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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO.: 72406/2016

- 1. REPORTABLE: YES / NO
 - 2. OF INTEREST TO OTHER JUDGES: YES / NO
 - 3. REVISED.
- DATE: 19/09/2023

In the matter between:

K S MSELEKU

Plaintiff/Applicant

And

THE ROAD ACCIDENT FUND

Defendant/Respondent

JUDGMENT

SEKHUKHUNE AJ

Introduction

[1] This is an application for default judgment heard in terms of on Rule 38(2). For the purpose of this judgement, the parties shall be referred to as Plaintiff and Defendant respectively. The Defendant's defence was struck out on 20 July 2020 before the honourable Koovertjie J.

[2] The parties settled the merits aspect of the matter on the basis that the Defendant is liable for 100% of the Plaintiffs proven damages. The Plaintiff was a passenger involved in a motor vehicle accident on 8th March 2015. To this end, an offer made by the defendant was handed up and was confirmed by Counsel for the Defendant, Ms LE Lefulute.

[3] The matter is before court for the determination of Quantum, particularly general damages, future medical expenses and loss of earnings. The Plaintiff has filed medico-legal reports which were not countered. Advocate LE Lefulute for the Defendant, confirms that the Defendant is satisfied in terms of Section 17(1A) of the Road Accident Fund Act 56 of 1996, read with Regulation 3, that the Plaintiff qualifies for general damages. The court appreciates the late intervention by Defendant's counsel in this regard as this head of damages would have been postponed in the absence of the decision made. An offer on general damages with deleted figures and an undertaking in terms of section 17 (4)a was handed up for confirmation.

Background

[4] The Plaintiff is an adult female born on 19 February 1991, making her 32 years of age. She has lodged a claim with the Defendant. The claim is for damages suffered and arising from a motor vehicle accident in which she was involved as a passenger on 08 March 2015.

[5] On 14 September 2016, summons was issued against the Defendant claiming R5 000 000 made up as follows:

5.1 General damages R1 500 000

5.2 Future loss of earnings / capacity R2 00 000

5.3 Past and future medical expenses R1 500 00

The summons was served on the defendant on 15 September 2016. The particulars of claim were amended, but this is not substantial, as the claim was now reduced to R3 000 000.00

Plaintiff's evidence on Quantum :

[6] According to the statutory medical report Form 1 dated 08/08/2015, completed by Dr AJ Hovies, the Plaintiff has sustained a laceration on the knee and has headaches.

[7] The hospital records confirm that the Plaintiff was received following an involvement in the accident and confirmed the injuries as recorded in the statutory medical Form 1.

[8] Expert reports were also filed in support of the claim, and the experts' findings, opinions and recommendations are discussed hereunder.

[9] Dr Schnaid, the orthopaedic surgeon was placed in possession of the hospital records and the completed RAF Form 1 when doing the assessment on 21 November 2016, on 11 July 2019 and 18 March 2023.

[11] He states that the plaintiff sustained a head injury and soft tissue injury to the left knee. The knee laceration was sutured and stitched.

[12] The Plaintiff complains of pain in the left knee, lumbar spine with radiation into the leg as well as pain in the cervical spine. She complains that she is unable to walk long distances, sit or stand for long periods. Furthermore, she cannot run and is unable to carry heavy objects. She also experiences headache, forgetfulness, emotional mood swings and blurring of vision. The left knee locks in inclement weather. She is no longer playing netball which she used to play pre-accident.

[13] The expert opines that the plaintiff will need future medical attention for the knee and the back.

[14]He opines that the knee needs an arthroscopy to see if there is any damage that needs to be repaired. The Knee injury pre-disposes her to osteoarthritis which will probably necessitate a total knee replacement.

[15]He opines that the lumbar and cervical spine need medical attention and that provision for a cervical fusion need to be made.

[16]I pause to state that the back problem only arises at assessment. It is not clear when it started and the circumstances around it as it is not reported anywhere in the lodgement documents. It is noted that the other experts also mention this, but no nexus is established except to state that it is part of the now complaints. Some complaints involve the neck and shoulder as it appears below in Dr Segwapa's report. No nexus is established.

[17]The neuropsychological symptoms and complaints flowing from the injuries are deferred.

Dr Segwapa - Neurosurgeon:

[18]The plaintiff reports that she lost consciousness and regained it in hospital.

The paramedic however records her GCS at 15/15.

[19]At paragraph 3 of the first report of November 2016, the expert records injuries as laceration on the left knee and pain on the right parietal region which were treated, and Plaintiff was discharged on the same day. She underwent follow-up at the local clinic.

[20]In respect of complaints reported by the patient, she suffers from headaches especially when it is very hot. She experiences back pain and left knee pain.

[21]Dr Segwapa opines that with the information provided, there are features of mild concussive head injury and recommends a neuropsychological evaluation by a clinical psychologist.

Conservative treatment is also recommended for the headaches, backaches and knee.

[22]The expert does not explain as to the nexus between the accident and the now back pains complained about.

The same complaints are presented at the assessment on 23 May 2023.

Lufuno Modipa - Clinical Psychologist

[23]The expert was in possession of the orthopaedic report, the neuro-surgeons report and medical records.

[24]At paragraph 2.2 the expert notes that the medical records documented that the Plaintiff sustained a head injury and left knee laceration.

[25]The Plaintiff complaints of headaches lower back pain and left knee especially in cold weather. She stated that she stopped working due to the pain. She noted that her job needed her to stand for prolonged period.

[26]The expert conducted tests and summarises the findings at paragraph 9.

[27]The findings suggest that she still retains residual effects of a head injury.

She presents with emotional difficulties and cognitive deficits in all areas assessed. She presents with moderate chronic symptoms of depression from which she will suffer on a long-term basis.

20 sessions of psychotherapeutic intervention are recommended.

Brenda Pillay - Occupational Therapist

[28]At paragraph 1.2 of the first report the expert notes that the Plaintiff sustained a head injury and an injury to the left knee and refers to the other reports for further details on treatment.

[29]She complains of left knee pain, back pain daily, difficulty carrying, lifting and bending. She is unable to run, jog or engage in high impact activities. She tends to tire easily.

[30] Physical assessment revealed restricted movement on the left knee, back, neck and shoulder.

She demonstrated dynamic strength to do sedentary, to light work and early ranges of occasional medium work with some accommodation.

Her current work demands range from light to occasional medium strength demands with frequent standing and walking. It involves weight material of 5 - 6kg.

[31] The expert notes that the current job does have standing and walking demand and states that the Plaintiff alluded that the manager is sympathetic. (This sympathetic aspect is not confirmed).

Given the symptoms which included the neck, lower back and knee pain, she is not suited for the current job as a general worker.

T Talmud.- Industrial Psychologist

[32]The expert confirms that the Plaintiff has grade 11 She failed grade 12 in 2011. She defers to information in the absence of collateral.

[33]She was working on a contractual capacity for the Msinga Local Municipality, as a general worker (waste). She started on 1 April 2013, therefore working as such for almost 2 years when the accident occurred. She has been working 12 days in a month from 7:00am to 4:00pm on a Extended Public Works Program ("EPWP"). The

earnings of R1200 without additional benefits are earned by the EPWP/Contract workers since engagement. Their contracts are not automatically renewed as they depend on funding availability and workers maintaining good performance.

[34] It is confirmed that the Plaintiff was a good worker before the accident. She was off work for 3 months and was paid as per employer certificate completed by the employer.

Upon return, her work deteriorated which poses a disadvantage for permanent positions as compared to the other individuals who are not injured and do not have the difficulties that she has.

[35] She was accommodated upon return because she fatigues easily, struggles to stand for extended periods and difficulty bending. She also experiences emotional difficulties.

[36] The Plaintiff was expected to continue in the line of work and similar positions had the accident not occurred e.g packer, cleaner, assembly line worker, assistant etc. She was expected to reach her career plateau at between 40 and 45 in line with Paterson A2/A3 earnings. Note is that she was earning at a Peterson A band at the time of the accident.

[37] Post morbidly she is not expected to sustain the current job as she has now become unsuited for it and her performance has been confirmed by the employer to have deteriorated and is now accommodated to take breaks and while others complete her job when she is unable to. She retains the ability to do jobs falling in the light work which require accommodation. Should the contract not be renewed, she will struggle to secure a job, while on the other side she has been disadvantaged in securing permanent employment with the current employer. In addition to this, the experts have found her complaint to be of continuous nature affecting her career.

[38] In the addendum report of 15 June 2023, it is noted that the Plaintiff resigned from the work because of the difficulties expressed in the first consultation and report. She at the time was earning R1 300 in January 2020 and R1 192 in February

2020. She stopped working in February 2020 because of the combination of symptoms related to the knee and lower back. She remains unemployed to date. Reference is made to the occupational therapist findings in this regard, having considered the expert reports by the primary experts regarding the diagnosis and prognosis (psychological and physical).

[39]Premorbidly, the expert paints two probable income scenarios for the Plaintiff that is if she were to continue in the formal sector and in the informal sector.

Had she continued to work in the formal sector she would have been earning in line with earnings of Paterson A2/A3 as per initial report, with additional allowances and or benefits once she secured a permanent job.

Scenario two is based on informal sector. Had she secured a job in the informal sector the national minimum wage (R25 hourly rate), which is R4 956.90 per month.

Thereafter she would have received inflationary increases up to the age of retirement being 65.

[40]Note that only 25% of the workforce work in the corporate sector, making the second scenario the most probable given the educational and work profile of the Plaintiff herein (See pages 127-128 ,The Quantum Year Book-Robert J Koch, 2023. The likely earnings are more realistic over possible earnings **(Casterns v Southern Insurance** 1985 (3) SA 1010 (c) at 1020 Notably, the Actuary makes reference to this at paragraph 3 of the report.

General Damages:

[41]Counsel has referred the court to case law in support for an award in general damages.

[42]Although the Plaintiff has initially argued for R700 000.00, the court was requested to adjourn the matter for discussions in an effort to settle the matter partly

or wholly. The Plaintiff seemed to engage the Defendant despite the Defendant not being formally before court. This engagement obviously brought about a favourable decision in respect of accepting general damages. The court was informed that the two counsel have discussed the general damages and Counsel for the Defendant having received mandate on the decision regarding the seriousness of the injuries, has also assessed this head of damages at R550 000.00 but doesn't have instructions to tender same. The defendant's Counsel confirms this.

[43]The court is now only seized with the adjudication regarding the appropriate amount/award given the evidence.

[44]Counsel for the Plaintiff referred to various cases at paragraphs 24 to 27.

Radebe v Road Accident Fund (14645/2017) [2019]ZAGPPHC 475 (8 August 2019

M obo M Road Accident Fund (4484/2016) [2018] ZAGPJHC (18 June 2018)
Maele v Road Accident fund ,QOD Volume VII,E4-1

Sefuthi v Road accident Fund [2022]ZAFSHC 268 at 39-50

The first two cases deal with mild head injury associated with post-traumatic disorders as the main injury, with some other minor injuries. The awards range from R400 000.00 - R450 000.00. The third case deals with a mild concussive head injury and left tibial injury which has completely healed with a possible arthroscopy and debridement. The award value is R477 000.00. Notably, the injuries in first two cases do not have a knee injury and the Plaintiff sustained one that needed to be stitched. The knee now has limitations and requires future medical intervention inclusive an arthroscopy and an unrated knee replacement.

[45] Counsel lamented on Sefuthi v RAF 2022 ZAF SHC 269 in which an amount of R700 000 was awarded. In this case the Plaintiff sustained:

- A fracture of the femur (2cm shorter) A fracture of the left knee

- Rib fracture Lung contusion
- Multiple facial abrasions
- Laceration forehead
- Abrasions left arm

[46]The sequelae in Sefuthi included scarring, shortening of the leg, arthritis, septic and oozing of discharge at the open reduction internal fixatives region. A high probability of a knee replacement was in this case indicated with revision of the knee replacement every 12 - 15 months. The injuries are clearly a lot different and more serious when compared to the documented injuries sustained by the Plaintiff in the case before court and accident under discussion. The two are clearly not comparable.

[47]It is clearly documented from Form 1, which is based on hospital records that the Plaintiff sustained a knee injury and a mild head injury. The knee injury was sutured and stitched. The injuries and sequelae have negative impact on the Plaintiffs day to day and career functionality. She has residual psychological problems as confirmed by experts and collateral information.

[48]There clearly is no case that can mirror the four corners of another, but can be used as a guidance .In my view the amount of R600 000.00 (Six Hundred Thousand Rands Only) is fair and reasonable under the circumstances.

Loss of earnings:

In the heads of argument Counsel addressed the court on the initial calculation based on the reports that were made before the addendum reports before court. He argued for an amount of R1 191 560.00. Be that as it may, the contingency deductions argued at paragraph 20.2 to 20.4 and those advanced in court have been considered.

[49]A summary of the calculations dated 21 June 2023 based on the addendum report of the industrial psychologist is as follows:

	<u>Scenario 1</u>	<u>Scenario 2</u>
Past	R99 300	R72 600
Future	R2500 200	R1 139 200
Total:	R2 599 500	R1 211800

[50] Having accepted the earnings as calculated by the actuary at paragraph 5.5 in respect of the probable loss of earnings is:

Past loss of earnings:

<u>Past (uninjured):</u>	R141 100.00 -5% (R7055)
	=R134 045.00
Past (injured)	R68 500.00
The total past loss of earnings	<u>R65 545.00</u>

The court notes that counsel argues for a higher than normal 15% deduction on the past loss of earnings due to the postulation made in the initial industrial psychologist report, I am of the view that this should not be the case on the scenario accepted by the court. The Plaintiff had already put her foot forward actively working towards getting a permanent job by working on the waste program (exploration phase of her career) as stated by the industrial psychologist.

Future loss of earnings:

The loss is calculated at R1 139 200 before the application of contingency deductions.

Counsel argues that a contingency deduction of 20% should be applied given the age and the progression of the Plaintiff up to A2/A3 scales (which was rejected for

probability) and suggests that a further 20% be applied, making the total deduction 40%. When probed on the probability of the earnings with the facts before court, counsel suggested that a total of 55% be deducted to cure the basis. An illustration was made at the back of the heads of argument and handed up.

[51] As stated above, the court's starting point was the basis upon which the calculation has been made and accepts that the Plaintiff would have likely been employed in similar unskilled/ semi-skilled basis on the second scenario painted. The employer confirmed that the EPWP's members are considered as employees when internal municipal vacancies are advertised. It is not clear as to what positions she could have in all probability been short listed for, interviewed and hired, given her qualifications and work profile. This is where the experts brought about the light.

[52] The Plaintiff was 24 at the time of the accident and was employed in a contract which is not guaranteed renewal and depends on funding of programs (EPWP). She has been employed and earning the same income for almost 3 years before and after accident, with a slight increase of approximately R1 00 in 2020.

[53] The Plaintiff had 41 years career marathon and a lot of uncertain positives and negatives could have taken place in a saturated market of people with her qualification profile. An application of ½% sliding scale is just a little over 20%. (R Kock-The Quantum Yearbook pg 123). She is now suffering from a combination of limitations from the head injury and the knee injury. Over and above, she is said to be suffering from undocumented back, neck and shoulder sequelae, the nexus of which was not established. A 25% contingency deduction is fair and reasonable.

Therefore, the court awards R854 400 in respect of future loss of earnings.

[54] In the circumstances the Plaintiff is awarded the following:

[54.1] Future medical expenses: section 17 (4)a of Act 56 Of 1996

[54.2] General damages: R600 000.00

[54.3] Loss of earnings: R919 945.00

Total: R1 519 945.00

[55]The capital amount to be paid by means of into the account of Dudula Incorporated Trust account, Standard Bank

Account number: [....]
Branch: [....]
Ref: [....]

[56]The defendant shall pay the Plaintiffs costs on a party and party scale including cost counsel.

[57]Interest at the prescribed rate.

**P SEKHUKHUNE AJ
ACTING JUDGE OF THE HIGH COURT**

For the Appellants: Adv CR Van Onselen

Instructed by: Instructed by Madudula Inc

Heard on: 19 June 2023

Judgement handed down on: 19 September 2023