

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

CASE NO: 49906/17

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED

DATE: 05 JUNE 2023

In the matter between:

METU, LINDA SELINA

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGEMENT

BOKAKO AJ:

INTRODUCTION

1. On 30 April 2016 at about 14h30 and at Smith Street, Johannesburg, the plaintiff sustained injuries from driving a motor vehicle bearing registration letters and numbers unknown to the plaintiff and the plaintiff being a pedestrian. The collision was caused entirely due to the sole negligence of the insured driver.

2. The Plaintiff is Linda Selina Metu, a major female infra worker, born on 1[...]th M[...] 1967 and presently residing at 2[...] O[...] Street, Coligny. Ms Metu was injured due to an accident on 30 April 2016. The Plaintiff worked for Transnet as an

Infra Worker at the accident date. She commenced service in 2015. She was reportedly off work for three months but was paid during this time. As a result, in 2018, she earned R12,095 pm (R145,140 pa).

3. The Plaintiff launched a claim against the Road Accident Fund in terms of Section 17 of the Road Accident Fund Act 56 of 1996, amended ("the Act), as a result of the injuries, and as fully set out in the Summons.

4. The matter proceeds only regarding quantum, as the merits were previously settled 90% in favour of the Plaintiff. The matter was enrolled for trial and came before me on 24 April 2023. Advocate Van der Berg appeared for the Plaintiff and Advocate Mabena for the Defendant. Proof of service of the notice of set down directly on RAF has been filed. The State Attorney now represents RAF after parting ways with its earlier-appointed attorneys. This judgment was reserved after the Court had listened to brief oral submissions by both Counsels.

5. On 7 April 2019, the HPCSA found that the Plaintiff does qualify for general damages.

6. The Plaintiff demonstrated in her founding affidavit that the reasons for using the deposition for evidence are that the defendant did not intend to cross-examine experts regarding loss of earnings. Furthermore, the application of contingencies on the actuarial report is within the discretion of the Court, and it is more cost-effective to use an expert affidavit than to give evidence in person.

7. I do not doubt that, given the current status of the Defendant, it would most likely be convenient and justifiable for the Plaintiff to lead evidence by way of an affidavit. Accordingly, I find that the Plaintiff complied with the Rules of the Court in giving the Defendant reasonable notice of such an application.

8. Counsel for the Plaintiff submitted that the issues for determination concerned the Plaintiff's loss of earnings or earning capacity and general damages.

Loss of earnings or earning capacity

9. The Plaintiff served the following reports in support of his claim for loss of earnings: - Dr. Naidoo (specialist psychiatrist), Rolene Hovsha (clinical psychologist), Dr. Berkowitz (plastic surgeon), Dr. Reid (orthopedic surgeon), Joanne Tarry (occupational therapist), Lewis Rosen (industrial psychologist) and an actuarial calculation was obtained from Ivan Kramer CC.

10. Before the trial, the experts had deposed to affidavits in which they confirmed their qualifications and the opinions or contents of their medico-legal reports filed on behalf of the Plaintiff. All expert reports were served and filed timeously.

11. It was submitted that the Plaintiff sustained injuries in the collision described above Minor to mild brain concussion; Left forehead laceration; Right pubic rami fractures; Plaintiff had the following complaints in respect of sequelae from the abovementioned injuries: headaches; poor concentration; memory loss; depressed mood and right hip pain.

12. Dr. Naidoo (specialist psychiatrist) diagnosed the Plaintiff as suffering from a depressive disorder due to injuries sustained in the accident with travel-related anxiety symptoms.

13. Rolene Hovsha (clinical psychologist), the initial assessment revealed several cognitive deficits ranging from below average to severely impaired in the following areas of functioning: orientation; attention and concentration; numerical reasoning; speed information processing/motor speed; visuopraxy; executive functioning; memory and more areas of deficit were found on re-assessment, deficits were once again found in that Plaintiff was fully oriented in all spheres on re-assessment, it was also found that there were certain areas of improvement on re-assessment: on a test of initiation, her performance was initially impaired but now average; her capacity for abstraction and non-verbal concept formation, visual analysis, planning and visual motor co-ordination skills was below average originally, and average on re-assessment; her verbal ability for forming concepts, logical abstract reasoning, generalising and drawing relationship among different elements in the environment was severely impaired initially and impaired on re-assessment. In addition, some

areas deteriorated upon re-assessment: her ability to use practical judgment and common-sense reasoning, as well as the ability to appreciate and recall helpful information that is utilized in connection with sound and intuitive judgment, was superior initially but average upon re-assessment; numerical reasoning was found to be below average initially, but impaired upon re-assessment.

14. The clinical psychologist is further of the view that the Plaintiff's profile remains one of deficit functioning. She concludes that the deficits suffered by the Plaintiff align with a moderate traumatic brain injury. She also believes that the Plaintiff presents a symptom cluster well documented in patients following damage to the brain. Finally, she concludes that a significant period of 7 years has elapsed since the accident, resulting from which the deficits found upon re-assessment are likely to be stable and of a permanent nature and unlikely to improve over time.

15. Dr. Reid (orthopedic surgeon) Upon re-assessment, found that the Plaintiff had the following complaints: right groin pain related to activity and cold and inclement weather as well as lower back pain; difficulty finding a comfortable position in which to sleep; mobility is restricted in that she is unable to walk far or fast; difficulty sitting or standing for long periods; unable to lift or carry heavy objects; activities involving repeated flexing and straightening of her lumbar spine further aggravate her symptoms; she still walks with the aid of one crutch when she has to stand for long periods or walk far distances.

16. Dr. Reid confirms that at the time of the accident, the Plaintiff was employed as an Infra-worker (millwright assistant) at Transnet Freight Rail in Coligny, where she had been employed since 1 May 2015 (360). Before the accident, the Plaintiff's duties included carrying pipes, cleaning the pump house and vegetation site, and opening a grabber. Following the accident, the Plaintiff was off work for one month. Upon her return to work, she was assigned lighter duties such as fault reporting and cleaning the pump house and surrounding areas. Even though she is no longer required to carry pipes, the Plaintiff notes that her work duties still exacerbate her symptoms. Dr. Reid confirms that the Plaintiff intended to qualify as a millwright at the time of the initial assessment in January 2018. However, he is of the view that in light of three years have passed since the Plaintiff is unlikely to qualify as same. Due

to the Plaintiff's injuries, she will likely experience increasing difficulty with the strenuous and physically demanding duties required of her in factories, power plants, production facilities, and construction sites. Plaintiff's current employment is not suitable for her, considering her lumbar spine and pelvis pathology related to the accident. She requires sedentary type work that does not place excessive strain on her injured sites and where she can take regular breaks throughout the working day. Taking into consideration her age, the economic situation, and the high unemployment rate in the open labour market in South Africa at present, it will be exceedingly difficult for the Plaintiff to find new suitable employment.

17. Joanne Tarry (occupational therapist) concludes that taking into consideration the pain experienced by the plaintiff in conjunction with her orthopedic prognosis, in the interest of joint preservation, it can be concluded that the Plaintiff will be better suited to partake in the work of a sedentary physical demand level with aspects of light work. Her assessment revealed that the Plaintiff would have difficulty coping with her current occupation's more strenuous physical demands, namely sitting and standing for prolonged periods of time, handling heavy loads, and climbing stairs. Due to her right hip pain, the plaintiff demonstrated difficulty in walking, repetitive squatting, standing work, forward bend standing, crouching, stair climbing, and manual handling tasks. These tasks are essential mobility requirements within her workplace. Difficulty performing these tasks would decrease productivity and efficiency within her workplace. When considering the plaintiff's residual physical limitations, she would be viewed as an unequal competitor in the open labour market compared to her able-bodied counterparts. Her residual deficits have negatively impacted her vocational capacity, and she will likely experience an ongoing loss of productivity due to her obligations.

18. Lewis Rosen (industrial psychologist) on 14 January 2019 with addendum reports on 17 September 2021 as well as 30 March 2023, she states that an Infra-worker is an assistant to maintenance personnel involved in maintaining the infrastructure of the various assets at Transnet. The Plaintiff's post involves assisting a millwright at the Coligny fuel depot. Specifically, the millwright is responsible for servicing, maintaining, and repairing onsite machinery, pumps, and pipes. Plaintiff's job is to assist in manual labour, explicitly laying pipes and clearing the yard of

vegetation. At the time of the accident, the Plaintiff earned a package of R12 095,00 per month in 2018, which, in Rosen's view, is the equivalent of approximately the median of a Paterson A3 grade worker. Further confirms that instead of being promoted from the beginning of 2017 to the position of millwright as set out in previous reports, the Plaintiff remains in the same place at which she was employed at the time of the accident. Rosen believes that the Plaintiff likely has lost approximately 10% of income from the beginning of 2017, likely to continue, and that Plaintiff's vulnerability has increased.

19. The actuary's report set-out assumptions that the Plaintiff sustained a loss of income. In 2018 she earned R12,095 pm (R145,140 pa) by adjusting for inflation, which amounts to an income of R 134,888 pa as of January 2017. The Plaintiff now makes R 169,855 pa. The loss of income has been calculated from January 2017, but for the accident: She would have been promoted at the beginning of 2017. She would then have earned at the B1 level. She would have continued to receive inflationary increases in the future.

20. Regarding the accident: it is assumed that her income increased uniformly from R145,140 pa in July 2018 to reach R 169,855 pa by the valuation date. She will continue to receive inflationary increases. The Plaintiff has suffered from a decrease in productivity. She is now a more vulnerable employee and is an unequal competitor in the open labour market. Her career progress and opportunities will now be restricted. The above factors and all other risks affecting her income should be considered in the general contingency deduction. She would "but for the accident" have retired at age 65 years. It is assumed that her retirement age "having regard to the accident" will be as in "but for the accident".

21. The principle is to place the Plaintiff in the same financial position as she would have been but for the accident. This is done by calculating the value of her income for the accident and the value of her income regarding the accident. The difference is the loss of income suffered. She is further alluding that a deduction for general contingencies needs to be made to allow for savings in traveling to and from work and the possibility of a loss of income due to illness or unemployment.

22. The primary method of assessing loss of earning capacity is calculating the present value of the Plaintiff's future income had she not been injured in the relevant accident, calculating the current value of the Plaintiff's estimated future payment having regard to the injuries sustained in the collision, subtracting the second figure from the first and adjusting the final figure in light of all the relevant factors and contingencies after applying a 20% contingency differential, Plaintiff's total loss of earnings amounts to R482 950,00.²³.

23. On 7 April 2019, the HPCSA found that the Plaintiff does qualify for general damages. The Plaintiff was further assessed by Dr. Berkowitz (plastic surgeon); he found that the Plaintiff sustained a laceration of the left side of the forehead, reaching maximum medical improvement but leaving the Plaintiff with a severe permanent facial disfigurement that will not benefit from surgical revision.

Submissions on behalf of the Plaintiff

24. Counsel for Plaintiff made submissions concerning the evidence of the expert witnesses appearing above. Therefore, under this part, only some of the proposals by Counsel will be referred to avoid unnecessary repetition. Counsel argued on behalf of the Plaintiff that a fair and reasonable award would be arrived at when the average of the above assumptions is calculated, an amount of R482 950,00.

25. Regarding the application of contingency deductions, Counsel's submissions included the following about Nicholas JA at 116-117 of *Southern Insurance Association v Bailey NO 1984 (1) SA 98 (A)*: Where the method of actuarial calculation is adopted, 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" (per Holmes JA in *Legal Assurance Company Limited v Botes 1963 (1) SA 608 (A)* at 614F. Further, according to the learned author, Koch stated that "(general contingencies cover a wide range of considerations which may vary from case to case and may include: taxation, early death, saved travel costs, loss of employment, promotion prospects, divorce, etc. There are no fixed rules as regards general contingencies).

General Damages

26. On the aspect of General Damages, on 7 April 2019, the HPCSA found that the Plaintiff does qualify for general damages. The Plaintiff was assessed by Dr. Berkowitz, the (plastic surgeon); he found that the Plaintiff sustained a laceration of the left side of the forehead, which has reached maximum medical improvement but has left the Plaintiff with a severe permanent facial disfigurement which will not benefit from surgical revision.

27. The Defendant admitted the Serious Injury Assessments and confirmed that the matter was to proceed on the issue of general damages. On 1 August 2008, the Road Accident Fund Amendment Act, 19 of 2005 (*"the Act"*) took effect, thereby amending Section 17(1) of the Road Accident Fund Act, 56 of 1996. It did so by introducing limitations on the Respondent's liability for general damages. In this regard, the obligation of the Respondent to compensate a third party for a non-pecuniary loss now became limited to *"compensation for a serious injury as contemplated in subsection 1(A) of the Act and would only be paid to employ a lump sum"*.¹

28. Section 17(1)(A) of the Act provides that the assessment of the seriousness of an injury shall be premised on a prescribed method. Section 26(1A) provides that the Minister may make regulations regarding assessing severe damage. This the Minister did when the Road Accident Fund Regulations of 2008 were promulgated by the publication of the Government Gazette of 21 July 2009. Regulation 3 deals with the method of assessing a severe injury. Regulation 3(1)(a) provides that a medical practitioner must evaluate a Third Party wishing to claim general damages.

29. Regulation 3(3)(a) provides that such a third party shall obtain a Serious Injury Assessment Report (defined by Regulation 1 as it duly completed RAF4 form) from his medical practitioner. Regarding Regulation 3(3)(c), the Respondent is only liable to compensate the third party for general damages if the Fund is satisfied that the injury has been correctly assessed as prescribed by the Regulations in general.

¹ Section 17(1)(b) of the Road Accident Fund Act, 56 of 1996, as amended by Section 17(1)(A).

30. When the Fund is not satisfied that the third party's injuries were correctly assessed, the Respondent can reject the third party's RAF4 form and give reasons for its rejection.

31. Counsel for the Plaintiff referred to several relevant case laws with similar effects. Plaintiff submitted that R650 000,00 – R750 000,00 would be fair and reasonable. RAF 4 form qualified the Plaintiff's injury as a severe injury on the narrative test in terms of section 17(1) of the Road Accident Fund Act 56 of 1996 (as amended). The obligation of the Road Accident Fund to compensate a Third Party for non-pecuniary loss shall be limited to compensation for a severe injury as contemplated in section 17(1) (A). It shall be paid by way of a lump sum. Section 17(1) (A) of the Road Accident Fund Act governs compensation for non-pecuniary loss or general damages.

32. The Plaintiff sustained the following injuries: Pelvic fractures, Forehead laceration, and Psychological and psychiatric as a result of the Plaintiff's injuries. As a consequence of the injuries sustained by the Plaintiff: The Plaintiff had to undergo medical treatment and will in future have to proceed to undergo medical treatment, requiring an accommodation, medical goods, and services, as well as assistance and assistive devices; The Plaintiff was and/or is and/or will continue to be subjected to pain, suffering, discomfort disfigurement, inconvenience, emotional impact due to the injuries, disability and loss of amenities of life; the plaintiff was unable to attend to her income earning activities, resulting in a loss of income; she has suffered a partial alternatively destruction of her income earning capacity. As a result of the bodily injuries, the plaintiff has suffered damages. Counsel for the Plaintiff referred this Court to several judgments. The Plaintiff's injuries are distinguishable from some of the case law. I concur with the Counsel's submission that it is widely accepted that one can hardly find two similar cases.

33. Regarding the nature and extent of the injuries sustained by the plaintiff in this matter and the sequela, the compensation for general damages in the circumstances of R 600 000 for general damages is fair and reasonable.

Conclusion

34. I note the views expressed by the expert witnesses, prominently by Dr. Reid (orthopedic surgeon). He opined that due to the plaintiff's injuries, she would likely experience increasing difficulty with the strenuous and physically demanding duties required of her in factories, power plants, production facilities, and construction sites. Plaintiff's current employment is not suitable for her, considering her lumbar spine and pelvis pathology related to the accident. She requires sedentary type work that does not place excessive strain on her injured sites and where she can take regular breaks throughout the working day.

35. Taking into consideration her age, the economic situation, and the high unemployment rate in the open labour market in South Africa at present, it will be exceedingly difficult for the plaintiff to find new suitable employment. The experts further indicate and corroborate that the plaintiff is considered more vulnerable due to her involvement in the accident. Her depression and anxiety symptoms may make her less motivated and driven overall. This, in turn, may hamper her employment opportunities and render her vulnerable in any employment situation.

36. In *De Jongh v Du Pisani NO* [2004] 2 All SA 565 (SCA), it was stated that a court should exercise discretion on the appropriateness of quantum to be awarded and to do so with due regards to the previously decided cases of similar facts and law and fairness to the parties.

37. In this matter, before taking into account other decided issues and the cases Counsel referred to me for the Plaintiff, I believe that the amount for loss of earnings and incapacity that is fair is R482 950,00.

38. Therefore, I will award the Plaintiff the total amount of R482 950,00 regarding loss of earnings or earning capacity.

Order

On the premises, I make the following order:

39. The Defendant is ordered to pay the Plaintiff a sum of R600 000.00 (six hundred thousand rands) as compensation for general damages, And;

40. The Defendant is ordered to pay the Plaintiff a sum of R482 950,00 (four hundred and eighty-two thousand nine hundred and fifty rands).

41. Payment will be made directly to the trust account of the Plaintiff's attorneys within 180 (hundred and eighty) days from the granting of this order, the details of such trust account being:

Holder	De Broglio Inc. Attorneys
Account Number	1[...]
Bank & Branch	Nedbank – Northern Gauteng
Code	1[...]
Ref	M3523

42. The Defendant is ordered in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 to reimburse the Plaintiff for **90%** of the costs of any future accommodation of the Plaintiff in a hospital or nursing home, or treatment or the rendering of service to him or supplying goods to him arising out of injuries sustained by Plaintiff in a motor vehicle accident on which the cause of action is based, after such costs have been incurred and upon proof thereof.

43. The Defendant is to pay the Plaintiff's agreed or taxed High Court costs as between party and party; all costs are subject to the discretion of the taxing master.

a. The Plaintiff shall, if the costs are not agreed serve the Notice of Taxation on the defendant's Attorney of record; and

b. Plaintiff shall allow Defendant 180 (One Hundred and Eighty) days to make payment of the taxed costs after service of the taxed bill of costs.

44. The Plaintiff **did not sign** a Contingency Fees Act Agreement.

T.BOKAKO
ACTING JUDGE OF THE HIGH COURT

APPEARANCE:

COUNSEL FOR PLAINTIFF: ADV P J VAN DER BERG

COUNSEL FOR THE DEFENDANT: ADV S. MABENA

DATE OF HEARING 24 APRIL 2023.

JUDGEMENT DELIVERED: 5 JUNE 2023