

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Not Reportable
Case no: 5906/2021

In the matter between:

KEDIBONE MARGARET VINGER

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

Neutral Citation: *KM Vinger v Road Accident* (5906/2021) [2025]

Coram: Buys AJ

Heard: 22 April 2025 – Heads of Argument filed on 29 April 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 15H30 on 16 MAY 2025.

Summary: Claim for damages – estimated future medical expenses and loss of income/earning capacity.

ORDER

1. The defendant to pay 100% of the plaintiff's proven or agreed damages.
2. The defendant is ordered to pay the plaintiff the amount of R362 262 (three hundred sixty-two thousand two hundred and sixty-two rands), which consists of past and future earnings.
3. The aforesaid amount is to be paid into the following bank account:

Symington & de Kok Attorneys

First National Bank

Account number: 6[...]

Branch code: 250 655

Reference: TR0706FXV2621

4. The defendant shall be afforded a period of 180 calendar days from the date of this order to effect payment of the aforementioned amount, during which period the plaintiff will not be entitled to issue a writ against the defendant.

5. The defendant is ordered to furnish the plaintiff with an undertaking in terms of s 17 (4)(a) of the Road Accident Fund Act 56 of 1996 for payment of 100% of the costs of the future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of a service or supply of goods to the plaintiff arising out of the injuries that the plaintiff sustained in the motor collision which occurred on 7 October 2017 and the *sequelae* thereof, after such costs have been incurred and upon proof thereof.

6. The adjudication of the remaining aspect of general damages is separated in terms of rule 33 (4) of the Uniform Rules of Court and stand over for later adjudication.

7. The defendant shall pay the plaintiff's taxed party and party costs on a high court scale to date of this order, including but not limited to the costs relating to the merits of the matter, together with all the travelling costs, accommodation for the plaintiff and AV Theron & Swanepoel Attorneys and the reasonable qualifying fees, reservation fees and appearance fees of counsel (on scale B) for 22 and 23 April 2025 and the following experts:

(a) Dr JF Ziervogel;

(b) Enid Kruger;

(c) Susan van Jaarsveld;

(d) Human & Morris;

(e) Dr PJ Fischer.

8 Interest on the capital amount and taxed costs shall accrue at the prescribed interest rate, calculated 14 (fourteen) days from date of this order to date of payment, in the event that payment is not affected within the 180 days from date of this order as per paragraph 4 *supra*.

JUDGMENT

Buys AJ

Introduction

[1] This is an action instituted by the plaintiff, Kedibone Margaret Vinger, against the defendant, the Road Accident Fund, for damages suffered by the plaintiff as a result of a vehicle collision on 7 October 2017.

[2] The defendant conceded to the merits and is, as a result, 100% liable for the plaintiff's proven or agreed damages. The plaintiff did not persist with her claim for past medical expenses, and the claim for general damages could not proceed because the defendant neither accepted, nor rejected that the plaintiff suffered a serious injury. I was requested by counsel on behalf of the plaintiff to separate the claim for general damages in terms of rule 33(4) of the Uniform Rules of Court (the rules) and to postpone the said claim for later adjudication and only to adjudicate the plaintiff's claim in respect of estimated future medical expenses and her claim for loss of income/earning capacity.

[3] It should be mentioned from the onset that the legal representative who was on record for the defendant indicated that she had no instructions on the matter and, as a result thereof, requested to be excused from the hearing of the matter and consequently the matter proceeded without any opposition.

Evidence presented by and on behalf of the plaintiff in terms of rule 38(2)

The plaintiff

[4] The plaintiff presented the following evidence on affidavit:

(a) she sustained injuries to her head, cervical spine, and lumbar spine as well as various cuts abrasions and lacerations;

(b) after the accident, she was taken to Boitumelo Hospital for treatment;

(c) she passed grade 11 in 2006 but has no further training qualifications;

(d) at the time of the accident, she worked as a gardener;

(e) after the accident, she returned to her position as a gardener, however, she struggles to work as she did before the accident due to frequent headaches, increased forgetfulness, and back pain. She did not have any such problems at work prior to the accident;

(f) her employer accommodated her by placing her on light duty from about six months after the accident. Her male colleague now does all the heavy work.

Expert: Dr PJ Fisher

[5] Dr Fisher, the orthopaedic surgeon, presented the following relevant evidence:

(a) due to the plaintiff's manual intensive work in gardening, her lower back condition might degenerate further over the next 15-20 years and her retirement age might decrease with five to ten years;

(b) the plaintiff requires 'treatment of chronic headaches and neck and back pain', including 'spinal fusion and stabilisation';

(c) he envisions future medical treatment for the plaintiff and estimated the amount thereof as around R425 000.

Expert: Ms EM Kruger

[6] Ms EM Kruger, the occupational therapist, presented the following relevant evidence:

- (a) the plaintiff's physical abilities are not 'adequate for her job as a gardener';
- (b) the plaintiff's residual problems rendered her a compromised and unequal contender in the open labour market, which will have a negative impact on her competitiveness compared to her non-injured counterparts;
- (c) even though the plaintiff returned to her pre-accident job, it is possible that the plaintiff is accommodated by a sympathetic employer. The plaintiff 'might compromise her residual abilities by continuing with her job'.

Expert: Ms S van Jaarsveld

[7] Ms S van Jaarsveld, the industrial psychologist, presented the following relevant evidence:

- (a) considering the opinion of the medial experts, the core activities of a gardener (including the associated requirements posed on a gardener) and the plaintiff's physical limitations, Ms van Jaarsveld opined that the plaintiff is no longer able to perform her work as a gardener or any other similar position, although she is accommodated by a sympathetic employer, with a resultant decline in productivity;
- (b) despite being employable, the plaintiff's career choices have been significantly narrowed down as she will not qualify to perform work of a sedentary nature and as she will have to compete with more able-bodied individuals, for which there is an abundance of workers available. These factors will have a negative influence, even in a protective work environment, and as such she is a vulnerable employee. The plaintiff will find it difficult to secure alternative employment in the open labour market in future due to the injuries she sustained in the accident;
- (c) a higher contingency calculation must be made for the plaintiff's future loss of earnings as she will not be employed until the normal retirement age of 65 years;
- (d) if the plaintiff is to lose her work, she must be compensated for the loss of income as a gardener from the age of early retirement/retrenchment until the normal

retirement age of 65 years;

(e) when considering the plaintiff's future work potential and earning capacity, the extent of her injuries, residual work capacity and its impact on her future career and possible future medical treatment, the plaintiff will not be able to work at the same rate as prior to the accident, and her productivity has been negatively affected by the injuries she sustained in the accident – as such, the plaintiff must be viewed as a vulnerable employee.

The defendant's case

[8] The evidence presented by the plaintiff and the evidence presented by the expert witnesses referred to *supra* have not been disputed by the defendant. No evidence has been presented by and/or on behalf of the defendant.

Applicable legal principles

Loss of earnings

[9] In *Dippenaar v Shield Insurance Co Ltd*,¹ Rumpff CJ expressed a claim for loss of earning capacity in the following manner:

'In our law, under the *lex Aquilia*, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate.'

[10] It is trite that any patrimonial claim in respect of future loss of earnings / earning capacity requires proof on a balance of probabilities of diminished earning capacity resulting in actual patrimonial loss.²

[11] In respect of calculations, the court, in *M S v Road Accident Fund*,³ held as follows:

¹ *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) at 917A-B.

² *Rudman v Road Accident Fund* [2002] ZASCA 129; [2002] 4 All SA 422 (SCA); 2003 (2) SA 234 (SCA) para 11.

³ *M S v Road Accident Fund* [2019] ZAGPJHC 84; [2019] 3 All SA 626 (GJ) para 42-43 .

'The *locus classicus* as to the value of actuarial expert opinion in assessing damages is *Southern Insurance Association Ltd v Bailey* NO where Nicholas JA said the following:

"Where the method of actuarial computation is adopted in assessing damages for loss of earning capacity, it does not mean that the trial Judge is 'tied down by inexorable actuarial calculations'. He has 'a large discretion to award what he considers right'. One of the elements in exercising that discretion is the making of a discount for 'contingencies' or differently put the 'vicissitudes of life'. These include such matters as the possibility that the plaintiff may in the result have less than a 'normal' expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case".

Zulman JA, with reference to various authorities including *Southern Assurance* said as follows in *Road Accident Fund v Guedes*:

"The calculation of the quantum of a future amount, such as loss of earning capacity, is not, as I have already indicated, a matter of exact mathematical calculation. By its nature, such an enquiry is speculative and a court can therefore only make an estimate of the present value of the loss that is often a very rough estimate (see, for example, Southern Insurance Association Ltd v Bailey NO) Courts have adopted the approach that, in order to assist in such a calculation, an actuarial computation is a useful basis for establishing the quantum of damages".

[12] In dealing with actuarial reports, it was held as follows in *Morris v Road Accident Fund*:⁴

'The general principle applicable to the assessment of damages for loss of earnings capacity is that the Plaintiff must prove that the reduction in earning capacity gives rise to pecuniary loss. In *Prinsloo v RAF* in dealing with this principle, Chetty J stated as follows:-

"A person's all-round capacity to earn money consists, *inter alia*, of an individual's talent, skill, including his/her present position and plans for the future and, of course, external

⁴ *Morris v Road Accident Fund* [2018] ZAGPPHC 486 para 17-18.

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 earning 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 would be nil."

On the aspect of contingencies, Nicholas JA in *Southern Insurance Association v Bailey N.O.* stated the following: -

"In the case where a Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an 'informal guess', it has the advantage of an attempt to ascertain the value of what was lost on a logical basis."

[13] The general principles pertaining to contingency deductions were usefully summarised in the recent case of *Engelbrecht v Road Accident Fund*:⁵

'It is trite that contingency deductions are within the court's discretion and depend upon the judge's impression of the case. See *Southern Insurance Association v Bailey NO 1984 (1) SA 98 (A)* at p113 and Robert Koch: *Quantum Yearbook 2011* at p. 104.

In *Southern Insurance Association Ltd v Bailey NO*, the following was stated:

"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future without the benefit of crystal balls, soothsayers, augers or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of a loss."

⁵ *Engelbrecht v Road Accident Fund* [2024] ZAGPPHC 440 paras 46-47.

Matters that cannot be otherwise provided for or cannot be calculated exactly but that may impact upon damages claimed are considered contingencies and are usually provided for by deducting a stated percentage of the amount or specific claims. See *De John v Gunter* 1975 (4) SA 78 (W) at 80F. Contingencies include any possible relevant future event that might cause damage or a part thereof or which may otherwise influence the extent of the plaintiff's damage. See *Erdmann v Santam Insurance Co. Ltd* 1985 (3) SA 402 (C) at 404; *Burns v National Employers General Insurance Co Ltd* 1988 (3) SA 355 at 365. Further, “....A court may be entitled to qualify an amount of damages from an estimate of the plaintiff's chances of earning a particular figure. The figure will not be proved on a balance of probability but will be a matter of estimation.” See *De Klerk v Absa Bank Ltd and Another* 2003 (4) SA 315 (SCA); See also *Goodall v President Insurance Company Ltd* 1978 (1) SA 389 (W); and *Road Accident Fund v Guedes (611/04)* 2006 ZASCA 19 2006 (SCA). “The deductions are the court's discretion, and there are no fixed rules regarding general contingencies.”.’

[14] In *Gwiba v Road Accident Fund*,⁶ it was held that:

‘Our courts have accepted that the extent of the period over which a plaintiff's income has to be established has a direct influence on the extent to which contingencies have to be accounted for. The longer the period over which unforeseen contingencies can have an influence over the accuracy of the amount deemed to be the probable income of the plaintiff, the higher the contingencies have to be applied.’

Future medical expenses

[15] It is, generally speaking, not competent for a court to order the Road Accident Fund (the RAF) to provide a plaintiff with an undertaking in respect of future medical expenses where the RAF has not elected to give such an undertaking. This is because the RAF is not obliged to give an undertaking, but is given a right to do so, and the obligation to give an undertaking can only generally arise once such an undertaking is tendered.

[16] Contrary to the above, in *K obo M and Another v Road Accident Fund (K obo M)*,⁷ the full court found that a court can – also on cases of default – take judicial

⁶ *Gwiba v Road Accident Fund* [2023] ZAFSHC 43 para 16.

⁷ *K obo M and Another v Road Accident Fund* 2023 (3) SA 125 (GP) paras 26.

notice of the RAF's 'blanket election' to furnish an undertaking in respect of any 'proven claim' for future medical expenses. The full court held as follows in this regard:

'Insofar as there may have been doubt as to either the existence of a 'blanket election' or whether this fact has sufficiently been so notorious that a court could have taken judicial notice thereof, such doubt has now been removed by the Fund's CEO. *Counsel for the Fund has confirmed in open court that courts can now take judicial notice of this. The result is that, once a plaintiff proves its claim as contemplated in s 17(4)(a), it is entitled to claim an order catering for a direction to the Fund to furnish such an undertaking and a court is entitled to grant such an order. This will also apply in instances where orders by default are sought.*' (Emphasis added.)

Analysis

[17] In view of the undisputed evidence of the plaintiff and the plaintiff's experts referred to *supra*, the plaintiff has proved, on a balance of probabilities, that she suffered a loss of earning capacity and a resultant pecuniary loss as a result of the injuries sustained by her in the accident and the *sequelae* thereof. But for the injuries sustained by the plaintiff in the accident, the plaintiff's career and earnings would not have been compromised and the plaintiff would have worked until the age of 65 years old. Accordingly, the plaintiff suffered a loss of earnings due to her likely early retirement and being rendered a vulnerable employee.

[18] Although the plaintiff's actuary did not apply any contingencies in calculating the loss of earnings, the nett future loss is calculated purely on the strength of the assumption that the plaintiff will likely retire at the age of 57.5 years instead of at 65 years old. The calculation thus reflects the loss of earnings due to early retirement of 7.5 years, but not the loss of earnings suffered due to now being a vulnerable employee.

[19] The plaintiff is currently 39 years of age (also at the time of the actuarial report) and as a result the future pre-morbid contingency should be applied to a 26-year period.

[20] If the normal 'sliding scale' formula is applied, namely 0.5% contingency deduction per annum until retirement, the future uninjured contingency would be 13%. The defendant did not present any evidence to show that there are any negative factors that should have been accepted by this court to increase the future uninjured contingency percentage. I also align myself with the submission made by Mr van der Merwe, on behalf of the plaintiff, that no negative contingency factors are present to justify an increase beyond a 15% contingency deduction for the future uninjured scenario.

[21] I also accept the evidence presented on behalf of the plaintiff and agree with the further submissions made by Mr van der Merwe, namely that the plaintiff is not only likely to retire early but also has become a significantly more vulnerable employee due to the accident. If she loses her current work, she may not find another sympathetic employer willing to accommodate her before her likely retirement age of 57.5 years. In the premises, a contingency deduction of 40% in the future injured scenario should be applied. Therefore, I agree with Mr van der Merwe's submission that a contingency spread of 25% should be applied to the latest calculations of the actuarial report as follows:

	UNINJURED	INJURED	NET
FUTURE LOSS	R984 568	R791 035	R193 533
CONTINGENCIES	R147 685 (15%)	R316 414 (40%)	R168 729
NET FUTURE LOSS	R836 883	R474 621	R362 262

[22] Mr van der Merwe submitted that the nett loss of R193 533 reflects the early retirement loss calculated by the plaintiff's actuary, whereas the loss of R168 729 results from the proposed contingency spread of 25% and reflects the loss due to the plaintiff being rendered a vulnerable employee.

[23] Taking Mr van der Merwe's able submissions pertaining to the actuarial report dated 10 April 2025 into consideration, I am satisfied that the amount of R362 262 be awarded to the plaintiff as loss of earnings.

[24] In applying the principles set out in *K obo M*, I am satisfied that the plaintiff has proved her claim as contemplated in s 17(4)(a) of the Road Accident Fund Act and, therefore, I can see no preclusion against holding the defendant to its blanket election to provide undertakings as envisaged in s 17 of the of Road Accident Act.

Order

[25] Accordingly I make the following order:

1. The defendant to pay 100% of the plaintiff's proven or agreed damages.
2. The defendant is ordered to pay the plaintiff the amount of R362 262 (three hundred and sixty-two thousand two hundred and sixty-two rands), which consists of past and future earnings.
3. The aforesaid amount is to be paid into the following bank account:

Symington & de Kok Attorneys
First National Bank
Account number: 6[...]
Branch code: 250 655
Reference: TR0706FXV2621
4. The defendant shall be afforded a period of 180 calendar days from the date of this order to effect payment of the aforementioned amount, during which period the plaintiff will not be entitled to issue a writ against the defendant.
5. The defendant is ordered to furnish the plaintiff with an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996 for payment of 100% of the costs of the future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of a service or supply of goods to the plaintiff arising out of the injuries that the plaintiff sustained in the motor collision which occurred on 7 October 2017 and the *sequelae* thereof, after such costs have been incurred and upon proof thereof.

6. The adjudication of the remaining aspect of general damages is separated in terms of rule 33(4) of the Uniform Rules of Court and stand over for later adjudication.

7. The defendant shall pay the plaintiff's taxed party and party costs on a high court scale to date of this order, including but not limited to the costs relating to the merits of the matter, together with all the travelling costs, accommodation for the plaintiff and AV Theron & Swanepoel Attorneys and the reasonable qualifying fees, reservation fees and appearance fees of counsel (on scale B) for 22 and 23 April 2025 and the following experts:

- (a) Dr JF Ziervogel;
- (b) Enid Kruger;
- (c) Susan van Jaarsveld;
- (d) Human & Morris;
- (e) Dr PJ Fischer.

8. Interest on the capital amount and taxed costs shall accrue at the prescribed interest rate, calculated 14 (fourteen) days from date of this order to date of payment, in the event that payment is not affected within the 180 days from date of this order as per paragraph 4 *supra*.

BUYS AJ

Appearances

For the plaintiff:

HJ van der Merwe

Instructed by:

Symington De Kok Attorneys, Bloemfontein.