

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

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 18740/2019

| | |
|----------------------|----------------------------------------|
| (1) | <u>REPORTABLE:</u> NO |
| (2) | <u>OF INTEREST TO OTHER JUDGES:</u> NO |
| (3) | <u>REVISED.</u> |
| 29 April 2023 | MPIENAAR..... |
| DATE | SIGNATURE |

In the matter between:

SIZANI ELDER MAKHUBU

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT:

This judgment was handed down electronically by circulation to the parties representatives by email. The date and hand-down is deemed to be 10h00 on 2 May 2023.

M PIENAAR, AJ

Introduction

[1] On 29 September 2013 the Plaintiff was a passenger in a motor vehicle with

registration number [...] traveling to Embalenville, Mpumalanga province on R546 road. The Plaintiff lodged her claim directly at the Road

Accident Fund on 7 August 2015 and the RAF did not attend to her claim. On

27 March 2019 the Road Accident Fund was served with the summons.

The defendant entered an appearance to defend and filed a special plea and

plea, but at some stage the attorneys of record for the defendant withdrew

and no attorneys were appointed.

[2] On 22nd March 2023 the matter came before me, Mr Lubbe appeared on

behalf of the Plaintiff. There was no appearance on behalf of the RAF.

The matter was standing down until 23 March 2023 to obtain an Affidavit

from the Plaintiff Attorney regarding the direct lodgment of the Claimant

with the Fund. The notice of set down was served on 09 February 2023.

Background

[3] On 15 November 2021, Flatela AJ, granted an order that RAF's defence be

struck out and that the Plaintiff proceed to trial abasing RAF by way of default proceedings.

[4] Counsel for the Plaintiff submitted that the merits of the matter had been

settled on the basis that the Defendant is liable for 100% of the proven or

agreed damages of the Plaintiff. An offer was also made for loss of earnings

and General damages which was rejected by the Plaintiff.

[5] The Plaintiff moved for an amendment of the amounts claimed for General

Damages and past and future loss of earnings and/ or earning capacity as

follows:

| | |
|--------------------------------------|---------------|
| Past and future loss of earnings | R2 513 479,00 |
| Non Pecuniary loss (General Damages) | R850 000,00 |

[6] For sake of completeness the following documents were named as exhibits

during trial, namely:

The Pleadings bundle as Exhibit A;

Plaintiff's expert reports bundles and Confirmatory affidavits as Exhibit B

Plaintiff's merits bundles as Exhibit C

Plaintiff's amended actuary report for trial Exhibit F

EVIDENCE

[7] The Plaintiff served the following reports in support of her claim for General Damages and Loss of Earnings/loss of earning capacity:

- Dr S van Heerden
- Rosslyn Bennie
- Ben Moodie
- Prof HLM Du Plessis
- Plastic Surgeon
- Occupational Therapist
- Industrial Psychologist
- Actuary

Dr Schalk Petrus van Heerden (Plastic Surgeon)

[8] Dr van Heerden examined the Plaintiff on 01 February 2023. He had also

completed the RAF 4 form in which he found that the Plaintiff qualified for

General Damages under 5.2 (i.e. permanent serious disfigurement), after

calculating her injuries to amount to 5% whole person impairment or WPI.

[9] According to Dr van Heerden the Plaintiff sustained a displaced closed right

femur fracture and she complained about pain in her right leg and left elbow.

On examination there were small scars present on the distal posterior right

thigh and the scars measure 6cm x 4cm x 3cm. The scars are hyperpigmented. The underlying skin is thin and slightly raised above the

level of the underlying skin. The scars are soft and pliable.

Rosslyn Bennie (Occupational Therapist)

[10] Rosslyn Bennie assessed the Plaintiff on 21 September 2021. Ms Makhubu

sustained the following injuries : Painful right leg, painful left elbow and

closed right femur fracture displaced.

[11] She complains of pain in the right shoulder, radiating to the elbow and

chest, associated with reduced function of the right upper limb.
Pain in the
right hip and knee, exacerbated by cold/inclement weather,
crouching,
kneeling and walking long distances. She has difficulty balancing
on the
right leg. She has reduced hearing after the accident and believes
her ears
were injured.

[12] Ms Makhubu worked as a firefighter at Balfour, at the time of the
accident.

She is no longer working in this position. Ms Makhubu was paid for
two
months post- accident. She was unable to return to this work post-
accident
due to reduced physical capacity and would not have been able to
participate in fitness training.

[13] She reported pain in the right upper arm associated with force
exertion.

She demonstrated slowed upper limb coordination for
diadochokinesis on
the right and on the round block task which requires gross hand
movements, she performed below average with the dominant
right- handed
performance with weakness and fatigue off the right arm notable.

[14] During the physical evaluation pain behaviour was observed related to

pain in the right arm and right leg. Ms Makhubu's current physical abilities

are that where she is not deemed to be suited to perform work doing

firefighting or roadside litter pick-up, as her current physical ability is not in

keeping with the critical demands, because of the fracture to her right leg

as well as her symptomatic right arm.

[15] Ms Makhubu's vocational prospects will be dependent on the orthopaedic

prognosis. When considering the extended time that has lapsed since the

accident and that she has undergone surgery to the right lower limb, the

orthopaedic prognosis may not be favorable and long term mobility

restrictions could be anticipated, although an orthopedic surgeon would

need formally comment on this.

Loss of Earnings/Earning capacity:

Ben Moodie - Industrial Psychologist

[16] The Plaintiff consulted the expert in September 2019 and an addendum report was done in March 2023.

[17] The accident intervened on 29 September 2013. She was absent from work for a period of 3 months following the accident during which time she was fully remunerated.

[18] Ms Makhubu reported that she completed Grade 12. She also completed short courses, but this could not be verified. The claimant entered the open labour market in 2011 when she secured employment as a Firefighter at Working on Fire in Balfour. She was working in this position at the time of the accident and was earning a basic salary of R2 500 per month.

[19] The expert was unable to contact collateral information from Working on Fire and the Claimant did not have the contact details for her previous supervisor. No collateral information could be obtained.

[20] Ms Makhubu could then surely have secured employment at a larger

concern where she would have started with a salary on par with Paterson

level A1 (lower quartile), earning basic salary only R 7 200 per month plus

possible 13th cheque and a Provident Fund for approximately 2-3 before

she could have negotiate salaries to earn on par with the total guaranteed

package. Once the claimant entered the open labour market on par with

Paterson Level A1, she would have progressed in a straight line to reach

the pinnacle of her career on par with Paterson Level B3/B4 by the age of 45.

But for the accident the claimant would have continued working until the

normal age of 65.

[21] After her recuperation period she returned to work but she did not go out

on calls and only attended work as a First Aider. This did not influence

her salary. Ms Makhubu stated that she struggle with this work as she had

pain due to sitting for long periods of time or walking frequently.

[22] She continued in this capacity until January 2014 when she resigned due to

reduced physical capacity and would not have been able to participate in

fitness training. Since her contact at EPWP came to an end, she remains

unemployed. The Claimant worked as a Roadside Litter Pick-up Cleaner

for a period of ten months in 2022. She was getting paid R1800 per month.

She is financially dependent on the child grant she receives.

[23] The expert, having referred to the opinions of the Occupational therapist

who assessed her, concluded that Ms Makhubu's vocational prospects will

be dependent on the orthopaedic prognosis. When considering the extended time that was lapsed since the accident and that she has undergone surgery for the right lower limb, the orthopedic prognosis may

not be favorable and long term mobility restrictions could be anticipated,

although an orthopaedic surgeon would need to formally comment on this.

Mr Moodie is of the opinion that her vocational prospects have been

negatively affected by the accident, and may be expected to continue to remain limited into the future. The Plaintiff suffered orthopaedic injuries, but there is no Orthopaedic surgeon medico legal report before Court.

[24] According to the addendum report of Mr Ben Moodie, no proof of collateral information was obtained. Mr Moodie could not get hold of her previous employer. He contacted Gauteng Fire Department to enquire about which is the busier months of the year.

[25] This expert is of the opinion that for the small likelihood that the claimant will be able to obtain and sustain work, she will function on a very basic level doing work such as filing, working as a tea lady or any other similar work, where it will not be required of her to pick up heavy articles.

[26] Counsel submitted that the contingencies applied by Quantum actuary report were fair and reasonable. The actuary report by Quantum Actuaries does not help the Plaintiff's caused.

[27] The actuary report by Quantum Actuaries is based on the sources of

information by the medico legal report by Industrial Psychologist Mr Ben

Moodie dated 6 May 2022 and the addendum report as well as the

quantum Yearbook by Koch 2023. I have perused through the actuary report.

[28] There is no evidence before the court relating to the Plaintiff's qualifications.

The impact of this is that the Plaintiff cannot provide proof of her qualifications. This information was not available to Mr Moodie when both his reports were compiled.

[29] According to the Industrial Psychologist he was recently placed in possession of salary advice dated April 2012 where it is indicated that the

claimant was earning a salary of R1 585,50 per month. However this collateral information was not placed before Court.

[30] The onus is on the Plaintiff to ensure that the court has all necessary and

and relevant evidence to assist the court in arriving at a just and fair

decision. The Plaintiff failed to provide her educational qualifications, experience, professions and earnings profile.

[31] In *Mlotshwa v RAF, Petersen AJ* granted absolution from the instance. In

this, plaintiff provided no proof of any bank statements to prove his income

and he was not registered for income tax purposes with the South African

Revenue Service (SARS). In this case, he quoted *Terblance v Minister of*

Safety and Security and Another at para 14 - stated

“I agree with the salutary practice proposed in the above-quoted paragraphs

of *Bailey*. It has mustered approval in numerous judicial pronouncements

and is widely accepted as the best practice available. I wish to add,

however what the learned judge said further on page 379, which is omitted

in *Bailey*. The two sentences which follow immediately upon the quote in

Bailey are opposite:

“... It is not so bound in the case where evidence is available to the Plaintiff

which he has not produced; in those circumstances the Court is justified in giving and does give absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damage suffered, still if it is the best evidence available, the Court must use it and arrive at a conclusion based on it".

[32] Similar issues regarding the onus of proof of the Plaintiff was discussed

in *Mlotshwa v RAF and Jerome Alphonsus Du Plessis and Road Accident*

Fund were Petersen JA (as he then quoted an unreported appeal in the

Gauteng Local Division of Boy Petrus Modise v Passenger Rail Agency of

South Africa case number A5023/2013 (11 June 2014) at paragraph 10

against the dismissal of a claim for loss of earnings and future loss of

earnings, *Wright J* held:

"This is an unfortunate case. One suspects that the Plaintiff did suffer a

pass loss of earnings and will suffer future loss of earnings. However, I may not allow a suspicion nor my sympathy for the Plaintiff, to translate into a basis for awarding damages where evidence does not allow this. The variables in the equation are simply too many”.

General Damages

[33] On 22nd March 2023 an Offer was made by the Defendant for General

Damages, which offer was rejected by the Plaintiff. In this case the Plaintiff

suffered a closed right femur fracture, displaced, right leg and left elbow

injury. The Plaintiff has severe scarring.

[34] The accident has left Ms Makhubu with serious permanent impairment and

some scarring with disfigurement. Mr Lubbe assist the Court with case law

to quantify the issue of General Damages.

[35] In the matter of *Ndaba v RAF* 2011 (6E3) QOD 13 (ECB) an amount of

R300 000,00 was awarded to a female informal hawker who was 42 years

old at the time of the injury. This is equal to a present day value of R456 900,00. The Plaintiff sustained multiple orthopedic injuries including

a pelvic fracture, and fractures to the right femur and tibia as well as a left

knee injury. Open reductions and fixation were performed on the hip joint,

femur and tibia. The court held that she could no longer trade as a hawker.

Although the injuries differ from those in case, the judgment cannot be

excluded as a yardstick.

[36] Mr Lubbe made submissions that a fair and reasonable amount is R450 000,00. I am also of the view that an amount of R450 000,00

is a fair and reasonable compensation for the General Damages.

RULING

With all that has been said above I make the following rulings:

[37.1] In so far as future hospital expenses are concerned, the Defendant shall

furnish the Plaintiff with a 100% undertaking in terms of

Section 17(4) (a) of the Road Accident Act, Act 56 of 1996.

[37.2] In so far as General Damages are concerned I am of the view, considering all the comparative cases I have been referred to that R450 000,00 is fair and reasonable.

[37.3] In so Loss of Earnings/earning capacity are concerned, I am of the view there is not sufficient evidence for me to find for the Plaintiff on a balance of probabilities therefore, I am of the view that absolution from the instance is the appropriate order under this head of damages.

ORDER

[38] In a result, I make the following order:

[38.1] The Defendant shall furnish the Plaintiff with a 100% undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996 ("the Act") to pay the costs of future accommodation of the Plaintiff in a hospital or nursing home, or treatment of or rendering of a service

or supplying of goods to him, arising out of the injuries he sustained in the motor vehicle collision which occurred on 29 September 2013, after such costs have been incurred and upon proof thereof.

[38.2] The Defendant shall pay the amount of R450 000,00 (Four hundred and fifty thousand rand only) within 180 days.

[38.3] Absolution from the instance is granted in respect of loss of income/ earning capacity.

[38.4] In the even of the aforesaid capital amount not being paid timesouly, the Defendant shall be liable for interest on the amount at the rate of 10,75% per annum calculated from the 15th calendar day after the date of the Order to the date of payment in accordance with the Prescribed Rate of Interest Act 55 of 1975, read with Section 17(3) of the Road Accident Fund Act 56 of 1996.

[38.5] The Defendant is ordered to pay the Plaintiff's agreed or taxed High Court

costs as between party and party such costs to include the costs of Counsel day fee for 22nd March 2023 and 23rd March 2023 the qualifying fees of the experts consequent upon obtaining Plaintiff's reports.

[38.6] The amount referred to above will be paid to the Plaintiff's attorneys,

Strydom Ing by direct transfer into their trust account, details of which are the following:

Name : Strydom Ing
Bank : Standard Bank
Account number : [...]
Account type : Trust
Branch code : 014845
Reference : 3177

[38.7] It is further recorded that there is a valid contingency fee agreement.

MPIENAAR

Acting Judge of the High Court of South

Gauteng Division, Pretoria

Delivered: This judgment was prepared and authorised by the Judge whose name are reflected and is handed down electronically by the circulation to the Parties/their Legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 2nd May 2023.

Heard on : 23 March 2023
Judgement date : 2 May 2023

APPEARANCES:

Counsel for the Applicant : Adv G Lubbe
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Appearance for the Defendant : Road Accident Fund
No appearance

[1] CaseLines: 0001 Pleadings

[2] Caselines : 0000 Default Judgment, bundle 12

- [3] Caselines : 0009 Orders, bundle 3
- [4] Caselines : 0013 Default Judgment Order, bundle 7
- [5] Caselines : 0001 Pleadings, bundle 9
- [6] Caselines : 0005 Experts
- [7] Mlotshwa v RAF 9269/2014 [2017] ZAGPPHC 109 (29 March 2017)
- [8] Ndaba v RAF 2011 (6E3) QOD 13 (ECB)
- [9] Mlotshwa v RAF 9269/2014 [2017] ZAGPPHC 109 (29 March 2017)
- [10] Jerome Alphonsus Du Plessis and Road Accident Fund unreported Case 913/18 Gauteng Division, Pretoria; see footnote 17