

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



- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES:
NO
- (3) REVISED **NO**
- DATE: 26 May 2023

Case No.: 22540/2017

In the matter between:

LYNETTE ZANELE SHEZI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

KHWINANA AJ
INTRODUCTION

- [1] The plaintiff, Ms Lynette Zanele Shezi instituted action proceedings in her personal capacity against the defendant for damages in terms of the Road Accident Fund Act 56 of 1996, pursuant to a motor vehicle collision.

[2] The merits and quantum as well as general damages were previously resolved at 80% in favour of plaintiff. The plaintiff approaches this court for Past and future loss of earnings determination.

[3] I am therefore ceased with determination of loss of earnings only.

BACKGROUND

[4] The plaintiff was involved in a motor vehicle collision that occurred on 21 February 2016 wherein she was being side swiped from behind. The plaintiff lost control of her vehicle and her vehicle thereafter overturned. The plaintiff sustained injuries as a result of the said motor collision.

[5] The plaintiff was employed as a senior administrator clerk and her work performance was outstanding. She stood a good chance of being considered for promotions, namely, senior administration officer.

[6] The consequence of the injuries sustained in the motor vehicle collision, are that the plaintiff struggled to cope with her work demands post- accident especially because of her poor vision in the right eye.

[7] The plaintiff had various problems:

1. She did not submit her work on time.
2. She required assistance to complete work tasks.
3. She relies on colleagues.
4. She could only perform work that did not require her to sit in front of a computer.

[8] The plaintiff was accommodated and based on the employer, the plaintiff is

unlikely to be considered for promotion considering her challenges.

INJURIES SUSTAINED

[9] The plaintiff sustained the following injuries:

1. Head injury;
2. Right eye injury; and
3. Disfigurement and Degloving injuries.

DR MAZWI

NEUROSURGEON

[10] The plaintiff sustained a mild head injury. The neurological examination, found that the plaintiff has complete right eye blindness and difficulty with concentration. The plaintiff has significant memory disturbances and suffers from recurrent post-injury severe headaches. The Neurosurgeon opines that the plaintiff's whole-person impairment is 45% and noted that there is a significant long-term mental disturbance

MS N NQHAYI

CLINICAL PSYCHOLOGIST

[11] She opines that the plaintiff decreased intellectual capacity and areas of difficulty in various domains of neurocognitive functioning including:

1. Inadequate attention and concentration.
2. Impaired mental tracking abilities and complex attention.
3. Inadequate double tracking and working memory.
4. Impaired mental processing, psychomotor speed, and visual tracking.
5. Inadequate sustained attention and auditory divided attention.
6. Variable immediate verbal memory and adequate long-term verbal memory.

7. Moderate PTSD symptoms, moderate depression, and anxiety.

[12] She says the plaintiff demonstrated mild neurocognitive impairments and depletion in her neuropsychological abilities that are compatible with a mild head injury compounded by emotional difficulties. She says this has limited the plaintiff's enjoyment of life. She opines that plaintiff is suffering from moderate PTSD symptoms with co-morbid depression and anxiety which is attributable to the sequelae of the trauma she experienced and the result of the accident. The plaintiff is uncomfortable around people as a result she isolates herself, has low self-esteem, lives with sadness, chronic pain and poor self-image. Her prognosis is poor.

DR NHLAPO

OPHTHALMOLOGIST

[13] The plaintiff sustained an injury to the right eye; a fracture of the right orbital roof with a right extraconal foreign body, proptosis with inferior dystopia, and right superior rectus impingement. The plaintiff has a 3cm penetrating laceration on the right supra-orbital region. Ophthalmological examination revealed no light perception, normal vision for far objects is 1.0 with or without correction, no binocular single vision, poor depth perception, a 6cm curvilinear horizontal scar on the right upper lid, right exotropia of 35 prism dioptres, pigmented conjunctiva.

[14] The plaintiff suffers from the following sequelae signs of blunt trauma to the anterior segments and the cornea is clear. The anterior chamber is open and clear. There are sphincter tears on the pupil margin. The

pupil is dilated with an afferent pupil defect. The lens is clear. The intraocular pressures are 17mmHg. On fundoscopy, the optic disc is pale, and the retinal blood vessels are attenuated. The plaintiff has been diagnosed with Traumatic Optic Neuropathy, a blind right eye. right exotropia.

[15] The Ophthalmologist recorded the plaintiff's whole person impairment (WPI) is 24% with permanent impairment of the visual system and permanent impairment of the whole person which is based on the following functions of the eye corrected visual acuity for near and for far objects. The visual field perception and ocular motility and diplopia.

LOSS OF EARNINGS AND OR EARNING CAPACITY

LEGAL POSITION

[16] Counsel Haskins for the plaintiff submits that in Rudman v Road Accident Fund¹ the court held that "To claim loss of earnings or earning capacity, a plaintiff must prove the physical disabilities resulting in the loss of earnings or earning capacity and also actual patrimonial loss". The measure of proof is a preponderance of probabilities, which entails proving that the occurrence of the loss is more likely than not. In the matter of Union and National Insurance Co Limited v Coetzee² the court held that there must be proof that the disability gives to a patrimonial loss, which in turn will depend on the occupation or nature of the work which the patient did before the accident or would probably have done if he had not been disabled.

[17] In Hendricks v President Insurance Co Ltd³ Selikowitz J held that

¹ 2003 SA 234 SCA

² 1970 (1) SA 295 (A) AT 300 A

³ ZASCA 2014 182 paragraph11

“The principle applicable to the assessment of damages has as its ratio the policy that the wrongdoer should not escape liability merely because the damages he caused cannot be quantified readily or accurately. The underlying premise upon which the principle rests is that the victim has, in fact, suffered damages and that the wrongdoer is liable to pay compensation or solatium”.

[18] In *Mvundle v RAF*,⁴ Kubushi J stated that:

“It is trite that damages for loss of income can be granted where a person has in fact suffered or will suffer a true patrimonial loss in that his or her employment situation has manifestly changed. The plaintiff’s performance can also influence his/her patrimony if there was a possibility that he/she could lose his/her current job and/or be limited in the number and quality of his/her choices should he/she decide to find other employment.

[19] In *RAF v Guedes*⁵ the court stated that “

“In assessing damages for loss of earnings or support, it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in actuarial calculation. The deduction is the prerogative of the Court. (My emphasis)

[20] It is trite that the percentage of the contingency deduction depends upon a number of factors and ranges between 5% and 100%, depending upon the facts of the case⁶.

[21] In the leading case of *Southern Insurance Association Ltd v Bailey*⁷ the Court stated:

“Any enquiry into damages for loss of earning capacity is of its nature speculative... All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to 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. 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.”

⁴ Unreported North Gauteng High Court case 63500/2009 (17 April 2012)

⁵ 2006(5) SA 583 paras 9-10

⁶ *AA Mutual Insurance v van Jaarsveld* 1974 (4) SA 729 (A)

⁷ 1984 (1) SA 98 (A) 113H-114E

[22] According to *AA Mutual Insurance v Van Jaarsveld*⁸ the court has a discretion in allowing contingencies. The Court has a wide discretion that must, however, be based upon a consideration of all the relevant facts and circumstances. Justice and fairness for the parties is served by contingencies to be applied on the proven facts of the case. The discretion of the Court may not be usurped by the evidence of the experts such as the actuary. Actuaries' evidence only serves as a guide to the Court.⁹ There are many factors that come into calculation such as the possibility of forced retirement before the age of 65, the possibility of death before 65 years of age, the likelihood of suffering an illness of long duration, unemployment, inflation and deflation, and alteration in cost.

[23] In *Phalane v Road Accident Fund*¹⁰ it was ruled that:
Contingencies are the hazards of life that normally beset the lives and circumstances of ordinary people (*AA Mutual Ins Co v Van Jaarsveld* reported in *Corbett & Buchanan, The Quantum of Damages, Vol II 360 at 367*) and should therefore, by its very nature, be a process of subjective impression or estimation rather than objective calculation (*Shield Ins Co Ltd v Booysen 1979 (3) SA 953 (A) at 965G-H*).

[24] Contingencies for which allowance should be made would include the following:
(a) the possibility of illness that would have occurred in any event;
(b) inflation or deflation of the value of money in the future; and

⁸ 1974 (4) SA 729 (A)

⁹ *RAF v Guedes 2006 (5) SA 583 (SCA)* at para 8

¹⁰ 948112/2014) 2017 ZAGPPHC 759 (7 NOVEMBER 2017)

(c) other risks of life such as accidents or even death, which would have become a reality, sooner or later, in any event (Corbett, *The Quantum of Damages*, Vol I, p 51).

[25] Counsel submits that the 'once and for all' principle determines that a plaintiff only has one chance to claim all past and potential damages flowing from a single cause of action. When courts make awards for potential or future losses, it is general practice to make use of contingency deductions to provide for any future events or circumstances which is possible but cannot be predicted with certainty such as longevity, loss of employment, early death, or promotion prospects.

[26] In order to determine a plaintiff's claim for future loss of income or earning capacity, it becomes necessary to compare what the claimant would have earned 'but for' the incident with what he would likely have earned after the incident. The future loss represents the difference between the pre-morbid and post-morbid figures after the application of the appropriate contingencies.

[27] The Plaintiff's future employability is an important consideration and the associated risks as identified by the experts. The Plaintiff's physical injuries and how those injuries impact her working capacity is also an important consideration. Future treatment required and whether the Plaintiff would be able to recover. The likelihood of the Plaintiff being fired or retrenched. The fact that the plaintiff has an unsatisfactory service record. The possibility of mistakes having been made in the determination of the life expectancy or earning life expectancy of the Plaintiff. The likelihood of illness.

[28] These factors must be juxtaposed against the injuries sustained by the

plaintiff in the accident and more importantly the causal link between those injuries and the impact that it has on the plaintiff's earning capacity. General contingencies cover a wide range of considerations, which vary from case to case and there are no fixed rules as regards general contingencies. Robert Koch provides the following guidelines:

Sliding scale: ½ % per year to retirement age, i.e. 25% for a child, 20% for a Youth, and 10% in middle age. Normal contingencies: the RAF usually agrees to deductions of 5% for past loss and 15% for future loss.

Case law in support of higher post-morbid contingency deduction.

[29] In *Ubisi v Road Accident Fund*¹¹ the Court, in awarding a pre-morbid contingency deduction of 20% and a post-morbid deduction of 50% stated that:

“On the value of income having regard to the accident it is submitted that a higher than usual contingency of 70% be applied, considering the opinion of Dr Blignaut, the defendants expert, with whom Dr Booyesen concurs that even after surgery he does not think that the plaintiff will be able to compete or secure work in the open labour market. The plaintiff has shown resilience on the objective facts, albeit conflicting at times by seeking employment unconstrained by his medical deficits”.

[30] Counsel submits that the plaintiff will henceforth primarily depend on sympathetic employment. This finding is in view of the fact that the plaintiff would be disadvantaged in an open labour market and thus should weigh in against her. The plaintiff has a grade 12 level of education and obtained various in-house training certificates. The plaintiff was working towards a diploma in public relations. Upon completion of her studies, the plaintiff could have been promoted or secured better employment in the open labour

¹¹ (31563/2014) [2014] ZAGPPHC 453 PARA 11

market. The plaintiff would therefore have earned between median and upper quartile of Paterson B4. With added experience, the plaintiff was likely to have progressed and reached her career ceiling of Paterson C2/C3 when she reached 55 years. Thereafter normal inflationary earning increases would have been applicable up until retirement age 65.

POST-MORBID POTENTIAL

- [31] The plaintiff's reported headaches will have a detrimental effect on her concentration and may negatively influence her work ability to work to her full potential and will render her prone to errors and negligent mistakes which will affect her work quality and competence. Her forgetfulness will have similar effects. The plaintiff did not complete her practical in order to complete her diploma. She also performs her work tasks slower and requires more time to comprehend tasks. The emotional impairments (especially PTSD) have negatively affected her. The plaintiff's employment potential is further compromised due to her poor vision.
- [32] Even though the plaintiff is still employed, based on the collateral information obtained, the plaintiff is not performing her duties as pre-accident. She is therefore being accommodated and there are no prospects of promotions. The industrial psychologist notes that although the plaintiff is sympathetically employed, should the challenges persist, she is at risk of losing her employment which will result in her remaining unemployed for the remainder of her work life, or she will not be able to continue to work until age 65 because of the injuries.

ACTUARIAL CALCULATION

[33] The Actuaries calculated the plaintiff's loss as follows:

Past loss

Value of income uninjured		R 1 513 915.00
Less Contingency deduction 5%		R 75 695.10
		R 1 438 219.25
Value of income injured		R 1 222 681.00
Less contingency deduction	10%	R 122 268,00
		R 1 100 412.90
NET PAST LOSS		R 337 806.35

Future Loss

Value of income uninjured		R 5 641 856.00
Less contingency deductions	15%	R 846 278.40
		R 4 795 577.60
Value of income injured		R 3 156 195.00
Less Contingency deduction	40%	R 1 893 717.00
		R 1 262 478.00
NET TOTAL LOSS		R 3 533 099.60
NET TOTAL LOSS		R 3 870 905.95

ANALYSIS

[34] I have considered all the facts as alluded to by the medical experts. It is evident that the plaintiff will still be able to work however she has been compromised. She can no longer compete with other abled bodies. Her

opportunities for promotion have been diminished. She has been unable to finalise her diploma. The contingencies calculation are merely a guideline by their nature. They are a process of subjective impression or an estimation rather than objective calculation.

[35] The plaintiff was is 51 years of age and would have retired at 65 years, but for the accident. This means the relevant period of risk for purposes of determining a contingency deduction is 14 years. It is imperative to mention that the plaintiff is not a youth, nor a middle-aged person. I have considered the calculations as postulated and I have not interfered with the past loss of earnings as alluded therein. I however have in relation to future loss of earnings applied twenty (20%).and ten (10%) contingencies which I regard as fair and reasonable under the circumstances.

[36] The calculations are projected below as follows:-

Future Loss

Value of income uninjured		R 5 641 856.00
Less contingency deductions	20%	R 1 128 371.20
		R 4 513 485.80
Value of income injured		R 3 156 195.00
Less Contingency deduction	10%	R 315 619.50
		R 2 480 575.50
NET TOTAL LOSS		R 1 672 910.30
ADD PAST LOSS		R 337 806.35
NET TOTAL LOSS		R 2 010 716.65

[37] In the result, I grant the following order:

1. Loss of earnings R 2010 716.65 (less 20%)
2. Costs on a party and party scale

The draft order attached hereto and marked "X" an order of Court

ENB KHWINANA

**ACTING JUDGE OF NORTH
GAUTENG HIGH COURT, PRETORIA**

Counsel for Plaintiff: Adv Lizelle Haskins

Date of Hearing: 26 February 2023

Date of Judgment: 25 May 2023