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## JUDGMENT

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### **RANCHOD J**

[1] The plaintiff who is currently 31 years old, sustained bodily injuries in a motor vehicle accident on 6 April 2018 in Amanzimtoti. As a result, she claims compensation from the Road Accident Fund in terms of the Road Accident Fund Act 56 of 1996 (as amended) (the Act).

[2] At the commencement of the trial I was informed that the issue of liability (the merits) was settled 100% in favour of the plaintiff.

[3] I was also informed that the defendant had made a “without prejudice” offer of settlement (which was rejected by the plaintiff) for general damages and loss of earnings and it would furnish an undertaking for future medical and hospital expenses in terms of section 17(4) of the Act. There is no claim for past medical or hospital expenses.

[4] I was informed further by plaintiff’s counsel that although there was no formal letter from the defendant rejecting or accepting the claim for general damages as serious, that it had made an offer for this head of damages implies that it had accepted it. Plaintiff therefore persists with the claim for general damages. I will revert to this later.

[5] The plaintiff was a pillion passenger on a motorcycle at the time of the accident. She was almost 26 years old at the time. It is alleged that she worked as a caregiver when the accident occurred. She was off work for three months to recover from her injuries. Further, that she struggled to cope with the demands of the job after the accident. She recently obtained employment as a cashier. She attained Grade 9 in school.

[6] The merits having been settled, I turn to the issue of quantum of the plaintiff's damages, more specifically, loss of earnings/earning capacity and general damages.

[7] The plaintiff filed several medico-legal reports in support of her claim. The defendant did not file any. I ruled that the evidence of plaintiff's experts may be admitted in terms of Rule 38(2) of the Uniform Rules of Court.

[8] It appears from the expert reports that plaintiff suffered the following injuries:

- 8.1 Neck injury;
- 8.2 Closed fracture, left olecranon (the bony part of the elbow);
- 8.3 Dislocation of left ring finger's PIP-joint;
- 8.4 Soft tissue injury left shoulder;
- 8.5 'Possible' post-traumatic epilepsy; and
- 8.6 Abrasions of the back and hips.

[9] **Treatment received by plaintiff**

- 9.1 Plaintiff was treated at the Scottsbrough Hospital and discharged the next day.
- 9.2 Three weeks later she had an open reduction and internal fixation (ORIF) of the left olecranon (the bony part of the elbow). She wore a brace for two weeks after the operation.
- 9.3 In their heads of argument, plaintiff's counsel states that plaintiff suffered from emotional shock for which she never received treatment, and this progressively developed into a post-traumatic stress disorder: More on this later.

[10] **The sequelae of the injuries**

- 10.1 Dr Van den Bout (orthopedic surgeon) is of the view that plaintiff will not be able to return to her job as caregiver due to the injuries sustained. But he defers to a final evaluation by an occupational therapist and industrial psychologist.
- 10.2 Plastic surgeon, Dr Pienaar, says there is a surgical scar of 10cm over her left elbow which is visible and very sensitive and unsightly. (In my view, this is to be dealt with in the claim for general damages.)

10.3 Dr Fine, a psychiatrist, is of the opinion that plaintiff suffers from post-traumatic stress disorder and depression and recommends psychiatric treatment.

10.4 Neurologist Dr Smuts opined that plaintiff possibly sustained a mild concussive brain injury. However, as appears from an addendum report from Dr Romanis (see 10.5.2 below) there is no evidence of brain injury.

10.5.1 Clinical psychologist Adele Romanis stated that plaintiff displayed a high degree of post-traumatic stress syndrome including suicidal ideations (she has already attempted suicide on one occasion). Ms Romanis suggested psychotherapeutic intervention from a clinical psychologist.

10.5.2 Dr Romanis provided an addendum report in which she states:

“Neither writer, Dr Smuts nor Dr Fine found any evidence of a brain injury during their separate evaluations and, having reevaluated the test results and the clinical notes of Ms Paulsen, writer also confirms that she did not find any evidence of a brain injury at the time of the accident.”

10.6.1 Occupational Therapist, Ms Friedrichs (of Rita van Biljon) commented on the loss of quality of life and the post-morbid impact on plaintiff's earning capacity. On testing, she found that plaintiff has a weak left-hand and her grip was well below average. She notes that plaintiff was an assistant caregiver at the time of the

accident. She states that plaintiff was unwilling to provide details regarding the sequence of events following the accident. She stated that plaintiff was right-handed.

10.6.2 Under the heading ‘VOCATIONAL INFORMATION AND EARNING CAPACITY’ the occupational therapist states:

“7.1 PRE- AND POST-ACCIDENT EDUCATION

- a. The plaintiff stopped her school career after completing Grade 9 as she fell pregnant.
- b. The plaintiff indicated that she was busy with caregiver training when the accident in question occurred. On direct questioning, she could not indicate if she completed the course, and deferral is made to the Industrial Psychologist for clarification.

7.2 PRE-AND POST-ACCIDENT EMPLOYMENT HISTORY

- a. The plaintiff has work experience as a general worker in a supermarket, a cashier, a waiter/bartender, and an assistant caregiver.

7.3 PRE-AND POST-ACCIDENT (CURRENT) WORK DESCRIPTION

7.3.1 The plaintiff was uncooperative in answering the interview questions, which made it challenging to obtain a detailed job description.

7.3.2 Pre-accident work description

- a. The plaintiff commenced her in-service training as a caregiver in 2018. It appeared that she worked at an old age home.
- b. She worked as an assistant caregiver and had to assist the residents with bathing, dressing, bed mobility, and taking their medication. She also had to assist in preparing breakfast in the mornings.
- c. The plaintiff’s work as an **assistant caregiver** can likely be categorized as **medium work with**

**aspects of heavy to very heavy work** (when assisting with patient transfers).

7.3.3 Post-accident and current work description

- a. The plaintiff reported that she returned to her pre-accident work as an assistant caregiver after she had the surgery on her left arm.
- b. She reported experiencing the following challenges at work:
  - i. She had difficulty performing bilateral tasks and had to ask the other caregivers for assistance.
  - ii. Her left arm was painful, with the pain radiating from her neck, down the left shoulder, and into her arm. The pain was aggravated by putting strain on her arm.
  - iii. The strength in the left arm was decreased.
- c. She indicated that the other caregivers complained that they had to assist her with her duties, and she was dismissed approximately a month after she returned to work.
- d. In 2019 she secured employment as a cashier at Spar. Her duties included standing while assisting customers at the till point. Her work as a **cashier** can be categorized as **light work**.
- e. She reported experiencing the following challenges at work:
  - i. Cold weather aggravated the symptoms in her left arm. She requested not to sit at a till close to the fridges or the door as the cold made left arm movements more challenging.
  - ii. She used only her right hand to pull heavy items e.g. a large bag of dog food, through the till.

- iii. On direct questioning, no complaints related to her neck or back were reported.
- f. She was reportedly accommodated and moved to work behind the cigarette counter.
- g. The plaintiff did not indicate why her employment as a cashier was terminated.
- h. At the time of the evaluation, the plaintiff was unemployed.

10.6.3 Ms Friedrich administered a range of tests and summarized the results of plaintiff's vocational and earning capacity. She stated:

"The plaintiff's physical ability as determined on the day of the evaluation is based suited to sedentary and light work. She met the frequent sitting demands associated with sedentary work. She met the occasional to frequent working and standing demands associated with light work but did not meet the full spectrum weight handling demands (frequently lifting and carrying 4.5kg and occasionally 9kg)."

10.6.4 The occupational therapist then considers "the diagnosed epilepsy" and says plaintiff "will be further restricted in terms of the type of work that she can perform". However, Dr Van den Bout put it no higher than that there is a "possibility" of epilepsy. No actual diagnosis of epilepsy had been made.

10.6.5 The occupational therapist concludes that:

"Considering the physical and psychosocial challenges the plaintiff presented with, she is considered to be a vulnerable individual and not an equal competitor for sedentary and light work employment when compared to her peers."



[11] **Quantification of loss of earnings / earning capacity**

11.1 The industrial psychologist, Dr Ben Moodie, referred to the various medico-legal reports and his interview with the plaintiff. He notes that plaintiff did not provide any proof of her income from the several employers she said she worked for. He considered her level of education [she said she attained Grade 9 but her curriculum vitae states she achieved Grade 8] and that she completed a Caregiver certificate course prior to the accident.

11.2 Mr Moodie considered the situation of an individual with a qualification below Grade 11 and equates it to the lower quartile and median of Paterson Grade A1. He says therefore, a person with a below Grade 11 school qualification can progress to earn a basic salary on the lower quartile of Paterson A1 plus a 13th cheque and employer UIF contribution.

[12] **The actuarial calculations**

12.1 Munro Forensic Actuaries considered the report of Industrial Psychologist Mr Moodie and an affidavit dated 20 July 2023 by the plaintiff (which simply confirms that she was unemployed as at that date). Having considered the supplied information, the actuaries postulated three scenarios (prior to any applicable contingencies and that the RAF cap has no impact).

12.2 In all three scenarios the past loss of income is determined to be

R 267,600.00.

12.3 Future loss of earnings is determined to be R 895,100.00 (scenario 1); R 1,158,300.00 (scenario 2) and R 1,769,700 (scenario 3).

[13] Counsel for the plaintiff urged me to accept scenario 3 whilst counsel for the Fund submitted that scenario 2 would be more appropriate – prior to contingencies being applied.

[14] I have considered the fact that plaintiff was unable to provide proof of the income she earned despite being requested to do so. I have also considered the various expert reports. In my view, scenario 2 would be the appropriate one to apply.

[15] There remains the question of contingencies to be applied. In my view 10% for past loss and 20% for future loss would be appropriate in this case.

Therefore:

<b><u>Past loss</u></b>	R 267,600.00
Less: Contingency deductions (10%)	<u>R 26,760.00</u>
	<b><u>R 240,840.00</u></b>
<b><u>Future Loss</u></b>	R 1,158,300.00
Less: Contingency deductions (20%)	<u>R 231,660.00</u>
	<b><u>R 926,640.00</u></b>
Total loss of earnings/earning capacity:	<b><u>R 1,167,480.00</u></b>

**General damages**

[16] There remains the question of general damages. As I said earlier, the Fund had made a “without prejudice” or admission of liability offer, in full and final settlement of the claim. I was told that the offer was for loss of earnings and general damages.

[17] The document evincing the offer was uploaded on Caselines. The amounts for the two heads of damages have been redacted, no doubt because it was a “without prejudice” offer.

[18] Counsel for plaintiff urged me to determine the claim for general damages as it is implied by making an offer for general damages, that the Fund accepted that plaintiff’s injuries were serious. Reliance was also placed on an RAF4 report completed by orthopedic surgeon Dr A Van den Bout who states (and also in his medico-legal report) that plaintiff’s injuries did not qualify as serious in terms of the “Whole Person Impairment” criteria, but her injuries did qualify under the “Narrative Test”, as serious long-term impairment or loss of a bodily function. The RAF4 report had been submitted to the Fund.

[19] In *Phiri v RAF* (unreported) 34481/2018 (23 December 2021) Gauteng Local Division, Johannesburg, Nichols AJ neatly sums up the procedural requirements for a claim for general damages as follows:

“6 Since 1 August 2008, the RAFs liability for general damages has been limited to claimants who have suffered serious injury. Our courts have held that it

is the RAF that must determine whether a claimant's injuries are serious or not, so as to justify the award of compensation in the form of general damages. This determination is an administrative exercise that is performed by the RAF in the manner prescribed by the Regulations.

7 The alternative body that is authorised to determine whether a claimant has suffered a serious injury that justifies the award of general damages is an appeal tribunal of the HPCSA [Health Professions Council of South Africa]. The Regulations, which prescribe the manner in which serious injury may be determined, provide for an appeal tribunal of three independent medical practitioners to be appointed by the registrar of the HPCSA.

8 Unless and until the RAF or HPCSA appeal tribunal has made a decision on or determined that the claimant's injuries qualify as serious the court cannot adjudicate a claim for general damages. In the context of general damages, the court's role is now confined to determining quantum that is most appropriate in the circumstances of the case. Accordingly, I do not have jurisdiction, particularly as a court of first instance, to determine whether the claimant has suffered a serious injury justifying the award of general damages."

[20] In *Road Accident Fund v Faria* 2014 (6) SA 19 (SCA) the Supreme Court of Appeal (the SCA) held:

"34 The amendment Act, read together with the Regulations, has introduced two 'paradigm shifts' that are relevant to the determination of this appeal: (i) general damages may only be awarded for injuries that have been assessed as 'serious' in terms thereof and (ii) the assessment of injuries as 'serious' has been made an administrative rather than a judicial decision. In the past, a joint minute prepared by experts chosen from the contending sides would ordinarily have been conclusive in deciding an issue between a third party and the RAF, including the nature of the third party's injuries. This is no longer the case. The assessment of damages as 'serious' is determined administratively in terms of the prescribed manner and not by the courts. . . ."

[21] In this matter before me, counsel for the Fund responded to the submissions by counsel for the plaintiff on an appropriate amount to be awarded for general damages. In my view, this is obviously on the assumption that this court finds that there is an implied acceptance by the Fund that the injuries sustained by the plaintiff are serious.

[22] As I said, the Fund has not formally indicated that it is satisfied that the plaintiff's injuries have been correctly assessed as serious. It has not rejected the plaintiff's RAF4 Form or directed her to submit herself to further assessment at the Fund's expense.

[23] In *Keagan v Road Accident Fund* (Case No: 15432/2021) (Gauteng Local Division) a judgment handed down on 1 February 2024 plaintiff's counsel had submitted that the fact the Fund had made an offer for general damages constituted an acceptance of liability for it. Cajee AJ held that there was no waiver of privilege (by the Fund) in the matter before him. He said:

"It would indeed hamper the process of litigation and settlement negotiations if without prejudice offers could be used against parties where privilege in respect of such tenders are not waived. In my opinion this would apply with even more force in litigation involving the RAF which should be encouraged to try and settle matters as amicably as possible."

[24] I agree with the finding of the learned Acting Judge. I may add that in the last paragraph of the "without prejudice" offer made by the Fund in this matter before me it is stated:

“Acceptance of this offer will only be deemed valid acceptance if it is accepted in its totality. An acceptance on one or more aspects of the offer (such as merits or quantum only or only selected heads of quantum) will be regarded as a counteroffer by the claimant, and will not be deemed to constitute a valid agreement, unless the Road Accident Fund expressly accepts the counter offer.”

[25] In these circumstances, it cannot, in my view, be said that the Fund had impliedly accepted the injuries sustained by the plaintiff as serious. Therefore, the claim for general damages falls to be postponed *sine die*.

[26] The draft order marked “XXX” is made an order of court.

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**RANCHOD J**  
**Judge of the High Court**  
**Gauteng Division, Pretoria**

**Date of hearing:** **8 November 2023**

**Date of judgment:** **19 February 2024**

Appearances:

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