

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

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 32015/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
25/8/2022

DATE

SIGNATURE

In the matter between:

SITHOLE MARIA JOYCE

PLAINTIFF

AND

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

[1] This is an application for default judgment brought by the plaintiff, Ms Maria Joyce Sithole, an adult female born on 13 June 1985. On or about 15 February 2019 at approximately 00h15 she was involved in a motor vehicle accident as a passenger, on the N12 Highway, near Delmas. The said motor vehicle with registration number [...] was driven by Mr Jaime Navio Simango (“**the insured driver**”). The insured driver lost control over the vehicle and the vehicle overturned. The plaintiff sustained various injuries during the accident and was transported from the scene to Sunshine Hospital. She was discharged on 25 February 2019.

[2] As a result of the collision the plaintiff sustained the following injuries;

1. A head injury with a GCS of 13/15;
2. A fracture of the right lamina papyracea and ethmoid haemosinus;
3. Cervical spine whiplash injury;
4. Right wrist extra-articular fracture with an ulnar styloid fracture;
5. Comminuted left wrist extra-articular fracture with an ulnar styloid fracture;
6. Median nerve damage on the left wrist;
7. Abdominal injury;
8. Scarring and disfigurement.

[3] While admitted to Sunshine Hospital the plaintiff received the following medical treatment;

1. CT scans were performed;
2. the right wrist fracture was treated with an open reduction and locking plate screw inserted through a volar approach; and
3. the left wrist fracture was initially treated with a joint spanning external fixator and thereafter the external fixator was removed and replaced with an open reduction and locking plate screw inserted through a volar approach.

[4] As a result of the injuries and the sequelae thereto the plaintiff developed;

1. Limited use of her left wrist and she wears a splint on both her wrists. The fingers on her left hand are also swollen which prevents her from closing her hand into a fist;
2. Weakness and pain in both her arms, the pain in her left wrist is aggravated during cold and inclement weather as well as when performing activities;

3. An inability to do household chores;
4. Mood swings and aggression;
5. Difficulties with attention, concentration and memory;
6. Headaches;
7. An increased appetite;
8. Poor vision; and
9. Scarring.

[5] The merits have been conceded 100% in favour of the plaintiff.

[6] The matter came before me on 8 August 2022 as an application for judgment by default in terms of Uniform Rule of Court 39(1) with provides as follows;

“(1) If, when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him and judgment shall be given accordingly, in so far as he has discharged such burden. Provided that where the claim is for a debt or liquidated demand no evidence shall be necessary unless the court otherwise orders.”

[7] In support of the application, the plaintiff relied on the evidence of her expert witnesses, which evidence was presented in the form of affidavits by the expert witnesses, which simply verified and confirmed under oath the contents of these reports.

[8] The evidence relied upon as contained in the expert reports also contained hearsay evidence as the reports and the opinions expressed therein to a certain extent were based on what was reported to these experts mainly by the plaintiff and other persons. However, I am of the view, I can and should rely on this evidence and I do so on the basis of the provisions of s 3 of the Law of Evidence Amendment Act, Act 45 of 1988.

Issues

[9] This court is therefore, called to adjudicate the question of quantum. The plaintiff claims the following;

- | | |
|-----------------------------------|------------|
| 1. General Damages | R 750 000 |
| 2. Past and Future Loss of Income | R1 521 605 |

3. Future medical expenses. Section 17(4)(a) undertaking.

[10] Following the accident, the plaintiff filed the following medico-legal reports;

1. Prof Frey (Orthopaedic Surgeon);
2. Mr Ormond-Brown (Clinical Psychologist);
3. Dr Leshilo (Psychiatrist);
4. Ms Van Der Walt (Occupational Therapist); and
5. Mr Peverett (Industrial Psychologist).

Summary of Expert's Reports

Professor Frey (Orthopaedic Surgeon)

[11] The plaintiff consulted Prof Frey on 20 May 2020. He found marked radial shortening with an ulnar plus on the left wrist, the left wrist has collapsed, as well as degenerative changes in the carpal bones. The right wrist has healed and the implants are in situ in both wrists. Notwithstanding future medical treatment, the neuromuscular endplates in the wrist will become non- functional around two years after injury. Thereafter there will not be any further recovery.

[12] Prof Frey indicated that the cervical spine showed minor changes and the Spurning's sign was negative. He opines that the neck changes cause occasional localised neck pains, but will not cause the median nerve neurology symptoms in the plaintiff's left hand. The partial median nerve palsy in the left hand was caused by the comminuted wrist fracture at the time of the accident.

[13] In conclusion Prof Frey found that the median nerve was damaged at the time of the accident and has only partially recovered. The plaintiff's left wrist and finger function is poor and not as strong as compared to the uninjured side.

[14] Prof Frey rated the plaintiff's injuries as serious in terms of both the WPI at 36% and the narrative test as serious long-term impairment or loss of bodily function.

[15] Prof Frey recommended future medical treatment in respect sequelae. He opines that the injuries have had negative impact on the plaintiff's employability and daily living activities. Accordingly, it is unlikely that she will return to any kind of work requiring bimanual activity.

Mr Ormond-Brown (Clinical Psychologist)

[16] Mr Ormond-Brown assessed the plaintiff on 5 October 2020 and found that the plaintiff sustained a moderate to severe brain injury during the collision. The plaintiff demonstrated multiple symptoms of a brain injury, including headaches, excessive appetite, impaired vision, difficulties with attention and concentration, poor short-term memory, major depression and heightened levels of irritability.

[17] Based on the hospital records Mr Ormond-Brown found;

- 1) Evidence of craniofacial injury namely: abrasion to the plaintiff's forehead and swelling of right cheek, because she had bitten her tongue, a right periorbital haematoma developed while she was admitted to hospital,
- 2) The CT scan identified a fracture of the right lamina papyracea (part of the right orbit) and bleeding in the ethmoid sinus; in addition, she also suffered bilateral fractures of the radii of her forearms, internal abdominal bleeding, multiple lacerations, abrasions and haematomas.

[18] Mr Ormond-Brown opines that notwithstanding the CT scans not showing any intracranial abnormalities, it will not show shearing injury to the brain and therefore a clear CT scan does not exclude a brain injury.

[19] According to Mr Ormond-Brown the plaintiff performed poorly on the majority of the psychometric tests- her fine sensorimotor co-ordination was poor due to the injuries to her wrist and her short-term memory was exceptionally poor. She manifests major neuropsychological deficits. Mr Ormond-Brown is of the opinion that the results of the assessment reflect the consequences of the plaintiff's lack of schooling, major depressive disorder and a moderate to severe brain injury.

[20] He is of the opinion that the consequences of the orthopaedic injuries and neuropsychological deficits preclude the plaintiff from working in the formal and informal labour markets. The marked neurocognitive problems will likely make it more difficult for her to achieve her pre-accident potential. He also recommended future medical treatment in respect of the plaintiff's head injury sequelae.

Dr Leshilo (Psychiatrist)

[21] Dr Leshilo assessed the plaintiff on 1 July 2021 and found that the plaintiff's primary secondary psychiatric diagnosis is major depressive disorder (depressed mood, insomnia, poor concentration, loss of interest, loss of appetite and weight, tiredness, loss of energy and self-isolation), her illness is caused by chronic headaches and pain of both her wrists and which is impairing her functionally and occupationally.

[22] The plaintiff's secondary psychiatric diagnosis is post-traumatic disorder- re-experience of incident, hypervigilant, avoidance and fearful. The plaintiff's life expectancy has been altered by the psychiatric sequelae of the mental trauma, which will also impact negatively on her quality of life, and furthermore her depressive and stress related disorder hinders her to manage her social and occupational life and other related activities. However, Dr Leshilo indicated that the plaintiff's prognosis of the major depressive and post-traumatic stress disorder she suffers from, is favourable.

[23] Dr Leshilo indicated that the plaintiff will benefit from psychiatric treatment and thus, she recommended future medical treatment in respect of the plaintiff's head injury sequelae.

Ms Van Der Walt (Occupational Therapist)

[24] Ms Van der Walt assessed the plaintiff on 19 November 2020 and found that the plaintiff's pre-accident work duties as a cleaner would have been of light to medium strength demand.

[25] Ms Van der Walt found that the plaintiff presented with visible surgical scars over both her wrists and that there was no muscle wasting, but the right forearm is 1 cm shorter than the left. The left humerus is 2 cm shorter than the right. She also indicated that the plaintiff has a slight limitation of full joint range at both her wrists, with the left more affected.

[26] The functional use of the plaintiffs' hands was satisfactory and she would be capable of handling very light loads, under 5 kg, without limitation. However, the plaintiff struggled to tolerate compression forces through the wrists which would be reasonable given the type of injuries she sustained. Ms Van der Walt states that the plaintiff will in

future struggle with domestic chores because of remaining pain and limitations to the hands.

[27] The plaintiff relied on upper limb function and hand function to work. The plaintiff remains with perceived disability that continues to affect return to full functional ability. The plaintiff's measured work capacity is a match for loads of sedentary to light demand in the open labour market.

Mr Peverett (Industrial Psychologist)

[28] Mr Peverett states that, pre-accident the plaintiff would probably have been confined to a basic skilled level of functioning. Her pre-accident reported earnings of R5 000 per month is aligned with non- corporate earnings for basic skilled workers.

[29] According to Peverett, had the accident not occurred, future earnings probably would not have progressed beyond R88 000 per annum by the age of 50, thereafter inflationary increases until retirement age of 60. Post-accident the plaintiff has been rendered functionally unemployable as a result of the injuries sustained and a total past and future loss of earnings is applicable.

Actuarial Report- Munro Forensic Actuaries

[30] An actuarial calculation has been compiled by Munro Forensic Actuaries, which sets out the plaintiff's past and future loss of income until retirement age at 65.

[31] The actuarial calculations having regard to the above, is set out below with the proposed contingencies applied:

	UNINJURED INCOME	INJURED INCOME	LOSS OF INCOME
Past Loss of Income	R151 500	R0	
Contingencies 5%	R7 575		
Total Past Loss	R143 925	R0	R143 925
Future Loss of Income	R1 620 800	R0	
Contingencies 15%	R243 120		
	R1 377 680	R0	R1 377 680
TOTAL LOSS			R1 521 605

Future Hospital, Medical and Related Expenses

[32] There is more than adequate evidence before me that, as a result of the injuries sustained by the plaintiff during the accident, including the orthopedic injury to the left wrist, the plaintiff would require future hospital and medical treatment. The details and particulars of such hospitalization and treatment are contained in the medico-legal expert reports by the plaintiff's expert witnesses.

[33] This head of damages should be dealt with on the basis of a statutory undertaking to be provided by the Fund to the plaintiff in terms of section 17(4)(a)¹ of the Road Accident Fund Act, Act 56 of 1996 ("**the Act**"), and I therefore intend granting an order to that effect.

General Damages

[34] General damages include a person's physical integrity, pain and suffering, emotional shock, disfigurement, reduced life expectancy and loss of life amenities.

[35] In the matter of *De Jongh v Du Pisanie*² the plaintiff sustained a head injury consisting of extensive fragmented fractures of the frontal skull extending into the orbits (eye sockets) and the zygomatic arches -cheekbones, as well as the jaw, causing extradural haematoma which led to unconsciousness and which had to be surgically removed. The Supreme Court of Appeal, Holmes J, pointed out the following fundamental principle relative to the award of general damages as follows;

“that the award should be fair to both sides, it must give just compensation to the plaintiff, but not pour largesse from the horn of plenty at the defendants' expense.”

[36] As pointed out by the court in the case of *Hendricks v President Insurance*³ the nature of the damages which are awarded make quantifying the award very difficult.

[37] The Appellate Division in *Sandler v Wholesale Coal Suppliers*⁴ stated:

¹ Section 17(4)(a) of the RAF Act reads as follows:

“(4) Where a claim for compensation under subsection (1)(a) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her, the Fund or an agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the Fund or the agent to furnish such undertaking, to compensate

(i) the third party in respect of the said costs after the costs have been incurred and on proof thereof; or

(ii) the provider of such service or treatment directly, notwithstanding section 19 (c) or (d), in accordance with the tariff contemplated in subsection (4B)”.

² 2005 (5) SA 457 (SCA).

³ 1993 (3) SA 158 (C).

⁴ 1941 AD 194 at 199.

“Though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty.”

[38] Counsel for the plaintiff referred me to several comparable cases. However, each case must be adjudicated on its own merits within the overarching maxim of *stare decisis*. In *Dikeni v Road Accident Fund*⁵ Van Heerden J stated that;

“Although these cases have been of assistance, it is trite law that each case must be adjudicated upon on its own merits and no one case is factually the same as another... previous awards only offer guidance in the assessment of general damages.”

[39] Unfortunately, no expert can place an exact value to non-pecuniary loss such as pain and suffering, loss of amenities, emotional harm, etc. The damages that are to be awarded should be assessed by taking into account the age, sex, status, culture, lifestyle and the nature of the injury suffered, as well as having regard to previous awards made for similar injures. Also, other factors which are often taken into account include the degree of pain suffered. The fact that pain is subjective is taken into account, whether further surgery can be expected, whether the plaintiff has debilitating scarring, is unable to fend for herself and has a decreased life expectancy are examples of factors that guide the court.

[40] When dealing with the quantum of the general damages suffered by the plaintiff, I take cognisance of the facts placed before me. What the court is concerned with in assessment of general damages is to compensate the plaintiff fairly and reasonable, having regard to the range of impacts and effects that the injuries sustained at the time of the collision and its *sequelae* have upon the plaintiff.

[41] In that regard, I am satisfied that the plaintiff’s injuries are serious and that she qualifies for general damages. There can be little doubt about this. And although the Fund has never formally accepted liability for the plaintiff’s general damages, it similarly has never disputed liability for such damages.

⁵ 2002 C&B (Vol 5) at B4 171.

[42] Moreover, in compliance with the Act and the regulations promulgated thereunder, the plaintiff had lodged with the Fund a Form RAF 4 by the Orthopaedic Surgeon, Professor Frey, who assessed the plaintiff's WPI at 30%, but indicated that the plaintiff's injuries qualify as serious long-term impairment and/or loss of body function.

[43] I must determine an award for general damages that I regard as fair to both parties. Unfortunately, the defendant has not found it necessary to make submissions in this regard. Having regard to the plaintiff's physical injuries and the consequences thereof, including the impairment of her wrists, the chronic pain, psychological trauma and her significant loss of enjoyment of amenities of life, including a satisfying work life, I consider an amount of R750 000 to be fair and adequate compensation to the plaintiff in respect of her general damages.

Future loss of Income

[44] It is trite that the plaintiff must prove on a preponderance of probabilities her loss as well as the amount of damages that should be awarded. In assessing the compensation, the court has a large discretion, as was stated in *Legal Insurance Company Ltd v Botes*⁶ where the Court held:

“In assessing a compensation, the trial Judge has a large discretion to award what under the circumstances he considers right. He may be guided but is certainly not tied down by inexorable actuarial calculations.”

[45] In the seminal case of *Southern Insurance Association v Bailey N.O*⁷ the Court stated the following:

“Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future without the benefit of crystal balls, soothsayers, augers or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of a loss

14.2 It has open to it, two possible approaches:

14.2.1 One is for the Judge to make a round estimate on an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.

⁶ 1963 (1) SA 608 (A). Also see *Lambrakis v Santam* 2002 (3) SA 710 (SCA).

⁷ 1984 (1) SA 98.

14.2.2 The other is to try and 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.

14.2.3 It is manifest that either approach involves guesswork to a greater or lesser extent. But the court cannot for this reason adopt a non-possumus attitude and make no award.”

[46] Hartzenbeg J explained in *Road Accident Fund v Maasdorp*⁸ that:

“The question of loss of earnings and loss of earning capacity is a vexed one and is often considered by our courts. Usually, the material available to the court is scant, and very often, the contentions are speculative. Nevertheless, if the court is satisfied that there was a loss of earnings and/or earning capacity, the court must formulate an award of damages. What damages the court will award will depend entirely on the material available to the court.”

[47] In assessing the plaintiff’s loss of earning capacity I must consider what the plaintiff probably would have made of her earning capacity, and not what she might have earned. She is currently 37, she did not attend school and has no formal education. Her previous work experience was as a cleaner employed at Lucas’ Tavern. She was responsible for collecting empty bottles, cooking food, washing dishes and general cleaning of the tavern. She also did domestic chores in Mr Lucas Sibanyoni, her employer’s house. She earned R5 000 per month and she furthermore received an annual bonus of R2 000. After the accident in February 2019, she was unable to resume her work as a cleaner due to the injuries she sustained. During December 2019 the plaintiff attempted to generate an income, as a hawker by selling blankets, however, due to her injured wrists she was unable to carry and fold the blankets. Since then, she was unemployed.

[48] The plaintiff has been unemployed since 2019 to date, which puts her at further disadvantage when seeking employment. Her prospects of obtaining long-term employment, given the disadvantage from which she suffers, as opposed to able bodied persons are not good.

⁸ [2003] ZANHC 49.

[49] Furthermore, the plaintiff falls within a segment of society that is more severely affected by economic ups and downs. Whereas a skilled person has more options open to him/her, an unskilled or semi-skilled person will experience greater difficulty in finding employment. The plaintiff's injuries, especially the damage to her wrists, further limit her employment options.

[50] The above is further aggravated by the fact that Prof Frey recommended that the implants on both wrists need to be removed and the left wrist needs further investigations and nerve exploration. He indicated that the nerve damage will only recover for a maximum two-year period following the injury, because the neuromuscular endplates become nonfunctional around two years after injury. It is thus clear, that the window period in restoring the nerve recovery of the left wrist has since lapsed. Therefore, the prognosis in restoring the function to the plaintiff's left wrist has declined extensively.

[51] On the other hand, the plaintiff's injuries may respond somewhat to treatment. She is not completely incapable of working, and may obtain some form of employment. Ms Van der Walt, the Occupational Therapist, indicated that the plaintiff's remaining work capability would be suitable for selected light physical work in the open labour market. As a general worker, without education and training, having to be selective about physical work, would probably make it difficult for her to find and maintain suitable employment.

[52] Mr Peverett, the Industrial Psychologists, concluded that the plaintiff is rendered functionally unemployable as a result of the accident. In considering the plaintiff's lack of education and pre-accident employment, she would be confined to basic skilled level functioning, which is characterized by work that is practical, physical and labouring in nature. Considering her reported earnings at the time of the accident, age 33, her earnings in current terms would not have progressed beyond R88 000 per annum by the age of 50. This is aligned to income at the upper quartile for unskilled/basic workers (2021 Quantum Yearbook, page 123). Inflationary increases would be indicated thereafter prior to retirement age (65 years).

[53] In the unreported case of *Mashaba v Road Accident Fund*⁹, Prinsloo J, referring to the *Bailie* case above, held among others, that where career and income details are

⁹ [2006] ZAGPHC 20.

available, the actuarial calculation approach is more appropriate and a court must primarily be guided by the actuarial approach, which deals with loss of income or earnings before applying the robust approach, which normally caters for loss of earning capacity. This, so said the learned judge, would help the court to ensure that the compensation assessed and awarded to the plaintiff is as close as possible to the actual facts relied upon.

[54] When looking at contingencies it is trite that one deals with the vicissitudes of life such as life expectancy, periods of unemployment as well as the likelihood of illness. Hence these are matters that cannot be easily calculated but will impact upon the damages claimed. As stated in *AA Mutual Insurance Association v Van Jaarsveld*¹⁰ these are hazard that normally beset the lives and circumstances of ordinary people.

[55] It is *common cause* that, due to the accident the plaintiff's chances of employment have been limited. She is currently unemployed.

[56] I am therefore of the view that the contingencies of 5% in respect of pre morbid loss of earnings and 15% to future post morbid income would be reasonable under the circumstances.

[57] I can find no reason to doubt the calculations regarding past loss of income as calculated in the actuarial report by Munro Forensic Actuaries. I therefore accept the value placed on the amount for past loss of income in the amount of R143 925.

[58] As far as future loss of income is concerned; it is evident that the plaintiff is unskilled and suffers from disadvantage of not being able-bodied. The actuary report accurately reflects the plaintiff's probable employment future.

[59] I therefore come to the conclusion that an appropriate award in respect of future loss of income would be in the sum of R1 377 680. To this must be added the past loss of income of R143 925.

[60] In the result I find that the plaintiff has proven her claim to the extent as appears in the order below herein.

¹⁰ 1974 (4) SA 729 (A).

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

1. The draft order attached marked “X” is made an order of Court.

**CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT**

This judgment was handed down electronically by circulation to the parties’ representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 25 August 2022.

DATE OF HEARING: 8 AUGUST 2022

DATE JUDGMENT DELIVERED: 25 AUGUST 2022

APPEARANCES:

Attorney for the Plaintiff: Raphael David Smith Inc

Counsel for the Plaintiff: Adv M Jorge