Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: RAF 273/15

In the matter between:

SIBUSISO STEVEN NGWANE **Plaintiff**

AND

ROAD ACCIDENT FUND **Defendant**

CIVIL MATTER

KGOELE J

DATE OF HEARING	**:**	**16th and 17th October 2017**
DATE OF JUDGMENT	**:**	**17th October 2017**
DATE REASONS REQUESTED	**:**	**6 November 2017**
DATE REASONS HANDED	**:**	**11 January 2018**
COUNSEL FOR PLAINTIFF	**:**	**Adv. S M Malatji**
COUNSEL FOR DEFENDANT	**:**	**Adv. G I Mothibi**

REASONS FOR JUDGMENT

---

[1] The plaintiff in this matter instituted an action against the Road Accident Fund **(RAF)** claiming damages as a result of the accident that occurred on the 8th December 2013 in Mogwase North West Province.

[2] The issues regarding the merits of the case, the general damages and future medical expenses were settled and finalized before this matter appeared before me. The only issue that served before me concerned the loss of income or earning capacity of the plaintiff. I granted an Order on the **17th October 2016** in favour of the plaintiff to the effect that he had suffered a total loss of his earnings capacity. The defendant requested to be furnished with reasons for the said Order, which request was received on the 6th of November 2017.

[3] The issue that served before me was therefore confined to the question as to whether or not the plaintiff suffered loss of earnings or earning capacity as a result of the accident. In particular, the plaintiff's case is that he suffered total loss of earning capacity, whereas the defendant on the other hand contended that the plaintiff suffered partial loss of earning capacity. There was no dispute with regard to the past loss of earnings, the contentious issue related only to the future loss of earnings / or earning capacity.

[4] The plaintiff called three witnesses to advance his case that he had suffered total loss of future earnings. The first witness called by the plaintiff was Mr Ezekiel Mariri, (**Mr Mariri**) who was the

Supervisor of the plaintiff at Trollip Mining Services. He testified that pre-accident the plaintiff's job entailed driving a Rigid Dump Truck. He was one of the workers who were working very hard and were chosen and earmarked for promotion. The mine wanted to train them as Supervisors. The circumstances changed after the accident when the plaintiff returned back to work. They realized that his performance had dropped tremendously. He described it to have been low and poor, forgetful and sometimes full of anger. He was retrenched on the 31 March 2016 together with other workers.

[5] He further indicated that the criteria they used for retrenching their staff was to look for people who fell into the category of those who could not perform well and plaintiff was one of them. He furthermore indicated that, all the staff members that were retrenched were re-employed except the plaintiff because of the challenges that he was having post-accident. The group of staff that were earmarked for promotion together with the plaintiff as indicated earlier are now Supervisors.

[6] During cross-examination he indicated that they had accommodated the plaintiff when he resumed work after the accident and gave him light sedentary work. He only worked for a few months before he was retrenched. He further indicated that the work of a Supervisor in the field in which the plaintiff was earmarked for, still needed some form of physical work as they deal with safety which requires the Supervisor to go into the hole

of the mine, checking for the safety of the workers first before they come.

[7] The second witness was Maria Sophia Strydom, an Occupational Therapist who compiled a report about the plaintiff. She indicated that in addition to her initial report she compiled after the assessment of the plaintiff, she compiled an addendum to it. The addendum was done after new reports were made available to her. Her conclusion even after the addendum was made remained the same as the initial one and is as follows:-

> *"The writer concludes that his physical abilities evidently indicates that he will be able to perform sedentary work. Whether this is liable is however doubtful – his highest qualification is Grade 11 and he moreover does not have experience in any administrative work. Neurocognitive deficits and the severe traumatic head injuries as indicated above will also impede his ability to find employment that will suit his capability. He will in all probability not be a competitive employee in the open labour market".*

[8] She lastly indicated that she stood by this conclusion in the Joint Minutes which is basically that this physical ability will only allow the plaintiff to do very light sedentary work, but his competitive ability is doubtful that he will be able to do even administrative work. Nothing worth mentioning came out during cross examination.

[9] The last witness that testified on behalf of the plaintiff is Sandra Joy Moses, an Industrial Psychologist. She testified that she also compiled an addendum to her initial report after assessing the plaintiff in light of the additional information received from other

specialist. She testified that the additional information did not change her earlier opinion in the original report in as far as Post-accident Morbit is concerned.

[10] Her opinion in respect of the plaintiff's employment prospects and loss of earning is encapsulated in her addendum report as follows:-

> *"**3. EMPLOYMENT PROSPECT***
>
> *3.1 Pre-Accident*
>
> *The additional information does not change the writer's opinion in the original report.*
>
> *3.2 Post-Accident*
>
> *The additional information shows that Mr Ngwane has been compromised by the injuries sustained during the accident to the extent that he cannot achieve his pre-accident level of functioning. As he could not resume his pre-accident duties and had to be accommodated is supported by the additional information from the experts.*
>
> *The additional information shows that it is possible that Mr Ngwane's employer would not have continued with this contract of employment and decided to retrench him. Considering the Neurosurgeon's opinion that Mr Ngwane is limited due to generalized body weakness and will need early retirement the writer is of the opinion that Mr Ngwane's employment would not be sustainable after the accident.*
>
> *The addendum of the Occupational Therapist show that Mr Ngwane is limited to perform sedentary work which he is precluded from because he lacks the required Grade 12 level of education. Furthermore the severity of his head injury makes it problematic for him to learn new information making him untrainable.*

The additional information supports the writer's postulation in the original report. Mr Ngwane was unemployable after the accident and he was employed on a sympathetic basis. Thus chances of him securing alternative employment has been curtailed. He will remain unemployed for the rest of his work life.

4. LOSS OF EARNINGS

4.1 Post-Accident Scenario

In light of the additional information Mr Ngwane's post-accident earnings capacity remains unchanged. He suffers a total loss of income.

5. SUMMARY & CONCLUSION

The additional information received supports the findings of the original report.

Post-accident, the additional information shows that Mr Ngwane would not be able to achieve post-accident what he could have achieved had the accident not happened. He remains unemployable with a total loss of earnings.

6. RIGHT TO AMEND

The above recommendations and conclusions are based on the information made available to the writer at the time of the evaluation. The writer therefore reserved the right to amend this report should new information become available."

[11] She lastly indicated that in the Joint Minutes she stood by her opinion in her initial report and addendum. She added that the additional information supported her postulation in the original report that the plaintiff's employment prospects has been curtailed and will therefore remain unemployed for the rest of his work life.

[12] During cross examination she was confronted with the question as to whether it is or not within the Industrial Psychologist expertise to express an opinion on the employability of a person and she answered in the affirmative.

[13] The plaintiff closed his case and the defendant called Mr Kgalamadi Ramusi who is also an Industrial Psychologist as the only witness to testify on its behalf.

[14] He testified about the contents of his report and in particular his conclusion in paragraph 7.1 as far as post-morbid potential of the plaintiff. His conclusion is that the plaintiff still has capacity enough to carry on with his work. However, he continued, he will need accommodation and he has to undergo rehabilitation in order for him to function effectively. He therefore would still be a desirable employee in the open labour market with potential employers. According to him he may still realize his Pre-accident career goals should he find work.

[15] In as far as loss of earnings capacity is concerned, his conclusion is that there is no loss of earnings. He testified that in the Joint Minutes he deferred to the opinion of other experts in as far as plaintiff's employability is concerned. The same applies to the issue of the plaintiff's residual capacity to work as well as his retirement. During cross examination he gave a reason for deferring being as a result of the fact that it is not within his expertise to express an opinion on these two issues. He indicated further that he does not like to encroach on the specialties of other experts. He testified that he does not agree with the opinion of the plaintiff's expert, Ms Sandra Moses, to the effect that the plaintiff is not employable. His reason was that the other experts indicated in their reports that he can do sedentary work.

[16] Counsel representing the plaintiff submitted that the contention that the plaintiff has suffered total loss of earnings or earnings capacity is well founded on the evidence before Court even on the defendant own expert's reports as amplified by the agreed facts in the Joint Minutes of the respective experts. I fully agree with this submission.

[17] Firstly, all the witnesses that were called by the plaintiff stuck to the conclusions in their reports and the reasons thereof. They were never shaken during cross-examination. They were able to explain their conclusions and reasons in an impressive, coherent and articulate manner. I may pause here to single out Mr Mariri and Ms Sandra Moses in particular. On the other hand the only witness called by the defendant Mr Ramusi was not an impressive witness. He was very evasive in answering questions, and could not even make simple concession when the opportunity presented itself. Despite him being an Industrial Psychologist by profession, it was only after a lengthy cross-examination and him taking us back and fro that he conceded after being pressed, to the fact that he is required as an expert to express an opinion on the employability of a person, a fact which he at the beginning indicated that it is not within his expertise.

[18] The reports of the two Clinical Psychologists, are accepted because in their Joint Minutes, the Clinical Psychologists agreed that:-

- The plaintiff evidenced some signs of post-traumatic amnesia, including forgetfulness and irritability;

- The below average performance that was found by them after conducting neuropsychological tests is probably attributable to traumatic brain injury, aggravated by attention deficits due to pain and dysfunctional stress response, which interferes with allocation of cortical resources;
- Plaintiff sustained significant brain injury, which interferes with neurocognitive function;
- Plaintiff has lost significant work capacity, but defer to the occupational therapist and industrial psychologists.

[19] The Occupational Psychologists agreed in their Joint Minutes that different documentations made available to them could account to the different opinions as expressed in their respective reports. As far as the residual work capacity they deferred as follows:-

- **Ms Strydom** is of the opinion that Mr Ngwane will be able to return to the open labour market, preferably engaging in light duty work. **Ms Strydom,** is further of the opinion that the accident which Mr Ngwane was involved in, possibly contributed to the fact that he was retrenched. He had to engage in a lighter duty (Diesel Browser Driver) on his return to work and was shortly thereafter retrenched. He might not have been retrenched as a Rigid Dump Truck Operator as it is a unique occupation.
- **Ms Phasha** opines that Mr Ngwane will be able to cope with a wide variery of manual work which falls within the light to heavy category of work until normal retirement age. She is of the opinion that he will cope with his pre-accident work as a Rigid Dump Truck Operator as well as his post-accident

work as a Diesel Browser Driver which falls within medium category of work respectively. She defers to the opinion of Industrial Psychologist to comment on the reasons for his retrenchment

- **Ms Phasha** is furthermore of the opinion that he may struggle with occupation in a high semiskilled and skilled level, but he still possesses the necessary cognitive capacity to engage in his pre-and post-accident work. She defers to a neurosurgeon to comment on the severity of the head injury sustained. She also deferred to a clinical psychologist to also comment on his neurocognitive problems.

[20] Unfortunately the defendant elected not call their expert Ms Phasha who is a signatory to the Joint Minutes referred to above. Her opinion expressed above could not be tested as a result. What is further problematic in her opinion is that one does not find any pronouncement of the objective facts on which she based her conclusions in her report and mainly deferred to other experts. On the other hand, during her evidence in Court the plaintiff's Occupational Therapist Ms Strydom, managed to explain the objective facts upon which she relied and which she incorporated in her report. These objective facts therefore stand uncontested and her opinion is accepted by this Court. Consequently the opinion encapsulated in the report of Ms Phasha is rejected.

[21] The Joint Minutes of the Industrial Psychologists including their evidence in Court indicate that they both agree that Pre-accident the plaintiff would have continued working as a Dump Truck Operator and progressed to a Supervisory level of the section

through in-service training. He would probably have been able to work until retirement age 60 years, depending on the retirement policy of the company he was working for. However, they differ in as far as the Post-accident scenario is concerned. This is the bone of contention in this matter as already indicated above.

[22] Although they agree on the fact that the plaintiff Post-accident will need a sympathetic employer, their reports shows that their conclusion on the fact that he is employable or not is irreconcilable. This is evidenced by the fact that the plaintiff's expert, Ms Sandra Moses, emphasizes an opinion that in his inferred state, the plaintiff is a poor candidate for employment and it is reasonable to postulate that he will remain unemployable for the remainder of his work life span. The defendant's expert, Mr Ramusi, as indicated above, does not express any opinion on this at all but defers to the opinion of other experts.

[23] In the first place, I find it difficult to understand why Mr Ramusi can choose to defer his opinion to other experts when he conceded during cross-examination to the fact that it is within his realm of expertise to express an opinion on the employability of a person, although it took some hard work from his side to concede to this fact. Secondly, he does not want to express his opinion whilst in the Joint Minute he agrees to the fact that the plaintiff is disadvantaged in the open labour market due to physical and cognitive limitations which hampers his employability and competitiveness in an open labour market. In addition, he furthermore agreed that he needs to be accommodated and that

this is exacerbated by a need to assist in managing his headaches.

[24] The evidence of the Supervisor which stands unchallenged before the Court is crucial. This evidence revealed that even though the plaintiff was taken back at the mine after the accident, he was in sympathetic employment. He was later retrenched as a result of his poor performance. When all the other workers were taken back, after retrenchment, he was not. This clearly demonstrates the vulnerability of sympathetic employees in the labour market. It further proves that there is no such a thing called "*sympathetic market labour*". Once you are categorized to be in a sympathetic employment, this simply means that you cannot fit in the "*open market labour"* which is the normal threshold of employability in this Country.

[25] Our case law as far as sympathetic employment is concerned is also clear in this regards. In the matter of **Makuapane Boy v The Road Accident Fund, in the High Court of South Africa, Gauteng Division, Johannesburg, Case No: 2012/12871,** delivered on the **10th of April 2015**, the Court dealt with the issue of sympathetic employment in the following terms:

> "[21] I must make a finding on the question of whether or not the Plaintiff is currently in sympathetic employment. Mrs. Hough came to the conclusion that the Plaintiff is in fact currently in sympathetic employment. He can lose his employment anytime. The conclusion was well motivated and grounded. There was no compelling reason to doubt or reject

> the conclusion. The credible evidence was overwhelming in favour of the Plaintiff. The difficulty inherent in the precise calculations of loss of earnings is a trite matter, which was made clear in such cases as, Southern Assurance Association v Bailey N.O. 1984 (1) SA 98 (A), and numerous others. In Bane v D Ambrose 2010 (2) SA 539 (SCA) at para (15), the Court said: "The essence of the computation of a claim for loss of earnings is to compensate the claimant for his loss of earning capacity (see Byleveldt 1973 (2) SA 146 (A) at 150; Dippenaar v Shield Insurance Co. Ltd SA 94 (A) at 111)...when a Court measures the loss of earning capacity, it invariably does so by assessing what the Plaintiff would probably have earned had he not been injured and deducting from that figure the probable earnings in this injured state (both figures having been properly adjusted to their 'present day values'). But in using this formulation as a basis for determining the loss of earning capacity, the Court must pay care to make its comparison of pre and post injury capacities against the same background"."

[26] The Court in the above quoted matter said that this is the preferred approach in matters of this nature and that the matter should be based on the credible expert opinions. The Court further remarked as follows in **paragraph 22** of the same judgment:

> "[22] ... there were numerous decided case law in this High Court, where the Courts held that, even if found to be gainfully employed post-accident, victims of accidents, who no longer functioned in capacities that

> they were employed for, and as such entitled to damages, since they had sustained a complete loss of earning capacity. See for example, Fulton v Road Accident Fund 2012 (3) SA 255 (GSJ), where C J Claassen J found that Ms. Fulton, in spite of being gainfully employed as a teacher at her school, no longer functioned in the capacity that she was originally employed for, had as such sustained a complete loss of earning capacity. However, each case must still be decided on its own merits and peculiar circumstances. In my view, *the res inter alia actus maxim* finds application in this case in favour of the Plaintiff. (See Richards v Richardson, supra)."

[27] In *casu* the circumstances of the plaintiff are even worse than the case quoted above of **Makuapane** because in that case the teacher was still employable in a compromised situation, whereas in *casu* the plaintiff could not be accepted back at his previous employment after being retrenched even for a mere sympathetic employment basis. This clearly show that the fact that there is a Samaritan somewhere who can accommodate this kind of a person is immaterial when deciding on the employability of a person. The same applies to the submission that was put forward by the defendant's Counsel that he can be employable because according to the report of the Occupational/Therapist, Ms Marietjie Strydom, it was indicated that he drove from Polokwane to Bushbuckridge when he went for assessment, which is a distance of +- 200km. The defendant's Counsel loses sight of the fact that Ms Strydom further says in her report that "*plaintiff had to stop frequently on the way in order to take the necessary breaks."*

[28] In as far as the issue relating to expressing an opinion by an expert, plaintiff's Counsel submitted that where the experts of the employability of a person, called by the opposing litigants meet and reach agreements about facts or about opinions, those agreements bind both litigants to the extent of such agreement. No litigant may repudiate an agreement to which its expert is a party, unless it does so clearly and, at the very least, at the outset of the trial. In support of these contentions he referred the Court to the case of **Thomas v BD Sarens (Pty) Ltd Case No: 2007/6636, South Gauteng High Court, delivered on the 12th September 2012**, by **Sutherland J**, at **paragraph 11** where it was said:-

> "18.2 Where experts are required to supply facts, either from their own investigations, or from their own researches, and an agreement is reached with the other party's experts about such facts, such an agreement on the facts enjoys the same *de facto* status as facts that are expressly common cause on the pleadings or facts agreed in pre-trial conference or in an exchange of admissions (see ***Thomas v BD Sarens at par 12***).
>
> 18.3 Where two or more experts meet and agree on an opinion, although the parties are not at liberty to repudiate such an agreement placed before the Court, it does not follow that a Court is bound to defer to the agreed opinion. In practice doubtlessly rare, a Court may reject an agreed opinion on any of a number of grounds all amounting to the same thing; that is the proffered opinion was unconvincing. (***Menday v Protea Assurance Co. Ltd 1976 (1) SA 565 (E) at 669 B – E***). The rationale for not affording a litigant the same free hand derives purely from the imperative of orderly litigation and the fairness

due to every litigant to know, from the beginning of a trial, what the case is that has to be met (see ***Thomas v BD Sarens at par 13***).

18.4 The upshot of these principles is that it is illegitimate to cross-examine an opponent's witness to undermine an agreed position on facts or on opinion, unless, before the trial begins, the opinion of a party's own expert has been formally repudiated. No litigant shall be required to endure the risk of preparing for a trial on a premise that an issue is resolved only to find it is challenged (see ***Thomas v BD Sarens at par 14***).

18.5 Where the parties' respective experts were both mandated to inquire into the issue and in a joint minute agreed, it is fair contention that the case is not relied on the Plaintiff's evidence for any of the material issues in dispute; in every instance only experts could resolve the differences of opinion or underlying facts. In the main, the experts gathered input from the Plaintiff in the ordinary course of several interviews. If the facts gathered by the experts from the Plaintiff and agreed by them to be subjected to challenge by the Defendant, then the agreement between the experts on those matters ought to have been repudiated (see ***Thomas v BD Sarens, at par 27***).

18.6 The Defendant cannot be allowed, after the agreement, as to the condition of the Plaintiff post-accident, to seek to throw doubt on the very diagnosis, by relying on the facts derived from the experts' reports on the fact that he worked for a particular period after the accident, where probabilities suggest that the Plaintiff undertook the particular work rather than be unemployed, a stark choice that put him at risk (see ***Thomas v BD Sarens, at par 64***)."

[29] To the extent that the defendant's expert Mr Ramusi did not express his opinion in the issue regarding the total loss of earning capacity of the plaintiff is concerned, this means that he had no opinion. The evidence of the plaintiff's expert Ms Sandra Moses therefore remains unchallenged. In my view, this is the opinion that this Court can rely on because, it is clearly based on the opinions found in the reports of other experts. What is significant about her report and opinion is that, she initially came to the same conclusion even before the additional information of the current situation at work, that he was retrenched and could not be taken back, was submitted to her. In her additional report she indicated that this information confirms her earlier conclusion.

[30] In addition, the evidence of the Supervisor Mr Mariri is in all four corners supporting her conclusion. I find that there is abundance of objective facts that support her opinion, thus it is accepted by this Court.

[31] In as far as the Actuarial calculations are concerned, the plaintiff's Counsel submitted that the Court should accept the report as prepared by **Robert Kock** on behalf of the plaintiff. The reason being that they are based on the Joint Minutes of the Industrial Psychologists and the recent pay slip which was annexed to the papers as **Annexure "A"**. He applied 5% contingency deduction for past loss and also allowed 15% for future loss. The normal percentage awarded in these kind of cases is between 10-15% unless there are aggravating circumstances which can persuade

the Court to go beyond this. In our case, he argued, none were provided.

[32] He submitted further that the plaintiff in the matter of **Makuapane** referred to above, was still in the employment Post-accident, but was in a sympathetic employment, and the Court allowed a total loss of future earnings, less 15% contingency deductions. As already indicated above, the plaintiff in *casu* was accommodated for a particular period Post-accident, but was later retrenched as a result of the *sequelae* of the injuries he sustained in the accident. He finally submitted that, he is of the view that the calculations presented in the report of Robert Koch, inclusive of the contingencies allowed on the said amounts, are reasonable and should be accepted by this Court in the circumstances of this matter.

[33] At the end of the defendant's case the defendant's Counsel handed in an Actuarial Report prepared by **Messrs Schalb and Prefertus of Rosewaal Technologies (Pty) Ltd** which was accepted as **Exhibit "B"** with the aim to counter the one already submitted by the plaintiff. Plaintiff's Counsel submitted that the calculations in Exhibit "B" should be rejected because:-

- The calculations were not based on the Joint Minutes of the Industrial Psychologists but only on the report of Mr Ramusi alone as depicted in **paragraph 1** of the Actuarial Report;
- It is furthermore not in line with the evidence presented in this Court;
- The pre and past scenarios were treated as same;

- The report is also in stark contrast with what Mr Ramusi had agreed to in the Joint Minutes that the plaintiff has been compromised.

[34] I am in full agreement with the submission by the plaintiff's Counsel and the calculations in Exhibit "B" are rejected for the reasons advanced by the plaintiff's Counsel above. On the other hand this Court considered the plaintiff's Actuarial report compiled by Robert Koch and found that it is based on the joint minutes of the two Industrial Psychologists, the report the Occupational Therapist Ms Strydom and the recent pay slips. The calculation therein were done with the assumption that the plaintiff would have received even compound real increases to a career ceiling of R362 500 per year at age 45 (average of C1 median and B4 upper quartile which reflect much the same level of earnings) year according to the Quartum Yearbook for 2017. The calculations furthermore include the fact that the plaintiff was off work for 24 weeks and he received a total of 6 weeks statutory sick pay of R1616 per week (40,40x40) in terms of 2015 rand values). Thereafter assumption of full annual pay of R282 702 per year with inflation increases until termination of his service from April 2016. An assumption that he will never again enter into gainful employment was also made. An overall contingency deduction of 5% in respect of past loss of earnings and 15% in respect of future loss of earnings was allowed.

[35] In my view the calculations and the assumptions made are reasonable, conservative and are just in the circumstances of this case. As indicated by the plaintiff's Counsel, the deductions are within the normal contingency deductions allowed. The plaintiff has

suffered total loss of earning capacity although he was in sympathetic employment after the accident, he is currently without even that sympathetic employment.

[36] In the premises, I am satisfied that the plaintiff has made out a case for the judgment in his favour in the following terms:-

36.1 That he was accommodated after the accident until he lost his employment as a result of the *sequelae* of the injuries he sustained in the accident;

36.2 He remained unemployed to this date as a result of the *sequelae* of the injuries he sustained in the accident;

36.3 He has been compromised by the injuries he sustained in the accident, such that he is no longer an equal competitor in the open labour market, and he can only be accommodated by the sympathetic employers;

36.4 He is currently not in any sympathetic employment, as such he has suffered a total loss of earning capacity and should be compensated as such.

[37] As far as cost is concerned, there is no basis why costs should not follow the result. This costs should include costs previously reserved, and the costs of consequent upon the plaintiff's expert attending Court.

[38] The above sums the reasons why the Order which was granted on the 17th of October 2017 was made.

A M KGOELE

JUDGE OF THE HIGH COURT

ATTORNEYS

FOR PLAINTIFF	**:**	Langa Solomon Inc C/O Gura Tlaletsi Inco 38 Carrington Street MAHIKENG
FOR DEFENDANT	**:**	Maponya Incorporate Mega City Complex Sekame Road, Dr James Moroka MMABATHO