



Editorial note: Certain information has been redacted from this judgment in compliance with the law.

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 Number: **4453/2022**

In the matter between:

KEDIBONE DAPHNE MARIA MOLETE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT BY: **VAN RHYN J**

HEARD ON: **24 JANUARY 2024**

DELIVERED: **13 FEBRUARY 2024**

[1] The plaintiff, Kedibone Daphne Maria Molete, a female born on [...] 1972, instituted action against the defendant in terms of the provisions of the Road Accident Fund Act¹ (“the Act”) for payment of the amount of R878 112.58 in damages arising from an incident which occurred on 8 March 2019. A motor vehicle accident occurred on the M4 Road between Mothusi Road and the R730 Road, Welkom, Free State Province when the driver, M M Ketime, of a Ford Ikon with registration letters-and-numbers [...] FS (the “insured vehicle”) collided with a pavement barrier and subsequently lost control of the insured vehicle as a result of which it overturned. The plaintiff was a passenger in the insured vehicle at the time of the accident. The plaintiff’s action is based on the negligence of the insured driver.

¹ No 56 of 1996.

- [2] The matter was certified trial ready in respect of the merits and quantum of the plaintiff's claim on 4 September 2023. The defendant conceded the merits and its liability to compensate the plaintiff for 100% of the proven or agreed damages arising from the collision. The parties agreed to separate the claim for past hospital and medical expenses in terms of the provisions of Rule 33(4) of the Uniform Rules of Court and to postpone this aspect of the claim for later adjudication.
- [3] The future medical and hospital expenses have also been settled and the court was provided with a draft order in terms whereof the defendant is to furnish the plaintiff with an undertaking in terms of the provisions of section 17(4)(a) of the Act for 100% of the costs of the future accommodation of the plaintiff in a hospital or nursing home or the rendering of future medical treatment or the supply of goods arising from the injuries sustained in the motor vehicle accident.
- [4] The plaintiff did not claim any amount in respect of general damages. At the commencement of the trial on 23 January 2024, I was informed that the only aspect in dispute between the parties is the claim for future loss of income. Furthermore, it is not disputed that the plaintiff will suffer a loss of income, it is the contingencies that has to be applied in respect of the claim for future loss of income that is in dispute. The defendant has made an offer to settle the future loss of income but the plaintiff is not amenable to the settlement offer.
- [5] By agreement between the parties and in terms of Rule 38(2) of the Uniform Rules of Court, plaintiff's expert reports were received by way of affidavit. The plaintiff did not adduce any further evidence regarding her claim for loss of future earnings. The defendant did not present any evidence during the trial. The legal representatives, Mr van der Merwe on behalf of the plaintiff and Ms Mkhwanazi on behalf of the defendant, addressed the court on the reports filed by the plaintiff regarding the percentage to be applied in respect of the contingencies regarding the future loss of income only.
- [6] The plaintiff is an adult female. She was 47 years of age at the time of the motor vehicle accident. She was employed as a typist at the traffic college connected to the Matjhabeng Municipality, Welkom. After the accident she was transported to the Welkom Mediclinic Hospital where her wounds were cleaned and dressed and x-

rays were taken. It is common cause that the plaintiff sustained the following injuries during the collision:

- 6.1 lacerations to her left knee;
- 6.2 soft tissue injury to her head;
- 6.3 soft tissue injury to her neck.

[7] No loss of consciousness was reported. The laceration on her knee was sutured. The x-rays showed no fractures but she was admitted for 3 days and received conservative treatment during her stay in hospital. Plaintiff was discharged on the 11th of March 2019 with medication and a soft neck collar. She continued complaining of her neck and on 27 March 2019 a CT-scan of her neck was performed which revealed a congenital anomaly of the C1 complex and possible widening of the C1/2 interval. Her neck injury was managed with a neck brace and medication. The plaintiff consulted with Dr Hugo, a neurosurgeon, for her neck symptoms and eventually had two series of facet blocks. According to the plaintiff she did not experience any relief from her symptoms following the facet blocks.

[8] The plaintiff filed the following expert reports:

- 8.1 Dr A L Vlok - orthopaedic surgeon;
- 8.2 Lucindy van Zyl- occupational therapist;
- 8.3 Dr E J Jacobs - industrial psychologist;
- 8.4 Ms J Valentini - forensic actuary.

[9] The issue at hand is the percentage contingencies to be applied in respect of the uninjured and the injured scenario pertaining to future loss of earnings. The plaintiff is still employed in the same position as prior to the incident. She returned to work after two months' recovery leave. She is however, according to the medial reports and as argued on her behalf, in a more vulnerable position as a result of the injuries sustained during the incident. Her work is mainly computer related and she is the administrator for the traffic college. The college had 88 learners during 2021. Her working hours are 07h30 until 16h00, Mondays to Fridays. Prior to the incident she earned R12 000.00 per month. She received company contributions to the value of R7 013.00 per month during 2021. She is the only typist at the traffic college.

[10] The plaintiff's duties are as follows:

- 10.1 filing, taking/making telephone calls and sending emails;
- 10.2 keeping attendance registers for the learners;
- 10.3 making copies of the manuals and study material;
- 10.4 capturing learners' results, compiling a statement of results and certificate information;
- 10.5 general office administration.

[11] Since the accident, the plaintiff suffers from the following complaints:

- 11.1 headaches on a daily basis on the left side of her head;
- 11.2 she describes the headaches as pressing in nature;
- 11.3 the plaintiff scored the intensity of the headaches at 9/10;
- 11.4 she experiences pain in her neck on the left side and her left shoulder when typing, when doing elevated work, when handling heavy loads (heavier than 5 kg), when doing household chores and at night when she is sleeping;
- 11.5 she experiences pain in her left knee with prolonged walking, prolonged standing (2 hours), when handling heavy loads, when climbing stairs and during cold weather. She is no longer able to wear high heeled shoes and she cannot run at all.

[12] Dr A L Vlok, an orthopaedic surgeon practising at Pretoria, opined that the plaintiff's neck complaints are compatible with the soft tissue neck injury she sustained during the incident. Soft tissue neck injuries may cause chronic head and neck symptoms of varying degrees and even though 40% of patients may have chronic head and neck symptoms, most of the symptoms do not result in a major disability. Chronic head and neck symptoms and the extent to which they become intrusive and potentially disabling are determined by the patient's ability to manage these symptoms.

[13] According to Dr Vlok there is a 3% to 10% chance that the plaintiff may eventually require an anterior decompression and cervical spine fusion as a result of the soft tissue neck injury sustained during the incident should her symptoms fail to respond to the various conservative treatments available. The occupational therapist, L van Zyl, opined that, based on her findings, the plaintiff is still suited to her pre-, post-accident and her current work as a typist. However, her complaints are justified and she would require intermittent rest breaks when required to type for prolonged periods. This impacts negatively on her productivity and work speed and therefore

renders her disadvantaged within the open labour market when compared with uninjured peers. Currently she has a sympathetic and supportive employer which counts in her favour with regards to the plaintiff being able to retain her position at work even though she needs frequent leave of absence as a result of headaches and pain in her neck.

- [14] The plaintiff currently has to take intermittent rest breaks due to pain with a result that she is unable to complete her daily tasks and therefore ends up taking work home which she then completes after hours. The plaintiff takes pain medication on a daily basis. Mrs van Zyl discussed the plaintiff's work situation with her supervisor, Mr Mokoena, on 20 September 2021 and he reported that since the accident the plaintiff has taken frequent leave of absence from work almost on a weekly basis. He confirmed that she is often unable to work a full week as a result of the frequent headaches and pain. Dr Everd Jacobs, a qualified and practicing industrial psychologist, opined that the plaintiff is only suitable for sedentary to light work demands and cannot be regarded as an equal competitor in the open labour market. As an uninjured employee she most likely would have worked in her current capacity as a typist/clerk with her current employer up to the age of 65 years.
- [15] The plaintiff will be reluctant to change from her current occupation as she is already enjoying some sympathy in her current capacity. Mr van der Merwe argued that a slightly higher contingency than normal should be applied on the basis that the plaintiff is now, as a result of the injuries sustained in the accident, more vulnerable and is not an unequal competitor in the open labour market. The fact that the plaintiff will be reluctant to change employers might lead to her earning on a lower level in her injured capacity. The plaintiff's basic income per month amounts to R 16 204.00. She receives an annual bonus equal to one month's salary. The plaintiff has not suffered a past loss of income.
- [16] The plaintiff presented the evidence of Ms Julie Valentini, an actuary practising as such at Munro Actuaries, Cape Town. The actuary calculated the potential loss of earnings suffered by the plaintiff due to the accident as at 1 September 2022. The plaintiff's uninjured future earnings were calculated at R 4 324 100.00 and her injured future earnings at the same amount. A 10% contingency deduction was applied in

respect of the uninjured and a 30% contingency deduction in respect of her injured loss of earnings.

[17] The defendant contends that the plaintiff is still employed by the same employer, she returned to work two months after the accident and is able to perform her duties at work. She has not suffered any loss of income and therefore the defendant contends that a 15% contingency in respect of the uninjured loss of income and a 20% contingency in respect of the injured loss of income, in other words a so called 5% “spread” should be applied. The defendant placed on record that the parties agreed that the expert reports are what they purported to be and that same may therefore be handed up by the plaintiff by means of affidavit, which Mr van der Merwe did.

[18] The plaintiff is being sympathetically accommodated by her employer since she returned to work during 2019. She has approximately 13 years left before she reaches retirement age, being at age 65. The fact remains that she has to take regular breaks from typing and performing other duties during her workday. Considering all the above, her residual work capacity is restricted to sedentary light parameters of work.

[19] In *Road Accident Fund v Kerridge*² the Supreme Court of Appeal explained the approach to determine loss of earnings and applicable contingencies as follows:

“Contingencies are arbitrary and also highly subjective. It can be described no better than the oft-quoted passage in *Goodall v President Insurance Co Ltd* where the court said: ‘In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art of science of foretelling the future, so confidently practiced by ancient prophets and soothsayers, and by authors of a certain type of almanack, is not numbered among the qualifications for judicial office’”

[20] Contingencies are the hazards of life that normally beset the lives of ordinary people and should therefore, “by its very nature, be a process of subjective impression or estimation rather than objective calculation”³. The only reasonable way to compensate the plaintiff for her possible future loss of earnings in the event of her losing her employment before retirement age, would be by way of a contingency deduction to factor in the risk involved.

[21] I am satisfied that an appropriate contingency deduction to be applied is a 20%

² 2019 (2) SA 233 (SCA) at par [42].

³ *Shield Ins. Co. Ltd v Booysen* 1979 (3) SA 953 (A) at 965G-H.

spread between the uninjured and the injured future income scenario as contended by Mr van der Merwe. It has to be kept in mind that should her physical symptoms of pain worsen with time and as she ages, the possibility of future cervical spine surgery may also increase which will necessitate even more time off from work. Contingencies of whatever nature, generally serve as a control mechanism to adjust the loss to the circumstances of the individual case in order to achieve justice and fairness to the parties.

[22] The actuarial calculation submitted by the plaintiff is as follows:

Capital Value of Loss of Earnings.

	Uninjured Earnings	Injured Earnings	Loss of Earnings
Future	R4 324 100.00	R4 324 100.00	
Less contingencies	10%	30%	
	<hr/> R 3 891 690.00	<hr/> R3 026 870.00	<hr/> R 864 820.00
			<hr/>
	TOTAL LOSS OF EARNINGS		R864 820.00

[23] I am satisfied that the plaintiff should be awarded the amount of R 864 820.00 in respect of future loss of earnings as per the calculations by Munro Forensic Actuaries.

[24] **ORDER:**

Consequently, I make the following order:

1. The Defendant is liable for payment of 100% of the Plaintiff's proven or agreed damages arising from the motor vehicle accident that occurred on 8 March 2019.
2. The Defendant is liable for payment to the Plaintiff in the amount of R 864 820.00 (eight hundred and sixty- four thousand eight hundred and twenty rand) hereafter "the capital amount" in respect of future loss of income.
3. The Defendant is ordered to furnish to the Plaintiff an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for 100% of the costs of the future accommodation of the Plaintiff in a hospital or nursing home or the treatment of or the rendering of a service or the supplying of goods to the Plaintiff

arising out of the injuries sustained by the Plaintiff in the motor vehicle collision mentioned above, in terms of which undertaking the Defendant will be obliged to compensate Plaintiff in respect of the said costs after the costs have been incurred and on proof thereof.

4. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale, until date of this order, including but not limited to the costs set out hereunder:

- 4.1 The reasonable qualifying and reservation fees and expenses (if any) of the following experts:

- 4.1.1 Dr A L Vlok (Orthopaedic Surgeon);
- 4.1.2 Mrs L van Zyl of Rita van Biljon Occupational Therapists
- 4.1.3 Dr Everd J Jacobs (Industrial Psychologist);
- 4.1.4 JA Valentini – Munro Actuaries

5. The payment provisions in respect of the foregoing are ordered as follows:

- 5.1 Payment of the capital amount shall be made without set-off or deduction, within 180 calendar days from date of granting this court order, directly into the trust account of the Plaintiff's attorneys of record by means of electronic transfer, the details of which are the following:

Honey Attorneys - [...]
Bank - [...]
Branch code - [...]
Account No. - [...]
Reference - [...]

(please quote the reference at all times)

- 5.2 Payment of the taxed or agreed costs shall be made within 180 (one hundred and eighty) days of agreement or taxation (the

"*due date*") and shall likewise be paid into the trust account of the Plaintiff's attorneys of record referred to in 5.1 above;

6. Should the capital amount or costs not be paid by the respective due dates, the Defendant will be liable for interest at 11.25% (the statutory rate per annum) compounded, in respect of:
 - 6.1 The capital amount of the claim calculated from 14 (fourteen) days from the date of this order;
 - 6.2 The taxed of agreed costs, calculated from 14 (fourteen) days from taxation, alternatively date of settlement of such costs.
7. The Plaintiff's claim for past hospital and medical expenses is separated in term of the provisions of Rule 33(4) of the Uniform Rules of Court and postponed for later adjudication.

I VAN RHYN J

On behalf of the Plaintiff:
Instructed by:

Adv. J van der Merwe
Honey Attorneys
Bloemfontein

On behalf of the Defendant:
Instructed by:

Ms. K Mkhwanazi
State Attorneys
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