



**IN THE HIGH COURT OF SOUTH AFRICA,  
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/ NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

**Case No: 1657/2021**

In the matter between:

**NOMUSA PAULINAH RADEBE**

**PLAINTIFF**

And

**ROAD ACCIDENT FUND**

**DEFENDANT**

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**CORAM: NAIDOO J**

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**HEARD ON: 5 OCTOBER 2022**

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**DELIVERED ON: 30 JANUARY 2023**

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**JUDGMENT**

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- [1] The plaintiff, Nomusa Paulinah Radebe (the plaintiff), issued summons against the defendant, the Road Accident Fund (RAF) for damages arising out of injuries suffered by her, in a motor vehicle accident on 13 October 2017 on the N3 motorway in the Free State Province. RAF had previously conceded merits and negligence at 100%. By the time the matter came before me for the hearing of the trial in respect of quantum, most heads of damages had become settled, namely, general damages, future medical expenses and hospital expenses. The settlement of these various aspects was made an order of court. The only issue for this court to adjudicate was the loss of earnings and specifically the percentage of contingency deductions to be applied to loss of earnings. Adv (Ms) D Hattingh-Boonzaier represented the plaintiff and Ms P Banda represented RAF.
- [2] The plaintiff is a Provincial Traffic Officer, who appears to have completed road traffic duties on 13 October 2017, and was a passenger in a trailer which was being pulled by a motor vehicle driven by her colleague. The vehicle was involved in a collision, which resulted in the plaintiff being ejected from the trailer, and consequently suffered bodily injuries, namely abrasions and lacerations to her face and scalp as well as a fracture of the talus (ankle bone) on her right foot.
- [3] At the commencement of the hearing of this matter, the parties indicated that they have reached agreement in respect of the following matters:

- 3.1 the expert medical reports filed by the plaintiff and defendant, the joint minute completed on 29 September 2022 and filed by the plaintiff's and defendant's occupational therapists, all hospital records relating to the plaintiff as well as all other documents filed in respect of the merits and quantum in this matter, be admitted into evidence;
  - 3.2 the retirement age of the plaintiff is agreed at 57.5 years (for the purposes of calculating loss of earnings).
- [4] The plaintiff was examined and interviewed by various medical experts, mainly in 2021, some four years after the accident. The following is gleaned from the medico-legal reports filed by both parties, and is accepted to be common cause as no issue has been taken with same:
- 4.1 the plaintiff enrolled at the University of the Free State for a BA degree in 2006 but did not complete her studies as she fell pregnant.
  - 4.2 she failed most of her course modules in 2008 and deregistered; she re-registered in 2014 but left when she secured employment.
  - 4.3 she completed a Traffic Officer's Diploma (2014 – 2016), as well as several short courses in firearm safety and first aid;
  - 4.4 she suffered injury to the right hind foot as a result of the accident and experienced pain in that part of her foot;
  - 4.5 she returned to her employment as a traffic officer after being off work for about three months after the accident, and continued to perform the same duties she did prior to the accident;
  - 4.6 she was diagnosed as being depressed, anxious and showing signs of post traumatic stress; all of these conditions can be

managed with appropriate treatment. The defendant's occupational therapist held a different view, which I will deal with later.

- [5] The plaintiff engaged a number of medical experts, who each prepared reports in respect of their findings. I will deal briefly with opinions and/or conclusions of these experts. The orthopaedic surgeon engaged by the plaintiff, Dr Sher, observed that "*Clinically the plaintiff manifests with moderate right hind foot symptomatic and functional disability*". He observed further that she was somewhat overweight and that her weight would probably be considered an aggravating factor. With regard to her employment, Dr Sher remarked that "*The nature of her work would probably be considered relatively light to moderately demanding on occasion.*" The clinical psychologist, Ms Talita Da Costa found the plaintiff to be depressed, anxious, showing signs of post traumatic stress and presenting with certain cognitive difficulties, which worsen when she is in pain. The educational psychologist, Ms Mattheus, in performing cognitive tests, found the plaintiff to perform within an average to low average range.
- [6] Ms Fletcher, the occupational therapist took account of all the medico legal reports I have mentioned and after conducting her own assessment, found, with regard to the right ankle, that the plaintiff had decreased range of motion and muscle strength in the right ankle, decreased balance on uneven surfaces with vision occluded and decreased speed and coordination on the right. She concluded that the plaintiff would be able to sit and stand frequently during the working day, she would only occasionally be able to crouch, squat or perform weighted elevate work and rarely walk,

climb stairs, kneel or bend forward. As a result, she concluded that the plaintiff's occupation as a provincial traffic inspector can be classified as light work. Ms Fletcher deferred to the medical experts for medical intervention and agreed with Dr Sher that the plaintiff would probably require surgery to the ankle in the future should the anticipated degeneration of the ankle occur, probably around age 50 years.

- [7] Ms L Leibowitz, the industrial psychologist, similarly took account of all the medico-legal reports filed, and quoted relevant extracts from each report to support her conclusions that the plaintiff has been rendered less competitive as a result of the injuries she sustained in the accident and the sequelae thereof, that she will be unlikely to function at her pre-accident levels and will be at a disadvantage in her occupational pursuits. Ms Leibowitz was of the opinion that although the plaintiff is likely to continue working for as long as she is able to, she will do so with difficulty. She appeared to agree with Dr Sher and Ms Flecher that the plaintiff's working life will be shortened as a result of the injury, which would impact of her future earnings. Ms Leibowitz postulated that the plaintiff should be compensated for all losses in earnings.
- [8] The final expert engaged by the plaintiff was Mr W Loots, an actuary. He undertook a detailed exposition of the plaintiff's pre-accident and post-accident earnings, setting out the methodology he employed and the various factors that he took into consideration in arriving at the results contained in the report. After the parties agreed on a retirement age of 57.5 years, he recalculated the loss of earnings, applying a pre-accident

contingency deduction of 20% and a post-accident contingency deduction of 40%, as instructed by the plaintiff's attorneys. His calculations yielded an amount of Two Million Two Hundred and Six Thousand Five Hundred and Forty Six Rand (R2 206 546.00) in respect of loss of earnings.

- [9] RAF engaged two experts, Ms L Maritz, an Industrial Psychologist and Mr ML Makgato, and Occupational Therapist. Ms Maritz compiled her report without reference to any of the other medico-legal reports I have mentioned, and warned in her report that the results reflected therein should be utilised with care. It is not in dispute that for the purposes of this matter, Ms Maritz's report is not helpful. I shall, accordingly, not refer to her report. Mr Makgato, outlined a similar family, educational and occupational history in respect of the plaintiff, as did the other experts. He also referred to and considered the medico-legal reports of the plaintiff's experts. Mr Makgato conducted several tests, both physical as well as cognitive and perceptual, on the plaintiff. He found that physically she had good muscle tone, muscle strength and endurance, With regard to mobility, he found that the plaintiff could perform all functions, save for walking on her heels, squatting and crouching, which she found difficult to do. Similarly, with the cognitive tests, the plaintiff performed well and did not indicate any cognitive deficiencies or challenges, unlike the plaintiff's experts whose reports I have dealt with. He also did not observe any overt problems with her mood and indicated that she presented with "*an appropriate affect*". I note that Mr Makgato's assessment of the plaintiff occurred about nine months after Ms Fletcher evaluated the plaintiff.

[10] Mr Makgato agreed with the plaintiff's job classification as light work, and remarked that the plaintiff is functional but tires easily when engaged in activity. She indicated that she did not actively participate in sport prior to the accident, but if she wished to do so now, Mr Makgato remarked that she will be disadvantaged. The accident has affected the recreational aspect of her life as well as well as her general functioning in some aspects of daily life, and this represents loss of amenities to her. Considering her residual physical capacity and the demands of her current occupation, Mr Makgato is of the view that the plaintiff is a job match. Although his assessment indicates adequate cognitive functioning, the plaintiff will benefit from the intervention of the various medical experts and other professionals, and defers to them in respect of the further treatment of the plaintiff.

[11] The occupational therapists, Ms Fletcher and Mr Makgato compiled a joint minute in which they agreed on a number of aspects, many of which I have outlined in their respective reports as well as the reports of the other experts. There were two points of departure, the first one being Ms Fletcher's conclusion that the plaintiff's impaired visual perceptual skills would probably increase the possibility of her making errors at work and may affect her work speed and productivity. Mr Makgato pointed out that the plaintiff displayed adequate cognitive functioning when he assessed her, which was nine months after Ms Fletcher's assessment of the plaintiff. The other point of departure was the possible retirement age of the plaintiff. Ms Fletcher opined that the plaintiff will be unable to work beyond 55 years of age, and Mr Makgato was of the view that she could continue working up to age 60 years. The

difference of 5 years between each of their projections was divided in half and added to the projected 55 years. Hence the parties agreed on 57.5 years as the anticipated retirement date for the plaintiff.

- [12] The only issue between the parties appears to be the percentage of the contingency deductions to be applied to the loss of earnings, which is in the discretion of the court, and which discretion must be exercised judiciously, taking into account all relevant factors. RAF appears to be in agreement with the plaintiff that the contingency deduction for the pre-accident scenario should be 20%. The point of departure is the deduction in respect of the post-accident scenario. The plaintiff argues for a 40% deduction but submits that this figure can be reduced to 30%, while RAF argues for a 25% deduction in respect of the post-accident scenario
- [13] It is common cause that the plaintiff was remunerated during the period she was away from work, recuperating from the accident. The plaintiff returned to work 2-3 months after the accident, and resumed the duties which she performed pre-accident, albeit with a little difficulty. The industrial psychologist, Ms Leibowitz, obtained detailed collateral information from two senior functionaries in the Free State Department of Police, Roads and Transport (DPRT). Mr Thapelo Motaung, Chief Provincial Inspector at the DPRT confirmed the plaintiff's position, remuneration and the various benefits that staff, including the plaintiff, received. He indicated that he knows the plaintiff to be a hardworking and committed employee. After the accident she continued to perform her duties, without any special accommodation on account of her injury.



Although she did complain of pain sometimes, she continued to be a hardworking individual.

[14] With regard to promotional opportunities, Mr Motaung indicated that a Provincial Inspector, such as the plaintiff could advance to more senior roles, such as Senior Provincial Inspector and Principal Provincial Inspector, the former being a supervisory role and the latter entailing greater administrative duties. Both senior roles required the officer to be active in the field. The plaintiff would be eligible to apply for these positions, in spite of her injury.

[15] Mr Sam Motsabi, Control Provincial Inspector with DPRT, elaborated further on career progression for a Provincial Inspector (which is graded salary level 6). He explained that such an inspector could progress all the way to salary level 10, and explained the various ways in which this can occur. None of these ways precluded the plaintiff from enjoying career progression. He indicated that an individual with a Basic Traffic Diploma (which the plaintiff holds), needs no additional qualifications to progress to positions such as Senior Provincial Inspector and Principal Provincial Inspector. However, when applying for roles more senior to those I mentioned, a candidate with a Degree or Diploma would enjoy an advantage. There are instances where such requirements are relaxed. Employees are encouraged to improve their qualifications.

[16] In my view, the only area that the plaintiff is likely to suffer financial loss is if she is forced to retire early, due to her injury. However, if the pain in her ankle is managed through the surgery and

medication recommended by Dr Sher, should it become necessary, then it seems that could prolong her working life. Similarly the depression and anxiety she presented with prior to seeing Mr Mokgato can also be managed with the medication and treatment (such as psychotherapy) which the clinical psychologist and other experts recommended. The plaintiff must of course be compensated for the injury she suffered and the other sequelae of the accident, but, as has been well settled in our law, such compensation must not amount to largesse or a windfall. It must be commensurate with the damage suffered and taking all other relevant circumstances into account. The heads of damages which were settled prior to the commencement of the trial will take account of future medical expenses and the assistive devices, recommended by the occupational therapists, should these become necessary.

- [17] In my view the reports of the numerous experts indicate that their findings and recommendations are based largely on the probabilities and an anticipation of what the plaintiff's future condition may be. I borrow Adv Hattingh-Boonzaaier's words when I say that while we are "faced with a lot of what-ifs" in this case, one needs to be mindful of the current situation of the plaintiff and exercise a measure of common sense and judicious discretion in avoiding an award that would amount to a windfall. The plaintiff has continued with her pre-accident duties, without any special accommodation on account of her injury. While it is noted that she has to live with a measure of pain that she previously did not have, such pain is manageable with the appropriate treatment. Her injury does not appear to be a bar to her progressing in her career and

her life in the same way as her peers. Her cognitive deficiencies do not appear to have been caused by her injury, save that it worsens when she is in pain. For the reasons set out above, I am in agreement with Ms Banda's submission that the contingency deduction for the post-accident earnings should be 25%.

[18] I turn now to deal with the plaintiff's claim for compensation in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA). I enquired of Ms Hattingh-Boonzaaier whether the plaintiff had claimed compensation, as she was injured on duty. The parties agreed that written submissions would be made by Adv Hattingh-Boonzaaier in this regard. Judgment was reserved and such written submissions were filed. The defendant did not reply thereto or add anything further to its oral argument in court. The plaintiff, I am advised, did submit a claim in terms of COIDA on or about 1 November 2017, but as at the date of the hearing of this matter, she had not received any compensation in terms of COIDA. Adv Hattingh-Boonzaaier referred me to section 36(2) of COIDA, which provides that in awarding damages in an action, the court shall have regard to compensation paid in terms of the Act. She also referred to case law in which it was established that in making an award for damages a court must have regard to any payment in terms of COIDA and deduct such amount from the award it makes. I accept that the plaintiff has not yet received any payment from the Compensation Fund, but am of the view that the order that this court makes must be brought to the attention of the Compensation Commissioner.

[19] In the circumstances, I make the following orders:

- 19.1 The plaintiff's claim for loss of earnings is granted, as calculated by the actuary, Mr Wim Loots in his report dated 4 October 2022, subject to a contingency deduction of 20% in respect of the pre-accident earnings, and 25% in respect of the post-accident earnings;
- 19.2 The defendant is ordered to pay the plaintiff's costs on a party and party scale;
- 19.3 The plaintiff is directed to bring the order of this court, in respect of the loss of earnings, as well as the order made by this court on 20 April 2022 in respect of the other damages claimed by the plaintiff, to the notice of the Compensation Commissioner, within thirty (30) days of the date of this order, for consideration in respect of any award to be made in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

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**S NAIDOO, J**

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