road Accident Fund* (19585/2013) [2016] ZAGPPHC 584 (15 June 2016); *Gwaxula v Road Accident Fund* (09/41896) [2013] ZAGPJHC 240 (25 September 2013).

⁵⁸ *Hersman v Shapiro & Co.*, 1926 T.P.D. 367 at 379

⁵⁹ *Mkwanazi v Van Der Merwe and Another* 1970 (1) SA 609 (A) 631. Also see *Van Klopper v Mazoko*, 1930 TPD 860 at 865, where judge Tindall J held :

' . . . when a plaintiff is in a position to lead evidence which will enable the Court to assess the figure he should do so and not leave the Court to guess at the amount'.

Also see *Prinsloo v Luipaardsvlei Estates & G.M. Co. Ltd* 1933 W.L.D. 6 at 23; *Arendse v Maher*, 1936 T.P.D. 162 at 165; *Lazarus v Rand Steam Laundries* (1946) (Pty.) A Ltd 1952 (3) SA 49 (T) at 51; *Enslin v Meyer* 1960 (4) SA 520 (T) at 523; *Versfeld v South African Citrus Farms Ltd.*, 1930 AD 452 at 460; *Erasmus v Davis*, 1969 (2) SA 1 (A) at 22.

92. It was held that the reason why a court will only resort to doing the best it can, when all the available evidence had been presented, is 'obvious' in *Mkwanazi v Van Der Merwe and Another*.⁶⁰ The Appellate Division at page 632 held that if a court makes an award under circumstances where further evidence can be presented, it may be revealed *ex post facto* that the court's quantification does not accord with reality and that an injustice can be done to one of the parties.

93. If I were to make an award under circumstances where it is obvious that better evidence is available, I will create a precedent where the court condone this practice and litigants will be encouraged to purposefully and by design refrain from leading relevant evidence with the hope that the court's quantification will be more beneficial than would be the case had all the evidence been presented. A court's already complicated task would be exacerbated and the existing imponderables and uncertainties present in any once-and-for-all quantification process would be increased exponentially.

94. Judge Spilg J in *Ndlovu v RAF*⁶¹ at 438-439 held:

[83] The prejudicial consequences of a medico-legal report failing to comply with the basic requirement of identifying the underlying facts and their sources arise because in practice there can be a significant difference in the consequences where a court does the best it can with available evidence, and cases where the court finds that the plaintiff has not been frank with it or with the experts.

[85] In the first-mentioned situation a court will utilise a contingency factor to cater for the risk of a symptom or an event being causally related, or eventuating in the future. In the latter case the court may reject the evidence because it was presented as a fact that was subsequently shown to be

⁶⁰ 1970 (1) SA 609 (A) at 632.

⁶¹ 2014 (1) SA 4156 (GSJ).

incorrect, and not as an opinion, thereby precluding the court from adopting a contingency; in short, a matter of irresoluble imponderables is converted by the expert into a factual issue of true or false. The expert is not there to bolster the case of the attorney who elects to make use of his or her services, but to identify the imponderables and if possible weigh their likelihood of eventuating or having eventuated.

*[85] Accordingly much will depend on how the experts distinguish between objective originating data on the one hand, and the patient's say-so or unsubstantiated hearsay on the other. A court will readily be able to do the best it can and apply contingency factors in the first type of case. However, if it rejects the plaintiff's version or considers that available evidence has been suppressed it is entitled to reject the version and adopt an alternative conclusion with or without applying a contingency factor (compare *Harrington NO and Another v Transnet Ltd t/a Metrorail and Others* 2010 (2) SA 479 (SCA) at 494B – C).*

*[86] In this regard it is worth repeating the distinction drawn between the situation where a court will do the best it can with the available evidence (which is the norm when it quantifies damages and also when it considers the sequelae, provided causation of the underlying injury has been established), and cases where available evidence has not been produced and, if produced, would have resolved outstanding uncertainties. The distinction was set out by Colman J in *Burger v Union National South British Insurance* supra para 68 at 74G – 75B:*

*“Causation is one thing and quantification is another, although I readily concede that it is not always possible to distinguish clearly between them in cases like the present one. It has never, within the range of my knowledge and experience, been the approach of our Courts, when charged with the assessment of damages, to resolve by an application of the burden of proof such uncertainties as I have referred to. I am not dealing with a case in which the plaintiff could have called evidence to remove the uncertainty, but neglected to do so. I am referring to cases like *Turkstra Ltd. v Richards*, 1926 T.P.D. 276, in which the plaintiff has laid before the Court such evidence as was available, but that evidence has necessarily failed to remove uncertainties with regard to matters bearing upon the quantum of damage. The Court, in such a case, does the best it can with the material available. If it can do no better, it makes the informed guess referred to by Holmes, J.A., in *Anthony and Another v Cape Town Municipality*, 1967 (4) SA 445 (AD).*

What the Court will not do in such a case is to select, from the range of possibilities presented by the evidence, the possibility which is least favourable to the plaintiff because he bears the onus, and has not proved that a more favourable possibility ought to be preferred”.

The judgment goes on to set out in great detail the method of quantifying damages and its full import should not be considered by reference to this extract alone. The ratio was endorsed in Blyth v Van den Heever 1980 (1) SA 191 (A) at 225A – B and more recently in De Klerk v Absa Bank Ltd and Others 2003 (4) SA 315 (SCA) ([2003] 1 All SA 651) in para 33.

95. When the expert relies on facts, such facts must be proven by admissible evidence and the court must know on which facts the expert opinion is based because when an expert has been misinformed about the facts or has taken irrelevant facts into consideration or has omitted to consider relevant facts, the opinion is valueless.⁶² Failure to prove the facts on which an expert relies would render the views of the expert meaningless as it is based on inadmissible hearsay evidence⁶³ and no more than an abstract theory.⁶⁴

96. In personal injury quantification, where experts are called to assist the court in quantifying the damages to be awarded, experts rely heavily on the collateral facts submitted by the Plaintiff. The weight to be attached to the expert’s opinion is inextricably linked to the reliability of the Plaintiff who submits such facts to the expert and where the Plaintiff is discredited, the expert who relied on the discredited

⁶² *Twine v Naidoo* [2018] 1 All SA 297 (GJ) at para 18(h); *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) at 772.

⁶³ *Twine v Naidoo* [2018] 1 All SA 297 (GJ) at para 18(t).

⁶⁴ *S v Mngomezulu* 1972 (1) SA 797 (A) at 798F-H.

evidence will be of no or little value.⁶⁵ This is especially true for disciplines such as the clinical psychologists and the industrial psychologists.

97. In *S v Shivute*⁶⁶ it was noted that “[t]he accused failure to testify stripped the opinion evidence of the expert witness of almost all relevance and weight.” In these circumstances the court is constrained in accepting the opinion of the expert witness.⁶⁷ Consequently, it was held in that case that the accused’s silence and the inability of the court to determine the truthfulness of his account render the expert’s opinion of no value.

Loss of earning capacity

98. Although the evidence presented in this case leave much to be desired, I have no doubt that the injuries and sequelae reduced the Plaintiff’s earning capacity. There is no evidence before the court of an actual pecuniary loss apart from the experts’ hearsay evidence, which I reject for reasons set out already. The only question is whether I should make an award if I accept that the Plaintiff suffered a loss of earning capacity.

99. In this regard, I considered *Road Accident Fund v Maasdorp*⁶⁸ where the court held that:

⁶⁵ *S v Mthethwa* (CC03/2014) [2017] ZAWCHC 28 (16 March 2017) at para 98; *R v Möhr* 1944 TPD 105 at 108; *R v Abbey* [1982] 2 S.C.R. 24 at 43-45..

⁶⁶ 1991 (1) SACR 656 (NM) at 661H. Also see *S v Mngomezulu* 1972 (1) SA 797 (A) at 798F-H.

⁶⁷ At 661H.

⁶⁸ (1552/1999) [2003] ZANHC 49 (21 November 2003).

'The question of loss of earnings and loss of earning capacity is a vexed one and is often considered by our courts. Usually, the material available to the court is scant, and very often, the contentions are speculative. Nevertheless, if the court is satisfied that there was a loss of earnings and/or earning capacity, the court must formulate an award of damages. What damages the court will award will depend entirely on the material available to the court.'

100. In *Advocate Viljoen N.O v Road Accident Fund*⁶⁹ three judges of this division, sitting as an appeal court, was confronted with a similar situation where the evidence left much to be desired but where there was no direct evidence from the Plaintiff, which would have been valuable in plotting a pre- and post-accident career path. The court held at para 14:

This, however, does not mean that the court cannot consider the evidence of the expert witnesses. It does, however, impact on the quantification method that will be utilised. It is impossible to accurately determine the patient's post-morbid progression without evidence of how the claimant sees and experiences her future unfolding. In the claimant's absence, insufficient light was shed on the reason for her failing her first year and why she did not consider another study field. Due to the patient's failure to testify, a considerable measure of uncertainty prevails. This disregards the application of a purely mathematical model, even if higher than normal contingencies are applied. It is trite that in these circumstances, the court may decide to fix a lump sum as compensation, although it considers the actuarial calculations as one of the factors in determining the award.

101. The full court in that case (*Viljoen*) was obviously in a much better position to resort to a lump sum award based on the evidence presented in that case, albeit limited. The fact of this case is clearly distinguishable and does not conform to an actual award being made. There is no evidence of a pecuniary loss at all in this instance. The

⁶⁹ (A76/19) [2021] ZAGPPHC 461 (19 July 2021).

Plaintiff's case was also one of an actual loss as opposed to a loss of earning capacity.

102. The Plaintiff asked the court to make an award on loss of income and not for an award in respect of a loss of earning capacity. Although inextricably connected, the concepts of loss of income and loss of earning capacity are two different concepts.⁷⁰

103. Earning capacity is part of a person's patrimony, and the capacity can only be proved to have been lowered, and damages quantified in accordance, by proving an actual loss of income.⁷¹

104. Where both of these losses have been shown to exist, the claim for one becomes a claim for the other and they are interchangeable.⁷² In *Bane and Others v D'AMbrosi*⁷³ the court held that the essence of computation of a claim for loss of earnings is to compensate the claimant for his loss of earning capacity. The Plaintiff must show a monetary loss before there will be damages to his patrimony, failing which his damage will be non-patrimonial loss.⁷⁴

⁷⁰ *Deyssel v Road Accident Fund* (2483/09) [2011] ZAGPJHC 242 (24 June 2011) at para 14.

⁷¹ *Deyssel v Road Accident Fund* (2483/09) [2011] ZAGPJHC 242 (24 June 2011) at para 18.

⁷² *Deyssel v Road Accident Fund* (2483/09) [2011] ZAGPJHC 242 (24 June 2011) at para 18.

⁷³ 2010 (2) SA 539 (SCA) para 15. In *Saayman v RAF* 2010 (2) SA 539 (SCA) the court applied the loss of earnings and loss of earning capacity interchangeably. In *RAF v Delport* 2005 (1) All SA 468 (SCA) the SCA awarded damages for 'income earning capacity', thereby further strengthening the argument that loss of income and loss of earning capacity may be used interchangeably.

⁷⁴ *Deyssel v Road Accident Fund* (2483/09) [2011] ZAGPJHC 242 (24 June 2011) at para 21.

105. The Plaintiff's claim for non-patrimonial loss or general damages will be postponed *sine die* and considered by a different court.

106. Where a claimant cannot show an actual loss of income (a pecuniary loss), his claim for general damages ought to increase.⁷⁵ In short then, for any patrimonial claim of this kind, the Plaintiff must show a loss of earning capacity and an actual patrimonial loss as a result of the loss of earning capacity, thereby allowing the claimant to claim either loss of income or loss of earning capacity.⁷⁶

107. However a person cannot claim for loss of earning capacity which would not relate to an actual loss of income.⁷⁷ A claimant must first establish a patrimonial loss, through some form of formula that his loss of earning capacity will lead to an actual loss of income.⁷⁸ The general principle applicable in this regard has been succinctly stated in ***Prinsloo v RAF***⁷⁹ with reference to the leading cases of ***Santam Versekeringsmaatskappy v Byleveld***⁸⁰ and ***Dippenaar v Shield Insurance***⁸¹ as follows:

⁷⁵ *Deysel v Road Accident Fund* (2483/09) [2011] ZAGPJHC 242 (24 June 2011) at para 26; *De Kock v RAF* (2009) [9851/07] referred to in *Deysel v Road Accident Fund* (2483/09) [2011] ZAGPJHC 242 (24 June 2011) at para 26.

⁷⁶ *Deysel v Road Accident Fund* (2483/09) [2011] ZAGPJHC 242 (24 June 2011) at para 27.

⁷⁷ *Deysel v Road Accident Fund* (2483/09) [2011] ZAGPJHC 242 (24 June 2011) at para 15.

⁷⁸ *Rudman v Road Accident Fund* 2002 4 All SA 422 (SCA) at para 11; *Deysel v Road Accident Fund* (2483/09) [2011] ZAGPJHC 242 (24 June 2011) at para 17; *Bridgman N.O v RAF* (C) Corbett & Honey The Quantum of Damages in Bodily and Fatal injuries Cases Volume V at B4-1, B4-5.

⁷⁹ 2009 (5) SA 406 (SE). Also see *Griffiths v Mutual Insurance Co Ltd* 1994 (1) SA 535 (A) at 564 F-G.

⁸⁰ 1973 (2) SA 146 (A) at 150B-D.

⁸¹ 1979 (2) SA 904 (A) at 917 B-D.

'A person's all-round capacity to earn money consists, inter alia, of an individual's talents, skill, including his/her present position and plans for the future, and, of course, external factors over which a person has no control, for instance, in casu, considerations of equity. A court has to construct and compare two hypothetical models of the plaintiff's earnings after the date on which he/she sustained the injury. In casu, the court must calculate, on the one hand, the total present monetary value of all that the plaintiff would have been capable of bringing into her patrimony had she not been injured, and, on the other, the total present monetary value of all that the plaintiff would be able to bring into her patrimony whilst handicapped by her injury. When the two hypothetical totals have been compared, the shortfall in value (if any) is the extent of the patrimonial loss. ... At the same time the evidence may establish that an injury may in fact have no appreciable effect on earning capacity, in which event the damage under this head would be nil.'

108. The mere fact of a physical disability and accident-related sequelae does not necessarily reduce the estate of the claimant.⁸²

109. In assessing the claim for loss of earning capacity, the court has a wide discretion⁸³ and each case must be considered on its own merits and available evidence to establish if there is indeed a pecuniary loss.

110. I am not convinced that the Plaintiff had proven such a pecuniary loss.

⁸² *Mashilo v RAF* {63915/09} [2009] North Gauteng High Court; *Union and National Insurance Co Ltd* 1970 (1) SA 295 (A) at 300A; *Krugell v Shield Versekeringsmaatskappy Bpk* 1982 (4) SA 95 (T) at 99E.

⁸³ *Legal Assurance v Botes* 1963 (1) SA 608 (A) at 614.

111. I would have granted an order of absolution of the instance but the Plaintiff did make out a case for future medical expenses and unlike *Ntombela v Minister of Police*⁸⁴ where the court granted absolution in respect of one claim but not another, a court cannot split individual heads of damages and grant absolution only in respect of one head of damages but not the other.

112. In the result, I make the following order:

112.1. The Defendant is ordered to pay 100% of the Plaintiff's proven or agreed damages.

112.2. The Defendant is ordered to provide the Plaintiff, within 10 days of this order, with a section 17(4)(a) undertaking, which adopts the words used in S17(4)(a) if Road Accident Fund Act 56 of 1996 (as amended).

112.3. The Plaintiff's claim for loss of past and future loss of income is dismissed.

112.4. The Plaintiff's claim for general damages is postponed *sine die*.

112.5. The Defendant is ordered to pay the Plaintiff's party and party High Court costs, including the cost of experts employed and the cost of counsel.

FHH Kehrhahn
Acting Judge of the High Court
Gauteng Division, Pretoria

For the Plaintiff:

Adv M.I Thabede

Instructed by:

RS Tau Attorneys

Date of the hearing:

20 June 2023

⁸⁴ 1985 (3) SA 571 (O) at 573.