

REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 2010/17220

(1)	REPORTABLE YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<p>14/12/12</p> <p><i>[Signature]</i></p>	

In the matter between

BVUMA, KHANYISA SUZAN**Plaintiff**

and

ROAD ACCIDENT FUND**Defendant****Neutral citation:** *Bvuma v RAF* 2012 SA (GSJ)**Coram:** SATCHWELL J**Heard:** 28 November 2012**Delivered:** 14 December 2012

Summary: Opinion evidence is only acceptable from 'experts' who deal with facts which require skill and expertise to opine on such facts to the court. In this claim for loss of earnings/earning capacity of a teacher medical evidence was adduced as to injury and 'disability'. However, no facts or evidence were adduced dealing with the duties and responsibilities of members of the teaching profession in South Africa, the duties and responsibilities of South African primary school teachers, the basis upon which primary school teachers are or may be promoted, the basis upon which teachers are retrenched from employment, when retirement is voluntary or compulsory and the financial impact upon a teacher in either case. Accordingly, the 'experts' were unable to offer any link between employment and injury and explain or justify any resulting claim.

JUDGMENT

SATCHWELL J:

INTRODUCTION

[1] This judgment is yet another example of the 'sausage machine outsourcing' approach to Road Accident Fund litigation. Where there was a claim for 'loss of earnings/loss of earning capacity', there was no attempt by any legal representatives to conduct any enquiry into or obtain any information about the plaintiff's factual situation of employment. Instead the attorneys for both parties simply referred the plaintiff to a multitude of medical 'experts' resulting in an absence of factual information relevant to the claim for loss of earnings.

[2] Mrs Bvuma was the driver of a vehicle involved in a collision on 5th October 2010 and sustained a fracture to her left leg and soft tissue injury to her chest. A claim was lodged and litigation instituted. The matter was set down for trial on 28th November 2012. The merits have been settled. The issue of general damages has been held over until the question of 'serious injury' has been determined by the Appeal Tribunal constituted in terms of Regulation 3 of the RAF Act.

[3] In chambers, I heard argument from counsel for both Mrs Bvuma and the RAF only on the issue of whether or not plaintiff should succeed in her claim for 'loss of earnings/earning capacity' and, if so, in what amount.

LOSS OF EARNINGS/ LOSS OF EARNING CAPACITY

The Claim

[4] The particulars of claim seek compensation of R50,000.00 in respect of 'past and future loss of earnings'. At the pre-trial conference on 23rd October 2012 it was recorded that plaintiff seeks damages of R200,000.00 in respect of 'past and future loss of earnings/ earning capacity'. An actuarial report dated 14th November 2012 assessed the capitalised

value of her earning capacity. On 15th November 2012 the particulars of claim were amended to increase the claim for 'past and future loss of earnings' to R281,799.00.

[5] It is common cause that Mrs Bvuma has completed a Junior Primary Teacher's Diploma from Hoxani College,¹ a Certificate and Diploma in Education from Abbott College, an ACE Diploma through the University of South Africa and is currently studying for a degree in Education Management through the University of Pretoria.² Mrs Bvuma was employed as a primary school teacher prior to the accident. She remains so employed teaching grades 4 to 7.

Supposition and Speculation

[6] At the hearing, Mr Soares who appeared for the plaintiff, Mrs Bvuma, submitted that she should be compensated for loss of earnings in the amount of R140,000.00 which he justified as "*5% of the actuarial calculation*". The more I enquired what that meant, the more I was referred to this percentage of the actuarial calculation.

[7] I tried to ascertain the nature of the 'loss of earnings or earning capacity' and was informed that her career had been adversely affected by reason of her inability to coach after hours sports and as a result she may therefore be denied promotion and, if she were retrenched, she would find it more difficult to obtain employment. Also, I was informed that she would have to "*work harder*". Absolutely no information or evidence was produced in support of these vague speculations.

[8] I was presented with nothing more than "*5% of actuarial calculations*". I do not know why 5% was chosen as opposed to 2% or 15%. I do not know of what total this is a percentage? The actuarial calculations are a capitalised amount of Mrs Bvuma's income over her remaining working life but there are no figures concerning income which might have been earned if there was or was not a promotion or if there was or was not a retrenchment.

Absence of Investigation or Information

¹ Peverett 289; 296.

² Spavins 226.

[9] There is no indication that either attorney appearing for the parties thought to contact Mrs Bvuma's employers, either the Department of Education or the Principal of the school where she works, to obtain any details which would provide a foundation for any claim for 'loss of earnings/earning capacity' or which would challenge such claim.

[10] There is no information before the court from the Department of Education or elsewhere:

- a. Setting out the duties and responsibilities of members of the teaching profession in South Africa and particularly in primary schools. I do not know what is physically expected of primary school teachers working in small or large classes, in teaching languages or mathematics, or in blackboard/whiteboard/handcraft/speaking/work or in supervision.
- b. Setting out the duties and responsibilities of South African primary school teachers with regard to afterhours extra-mural activities. I do not know if there could be any adverse consequences if Mrs Bvuma cannot or does not coach sports.
- c. Setting out the basis upon which primary school teachers are or may be promoted, to what positions such promotions may take place or what differences in salary there are between Mrs Bvuma's current position and any other position to which she might aspire.
- d. Setting out the basis upon which teachers are retrenched from employment, whether or not such retrenchments have happened in primary schools in the past twenty years, the likelihood of such retrenchment in the future or whether Mrs Bvuma would be a more likely candidate for retrenchment by reason of her injuries.
- e. Setting out details of when retirement is voluntary or compulsory and the financial impact upon a teacher in either case – especially where early retirement is taken by someone who is unable to fully perform all required duties.

[11] Mrs Bvuma's claim was presented to me in court without any facts or information nor any coherent or logical argument. To offer, as the only basis for a claim for loss of earnings/ earning capacity "*5% of actuarial calculations*" is neither evidence, submission nor argument.

[12] However, what both attorneys had done was to refer Mrs Bvuma to a multitude of 'medical experts'. It seems to be a knee jerk reaction in RAF litigation that presentation of, or opposition to a claim must be bolstered by as many lengthy and repetitive reports as possible. One is tempted to speculate that the authors are paid according to the length of the report! Why this was done without any approach to Mrs Bvuma's employers, her immediate superiors or her colleagues is difficult to comprehend. Do attorneys no longer conduct any research or consult with potential witnesses? Do attorneys no longer collect information upon which expert witnesses could be asked to comment? Do attorneys simply outsource their responsibilities to 'medical experts'?

[13] It is expected in litigation seeking compensation for loss of earnings or earning capacity that evidence is obtained by the attorneys from the horse's mouth – as opposed to hearsay information distilled through such 'medical experts' who may not seek out original sources concerning employment.

[14] For instance, in Fulton v Road Accident Fund (2007/31280) [2012] ZAGPJHC 3; 2012 (3) SA 255 (GSJ) (1 February 2012), claimant's direct employer, the principal of the school at which she was teaching, testified to what exactly was required of her in the classroom and on the sports field and by way of administrative duties and he was able to comment exactly how and to what extent she was or was not able to carry out those responsibilities post accident and the implications for the school and for her career. Similarly, in Seconds v RAF [2008] JOL 22074 (EL), the principal of the school where the claimant taught gave evidence as to the activities required of a primary school educator, the nature and amount of mobility required of the claimant in the classroom, the content of applicable regulations concerning both mobility and performance of extra-mural activities and retirement options available to teachers.

[15] Regrettably, in this matter I was not provided with essential information or evidence and counsel was constrained to make speculative submissions which took the case no further.

The Reports of the Medical Experts

[16] Both parties commissioned the examination and assessment of Mrs Bvuma by a number of 'experts': The plaintiff utilised the services of Mr E Schnaid, orthopaedic surgeon; M Spavins, occupational therapist and M Peverett, industrial psychologist, whilst the RAF utilised the services of Mr Swartz, orthopaedic surgeon, C Motake, occupational therapist and T Gama, industrial psychologist.

[17] Attorneys, advocates and potential witnesses all appear unaware of the paradigm within which the opinions of witnesses are admissible in evidence in court proceedings. The opinion of an expert witness is only receivable in evidence and only to be relied upon where there are issues before the court requiring specialised skill and knowledge and where the opinion is based upon facts which have been proved by admissible evidence.³

[18] Only two of the reports commissioned in this case made any attempt to relate their opinions to the role and responsibilities of a primary school teacher before opining on Mrs Bvuma's ability to continue to occupy that role.

[19] In Spavins' report,⁴ she quoted from 'The Dictionary of Occupational Titles' to furnish a definition of "Teacher (education)"⁵ which is very general in nature, obviously relevant to an American or Australian situation, provides no information concerning teaching duties in primary schools in South Africa and gives no indication of the physical demands upon such a South African teacher.

[20] Spavins worked on the basis that Mrs Bvuma's employment could be "*considered to be light physical in nature*". From this report, I gain little if any knowledge of what the "*light physical*" duties are that she has in mind. Spavins concludes that Mrs Bvuma "*meets most but*

³ Holtzhausen v Roodt 1997 (4) SA 766 (W).

⁴ Page 8.

⁵ "Teaches, students, academic, social, and motor schools in public or private schools: Prepares course objectives and outlines for course of study following curriculum guidelines or requirements of state and school. Lectures, demonstrates, and uses audiovisual teaching aids to present subject matter to class. Prepares administers and corrects tests, and records results. Assigns lessons, corrects papers, and hears oral preparation. Teaches rules of conduct. Maintains order in classroom and on playground. Counsels pupils when adjustment and academic problems arise. Discusses pupils' academic and behavioural attitudes and achievements with parents. Keeps attendance and grade records as required by school. May coordinate class fieldtrips. May teach combined grade classes. May specialise by subject taught, such as math, science, or social studies. May be required to hold state certificate."

not all of the inherent physical demands of her current job” but I remain at a loss as to what these “physical demands” are or indeed what Spavins means by “core job requirements” and how Mrs Bvuma does or does not meet them. I do understand that Spavins found “some limitation in standing” and that she believes that Mrs Bvuma will require the assistance of an “ergonomic office chair, adjustable foot rest, easy glide mat”, but the court has still not been informed of the physical requirements of the job of a primary school teacher both inside and outside the classroom and how Mrs Bvuma can or cannot meet those requirements.

[21] Spavins’ examination results in the conclusion that Mrs Bvuma is:

*“not suited to work involving repetitive squatting, pushing/pulling or lifting of light weighs on a frequent basis....The results of this evaluation indicate that Mrs Bvuma has retained the physical capacity to cope with most of her core responsibilities of her job as a primary school teacher. She was not found to be suited to the standing requirement of her job and her productivity is dependent on regular changes of posture during the workday....recommended that when she is teaching lessons she would need to alternate between standing, sitting and walking around the class. The workstation adaptations recommended should improve her posturing when seated at her desk at school for marking pupils work and for lesson preparation. She is not suited to coaching sport due to her limitation in standing.”*⁶

[22] Peverett records the information made available to him (presumably from Mrs Bvuma) concerning her employment: “At the time of the accident...she taught Life Skills, Mathematics and English to Grade 3 learners in the junior special class. Since 2012 (post accident), she also teaches Afrikaans. She reportedly has 22 learners in her class. She also, annually between January and June, coached netball during school hours and worked Mondays from 7:30 to 15:00, Tuesdays to Thursdays 7:30 to 14:30 and Fridays from 7:30 to 13:00.”⁷ He then took this further by contacting Mrs Lamprecht, Department Head at Unity Primary School. Peverett’s summary of what she told him is that Mrs Bvuma

“...is required to stand for a significant part of the day to the young age group she teaches. Overall work performance is not perceived as problematic as she meets her objectives. ...no longer coaches netball due to pain in her knee and her consequent inability to run. ...Mrs Bvuma has significant difficulty walking, she is physically slower and has difficulty climbing stairs since the accident. ...knee is bound daily, reportedly due to pain. ...In terms of

⁶ Spavins 244.

⁷ Peverett 296.

...prospects for promotion... this is vacancy dependant and ...Mrs Bvuma does not have opportunity in this regard at present.”⁸

[23] Schnaid reported Mrs Bvuma’s complaints of pains in her left knee, her inability to walk long distances or sit or stand for long periods and her inability to climb stairs and lift or carry heavy objects.

[24] Swartz noted that Mrs Bvuma’s profession was that of “*teacher*” and without any further information or factual guidance to himself or to the court he commented “*There is no loss of work capacity as a result of the injuries to the left knee. She will not retire before normal retirement age as a result of the injuries. Loss of income as a result of the injuries will be nil.*”⁹ Absent any indication of Swartz’s understanding of what is physically required of a primary school teacher in a South African school, I am unable to assess the basis upon which Swartz has formed this opinion.

[25] Although notice was given that Motake and Gama would be called as witnesses, I have not been furnished with their reports (if any).

ASSESSMENT OF ‘EVIDENCE’

[26] It seems to be common cause that Mrs Bvuma cannot stand or sit for long periods, has difficulty climbing stairs, cannot run or perform sporting activities with her pupils, cannot lift heavy objects and cannot squat.

[27] Although Spavins concludes that she is able to meet the “*core job requirements*” of teaching and although Mrs Lamprecht is reported as saying that Mrs Bvuma “*meets her teaching objectives*”, it was still argued by her counsel that she may be refused promotion, be declared redundant and have to work harder.

[28] Having to work harder is, in my view, encapsulated within ‘general damages’ whilst there is a total absence of any information, as I have already commented, on promotion requirements or redundancy possibilities.

⁸ Peverett 299.

⁹ Swartz 321.

[29] In Fulton supra, there was evidence of what was required of an active sports coach, that physical incapacity disadvantages a teacher who is required to use additional equipment which brings extra costs. In Mpondo supra, the evidence noted the need to be able to “*stand or squat*” and for “*energy*” in classroom interaction. In Seconds supra, there was evidence that “*it was against school regulations to sit and teach*” and that an educator who could “*not do extra-mural activities*” would not be recommended for employment.

[30] In Shongwe v Road Accident Fund (27351/08) [2012] ZAGPPHC 214 (4 September 2012) the court found that an inability to “*walk or stand for lengthy periods of time*” or to “*sit for long*” or to “*coach sport at school*” did render the educator a “*more vulnerable employee*”. Nevertheless, the court also found that the educator could cope without expecting huge accommodations from her employer and that the Department of Education held itself out to be such a sympathetic employer.

[31] From the minimal information available, the pain and disability experienced by Mrs Bvuma does not currently affect her employability. However, the future is always uncertain.

[32] Absent any evidence concerning teaching responsibilities in primary schools in South Africa, I would have to take a common sense approach to Mrs Bvuma’s future employment. Class complements in public schools are frequently oversized. Young children require active management in that there is more physical interaction amongst themselves and with the teacher. They do not sit and read quietly at desks, but engage with the teacher constantly who must be able to stand and control the room of pupils. Small children seek out the adult in the room for guidance, comfort, teaching and approval and that adult must be able to go to the pupils wherever they are in the room and not merely sit at a desk. The educator is very much *in loco parentis*, walking around the classroom between desks and tables, ensuring pupils are not fighting, and being vigilant as to each child’s safety. Mobility is of the essence in managing and teaching a classroom filled with young children.

[33] On this approach, it is my view that there is a probability that Mrs Bvuma may indeed be obliged to seek a more sedentary career which may be available if and when she completes her degree in educational management. However, there is no information that any such career opportunity would be available so as to make any accommodation to her disability. It is also

unknown how long and at what cost employers would be prepared to continue supporting a teacher who is unable to carry out extra mural sporting duties.

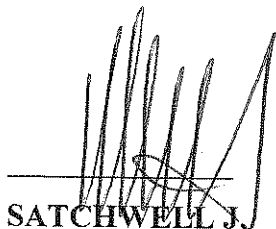
[34] However, there is neither information nor evidence before me to justify any award of compensation in respect of future loss of earnings.

[35] I am concerned that Mrs Bvuma should not be liable for the wasted costs in this litigation. It is possible that costs should be met *de boniis propriis*. However, no legal representative was alerted to this possibility prior to trial. They are entitled to make submissions in respect of these issues. They are also entitled to be represented at such hearing. Accordingly, the issue of costs will be postponed for hearing on a date to be arranged.

ORDER

1. The claim for damages in respect of future loss of earnings/earning capacity is dismissed.
2. The issue of costs is postponed to a date to be arranged with this court.

DATED AT JOHANNESBURG ON THIS 14th DAY OF DECEMBER 2012.



SATCHWELL J.

JUDGE OF THE HIGH COURT

APPEARANCES:

PLAINTIFF:

Mr Dos Santos Soares

Instructed by Dempster McKinnon Inc, Johannesburg

DEFENDANT:

Ms Mogomane

Instructed by MSM Inc, Johannesburg