




**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED
<u>23 / 02 / 2024</u>	
DATE	SIGNATURE

Case no. 1969/2020

In the matter between:

VICTORIA SALPHINA NGWENYAMA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

This Judgment was handed down electronically by circulation to the parties and/or the parties' representatives by e-mail. The date and time for hand-down is deemed to be 23 February 2024 at 10h00.

PICK, AJ

INTRODUCTION

- 1 This is a claim against the Road Accident Fund. The Plaintiff claims general damages, future loss of earnings and earning capacity. The claim is also for future medical expenses in so far as an undertaking has not yet been given and costs incurred by the Plaintiff in proving her claim.
- 2 The Defendant conceded 100% of the merits in favour of the Plaintiff and the Plaintiff's claim for past loss of earnings has become settled.
- 3 From the Bundle before Court, the Defendant never entered appearance to defend. On the day of trial however, the Fund appeared and engaged the Plaintiff for the purposes of settlement and made submissions to Court regarding the quantum of general damages and contingencies to be applied.

FACTS OF THE MATTER

- 4 The Plaintiff was a passenger in a motor vehicle when the accident occurred on 17 June 2016 at the Thulamahashe junction next to Dwarsloop. She was taken to hospital. On admission her GCS was 15/15, indicating she was fully awake. She incurred cuts on her forehead and a suspected C5 fracture. She was discharged on 24 June 2017
- 5 At the time of the accident, the Plaintiff was a 41 year old widow with two children, aged 17 and 21 years respectively. The Plaintiff finished grade 12 and has a diploma in hospitality and computer literacy. At date of accident, she worked as a clerk at a funeral Service. She does not earn extra commission anymore, as she no longer has the physical strength to assist at funerals as she used to prior to the accident. She avers to have been earning R 3500, 00 per month at the time of the accident, but provides no proof of income. The Actuary bases his calculations on extracts of a bank statement, attached to the

addendum IP Report, which reflects the Plaintiff's income as R2500, 00 per month.¹

- 6 To proof her claim, the Plaintiff consulted with an orthopaedic surgeon, neurosurgeon, a neurologist, clinical psychologist, plastic and reconstruction surgeon, an occupational therapist, and an industrial psychologist. According to the orthopaedic surgeon's report in 2021, the x-rays indicated a neck and lower back injury. The neurologist and neurosurgeon agree the Plaintiff suffered a mild to moderate head injury and suffers from chronic headaches which require future management with analgesics. The experts all agree that the motor vehicle accident impacted negatively on the Plaintiff's future earning capacity. No early retirement is foreseen.
- 7 Plaintiff's WPI is higher than 30% and she has a visible scar on the forehead, measuring 14cm x 1cm. No surgical scar revision is recommended by the plastic and reconstructive surgeon.

DISCUSSION /LAW APPLIED TO THE FACTS

- 8 It is a pity that the Expert Reports are all dated 2021, five years after the accident. The upside thereof is that the Plaintiff has reached the maximum medical improvement of the injuries sustained in the motor vehicle accident. During the time the Plaintiff spent in hospital after the accident, she complained of backache and had to be assisted with a walking ring. The soft tissue neck injury was treated conservatively, using a neck collar and analgesics. Plaintiff received physiotherapy following the accident.
- 9 Presently, her neck movement is restricted. Movement in the lower back spine is restricted due to pain. The Court was not placed in possession of the x-ray report to confirm the injuries suffered by the Plaintiff at the date of the motor vehicle accident. On admission of the Plaintiff, the hospital records reflect "*fracture of the C5 spine*" as confirmed diagnosis.² Both the neurosurgeon and

¹ Page 208 of the Bundle

² Page 222 of the Bundle

the plastic and reconstructive surgeon, working from the hospital records refer to the C5 neck injury not being confirmed, and no mention is made of a back injury. The neurosurgeon reports "*No fractures noted on x-rays.*"³ In his report the neurologist notes "*X-rays were said to be normal.*"⁴ As a result of the delay in time, it is thus unsure whether the lower back injuries identified by the orthopedic surgeon in his report are as a result of the accident. It is possible that the lower back injuries might have been incurred in between the date of accident and the date of the orthopedic surgeon's report. The orthopaedic surgeon however concludes that no surgical intervention is indicated at the date of examination, but might arise in future.

- 10 To succeed in her claim, the Plaintiff must proof on a balance of probabilities that the injuries she presently suffers, are sequalee of the motor vehicle accident she was involved in. The onus is not one of beyond reasonable doubt. The problem with expert reports is generally that one relies on the other and often the experts go beyond their scope of specialty in their reports. No doubt, the patient's version of events, injuries so suffered, and after-effects are important, but every so often, exaggerated by the patient and over emphasised by the experts, instead of providing "profession-specific" findings to assist the court in its evaluation. The consequence is that the court is more than often faced with different versions pertaining to the same event and the consequences thereof. Generally, and since the Defendant disposed of its panel attorneys, the only set of expert reports before the court for consideration is that of the Plaintiff. In the matter at hand: Notwithstanding the ambiguity arising from the experts' reports, this Court is satisfied that the Plaintiff's onus has been discharged by her difficulty in mobilising after the motor vehicle accident and her constant lower back pain in hospital. This Court is satisfied that the lower back injuries are sequalee from the motor vehicle accident.
- 11 Agreed by the experts, the Plaintiff suffered psychological damage and her self-confidence was affected by the scarring on her face. Noted by the industrial

³ Page 63 of the Bundle, under the heading Injuries sustained, Mapulaneng hospital records

⁴ Page 86 of the Bundle, under heading Radiology Investigation

psychologist, the Plaintiff will struggle with a physical, cognitively, and emotionally demanding job post the accident. The occupational therapist opines that the Plaintiff, although having retained the physical ability to cope with the demands of her work as a clerk, will have to be accommodated post- accident and she is likely to struggle with the cognitive demands of her position. The Plaintiff reports to the industrial psychologist that she was financially independent pre-accident and this remained the same post-accident.⁵

GENERAL DAMAGES

- 12 In terms of the narrative test, permanent scarring constitutes grounds for a claim in general damages. The Plaintiff was in hospital for seven days and endured pain and suffering during the accident and her convalescing thereafter. Her WPI is indicated as 34% by the neurosurgeon who takes it upon himself to evaluate the WPI on behalf of all the other experts. Concerning is that the other experts make their own specialty-bound evaluations on the Plaintiff's WPI, differing from what the neurosurgeon set down on his RAF4 on their behalf, to qualify the Plaintiff for general damages.
- 13 Allocation of general damages lies at the discretion of the Court. Davis J describes the approach a Court should follow as a "*flexible one*" in **Mashigo v Road Accident Fund**⁶ and quotes from **Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 and 199**: "*The amount to be awarded as compensation can only be determined by the broadest general consideration and the figure arrived at must necessarily be uncertain, depending on the Judge's view of what is fair in all the circumstances of the case*". Held in **Pitt v Economic Insurance Co Ltd**⁷ that an award in compensating the Plaintiff should be fair to both parties but "*it must not pour out the largesse from the horn of plenty at the defendant's expense*." The Supreme Court of Appeal warns against the ever-increasing allocations made by our Courts in **De Jongh v Du Pisanie**.⁸

⁵ Page 182 of the Bundle

⁶ (2120/2014) [2018] ZAGPPHC 539 (13 June 2018) at

⁷ 1957 (3) SA 284 (D) at 287

⁸ (220/2003) [2004] ZASCA 43; [2004] 2 All SA 565 (SCA); 2005 (5) SA 457 (SCA) (25 May 2004)

- 14 In its heads of argument, the Plaintiff referred the Court to the comparable cases of **Vukeya v Road Accident Fund**⁹ and **Makupula v Road Accident Fund**¹⁰. In these cases, the court awarded general damages in the amounts of R330 000 and R300 000 respectively. Both cases deal with mild to moderate head injuries and the prospective unemployability of the Plaintiffs. The current values of these allotments are R639 000 and R581 000 respectively. The Plaintiff suggested an amount of R650 000 to be fair and reasonable compensation in the circumstances.
- 15 The Defendant referred the Court to **Lee v Road Accident Fund**.¹¹ The Court, at the time allocated an amount of R250 000. The Plaintiff incurred injuries to his elbow, right knee, back, neck and had disfigurement on his left arm and visible size difference between his left and right calf. The current value of the allotment is R417 900. The Court was also referred to the case of **Stemmet v Padongelukkefonds**¹². The Plaintiff incurred C4/C5, C5/C6 injuries, chronic pain and his quality of life and ability to work was affected. The present value of the allotment is R373 000.
- 16 The technique of considering previous cases is explained in **Protea Accident Fund v Lamb**.¹³

"..... this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court's general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in in the assessment of general damages....".

⁹ 2014 (7B4) QOD 1 (GNP)

¹⁰ 2010 6 QOD B4-48 (ECM); (1635/07) [2010] ZAECMHC 17 (8 April 2010)

¹¹ [2010] (NQD) 17 GNP

¹² 2004 (5) QOD C4-60

¹³ 1971 (1) SA 530 (A) at 534H-535A

- 17 Comparable cases considered by the Court includes **Mashigo v Road Accident Fund**,¹⁴ where the Plaintiff was allocated R450 000 after suffering burn wounds to her breasts and not being able to breastfeed her second child. She suffered pain and will continue to suffer pain during the reconstructive surgery process and would most likely have permanent scars. The value of the allocation in today's terms is R 571 500. In **Heynecke v Visagie**¹⁵ the Plaintiff was unable to lift his right eyebrow and close his eyelids properly after having been bitten by a dog on the left cheek. Sequelae of the incident included persistent irritation and swelling of the affected area, extensive tearing and twitching of the left eye after the nerve endings were damaged. Severe irregular scarring remained and was considered a "serious cosmetic blemish". An amount of R2500 was awarded which in today's value equates to R87 055. In **M obo M v Road Accident Fund**,¹⁶ an amount of R400 000 was awarded to a minor 8 year old child who suffered a mild brain injury, headaches and an unsightly facial scar. The current value of the award is R508 000.
- 18 After having considered the Plaintiff's injuries, her pain and suffering, the time she spent in hospital, the sequelae thereof and comparable cases, I consider general damages in an amount of R400 000 fair and equitable in the circumstances.

LOSS OF FUTURE EARNINGS / EARNING CAPACITY

- 19 Nicholas JA stated in **Southern Assurance Association Ltd v Bailey NO**¹⁷:

"Any enquiry into damages for loss of earning capacity is of its nature speculative because it involves predictions as to the future. All that the Court can do is make an estimate of the present value of the loss. It has open to it two possible approaches. One is for the judge to make a round estimate of an amount that seems to him to be fair and reasonable. This is entirely a matter of

¹⁴ Refer Footnote 6 above.

¹⁵ 1980 (3G4) QOD 102 (W)

¹⁶ (4484/2016) [2018] ZAGPJHC 451 (18 June 2018)

¹⁷ 1984 (1) SA 98 (A) at 113 G-H

guesswork, a blind plunge into the unknown. The other is to try to make an assessment by way of mathematical calculations on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. There are cases where the assessment by the court is little more than an estimate; but even so, if it is certain that pecuniary losses has been suffered, the court is bound to award damages."

- 20 At the time of the accident, the Plaintiff held that she was earning R3500 per month. This could not be substantiated from the bundle before Court. The extracts from her bank statements indicate an income of R2600 for the period of May 2021 and R2500 monthly for the periods of June and July 2021 respectively. The Plaintiff avers that she was not coping with her employer's demands and resigned 11 months after the accident. She found work with another funeral undertaker the month thereafter, albeit at a lesser salary. The actuary bases his calculations on an income of R3500 per month at the date of accident. The calculations portray the Plaintiff's uninjured earnings as R206 000 for the 2023 period. This represents an income of R17 166, 67 per month. Even at a generous increase of 8% pa, the Plaintiff's salary only equates to R 6001 per month in 2023. The Court does not take away the possibility that the Plaintiff could have resumed her own business and could have earned in excess of R6001 per month.
- 21 *"It is well established that for purposes of the assessment of damages for loss of earning capacity the test is "likely" "probable" and not what claimant could possibly have earned in an optimal scenario. (Koch.2011:70). The best guide to likely earnings is often what the victim was earning at the date of the accident. (Koch 2012:106)" (own emphasis)*
- 22 The Plaintiff considers the standard contingencies of 5% pre-morbid and 15% post morbid as reasonable, whilst the Defendant argues that 15% pre-morbid

and 30% post morbid will be just. Due to the uncertainty of the Plaintiff's income at the date of accident, a higher contingency pre-accident will be applied.

- 23 The approach of deducting 0,5% per annum to retirement age in the "but for" scenario was adopted in **Goodall v President Insurance**.¹⁸ The Plaintiff was 41 at the date of the accident and is 48 years of age at date of the actuary's calculations. She has 17 years left to work which equates to 8.5%. Considering further the Plaintiff's income not having been proven prior to the calculations by the actuary, the rising unemployment figures, the weakening economy, the injuries sustained, the sequelae thereof, the employability of the Plaintiff and no surgical intervention presently being foreseen, the Court views contingencies of 30% pre-morbid and 10% post-morbid as fair and reasonable.

CONCLUSION:

- 24 The Plaintiff has proven her claim for damages against the Defendant on a balance of probabilities. The Plaintiff has also succeeded in proving that she will, resulting from the injuries she sustained in the motor vehicle accident, suffer a loss of income due to the scope of her future employability. Merits were conceded by the Defendant at 100% in favour of the Plaintiff and past loss of income has become settled between the parties on the date of trial. The Plaintiff also proved that future medical expenses are foreseen.
- 25 It was held in **Prinsloo v Road Accident Fund**:¹⁹ "..... *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.*"

¹⁸ 1978 1 SA 389 (W)

¹⁹ 2009 (5) SA 406 (SE) at 410

- 26 According to the actuary, the Plaintiff's future loss of earnings pre-morbid is R2 512 600, post morbid it amounts to R471 600. Applying 30% pre-morbid and 10% post morbid, the amount of R1 334 380 is considered fair and reasonable compensation for the Plaintiff's damages resulting from her loss of future earning capacity and loss of future earnings.
- 27 Cost should follow suit.

ORDER

The Defendant is ordered to:

- 28 Pay the Plaintiff an amount of R 1 734 380, made up of general damages in the amount of R400 000 and R1 334 380 as compensation for future loss of earnings.
- 29 Provide the Plaintiff with a Section 17(4)(a) undertaking for as far as it has not been done already.
- 30 Pay the Plaintiff's agreed or taxed party and party costs, subject to the discretion of the taxing master, inclusive of the costs and expenses occasioned by the consultations with the experts and their reports :

Ms N Ndzungu, Occupational Therapist – Report dated 9 July 2021

Dr ND Chula, Specialist Neurosurgeon – Report dated 21 April 2021

Dr MR Mudau, Specialist Neurologist – Report dated 20 April 2021

Dr RS Ngobeni, Specialist Orthopaedic Surgeon – Report dated 19 April 2021

Dr E Eksteen, Plastic & Reconstructive Surgeon – Report dated 21 April 2021

Mr S Ferreira-Teixeira, Clinical Psychologist – Report dated 24 June 2021

Munroe Actuaries – Reports dated 27 January 2022 and 23 August 2023

RT Ntsieni, Industrial Psychologist - Reports dated 16 July 2021 and 21 January 2022.

- 31 Pay Interest to Plaintiff at 11,75 % per annum should the amounts not be settled within 180 days from a Court Order to the effect having been made available to the Defendant.

[REDACTED]
[REDACTED] PICK, AJ
[REDACTED]

Acting Judge of the High Court of South Africa

Mpumalanga Division, Mbombela Main Seat

Appearance for the Plaintiff:

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Appearance for the Defendant:

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