HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 41578/2016

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 18 DECEMBER 2024

SIGNATURE

In the matter between:

LINDIWE PRECIOUS MBEVE Plaintiff

and

ROAD ACCIDENT FUND Defendant

Summary: *Claim against the RAF – quantum of damages – loss of earnings – plaintiff performing well academically post – accident, continuing with tertiary studies. Estimations of career path made by occupational therapist and industrial psychologist too conservative. Court not bound by expert opinions, especially when regard is had to facts.*

ORDER

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1. The defendant shall pay the plaintiff in the amount of R 2 238 368.00 (two million two hundred and thirty eight thousand three hundred and sixty-eight Rands) in respect of loss of earnings within one hundred and eighty days from the date of this order, whereafter the defendant shall

become liable to pay prescribed interest on said amount, calculated from 15 days after date of service of this order. The aforesaid amount shall be deposited into the plaintiff's attorneys of record trust account with the following details:

Name	:	MB Mabunda Incorporated
Bank	:	Standard Bank
Branch	:	Kempton Park
Branch Code	:	0[...]
Account number	:	0[...]

2. The issue of general damages is postponed *sine die*.

3. The defendant shall pay the plaintiff's costs on High Court party and party scale, including reasonable preparation and appearance fees for the plaintiff's experts and counsel's fees on scale B, and subject to the following conditions:

   3.1 In the event that costs are not agreed upon, the plaintiff will see to the taxation of such fees, subject to the discretion of the taxing master.

   3.2 The plaintiff shall allow the defendant 14 (fourteen) court days to make payment of the taxed or agreed costs, whereafter the outstanding amount shall attract prescribed interest until final date of payment.

4. It is noted that there is no contingency fees agreement between the plaintiff and her attorneys.

J U D G M E N T

The matter was heard in open court and the judgment was prepared and authored by the judge whose name is reflected herein and was handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the

electronic file of this matter on Caselines. The date of handing-down is deemed to be 18 December 2024.

DAVIS, J

Introduction

[1] In a claim for loss of earnings against the Road Accident Fund (the RAF), the plaintiff sought to rely only on affidavit evidence in terms of Rule 38(2), including that of her experts. The court declined to do so in respect of the occupational therapist and the industrial psychologist. After having heard evidence, the court concluded that the approach of these two experts were too conservative in respect of the plaintiff future post-accident income. The opinions expressed insufficiently took into account the plaintiff's post-accident tertiary studies. The court declined to follow the opinions and made an independent assessment of the future loss of earnings, as it was obliged to do.

Salient background

[2] The plaintiff was a 25 year old female passenger in a vehicle when the accident in question occurred on 24 February 2015. It is a pity that the matter took so long to be brought to finality, but the unintended benefit thereof is that the lapse of time created more certainty than speculation as to the plaintiff's post-accident career path.

[3] At the time of the accident, the plaintiff had not only passed grade 12 in 2009, but had completed a Computer End User Certificate. She was at the time employed as a practical trainee at Goldi Early Bird Farm as part of her further tertiary studies.

[4] The plaintiff has suffered a scalp laceration and degloving injury on the right side of her head. In addition her left wrist and forearm was injured. These injuries left her with unsightly facial scarring and a weakness in her left hand, particularly as the thumb tendon had been lacerated in the accident and had to be surgically re-attached. There was also a minor injury to her right hand.

[5] Since the accident, the lacerations have healed and the use of analgesics has eased the pain, but not entirely. I make reference to these injuries insofar as they

may have an impact on the plaintiff's earnings or earnings capacity, which will be discussed hereinlater.

[6] The tertiary studies referred to in paragraph 3 above was for a national diploma in agricultural management at UNISA. Although the completion of these studies were delayed by a year and the plaintiff had to complete her practical training later, at a different farm, she completed the diploma in 2016.

[7] Since then the plaintiff has completed skills training in respect of wheat survey, crop research, facility layout and preparation, layer unit operations, seed technology, broiler operations, piggery weight gain determination and milk parlour operation i.e further agricultural training over a wide range of agricultural activities.

[8] In January 2017 the plaintiff commenced with a B. Tech degree in Agricultural Management, but could not complete these studies due to financial constraints i.e for reasons unrelated to the accident.

[9] In 2020 the plaintiff commenced with an advanced diploma in Agricultural Management at UNISA. These studies were discontinued, again due to financial constraints.

[10] The plaintiff is still optimistic to eventually complete a Master's Degree in Agricultural Management and then to farm with chickens and vegetables.

Occupational therapist

[11] Ms Adroos, an occupational therapist since 1995, testified in confirmation of three consecutive reports complied by her in 2018, 2022 and on 12 August 2024 respectively.

[12] In contrast to the upward academic profile of the plaintiff, Ms Adroos was of the opinion that the plaintiff "*… is a candidate to perform sedentary and light work. She is ideally placed in her current placement [working in a kiosk at Mugg & Bean] … she will not be able to do cleaning tasks in a restaurant since this will exceed her*

residual physical abilities. She will have difficulty if she has to serve customers as a waitress. This makes her an unequal competitor …".

[13] Regarding the plaintiff's agricultural qualifications, Ms Adroos conceded that the plaintiff could work in the agricultural management sector but was of the opinion that "*… her work options could also be limited due to confinement to sedentary to light placements. She will not cope with practical tasks on the farm …*".

Industrial psychologist

[14] Ms Tasneem Mohamed, whose expertise has been accepted, testified as an industrial psychologist. She confirmed the contents of her initial report as well as her follow-up report, dated 26 September 2024.

[15] Ms Mohamed recorded that the plaintiff was, at the time of the follow-up assessment "*… working as a barista/cashier, saving funds towards her aspiration of farming*". She also noted that the plaintiff has followed up on her aspirations by applying with a business plan for participation in farming programs available at the Department of Agriculture and Land Reform.

[16] The industrial psychologist postulated three pre-accident earning scenarios. The first was the operation of an own farm. The second was, taking into account the plaintiffs qualifications at the time of assessment, the securing of work in the farming industry, initially in a "supporting" role, progressing to a supervisory or management capacity. This scenario also envisaged the possible security of funding or a government grant, which could lead to the management of an own farm. The third scenario was a "generic scenario", which, taking into account the plaintiff's current qualifications, could lead to the securing of some form of employment commensurate with a Paterson Grade B3 starting remuneration.

[17] Regarding the post-accident scenarios, Ms Mohamed concluded that "*… when considering the information at hand, [the plaintiff] will probably not be able to achieve her reported aspiration of farming with chickens and vegetables, a goal she had been working towards at the time of her accident in 2015. For purposes of*

qualification of the claim, the writer recommends a higher post-accident contingency deduction".

Actuarial calculations

[18] As is common in claims of this nature, the plaintiff employed the services of an actuary. An actuary can, however, only predict future loss by making assumptions, conclusions and presumptions based on relevant information made available to him at the time of calculation[1].

[19] In assessing future loss the evidence of actuaries is commonly led as a substitute for the court's own, less sophisticated, calculations[2]. A court is, however, not obliged to accept the evidence of the actuarial expert and must take care that the opinion of an expert witness does not usurp the functions of the court[3].

[20] In the present instance, the actuary has made calculations based on all three scenarios postulated by the industrial psychologist. The results are that for scenario 1 a total loss of earnings of R5 564 969.00 has been calculated, for scenario 2 R7 201 187.00 and for scenario 3 R8 950 477.00.

[21] The heads of argument delivered on behalf of the plaintiff merely states that the plaintiff should be awarded *"… the appropriate amount actuarially calculated …*".

Evaluation

[22] On 24 April 2018 DJP Ledwaba has already made an order determining that the RAF is liable for 100% of the plaintiff's proven damages and that the RAF shall furnish the plaintiff with an undertaking as contemplated in section 17(4)(a) of the Road Accident Fund Act[4].

[23] The issue of general damages and the plaintiff's entitlement thereto will also have to be postponed sine die and be referred to the HPCSA. This leaves the issue of the quantum of the plaintiff's loss of earnings as the only outstanding issue.

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[1] *AA Mutual Assurance Association v Maqula* 1978 (1) SA 805 (A) at 812B.
[2] Koch RJ, *Damages for lost income*, Juta, Cape Town, 1984 at 4.
[3] *Carstens v Southern Insurance Association Ltd* 1985 (3) SA 1010 (C) at 1021B.
[4] 56 of 1996.

[24] It is clear from a reading of all the expert reports and from what has been summarized above, that the plaintiff is a very bright and ambitious young woman. The expert reports postulating a limitation of her aspirations is almost demeaning to her. It is also trite that, for expert opinion to be of assistance to a court, it must be based on a proper factual basis[5].

[25] There is nothing to suggest that any consequence of the injuries sustained in the accident limited any of the plaintiff's academic capabilities. The only limitation of academic progress experienced to date, was that of a lack of finances, which is completely unrelated to the accident.

[26] I have again perused the report of the orthopeadic surgeon, and there is nothing to suggest that the occupational therapist's opinion that the plaintiff is only suitable for sedentary employment, has any factual basis.

[27] There is also insufficient factual basis to conclude that the diminished strength of the plaintiff's left arm and wrist would preclude her from being able to perform "supporting", "supervisory" or "managerial" functions, even in an agricultural environment. It was always clear that the plaintiff was never going to be a general farm labourer.

[28] It is also clear that, of the three scenarios postulated, scenario two is the one which is factually supported.

[29] While I am cognizant of the fact that the plaintiff's lesser left-arm strength might have an impact on the plaintiff's work-rate or employability, even as a manager, it is something which is unquantifiable in an empirical sense. This impact represents that kind of immeasurable future unforeseabilities which can only be catered for by way of the application of a contingency percentage[6].

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[5] *Holzhausen v Roodt* 1997 (4) SA 766 (W) and *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 616 H.
[6] *Southern Insurance Association Ltd v Bailey* 1984 (1) SA 98 (A).

[30] Following the reasoning of the Supreme Court of Appeal in *RAF v Guedes*[7], which confirmed a court's wide discretion in determining what is fair and just in a particular case, I determine that, on the facts and the clearly recognized drive and ambition of the plaintiff, the probabilities are that she would still reach the same heights as she would career-wise have reached, but for the accident. Insofar as there may be a higher contingency, now that she has been injured, that she might not realise the same income potential, that should be catered for by way of a higher contingency percentage.

[31] The actuary has calculated that the plaintiff's uninjured income potential, based a scenario 2, would be R7 109 582.00, after he had applied a 15 % contingency deduction.

[32] On the analysis set out earlier, I however part ways with the actuary where he calculated, based on the views of the occupational therapist and the industrial psychologist, that the plaintiff's post-accident income would only be a percentage of a projected income of R1 104 542.00.

[33] As explained, in my view the projected future post-accident income of the plaintiff would be the same as in the pre-accident scenario, but with a higher contingency deduction to be applied. I consider that doubling the contingency deduction to 30% would be a sufficiently "higher" contingency.

[34] The result of the above would, for clarity's sake, be the following:

	Uninjured	Injured	Net loss
Future income	8 364 214	8364 214	
Less contingencies	1 254 632	2 509 264	
Net	7 109 582	5 854 950	R1 254 632

[35] The result of the above calculation, is that the amount is not subject to a statutory "cap"[8].

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[7] 2006 (5) SA 583 (SCA) at 587A – B.
[8] Imposed by the Road Accident Fund Amendment Act 19 of 2005.

[36] Giving the plaintiff the further benefit of any doubt, I find it fair that the past loss has correctly been calculated at R983 736.00. It accords as close as possible to the factual situation to date.

[37] The result is that the plaintiff's total loss of income has been determined to be R2 238 368.00.

[38] I find no reason to deviate from the customary rule that costs follow the event.

Order

[39] In the premises, I make the following order:

1. The defendant shall pay the plaintiff in the amount of R2 238 368.00 (two million two hundred and thirty eight thousand three hundred and sixty-eight Rands) in respect of loss of earnings within one hundred and eighty days from the date of this order, whereafter the defendant shall become liable to pay prescribed interest on said amount, calculated from 15 days after date of service of this order. The aforesaid amount shall be deposited into the plaintiff's attorneys of record trust account with the following details:

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4. It is noted that there is no contingency fees agreement between the plaintiff and her attorneys.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 4 November 2024
Judgment delivered: 18 December 2024

APPEARANCES:

For the Plaintiff:	Adv L B Pilusa
Attorney for the Plaintiff:	MB Mabunda Incorporated, Kempton Park
For the Defendant:	No appearance