IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: 35790/2021

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

SIGNATURE 26/07/2023 DATE

In the matter between:

THABISILE PORTIA MTHEMBU **Plaintiff**

versus

THE ROAD ACCIDENT FUND **Defendant**

JUDGMENT

MOSOPA J

1. On 20 September 2020, a motor collision occurred involving the plaintiff, a pedestrian, and an unknown driver. The plaintiff, after alighting from her vehicle to check her tyre, was struck by a vehicle travelling at a high speed which failed to stop after this collision and drove away from the scene of the collision. As a result of this collision, the plaintiff brought a claim for damages against the defendant.

2. The motor vehicle collision occurred at Old Main Road Street, near Lotus Park in Isipingo, Kwa-Zulu Natal. This court has jurisdiction to adjudicate this matter by virtue of the fact that the defendant is resident within the area of the jurisdiction of this court, in terms of the provisions of section 21(1)(A) of the Superior Courts Act 10 of 2013 ("SC Act").

3. The defendant failed to avail itself on the date of hearing of the matter, despite having been notified thereof, and there was no appearance on behalf of the defendant. Consequently, the matter proceeded by way of default.

4. The issues for determination in this matter are:

   4.1 Liability;
   4.2 General damages;
   4.3 Loss of income and earning capacity.

LIABILITY

5. The plaintiff avers in her particulars of claim that the defendant is liable for the motor vehicle collision, as the driver of the vehicle which collided with the plaintiff is solely negligent as the cause of the collision, in that:

   5.1 he/she failed to keep a proper lookout;
   5.2 he/she drove at an excessive speed in the circumstances;
   5.3 he/she drove without due regard for other road users;
   5.4 he/she failed to apply his/her brakes timeously, adequately or at all;
   5.5 he/she failed to abide by the general rules of the road;
   5.6 he/she failed to avoid a collision when by exercise of reasonable care and skill, he/she could and should have done so; and,
   5.7 he/she failed to keep proper control of his/her motor vehicle.

6. As a result of the collision, the plaintiff sustained the following injuries:

   6.1 Left ankle fracture.

7. The plaintiff was examined and underwent x-rays. She wore a plaster of paris cast below the knee for six (6) weeks after her discharge from the hospital. She was finally discharged after a period of six weeks, after the plaster of paris was removed.

8. A merits affidavit was deposed to by the plaintiff in terms of rule 38(2) of the Uniform Rules of Court and no *viva voce* evidence was led. It is clear that the plaintiff does not reside in the area of this court's jurisdiction, as she resides in Kwa-Zulu Natal, and insisting on her physical appearance before court would have resulted in incurring unnecessary costs.

9. The plaintiff alighted from her vehicle to inspect her vehicle's tyre, after hearing a loud noise while driving. The plaintiff parked her vehicle at the bus stop, as indicated in the Accident Report. As she was attending to her vehicle's tyre, an unknown vehicle and unknown driver approached her, driving at an excessive speed, collided with her and then drove away without stopping. The plaintiff then sustained injuries as a result of the collision.

10. The plaintiff avers that the collision was as a result of the negligent driving of the unknown driver and that the defendant ought to be held liable for 100% of the proven damages suffered by the plaintiff.

11. According to the Accident Report, the collision occurred in "daylight", but no exact time is indicated. The road surface is indicated as having been "dry", which means that it was not raining at the time of the collision. There is no speed limit provided for the road where the collision occurred.

12. It is trite that the plaintiff bears the onus of establishing that the driver of the insured vehicle was not only negligent, but that such negligent act caused the harm or loss (see ***van Wyk v Lewis* 1924 AD 438** at 444).

13. In a *locus classicus* case relating to matters involving negligence, the matter of ***Kruger v Coetzee* 1966 (2) SA 428**, the following was stated:

> *"For the purposes of liability culpa arises if –*

(a) a diligens paterfamilias in the position of the defendant –

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence;

(b) the defendant failed to take such steps."

14. The type of road which the unknown vehicle was travelling on, has two lanes travelling in the same direction. The unknown vehicle was travelling in the lane closer to the bus stop and where the plaintiff alighted from her vehicle. According to the Accident Report, she was walking on the drivers' side towards the back of her vehicle when the collision occurred.

15. In argument, Mr Sello, on behalf of the plaintiff, referred to the matter of ***Manuel v SA Eagle Insurance Co. Ltd*** **1982 (4) SA 352** at 357A-D, where the following was stated, after the court considered several cases cited in argument:

"The principles to be extracted from these cases are as follows. A motorist who sees a pedestrian on the roadway or about to venture thereon, should regulate his driving so as to avoid an accident. The pedestrian may by his conduct convey to the motorist the impression that he recognises and intends to respect, the motorist right of way. When such an impression is conveyed by the pedestrian, the motorist may proceed on his way accordingly. Whether the motorist is reasonably entitled to assume or infer, from the conduct of the pedestrian, that his right of way is being recognised and respected, is a question of fact to be decided in each case. When the assumption is not justified, the motorist must regulate his driving to allow for the possibility, or probability, that his vehicle may not enjoy an unobstructed passage. Where a pedestrian reacts appropriately to the presence of an approaching vehicle, or to a warning by the vehicle, the critical enquiry is whether a reasonable motorist would foresee the reasonable possibility that the pedestrian might nonetheless act irrationally by

moving, perhaps suddenly into the vehicle or its path. That possibility exists for young children, for adults who are plainly drunk, and may arise in other cases."

16. There is nothing which points to the fact that at any stage, the plaintiff entered the road or crossed it, and she at all material times remained on the bus stop which was not in the lane of travel of the insured driver. There was no warning given to the plaintiff to move away from danger by the driver, and as a result, it is this court's finding that it is the sole negligence of the insured driver that contributed causally to the collision.

GENERAL DAMAGES

17. Dr Chetty, an Orthopaedic Surgeon, records that the injury sustained by the plaintiff is a left ankle fracture which did not require surgical procedure and same is confirmed by the hospital records relating to the admission and treatment of the plaintiff at the hospital. The impairment evaluation of the plaintiff is classified as "present severity with pain rating". The serious injury assessment on the RAF4 report on WPI was 5%. Dr Chetty further opined that:

"although her injuries fall below the 30% threshold according to AMA Guides, it is my reasoned medical opinion that she should be compensated for past medical and future medical expenses, it is also my reasoned medical opinion that she qualifies for pain and suffering secondary to the injury."

18. At this stage, the defendant has not rejected or admitted that the injury sustained by the plaintiff is serious enough to meet the threshold requirement for the award of general damages. It is trite that such a decision is statutorily conferred on the defendant, and not the court (see ***Road Accident Fund v Faria* (567/13) [2014] ZASCA 65 (19 May 2014)**). It is for the above reason that this court cannot at this stage determine the award of general damages and the issue ought to be postponed *sine die*.

LOSS OF INCOME AND EARNING CAPACITY

19. The plaintiff was assessed by three experts, all of whom compiled reports.

20. Dr Chetty, the Orthopaedic Surgeon, found that the plaintiff sustained a left ankle fracture, to which a plaster of paris cast was applied below the knee and removed after six weeks. The plaintiff is an enrolled nurse and went back to her employment after six weeks. The plaintiff did not require a surgical procedure. The plaintiff still experiences pain while standing. The plaintiff walks unassisted and her gait is unaffected.

21. The Occupational Therapist, Paroshni Pillay, found that prior to the collision, the plaintiff was in good health. Further, that the plaintiff is not suited to cope with medium, heavy and very heavy work. Pre-morbid, she completed her matric and enrolled as a nurse. She has been employed as an enrolled nurse at Prince Mshiyeni Memorial Hospital since July 2020. Her duties entail giving patients bed baths, administering medication, filing, feeding patients, assisting patients with using the toilet and monitoring all patients. Her work demands included prolonged standing, walking and heavy lifting/carrying.

22. Post-injury, she returned to her vocational environment and for two weeks, she performed light duties such as taking files, assessing patients and administrative tasks. After two weeks, she returned to her normal duties and she earns a salary of R17 000 per month. She is no longer physically suited to medium, heavy and very heavy work. Her capacity to sustain employment long term is compromised due to her persisting symptoms and it is envisaged early retirement of five years. But for the accident, the plaintiff would have secured her employment until the age of 60 years when she retires.

23. The industrial psychologist, Thokozani Makhathini, indicated that at the time of the collision, the plaintiff was employed as a nurse earning a basic salary of R14 281.75, a gross salary of R19 565.99 and a nett pay of R16 990.89 per month. Ms Thandazile Sithole from Prince Mshiyeni Memorial Hospital, informed her that pre-morbid, the plaintiff was performing well at an exceptional

level and her performance should have enabled her to progress to more senior positions, such as a professional nurse.

24. Post-accident, she returned to her pre-morbid capacity and received her full salary while she was away from work. Upon her return to work, she was placed on light duties and her salary remained unchanged, and after two weeks, she returned to her normal duties. It was confirmed that the plaintiff is not coping with her duties due to the limitations emanating from the injuries sustained. She complains of swelling and pain on the left ankle aggravated by cold weather. She experiences difficulty standing for extended periods while performing her duties and takes excessive leave and her performance level has reduced. Her work requires her to maintain a standing position and it thus aggravates pain on her left ankle.

25. If it was not for the collision, the plaintiff would have likely continued to participate effectively in the open labour market with the best chances to increase her earnings. Through continuous learning and on-the-job training, the plaintiff would have continued to progress and would have likely reached her career ceiling at Professional Nurse, Grade 3 and earned inflationary increases until retirement age. In her injured state, it is opined that the plaintiff is likely to struggle to meet job demands of the position, but she would likely be tolerated/accommodated by a sympathetic employer.

26. Two scenarios are tabled by the plaintiff's actuary and the contingencies deductions applied are 5% post loss for pre- and post-accident for future loss, 15% pre-accident and 25% post-accident. The first scenario refers to no advance qualifications post-accident and the second scenario provides for professional nurse qualifications post-accident.

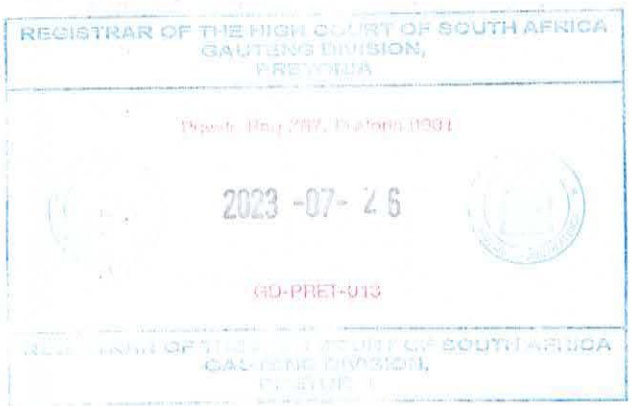
27. Despite her orthopaedic injuries, the plaintiff returned to her pre-accident position, albeit the fact that for two weeks, she was doing light duties and after two weeks, she resumed her normal duties. Ms Sithole only complaint about the plaintiff is her extended period of leave that she normally asked for. She is not performing at her pre-accident level but there are no serious complaints noted of her work performance post-accident. Ms Sithole is of the view that if it

was not for the accident, the plaintiff should have empowered herself and studied until she was a professional nurse. This opinion comes from the person who worked closely with the plaintiff. The plaintiff herself on her own account, wanted to study to the level of a professional nurse. It is therefore my considered view that the second scenario suggested by the plaintiff's actuary is the most suitable one which is accepted by this court.

ORDER

28. In the circumstances the following order is made;

1. The amended draft order marked "X" is made an order of court.



MJ MOSOPA
JUDGE OF THE HIGH COURT, PRETORIA

Appearances:

For the plaintiff:	Adv. Makonye Sello
Instructed by:	by S Msomi Attorney
RAF Representative:	No Appearance.
Date of hearing:	9 March 2023
Date of judgment:	Electronically transmitted