

REPUBLIC OF SOUTH AFRICA



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

Case Number: 14816/2019

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
_____	_____
DATE	SIGNATURE

In the matter between:

GROBBELAAR, CLASINA VEENEBOER

Plaintiff

and

ROAD ACCIDENT FUND
(Link no.: 4453783)

Defendant

JUDGMENT

KOM, AJ

Introduction

- [1] The plaintiff instituted action against the Road Accident Fund (“the Fund”) for damages as result of injuries sustained from a motor vehicle accident that occurred on 29 December 2017.

- [2] Prior to the hearing of the trial, the Fund conceded to the merits of the matter and accepted 100% liability for the plaintiff's proven damages.
- [3] The parties had also settled the plaintiff's claim for general damages prior to the trial date.
- [4] It was ordered by the interlocutory court on 3 June 2022 that the Fund's defence is struck out and that the trial should proceed by way of default.
- [5] At the commencement of the trial, the plaintiff made an application in terms of rule 38(2) of the Uniform Rules of Court for the admission of evidence on affidavit.
- [6] The chief purpose for the penning of this judgment is to give reasons for the court's decisions in respect of the plaintiff's claim for past hospital and medical expenses and the claim for loss of earnings suffered by the plaintiff as a result of a motor vehicle accident.
- [7] The need for a written judgment in respect of the past medical expenses is especially necessary given the flurry of activity and controversy surrounding the Fund's internal directive of August 2022, which reads as follows:

"All Regional Managers must ensure that their teams implement the attached process to assess claims for past medical expenses. All RAF offices are required to assess claims for past medical expenses and reject the medical expenses claimed if the Medical Aid has already paid for the medical expenses. The regions must use the prepared template rejection letter (see attached) to communicate the rejection. The reason to be provided for the repudiation will be that the claimant has sustained no loss or incurred any expenses relating to the past medical expenses claimed. Therefore, there is no duty on the RAF to reimburse the claimant. Also attached is a list of Medical Schemes. Required outcome: immediate implementation of the process and 100% compliance to the process."

- [8] In respect of the issue of the plaintiff's claim for loss of earnings, this court has identified an irregularity in the plaintiff's evidence in the computation of the plaintiff's claim and that this has a negative effect on the plaintiff's total claim for damages against the Fund.

Evidence

[9] In respect of the plaintiff's past medical expenses, this court takes cognisance of the following:

- a. The plaintiff sustained the following injuries from the accident:
 - i. Concussive (diffuse) brain injury;
 - ii. Right parietal cerebral contusion;
 - iii. Subdural and subarachnoid haemorrhages;
 - iv. Fracture of the left humerus;
 - v. Soft tissue haematoma of the left thigh; and
 - vi. Bruising and haematoma on the left cheek.

[10] The plaintiff was transported by ambulance to the Netcare Union Hospital where she received the following treatments or examinations:

- a. CT brain scan;
- b. MRI scan;
- c. X-rays;
- d. A urinary catheter was inserted; and
- e. An intravenous drip was erected.

[11] The plaintiff was then transferred to Netcare Montana Hospital where she was admitted to the intensive care unit for 6 days whereafter she was transferred to a general ward.

[12] The plaintiff was finally transferred to the 1 Military Hospital where she remained an inpatient until her discharge.

[13] The plaintiff was hospitalised for approximately 3 months after the accident.

[14] Statements of account or invoices, drawn in the name of the plaintiff's husband, for the plaintiff's past hospital and medical expenses have been filed of record.

[15] The plaintiff's husband was the primary member of their medical aid scheme, The Regular Force Medical Continuation Fund. The plaintiff's husband ceded his claim, for the costs of the medical treatments received by the plaintiff, to the plaintiff.

[16] In a supplementary affidavit, the plaintiff's husband confirmed that all the medical expenses were comprehensively paid for by their medical scheme and that the medical scheme paid directly to the relevant medical service providers.

[17] The plaintiff appointed the following experts to procure the necessary medico-legal reports for trial:

- a. Dr Preddy, Orthopaedic Surgeon;
- b. Dr Marus, Neurosurgeon;
- c. Dr Berkowitz, Plastic Surgeon;
- d. Ms Nicole Healy, Clinical Psychologist;
- e. Ms Gail Vlok, Occupational Therapist;
- f. Ms Tania Vermaak, Industrial Psychologist;
- g. Mr Gregory Whittaker, Actuary.

[18] Dr Preddy reported that:

- a. Due loss to a of full flexion, abduction, and internal rotation of the plaintiff's left arm the plaintiff is unable to lift her arm fully above her head or reach behind her back;
- b. The plaintiff presents with crepitus and the shoulder appears to be subluxated;

- c. There is wasting of the deltoid muscles and of the upper arm circumference;
- d. The plaintiff has a loss of full function of the left shoulder, especially in attempting to do activities such as carry objects, work overhead, lift objects up onto a shelf and do recreational activities;

[19] Dr Berkowitz reported that the plaintiff presented with:

- a. a scar measuring 15 mm x 3 mm lying longitudinally on the lateral aspect of the middle third of the left thigh.
- b. a serious permanent disfigurement of her left shoulder.

[20] Dr Marus reported that brain scans confirmed that the plaintiff presents with:

- a. various intracranial haemorrhages;
- b. a subdural, subarachnoid haemorrhage, together with a small right parietal cerebral haemorrhage;
- c. bilateral subdural and subarachnoid haemorrhages, together with a right parietal intracerebral contusion;

[21] Further in his report, Dr Marus states that the plaintiff sustained:

- a. significant head trauma with a period of post-traumatic amnesia;
- b. a moderate to severe concussive diffuse brain injury;
- c. right parietal intracerebral haemorrhage complicating her diffuse brain injury and increasing the likelihood of long-term cognitive dysfunction.
- d. The plaintiff remains at risk for the development of late post traumatic epilepsy.

[22] Dr Marus concluded in his report that the plaintiff's brain injury has had a significant alteration in her mental wellbeing and functional capacity as a wife, social worker and as an integrated member of society.

[23] Ms Healy reported that:

- a. Following the collision, the plaintiff's behaviour is consistent with poor frontal lobe control over her behaviour. The plaintiff has difficulty with attention and working memory, slowed double tracking, slowed processing speed, poor numerical reasoning, and a reduced speed of expressive language and language processing.
- b. The plaintiff's deficits are generally mild to moderate but are probably reflective of a moderate to severe brain injury.
- c. The plaintiff's brain injury contributes to her increased emotional lability, social withdrawal and increased levels of fatigue.
- d. The plaintiff's injuries have resulted in reduced cognitive functions and weakened work capacity.
- e. The plaintiff's development of a highly disabling obsessive-compulsive disorder (OCD) is associated with the brain injury with a causal link between the organic injury and the disorder.
- f. The Obsessive-Compulsive Disorder being triggered by the collision and its sequelae, resulted in a watershed in terms of the plaintiff's quality of life and affects her ability to function normally in society.
- g. The plaintiff's symptoms primarily meet the criteria for an obsessive-compulsive disorder (OCD), with good insight. Secondary to this disorder is residual posttraumatic stress disorder (PTSD), a Major Depressive Disorder, as well as Agoraphobia.
- h. Due to the plaintiff's organic brain injury, the therapy and intervention could have a limited efficacy, particularly where some of the OCD symptoms arise because of brain lesions. The therapy is most likely to be primarily supportive and educationally focused, rather than curative.
- i. The impact on the plaintiff's work capacity has been significant, and early retirement is appropriate. If the plaintiff were to stay on, she would have

to be moved out of a managerial position into a far more routine, less responsible position. The impact on her self-esteem would then be considerable. Even in a routine and supervised position, she would battle to cope due to the impact of OCD rituals and fears. Her work speed would probably not be competitive, and the position may require a sympathetic element.

- j. Early retirement will remain her best option.

[24] Ms Fourie reports:

- a. The plaintiff demonstrated the physical strength to cope with work that falls within the light physical demand range. The plaintiff meets all the described physical demands of her current job, except for her ability on the unilateral carry tasks with her left upper limb.
- b. The plaintiff is best suited to tasks within the sedentary to light physical parameters to lessen the strain on her affected joint in the long run.
- c. The presence of emotional and cognitive sequelae have reduced the plaintiff's competitiveness in the open labour market.
- d. The plaintiff's emotional changes will have a negative impact in terms of occupational performance such as poor work habits, her ability to cope under pressure and manage stress, and could impact on her interpersonal relationships with co-workers and clients.
- e. The plaintiff will have trouble in handling and adjusting to new and challenging situations due to presenting cognitive problems.
- f. Due to her impaired cognitive functioning, she would struggle to follow instructions, retain important information and complete an activity in a given timeframe.
- g. The plaintiff struggled to cope occupationally post-collision and has subsequently resigned /retired from her employment. This was probably unavoidable and a direct result of the injuries and sequelae thereof.

- h. The plaintiff has been rendered permanently vulnerable and uncompetitive in the open labour market.

[25] In respect of the plaintiff's employment outcomes, Ms Vermaak reported that:

- a. At the time of the collision, the plaintiff was employed as a social services programme manager at Rata Social Services (Pty) Ltd, earning a monthly salary of R 13 500.00 per month.
- b. But for the collision:
 - i. the plaintiff would have continued to work and earn as a social services programme manager or possibly entered into alternative employment in a position relevant to her educational background and occupational experience;
 - ii. the plaintiff would have earned in line with her employment as a social services programme manager with inflationary increases until retirement age 65.
- c. Having regard of the collision, the plaintiff:
 - i. was absent from work for three months during which time she was fully remunerated;
 - ii. returned to her pre-accident employment position as a social services programme manager at Rata Social Services (Pty) Ltd and continued her pre-morbid employment until December 2019 when she resigned and entered early retirement;
- d. has been rendered an uncompetitive competitor in the open labour market as she will not regain her pre-collision employment and earning capacity;
- e. the plaintiff will continue to suffer a loss of income.

[26] The actuarial calculations, by Mr Whittaker, are premised on his instructions that in respect of the plaintiff's pre-accident earnings:

- a. There is no evidence of a past loss of income up to 31 December 2019.

[27] Mr Whittaker was further instructed that the plaintiff's post-accident earnings are taken as nil from 1 January 2020 and that the plaintiff receives a small pension funded by her past savings and was therefore ignored in his calculations.

[28] Mr Whittaker's summary of his actuarial calculations are as follows:

Past loss

Value of income uninjured:		R 770,854
Less contingency deduction:	5%	<u>R 38,543</u>
Net past loss		R 732,311

Future Loss

Value of the income uninjured:		R 987,162
Less contingency deduction:	10%	<u>R 98,716</u>
Net future loss		R 888,446

Total net loss: R1,620,757

Issues

[29] As the issue of merits and general damages had been settled between the parties, and that the plaintiff had received an undertaking for future medical expenses, the court was only required to quantify the plaintiff's claim for past medical expenses and the plaintiff's loss of earnings as result of the accident.

[30] The point of contention in dealing with the plaintiff's claim for the recovery of past medical expenses is the fund's internal directive of August 2022 and the litigation that has ensued as a result of the directive.

Current Applicable Law

[31] In civil cases the measure of proof remains a preponderance or on a balance of probability. This means that the plaintiff must prove that she has more than likely suffered certain heads or categories of damage and she must also prove the exact amount of damages that she should be awarded to compensate for that loss.

[32] In the matter of *Discovery Health (Pty) Limited v Road Accident Fund and Another*¹, Mbongwe J canvassed the liability of the fund as set out in section 17(1) of the Road Accident Fund Act² (as amended), (“the Act”):

“... to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or his or her employee in the performance of the employee’s duties as employee...”

[33] The court held that:

“[40] Not only is the impugned decision arbitrary, it is a transgression of the enabling statutory provisions and the dictates of PAJA. The action of the [the Fund] unfathomably points to an oblivion that the schemes do not cover only motor accident-related matters of their clients, but their clients’ other health related aspects necessitating hospitalisation and medical treatment for which the schemes are obliged to pay – an obligation that would be impossible to discharge were the decision of [the Fund] to be left unchecked. Worst still, the decision is unlawful for its variance with the provisions of section 17 quoted above, which renders it irrational as well.”

[34] In the matter of *Zysset and Others v Santam Ltd*³, which was cited by Mbongwe J, the confirmed principle is that benefits received by a claimant from the benevolence of a third party or a private insurance policy are not considered for purposes of determining the quantum of a claimant’s damages against the Fund.

¹ 2022 JDR 3179 (GP).

² 56 of 1996.

³ 1996 (1) SA 273 (C).

[35] Mbongwe J ordered that the fund's directive of 12 August 2022 is declared unlawful, that the directive was reviewed and set aside and that the Fund is interdicted and restrained from implementing the impugned directive.

[36] The Fund attempted to take the Discovery Health decision on appeal to the Supreme Court of Appeal (the SCA) and to the Constitutional Court (the Con Court); however, both the SCA and the Con Court have dismissed the Fund's applications for leave to appeal.

[37] As per sections 18(1) read together with section 18(3) of the Superior Courts Act⁴, the Funds attempts to appeal the decision resulted in the suspension of the operation and execution of the court *a quo*'s decision pending the outcome of the appellate courts' respective decisions.

[38] Consequently, as both the SCA and the Con Court have dismissed the Fund's applications, there ought not to be any confusion that the Fund's impugned directive has been set aside and that the Fund is interdicted from applying the directive.

Findings

[39] Rule 38(2) confers on the court the power to order that all or any evidence adduced, at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as it may seem meet: provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.

[40] At no material time were the plaintiff or the plaintiff's medico-legal experts called to be subjected to cross-examination by the Fund and, in the interest of expediency to finalise such matters, this court finds no difficulty in ordering that the plaintiff's affidavit, the plaintiff's husband's affidavit or the medico-legal experts' affidavits and their respective medico-legal reports be admitted into evidence. In terms of section 3(1) of the Law of Evidence Amendment Act⁵,

⁴ 10 of 2013.

⁵ 45 of 1988.

read with section 34(1)(ii) of the Civil Proceedings Evidence Act⁶ this court accepts into evidence the hospital and clinical records on which the respective medico-legal experts based their respective reports on.

[41] The actuary records the following statement in his report:

"In light of Ms Vermaak's report we have valued the following pre-accident earnings, noting that there is no evidence of a past loss of income up to 31 December 2019."
(emphasis added)

[42] The plaintiff had received her full salary for the three months after the accident, while she recovered, and thereafter she returned to her premorbid employment until she resigned on 31 December 2019. The actuary calculates the plaintiff's future loss of earnings, but for the accident, from 1 January 2020 which is the date immediately after the plaintiff's resignation. As such this court finds that the plaintiff was unable to prove her loss of past earnings, consequently, the total of the award has been calculated to exclude the alleged past loss of earnings.

[43] Having regard to the industrial psychologist's report, this court notes with grave concern that the actuary was instructed to include a calculation for the plaintiff's alleged past loss of earnings when it was confirmed that there is no evidence of such. Although it may have been an earnest error on the part of the plaintiff's legal representatives, the inclusion of the plaintiff's alleged past loss of earnings in the total amount in the draft order appears to be opportunistic.

[44] Turning to the plaintiff's claim for her future loss of earnings and earning capacity, the various medico-legal experts each respectively conclude that the plaintiff suffered significant injury as a result of the accident. The injuries have resulted in a continued mechanical impairment to the plaintiff's left arm and that the plaintiff suffers with symptoms consistent with a not insignificant brain injury. From the plaintiff's husband's supporting affidavit, dated 17 July 2023, wherein he details the plaintiff's daily difficulties subsequent to the accident, it is evident that the plaintiff is suffering from long lasting effects from the accident, including depression and an obsessive-compulsive disorder. Given the

⁶ 25 of 1965.

plaintiff's moderately advanced age, the injuries sustained from the accident and the sequelae therefrom, the plaintiff has proven on a balance of probability that she is unemployable as a direct consequence of the accident and that her potential to earn future income has been compromised.

[45] The court finds the actuaries applied contingency deduction of 10% to the plaintiff's future loss of earnings and earning capacity to be fair and equitable given the plaintiff's age, injuries sustained and the sequelae suffered by the plaintiff as a result of the accident.

[46] In respect of the past medical and hospital expenses claimed for by the plaintiff, the court finds that despite the fact that the plaintiff was comprehensively covered by a medical scheme through her husband, the Fund remains liable for the loss suffered by plaintiff. Such would be congruent with the settled law

Order

[47] In the result I make the following order:

1. The Fund is to pay to the plaintiff:
 - 1.1. the amount of R983,397.77 (nine hundred eighty-three thousand three hundred ninety-seven rand and seventy-seven cents ("the capital sum"), comprising the amounts of: R94,951.77 in respect for past hospital and medical expenses and R888,446.00 relating to future loss of earnings and earning capacity.
2. Payment of the capital sum shall be made directly into the plaintiff's attorneys trust account within 180 (hundred and eighty) days from date of this order, the details of the trust banking account are as follows:
 - 2.1. Clive Unsworth Attorneys Trust Account (account number 000926221) maintained at the Standard Bank of South Africa.
3. Interest *a tempore morae* calculated in accordance with the Prescribed Rate of Interest Act 55 of 1975, read with section 17(3)(a) of the Road Accident Fund

Act 56 of 1996.

4. The plaintiff's party and party costs, as taxed or agreed:
 - 4.1. including, the costs attendant upon the preparation of reports and/or joint minutes and the preparation fees, if any, of:
 - 4.1.1. Dr Preddy, Orthopaedic Surgeon;
 - 4.1.2. Dr Marus, Neurosurgeon;
 - 4.1.3. Dr Berkowitz, Plastic Surgeon;
 - 4.1.4. Ms Nicole Healy, Clinical Psychologist;
 - 4.1.5. Ms Gail Vlok, Occupational Therapist;
 - 4.1.6. Ms Tania Vermaak, Industrial Psychologist;
 - 4.1.7. Mr Gregory Whittaker, Actuary.
 - 4.2. inclusive of the costs of counsel;
 - 4.3. on the basis that no contingency fee agreement had been concluded between the plaintiff and her attorney;
 - 4.4. subject thereto that the plaintiff shall:
 - 4.4.1. serve the notice of taxation on the Fund's attorneys of record, in the event that such costs are not agreed;
 - 4.4.2. allow the Fund 15 court days to make a full payment of the taxed costs.

5. The Fund shall furnish an undertaking as envisaged in Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, as amended, to the effect that the Fund shall compensate the plaintiff in respect of 100% of:

5.1. the costs of the future accommodation of the plaintiff in a hospital or nursing home;

5.2. the treatment of the plaintiff;

5.3. the rendering of a service to the plaintiff; and

5.4. the supplying of goods to the plaintiff,

after such costs have been incurred and on proof thereof arising from injuries sustained by the plaintiff, which forms the subject matter of this action.

6. The plaintiff's attorney shall upon receipt of payment of the Capital Sum mentioned above, pay the past medical and hospital costs and expenses less any pro rata portion in respect of attorney and own client costs to directly to the Regular Force Medical Continuation Fund (RFMCF).

**KOM AJ
JUDGE OF THE HIGH COURT
JOHANNESBURG**

For the Plaintiff: Adv P Uys
 Instructed by Mr C Unsworth of Clive Unsworth Attorneys

For the Defendant: Not applicable

