

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



CASE NO: 2019/32498

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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Date

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Matojane J

In the matter between:

RADEBE: PALESA

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MATOJANE J

[1] The Plaintiff, a 29 years old woman, has instituted action against the defendant (the RAF) for damages due to a motor vehicle accident that occurred on 31 December 2017.

[2] There is no claim for past medical expenses. The issue of general damages has, by agreement been referred to the HPCA. The only issue for determination is the quantum of the Plaintiff's future medical expenses and past loss of income and/or loss of earning Capacity.

[3] The defendant has considered the merits of the claim. The only issue before me is the quantum of the Plaintiff's damages resulting from the loss of past and future earning capacity.

[4] At the outset, I was advised that the parties did not intend to call any witnesses, and I was required to consider the matter on the papers before me. Plaintiff has filed an affidavit explaining that a copy of the joint minute was sent to the claim handler dealing with this matter for her input and signature, and to date, the claim handler has not responded. The defendant did not file any expert report.

[5] On 31 December 2017 at about 12H00, Plaintiff was a passenger in a motor vehicle travelling along Mahajane Street, Dobsonville, Soweto. An unknown motor vehicle travelling in the opposite direction at high speed suddenly veered onto their lane of travel and collided with the motor vehicle in which she was a passenger. She was not wearing a seatbelt at the time.

[6] As a result of the collision, the Plaintiff was admitted to Baragwanath hospital, where she was treated for a head injury, multiple facial abrasions and scarring to the left eyelid. Plaintiff relied on her expert witnesses' evidence, which was presented in the form of affidavits by these witnesses. The defendant did not file any expert reports.

[7] Dr Kelly, a specialist Neurosurgeon, noted that Plaintiff sustained a severe traumatic brain injury. He opines that though physical disability was not found, memory problems were evident, which impaired recent and remote memory. He reports that the Plaintiff suffers from post-concussion headaches and has an 8 -10% chance of developing late-onset post-traumatic epilepsy. Dr Kelly is of the view that the Plaintiff will not be able to compete effectively in the open labour market and that money should be set aside for the treatment of headaches for 3-5 years

[8] It is noted in the report by the specialist ophthalmologist Dr Berger dated 11 November 2019, that Plaintiff has a scarring on the upper eyelid that has resulted in shortening of the eyelid, which does not allow total closure of the eyelid over the eyeball and that this condition predisposes to tears are running out of the eye and exposes the eye to eventual corneal

dryness. She can prevent eye drying by multiple daily uses of artificial tears during day time and of an antibiotic gel before going to sleep.

[9] The Plastic and Reconstructive Surgeon, Dr Berkowitz in his report dated 14 November 2019, reports that the Plaintiff has been left with a disfiguring scarring which will benefit from surgical revision.

[10] Dr Matjane, a Specialist Psychiatrist, noted that the plaintiff's injuries are consistent with traumatic brain injury of mild to moderate severity and may be associated with chronic permanent neuropsychiatric/behavioural deficits. Dr Matjane found evidence that the Plaintiff suffered from secondary brain trauma from conditions such as intracranial bleeds, intracranial oedema, metabolic and electrolyte imbalances.

[11] Margaret Gibson, a psychologist, reports that Ms Radebe's overall neuropsychological test profile is consistent with the effects of a diffuse concussive brain injury. The nature of the brain injury, the presenting complaints and the neuropsychological findings indicate that there are permanent and serious impairments resulting from the brain injury sustained. She concluded that it is unlikely that Ms Radebe will be formally employable in the future, and it is considered unlikely that she will be able to engage in further training and education successfully.

[12] Michelle Doran, an Occupational Therapist, reports that

"Ms Radebe does retain the physical Capacity for the occupation of a sedentary to light physical nature post-accident, currently, and probably until indicated retirement age.... However, it is accepted that her suitability for such an occupation has been compromised by the severe traumatic brain injury, which seems to impact her ability to sustain her concentration, focus, and the identified difficulties with her memory.... Thus, it is accepted that considering the identified difficulties on a neurocognitive, neurobehavioural and neuropsychological level, Ms Radebe may experience on-going difficulties, especially in her ability to secure additional qualifications.

[13] Christa Du Toit, an Industrial psychologist, concludes in her report that:

Ms Radebe's occupational functioning has been considerably compromised by the sequelae of the severe traumatic brain injury she sustained in the accident. The combination of her neurocognitive-, neuropsychological- and neurobehavioural deficits has had a deleterious effect on her employability. She

is compromised in her ability to engage in further training and education successfully and will be significantly limited in her ability to secure and, more so, to sustain employment. It is noted that she has remained unemployed since the accident, and she is expected to remain an unequal competitor in the open labour market. The accident has, therefore negatively affected Ms Radebe's ability to work in a similar way as pre-accident.

Future hospital, medical and related expenses

[14] On the available evidence, the Plaintiff will require future medical hospital and medical treatment. The details and nature of the treatment are contained in the medico-legal expert reports by the Plaintiff's expert witnesses. The statutory undertaking to be provided by the Fund to the Plaintiff in terms of the Road Accident Fund, Act 56 of 1996 ('the Act') would deal with this aspect of the damages claims.

Past and Future loss of Earning / Loss of income Earning Capacity

[15] It is now trite that any enquiry into damages for loss of earning capacity is by nature speculative. All the court can do is estimate the present value of the loss whilst it is helpful to take note of the actuarial calculations, a court still has the discretion to award what it considers right¹.

[16] Considering the plaintiff's level of education (Grade 11), her non-completion of a leadership to facilitate completion of an NQF 6 qualification and her limited work history it is assumed that she would probably have continued working in low-level semiskilled capacities with periods of unemployment.

[17] For purposes of calculation, reference was made to Plaintiff's reported pre-accident income as a guideline for earning potential. She was unemployed at the time of the accident in December 2017. Between 2012 and 2014, she worked as a Cashier at Chicken Licken (Booyens), reportedly earning R4,000.00 per month (R48,000.00 per annum) adapted for inflation, which equates to R69 360.00 per annum. Allowing for some growth to the upper earning range of semiskilled workers and adapting the figure to inflation, a figure of R186 000.00 was arrived at.

¹ Southern Insurance Association V Bailey NO 1984 (1)98(AD) at 113 G

[18] The foregoing translated into actuarial calculations by the Plaintiff's actuary Ivan Kramer in terms of which it was projected that the Plaintiff's pre-morbid income would be R222 446 and post-morbid income is projected at R3 098 537.

[19] To accommodate for uncertainties, e.g. No proof could be provided for income earned while working at chicken licken, the availability of work and the projected earning potential, a contingency of 25% is applied to the accrued loss and 40% on the future loss as the actuarial figures are based on total employability post-morbid.

[20] The Plaintiff's injuries may respond somewhat to treatment. Dr Matjane does not foresee a permanent reduction in competitiveness in the open market. She is not completely incapable of working and may well obtain some form of employment.

[21] Considering the Plaintiff's age, educational background, employment history, injuries and all the expert opinions, I believe that 25% contingencies should be applied to pre-morbid positions and 40% to post morbid positions. I therefore conclude that a more appropriate award in respect of future loss of income would be the sum of R2 026 707.95.

[22] In the result, I make the following order

1. The Defendant shall pay the Plaintiff the capital amount of R2 026 707.95 in respect of the issue of loss of earnings together with 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.
2. Payment will be made directly into the trust account of the Plaintiff's attorneys within One Hundred and Eighty (180) days:

3.

4. Holder	5. De Broglio Attorneys
6. Account Number	7. 109 645 1867
8. Bank & Branch	9. Nedbank – Northern Gauteng
10. Code	11. 198 765
12. Ref	13. R560

4. The Defendant is ordered in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 to reimburse **100%** of Plaintiff's costs for any future accommodation of the Plaintiff in a hospital or nursing home, or treatment or rendering of service to her or supplying goods to her arising out of injuries sustained by Plaintiff in the motor vehicle accident on which the cause of action is based, after such costs have been incurred and upon proof thereof.
5. The Defendant is to pay the Plaintiff's agreed or taxed High Court costs as between party and party, the preparation, qualifying and reservation fees of the Plaintiff's experts consequent upon obtaining the Plaintiff's expert reports, if any, the Plaintiff's reasonable travel and accommodation costs to attend the Plaintiff's experts and the employment of counsel.
6. The Plaintiff shall, in the event that the costs are not agreed, serve the Notice of Taxation on the Defendants Attorney of record; and
7. The Plaintiff shall allow the Defendant fourteen (14) days to make payment of the taxed costs.
8. The issue of general damages is postponed and referred to the HPCSA for determination.

9. There is no contingency fee agreement in existence between the Plaintiff and her Attorneys.

KE MATOJANE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

APPEARANCES:

For The Plaintiff:

Adv Justin Erasmus

Instructed by de Broglio Attorneys

For The Defendant:

Phindile Makatini

RAF State Attorney