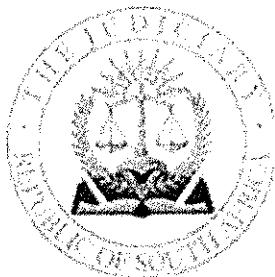


**REPUBLIC OF SOUTH AFRICA****IN THE HIGH COURT OF SOUTH AFRICA****GAUTENG DIVISION****PRETORIA**

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED 20 JUNE 2022
DATE	SIGNATURE

**CASE NO: 49296/2019**

In the matter between:

**MS RAKWENA****PLAINTIFF****AND****ROAD ACCIDENT FUND****DEFENDANT**

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**JUDGMENT**

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## CEYLON, AJ

### A. INTRODUCTION:

[1] This is an action in which the Plaintiff claims damages from the Defendant as statutory insurer in terms of Act 56 of 1996, arising from the bodily injuries she sustained in a motor vehicle collision that occurred on 27 November 2017.

[2] According to the particulars of claim, the Plaintiff claims hospital and medical expenses (past and future), loss of earnings (past and future) and general damages for a total sum of R3 000 000-00, interest and costs. At the hearing it was indicated that an amount of R1 950 423-08, that is R1 550 423-08 (loss of earnings) and R400 000-00 (general damages), would be claimed.

[3] The Plaintiff's Practice Note, dated 28 February 2022, indicates that the merits and quantum in this matter is in dispute [pg K4]. However, at the hearing, the Plaintiff's representative advised that the Defendant conceded the merits 100% in favour of the Plaintiff.

[4] In terms of an Order of this Court dated on February 2022 (per Noncembu AJ), the Plaintiff (Respondent in that application) was ordered to comply with the Plaintiff's (Applicant) rule 37 (2)(a) notice within five (5) days of service of such Order, that the Plaintiff shall retain the allocated trial date (of 07 March 2022) and, in the event that the Defendant fails to comply with the provisions of the said Order, the Plaintiff was granted leave to approach Court on the same papers, duly supplemented by the Plaintiff, for an Order striking out the Defendant's defence, alternatively, in the event that a date for such application cannot be obtained before the trial date (07 March 2022), the Plaintiff shall be entitled to proceed to seek default judgment on the allocated trial date. The said Order was served on the Defendant on 28 February 2022.

[5] The Defendant was absent at Court on the trial date and the Plaintiff proceeded on a default basis as envisaged in terms of the provisions of the said Orders.

[6] The Plaintiff led evidence by way of the expert witness reports and case authority. No witnesses were called to testify at the hearing.

### B. THE PLAINTIFF:

[7] The Plaintiff is Minah Sebalo Rakwena, an adult female consultant, resident at 2620 Block 6, Moloto, Gauteng Province.

[8] The Plaintiff was 30 years old and employed at Becort Financial Services at the time of the accident. She is unmarried, with one minor child and lives with her mother. She also has a diploma in administration.

[9] According to her experts reports, the Plaintiff was in good health before the accident, and has no history of chronic diseases or previous trauma-related surgeries. The Plaintiff never returned to work due to the head and other injuries and have been unemployed ever since.

[10] As a result of the accident, the Plaintiff was rendered unconscious and woke up in hospital. She was admitted to and treated at the Witbank hospital for approximately 2 weeks. After her discharge she had to wear a neck brace for 3 to 4 weeks.

#### C. THE INJURIES AND ITS SEQUELAE:

[11] She suffered various injuries as a result of the accident. These injuries will be discussed in more detail herein-under, through the reports of the medical experts.

[12] The expert reports indicate that the Plaintiff sustained several injuries, as set out herein-under:

##### (a) Dr PT Kumbirai (Orthopedic Surgeon):

- He reported the following: head and neck injuries and pain, personality changes (short temper), poor short-term memory, poor concentration and recurrent headaches.
- He found the Plaintiff's orthopedic whole person impairment at 0% WPI, and that no significant orthopedic negatives forseen for loss of amenities of life, and life expectancy.
- He concluded that past and future medical expenses should be forseen, but not any orthopedic surgeries.
- With regards to the effect of the injuries on the Plaintiff's social life, the expert reported personality changes, and the effect on employment is that she never continued her employment due to the head injury.

##### (b) Dr B Mosadi (Neurosurgeon):

- He reported that the Plaintiff complained about neck injuries and pain, frequent headaches and memory problems. He also received complains about left shoulder pains, aggravated by physical activity relieved by analgesia.

- The doctor also noted cervical spine whiplash injury and grade 3 concussion, and was treated with analgesia, X-rays and soft neck collar. She also suffers from post-concussion headaches.
- The above mild head injury could result in prolonged neurocognitive impairments and that may require neuropsychological treatment. No physical disability was found.
- There is also a +/- 2-5% chance of developing late onset post traumatic epilepsy.
- The Plaintiff will incur medical expenses and suffered loss of earnings. She also endured pain and suffering and lost the amenities of normal living during the hospitalisation period.

(c) Bogone Ngwato (Occupational Therapist):

- The injuries to the head, neck, left arm and left leg was observed. Occupational therapy would be required and the cost thereof must be taken into account in the claim. A multi-disciplinary team (including a neurosurgeon, physio therapist, clinical psychologist and orthopedic surgeon) required to assist with future treatment and interventions, plus their costs to be included.
- The Plaintiff is independent with self-care but would need assistance in relation to heavier household chores and spring-cleaning duties. She will also require special and assistive devices/equipment (including a high chair, low bench, small step ladder, etc) to assist her in carrying out her normal daily chores. She will also require transport, and reimbursement towards accident related trips.
- Due to the severe pain and headaches following the accident, and the psychological effects thereof, the Plaintiff's socialisation and efficiency in ADL participation will also be effected in the long term.
- The injuries sustained (as detailed by Dr PT Kumbirai and Dr B Mosadi) as well as the psychological and neuropsychological limitation raised above, will make it difficult for the Plaintiff to continue the work she has done pre-accident, but she should potentially qualify to do work within the light to low medium work category. She will be able to do so with the assistance of physio therapy and psychological interventions and treatments. She is therefore rendered a compromised competitor compared to her uninjured peers.

(d) NN Mqhayi/Mbabazi Consulting (Clinical Psychologist):

- Pre-accident history: The Plaintiff was in good health prior to the injuries, no history of head injuries, no mental disorder or epilepsy or previous motor vehicle accidents. She has matric and employed as a consultant at time of the accident. There were no significant occupational, academic or psychological difficulties prior to accident.

- Post-accident history: she could not continue her work and is currently unemployed. She complains about inability to sleep on her left side, swollen left leg when walking for prolonged periods, headaches, epistaxis, neck and back pains, she is easily angered and anxious when in a motor vehicle.
- Neurocognitive impact: the Plaintiff demonstrated decreased intellectual capacity, inadequate attention and concentration difficulty with working memory and double tracking abilities, adequate verbal fluency and general knowledge, fine motor skills and severe anxiety.
- She is unlikely to cope with tertiary education, as a result of limited neurocognitive abilities, mental speed, etc. The accident negatively affected her life and academic opportunities.
- Neurobehavioural changes: severe anxiety, PTSD symptoms, cognitive deficits, chronic pains and emotional fall-outs are limiting her occupational and social interactions, compromises her sense of independence, self-worth, her ability to achieve in life and as a mother has been compromised by loss of income.
- Loss of amenities: her neurocognitive and emotional problems have limited her enjoyment of life, reduced her academic opportunities and affected her job and social functioning. She will benefit from psychotherapy by a clinical psychologist.

(e) Prof DS Magazi (Neurologist):

- This expert reported that the Plaintiff presented with head, neck, shoulder, arm and ankle injuries. He reported that due to the head injury, she suffered unconsciousness on impact and only regained it later in the hospital. He indicated that the head injury was a moderate one.
- Symptoms: headaches, memory problems, epistaxis, neck and shoulder pain, arm and ankle pain, temper and anxiety were exhibited by the Plaintiff.
- He suggested treatment and intervention by experts in respect of the head injury, headaches, memory problems, pain and the temper and anxiety problems, eg, neurologists, physiotherapy, orthopedic surgeon as well as medication.
- Medical costs: he proposed that these costs of the required experts be included into the claim for damages.
- Life expectancy: no definite shortened life span expected.

(f) Christa Du Toit (Industrial Psychologist):

This psychologist reported as follows:

- Work history: worked as consultant and earned an amount of R5 000-00 per month, plus sales commission (+/- R2 000-00 to R2 700-00 per month), as well as bonus after 6 months.
- disability/other grants: none received currently.
- actual income: R10 536-03 per month (monthly package), that is R126 432-36 per month, as per pay slip of 25 August 2017. Having regard to all work perks and other information, the psychologist suggest the following:

(a) for purpose of calculation but for the accident: an amount of approximately R128 019-95 per annum, which fall under the parameters of semi-skilled worker per Robert Koch.

(b) for quantification purposes: taking into account the Plaintiff's age, educational and limited employment history, a straight time progression from her pre-accident earnings to the upper notch of semi-skilled workers (per Robert Koch) towards age 45 is projected as an estimated career ceiling with increases mainly inflation based there-after. This expert recommend pre-accident contingencies to accommodate uncertainties of availability of employment/fluctuations in earnings and periods of unemployment between jobs. According to this expert, the Plaintiff could have worked until age 65, depending on her general health, preferences and circumstances

- for purposes of calculation regarding the accident: the Plaintiff was unable to work after the accident. She, however, was unable to continue work due to injuries sustained and resigned. She remained unemployed from the date of accident to the present.

- future loss of earnings: it was discussed herein-above already. It is clear from the expert's reports that the Plaintiff suffered some loss of earning capacity, more so from a neuropsychological viewpoint and her experience of the accident. She was more suited to her pre-accident job, which was mainly sedentary in nature. She would probably experience longer periods of unemployment/fluctuations in earnings. An applicable higher than normal post-accident contingency would be recommended to accommodate uncertainties as it refers to availability of employment that falls within her residual work capacity, fluctuations in earnings and long periods of unemployment between jobs.

(g) Clemans, Murfin & Rolland (Actuaries):

The Actuary report sets out the calculation and the basis thereof of the Plaintiff's loss of income.

#### D. MERITS:

The Defendant confirmed that it conceded the merits 100% in favour of the Plaintiff [refer to the Defendant's email dated 02 June 2021 to Plaintiff, on pg S1 on Caselines].

#### E. QUANTUM:

##### (I) past medical and hospital expenses:

The Plaintiff claimed medical and hospital expenses in her particulars of claim, but no evidence was provided in the papers. It appears that the Plaintiff abandoned this claim, and it was also not dealt with at the hearing. Accordingly, this Court was not called upon to adjudicate on these heads of damages.

##### (II) future hospital and medical related expenses:

It is clear from the expert reports and evidence before this Court that the injuries sustained by the Plaintiff will attract future medical, hospital and other related expenses. The details of these have also been discussed above. Accordingly, this head of damages should be dealt with in terms of section 17 (4)(a) of the RAF Act 56 of 1996, and this Court intend to grant an appropriate order to this effect.

##### (III) the past and future loss of earnings/loss of income capacity:

(a) The past and future loss of earnings has been calculated by the Plaintiff's actuaries and the bases of such calculations appear to accord generally with the facts and probabilities in this matter.

(b) The Actuary report deals with the projected future and past loss of earnings. The calculation takes into account the input of the Industrial psychologist (C du Toit), discussed herein-above.

(c) At the hearing this Court was referred to RAF v CK (1024/2017)[2017] ZASCA 151 (1 November 2018 at para [30] hereof, where the Court dealt with contingencies where the SCA confirmed that it is trite that general contingencies cover wide range of considerations which vary from case to case [RJ Koch: The Quantum Yearbook (2015) at 120]. The SCA indicated that 5% and 15% for past and future loss respectively have become accepted as "normal contingencies" and that the usual considerations include taxation, early death, saved travel costs, loss of employment, promotion prospects, divorce, etc. The age of the Plaintiff is also a consideration in determining contingencies. In Bee v RAF 2018 (4) SA 366 (SCA) at para 116 it was said that the younger the victim, the longer the period over which the vicissitudes of life will operate and the greater the uncertainty in

assessing the claimant's likely career path. In that case a contingency of 15% for future loss of earnings over a work lifespan of 11 years was appropriate (RAF v CIC, *supra*, at para [32]).

(d) It was contended on behalf of the Plaintiff that contingencies of 15% be applied in respect of past and 35% in respect of future loss of damages. The Plaintiff based this contention on the opinion of the Industrial Psychologist and actuary consulted in this matter. The Industrial Psychologist recommended that a higher contingency be applied in this case based on the factors and circumstances of this particular case.

(e) According to the actuarial calculations, the accrued value, if the accident did not occur would be R408 048-00 and the prospective value R3 380 516-00.

(f) From the evidence led, there can be little doubt that the Plaintiff's injuries were serious and does affect her employment possibilities and opportunities negatively.

(g) However, it is unclear that the said injuries rendered the Plaintiff completely unemployable. For example, Dr PT Kumbirai, the orthopedic surgeon, stated that no significant orthopedic negatives are foreseen for loss of amenities of life and life expectancy, whilst Dr B Mosadi (neurosurgeon) could not find significant disability. The Occupational therapist (B Ngwato) found that although it will be difficult for the Plaintiff to continue to work as she has done pre-accident, the Plaintiff should potentially qualify to do work within the light to low medium work category, with the assistance of physiotherapy and psychological treatment. Prof DS Magazi (neurologist) indicated that no definite shortened life span is expected in respect of the Plaintiff.

(h) The Defendant, in its email dated 02 June 2021, to the Plaintiff's attorneys, noted that upon admission, on hospital records, no lacerations were present, no follow up visits to the hospital for treatment post-accident, and only whiplash from the neck. The Defendant therefore offered an amount of R556 671-40 for this head of damages (a 5% differential spread was applied).

(i) It appears from the foregoing that the parties are far apart with regards to the amount of compensation to be awarded for loss of earnings/earning capacity.

(j) With regards to the legal principles that apply in relation to loss of earnings, the following have been consulted:

(k) For a Plaintiff to succeed on a claim for future loss of earnings, he must prove on a balance of probabilities that he suffered a significant impairment giving rise to



a reduction in earning capacity. There must be proof that the reduction in earning capacity gives rise to pecuniary loss [Rudman v RAF 2003 (2) SA 234 (SCA)].

(l) In De Jongh v Du Pisane 2004 (5) QOD J2-103 (SCA) it was reiterated that contingency factors cannot be determined with mathematical precision and that contingency deductions are discretionary. This principle was also confirmed in Zondi v RAF (2565/2015) [2021] ZAGPPHC 707 (26 October 2021) at para 14.

(m) In Herman v Shapiro & Co 1926 TPD 367 at 379 it was held as follows:

*"Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate, but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages".*

(n) It is trite that the trial Court has a wide discretion to award what it in the particular circumstances order to be fair and adequate compensation to the injured party for bodily injuries and their sequelae [AA Mutual Association Ltd v Maqula 1978 (1) SA 805 (A) at 809].

(o) There are no hard and fast rules to be applied in deciding what a fair and adequate compensation to an injured party should be. Arbitrary considerations must inevitably play a part. Any enquiry into future loss of income is by nature speculative because it involves prediction of the future [Moeketsi v RAF (5651/2016) [2021] ZAFSHC 214 (30 July 2021) at para [21]; Southern Insurance Association v Baily NO 1984 (1) SA 98 (AD)]

(p) With regards to actuarial calculations, it was held in the Baily NO decision, *supra*, as follows:

*"...while the result of an actuarial computation may be no more than "informed guess" it has the advantage of an attempt to ascertain the value of what was lost on a logical basis" [at 114E; also see Moeketsi, *supra*, at para 22].*

(q) It was submitted on behalf of the Plaintiff that she would be prepared to accept an amount of R367 243-20 in respect of past loss of earnings, the latter amount being calculated at the amount of R408 048-00 as proposed by the actuary with a 15% contingency applied thereto. However, the 15% calculation on the R408 948-00 comes to an amount of R346 840-80 rather than the R367 243-20.

(r) This Court does not find the Plaintiff's contentions regarding past loss of earnings, taking into account of what was said at paragraph [111] (g) and (h) above, problematic as it is based on the calculations of the Plaintiff's actuary and

advice of the Industrial Psychologist and other medical experts on the one hand, and on a fair and reasonable contingency percentage of this particular case on the other. An award will be made according to these factors.

(s) With regard to future loss of earnings, the Court considered all the evidence, including the experts reports, case law the considerations referred to in paragraph [111] (g) and (h) above, all factors and circumstances and concluded that the amount proposed by the actuary cannot be sustained. This Court, after taking all the evidence before it into account, exercised its discretion and is inclined to award an amount of R1 250 000-00 as fair and reasonable for this particular head of damages.

(IV) general damages:

(a) At the hearing it was contended on behalf of the Plaintiff that the Defendant did not specifically accept that the Plaintiff's injuries were serious, but that the Defendant conceded the merits 100%.

(b) Section 17(1) of the RAF Act (as amended) provides that the assessment of the seriousness of an injury shall be premised on a prescribed procedure. Regulation 3 of the said legislation provides that a party wishing to claim general damages must be assessed by a medical practitioner who shall complete a serious assessment report, known generally as a RAF 4 form. In terms of Regulation 3(3)(c) the Defendant will only be liable to compensate a party for general damages in the event that the Defendant is satisfied that the injury has been correctly assessed as prescribed by the Regulation. If the Defendant is not satisfied that the injury has been correctly assessed, the RAF 4 form may be rejected and provide reasons for the rejection or direct the injured party for a further assessment to establish if the injury qualifies as a serious injury. This was confirmed by the Supreme Court of Appeals in Road Accident Fund v Duma [2012] ZASCA 169.

(c) The decision to determine if an injury is serious or not for the purposes of the RAF Act *supra*, is that of the Defendant and the Court can only enter the fray after a party exhausted the procedure under PAJA [Mabasa v RAF (86350/2018)[2021] ZAGPPHC 778 (29 October 2021). In Mphaha v RAF (698/2016)[2017] ZASCA 76 at para 14, this principle was explained as follows:

*"...an interpretation that seeks to suggest that because the Fund did not make a decision within 90 of receipt of the SIA report, it is deemed to have been accepted, that the third party has suffered serious injuries is untenable and in conflict with the provisions of subsections 17(1) and 17(1A) of the Act, and regulation 3..."* and at 18 *"In my view, absent any constitutional challenge, the reading into the regulations of a deeming provision is impermissible and tantamount to arrogating to court the powers of law-making functions"*

(d) From the Court papers, it appears that the Plaintiff did complete and submit the RAF Form 4 to the Defendant, but there is no evidence on record to suggest that the Defendant accepted or rejected it. In the absence of this information, this Court is unable to adjudicate on this head of damages.

(e) In light of this fact that the Plaintiff did not provide specific detail and proof on the acceptance or rejection of the RAF Form 4, this Court is not competent to deal with the issue of general damages and it therefore needs to be postponed in the circumstances.

#### F. CONCLUSION:

This Court is convinced that the Plaintiff proved that she suffered significant injuries/impairment, which gave rise to the reduction of the earning capacity and which caused the pecuniary loss.

In light the evidence cumulatively, including the nature of the injuries, age of the Plaintiff, the expert reports, case law cited and all other factors and circumstances of this particular case, this Court cannot find anything unreasonable, unfair or contentious with regards to the contentions made on behalf of the Plaintiff regarding loss of earnings.

This Court is therefore inclined to award, as fair, just and adequate compensation, as follows in favour of the Plaintiff:

- (a) past loss of earnings, an amount of R347 440-80; and
- (b) future loss of earnings, R1 250 000-00;
- (c) total: R1 597 440-80.

#### G. COSTS:

The general rule is that costs will follow the result and this rule should not be deviated from except where there are good ground for doing so [Myers v Abramson 195 (3) SA 438 (C) at 455. This Court could not find any good grounds upon which it should depart from the general rule.

#### H. ORDER:

In the result, judgment by default is granted in favour of the Plaintiff against the Defendant for:

1. payment of the sum of R1 597 440-80;
2. Defendant is ordered to pay the aforesaid amount into the trust account of the Plaintiff's attorneys, within sixty (60) days of date of this order;
3. in the event of default of the above payment, interest shall accrue on the outstanding amount at the prescribed rate per annum, calculated from due date until date of payment.
4. that the Defendant shall provide the Plaintiff with an undertaking in terms of section 17 (4)(a) of the Road Accident Fund Act 56 of 1996, for the payment of the costs of the future accommodation of the Plaintiff in a hospital or nursing home for treatment of or rendering of a service or supplying of goods to Plaintiff arising from the injuries sustained in the motor vehicle accident on 27 November 2017 after such costs have been incurred and upon proof thereof.
5. the Defendant is ordered to pay the Plaintiff costs of suit on a party and party basis on the High Court scale, including the costs of the Plaintiff's experts, and qualifying costs of the experts whose notices were served on the Defendant.
6. in the event that costs are not agreed, the Plaintiff will be entitled to serve a notice of taxation on the Defendant. The taxed cost will be payable within fourteen (14) calendar days of date of taxation and shall likewise be paid into the said trust account of the Plaintiff's attorneys.
7. the claim for general damages is postponed sine die.



B CEYLON

Acting Judge of the High Court of South  
Africa

Gauteng Division

Pretoria

Date of Hearing: 07 March 2022

Date of Judgement: 20 June 2022

Appearances:

For the Plaintiff: Mr Malesa

Instructed by: MHP Malesa Attorneys

Pretoria

For the Defendant: No appearance

Instructed by: No appearance