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

**IN THE HIGH COURT OF SOUTH AFRICA**
**KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO.: 579/18P

In the matter between:

| | |
|---|---|
| **Fjóla Dögg Konráðsdóttir** | **Plaintiff** |
| and | |
| **Road Accident Fund** | **Defendant** |

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**ORDER**

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1. Judgment is granted in favour of the plaintiff in the sum of R2 323 334.35.

2. The amended draft order marked X and signed is made an order of court.

**JUDGMENT**

**Delivered on .....**

**Mngadi, J**

[1] The plaintiff claims from the defendant damages in the form of loss of earnings arising out of a motor vehicle collision.

[2] The plaintiff is Fjóra Dögg Konráðsdóttir of Reykjavik in Iceland. The defendant is the Road Accident Fund (the fund) juristic person established in terms of s2 of the Road Accident Fund Act 56 of 1996 (the Act). The Act establishes the the Fund and declares its object to be payment of compensation for loss of or damages wrongfully caused by the drivers of motor vehicles.

[3] The plaintiff was injured in a motor vehicle collision that occurred on 30 March 2017 on the N2 Freeway in Empangeni when the car in which she was a passenger collided with a truck. The defendant has admitted liability for the damage suffered by the plaintiff as a result of the injuries she sustained in the collision. The plaintiff's claims in respect of general damages, medical expenses and past loss of earnings were settled. The issue for determination is the claim for future loss of earnings.

[4] The plaintiff in the trial lead evidence of four expert witnesses, namely, Dr Seedat, an orthopaedic surgeon; Professor L. Schlebusch, a clinical psychologist; Sonia Hill, a clinical psychologist and Felicity Jonck, an occupational therapist. The plaintiff also testified. The defendant lead evidence of the two expert witnesses namely, Thabisile Nxumalo, an occupational therapist and Louisa Maritz, an industrial psychologist.

[5] The parties agreed that experts' reports in the bundles were accepted for what they purport to be. Experts' reports of the experts that did not testify were those of Dr. Hogni Oskarsson specialist psychiatrist and that of Wim Loots, the actuary. The occupational therapist as well as the industrial psychologists prepared and filed joints minutes.

[6] The plaintiff in the amended particulars of claim claimed R8 209 000.00 for loss of earnings.

[7] Dr Seedat assessed the plaintiff on 18 April 2018. He found that apart from other minor injuries, the plaintiff sustained a significant fracture of the right distal radius, which had malunited. On the day of the accident, the plaintiff was admitted in hospital and treated conservatively. The fracture of the distal radius was manipulated in theatre and a plaster of paris applied, which was later, in preparation for the flight from South Africa to Iceland, changed to a plaster backslap. A local doctor in Iceland continued treatment in a splint and thereafter started rehabilitation with a physiotherapist. However, the fracture malunited with a critically apparent deformity of the wrist. Dr Seedat in the report expressed an opinion that the fracture of the right distal radius has malunited with shortening and radial angulation, this resulted in a positive ulna variance with impaction of the ulna on the carpal bones causing pains in the right lower arm including the wrist joint..

[8] Dr Seedat in his report opined that the deformity required surgical correction in the form of an osteotomy entailing the cut of the deformed distal radius, elongation, realigned bone-grafted and fixed with a plate and strews.

[9] Dr Seedat testified that he examined the plaintiff again on 26 May 2022. He testified that the further surgery that he had earlier recommended had risks of complications assessed at 50%. It may result in the nerve damage in both sites, as well as infection. It was also not assured of positive results. Therefore, he stated he would understand if the plaintiff was not prepared to undergo further surgery. He

said such a decision in view of the high risk of further surgery is reasonable and justifiable.

[10] The occupational therapists in the joint minute and confirmed in their evidence found that the plaintiff had intact hand function (both left and right), intact function throughout her spine, left upper limb, right shoulder, elbow and forearm and both lower limbs. They found that she demonstrated symmetrical posture, intact balance and independent mobility. In addition, they found that the assessment of the right wrist and hand revealed reduced range movement at the right wrist with associated pain and reduced right dominant hand drip strength. They agreed that the injury and sequelae thereof results in the plaintiff's vocational capacity restricted to jobs with sedentary to light physical demands. They found that she will no longer be able to compete for Social and Healthcare Assistants position with medium to very heavy physical demands.

[11] The industrial physiologists agreed that in September 2016 the plaintiff began working at Hill Husio (The Other House) which is state facility caring for the disabled. On 30 March 2017 she was paid 314 274 ISK (the Iceland Krona) per month with benefits including bonus, leave, overtime, food allowance. Her payslip for September 2017 showed that she was paid a monthly wage rate of 340 939 ISK excl benefits and overtime. The plaintiff in 2019 as Social and Health Assistant she earned 4 091 268 ISK per annum in line with average income for caregivers and health workers in Iceland. In 2020 the plaintiff as a childcare assistant and after care children supervisor earned a combined income of 682 440 ISK per month with no benefit which is above income ranges of caregivers/care workers. They agreed that the plaintiff would have had the capacity to continue working until normal retirement age of 67 years.

[12] The Industrial Psychologists Pre-Accident summarised the position as follows: Although she resigned from the above position as a caregiver, she obtained a position as social and health assistant at a similar rate. She continued to benefit from inflationary linked increases and in 2019 she was earning a basic income of 4 091 268ISK per annum....As noted, she resigned for reason seemingly somewhat unrelated to the injuries, due to her

pregnancy and with reference to Ms Jonck (Occupational Therapist) the family relocated to another town.... She stayed at home after birth of her first child and thereafter she started offering a service as a care assistant in January 2020. In addition to the above, she also secure work in mid anbout mud-2020, as an after-care children supervisor at Ingimar-Bungubrekka Kindergarden (aftercare also/day-care). It is noted tyat, on everage, her combined income from the above mentioned two part time positions, is currently in the region of 682 440 ISK per month with no benefits(and /or an income of in the region of 8 189 289 ISK per annum)...research suggested that the average salary increases, in Iceland over the past 16-32 months, have been in the region of 3%-5% and consideration could be given to such annual increases...In addition, it is suggested that the plaintiff would have had the caopascity to continue working until normal retirement age 67. The Industrial Psychologists Post-Accident noted as follows. 'At the time of the accident Ms Konráðsdóttir was on leave from 15 March 2017 and she was supposed to return to work early April 2017. However, due to the accident, she was off work for about eight weeks and returned to work on the 16th May 2017. Thus, any loss of earnings such as in relation to unpaid leave, overtime, and a reduction in her monthly wage amounts are indicated...We agree that Ms Konráðsdóttir has residual work capacity to continue working in her post accident scenario....We agree that cognisance should be taken of her actual income and that Ms Konráðsdóttir ia able to continue to work and to earn an income similar to her pre-morbid earnings...it is then reasonable to suggest that her work opportunities , will now and in future be restricted and narrowed and it seems that she will continue to function as a reduced level of occupational performance and consideration could be given to a higher post-accident contingency.'

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[13] The Industrial Psychologists agree that the plaintiff has residual work capacity to continue to work and to earn an income similar to her pre-morbid earnings. They agree that as a result of the injuries the plaintiff sustained in the motor vehicle accident her vocational potential has been compromised and her work opportunities have been narrowed since she is unable to take on positions of Social and Heathcare Assistants with medium to very heavy physical demands. As a result, the plaintiff is no longer able to compete for Social and Healthcare Assistant position with medium to very heavy physical demands.

[14] The evidence of Professor Schlebusch read with the other reports establish that pre-accident the plaintiff had some mild psychological challenges which were exacerbated by her involvement in the motor vehicle accident on 30 March 2017. These challenges did not affect the plaintiff in her work. There is no evidence that such challenges could not be managed by appropriate therapy. However, in my view, such challenges show a slight risk in plaintiff as an employee on long-term basis, which justifies a contingency above the average in the pre- accident scenario.

[15] The plaintiff testified as follows. She was born on 17 December 1991. She was 25 years old on 30 March 2017 when the accident occurred. She is now married and she has two children. At the time of the accident, she worked as a Social and Health Care Assistant working in an after school day care facility of children with special needs. She was studying at the same time. She testified that it is her passion to work with people with special needs. She grew up in her family with persons with special needs. Whilst employed, she studied for a tertiary qualification to qualify as a Social and Health Care Assistant. It is a three (3) a tertiary (3) year course. The accident interrupted her studies but she eventually completed the course in 2018.

[16] The plaintiff testified that after obtaining her qualification she got a raise in her salary. She testified that after the accident, she struggled to carry out her duties, which involved assisting persons with physical challenges because she did not have strength in her right arm and she was constantly in pain. She then went on maternity leave. She was on maternity leave looking after her son and eventually her position was filled. She testified that she relocated to a small town and took a job supervising at the Kindergarden children aged 8 to 10 years.

[17] The plaintiff since 2019 she took an additional job looking after a child with special needs. She left the Kindergarten in December and she is now involved in a Green House which involves cutting the cabbage and putting it in boxes but it is a summer job and she gets taken if there are vacancies. The plaintiff testified that as a Social and Health Care Assistant, the job she is qualified for, she is unable to carry it

out 100%. She said due to the weakness of her right arm, she cannot carry medium to heavy duties. The job requires that one must assist physically challenged persons by transferring them, putting diapers on them or clothing them. She has adopted by relying more on her left arm although she is right handed. In addition, she is in constant pain on the right arm.

[18] In my view, the plaintiff post-accident has managed to find alternative relatively well paying employment. That employment is of a temporary nature with no job security. It is not necessary to determine plaintiff's actual past loss of income because the defendant's counsel proposes a figure of R48 300 and the plaintiff's counsel R45 000. Experts agreed that the plaintiff's injury has stabilised. There are no prospects of any improvement. It is expected that at some stage she will develop arthritis in the right wrist. Experts agreed that the pain in the right wrist is a long term. Similarly, is the loss of strength, which causes the plaintiff not to be able to carry anything, weighing more than eight kilogram. The job of being a Social and Healthcare Assistant involves physically assisting physically disabled persons. The accident has compromised the plaintiff's competitiveness on the open labour market and in her chosen career. It has compromised her ability to find employment, her ability to keep employment, her ability to advance in her career. It has also reduced the lifespan of her employment.

[19] I accept the evidence that the plaintiff's right hand is not fully functional and that it is unlikely to improve in any significant manner. Dr Seedat testified that the chronic pain experienced by the plaintiff is because of the deformity in the manner the facture has healed. It follows that the pain is long-term. I accept that the plaintiff's capacity to earn future income as a result of the accident is significantly reduced. The plaintiff in the chosen career, a career for which is passionate and for which is qualified her has a vocational capability significantly restricted. The plaintiff's post -accident work history shows her determination to work. In Iceland the unemployment rate is very low and there is high life expectancy. The plaintiff is of good health. The accident has had no effect on her life expectancy. The plaintiff in her fifties would have settled in her work with reduced physical activity. I am of the

view that it can be accepted that the plaintiff would retire at the normal retirement age.

[20] Both parties agreed that plaintiff qualifies for compensation for loss of future earnings. Plaintiff's counsel submitted that to determine future loss of income or earning capacity it becomes necessary to compare pre-morbid earning capacity and post-morbid earning capacity, the difference after the application of contingencies represents the future loss of earning capacity. He submits that in plaintiff's case the issue is the determination of post-morbid contingency. He provided three scenarios. In all three scenarios, had the accident not occurred, a contingency of 15% to total earnings of R8 897 275 results in R7 562 684. The three scenarios applying post-morbid contingencies of 35%, 40% and 50% respectively result in R2 757 879, R2 224 319 and R3 114 046 respectively. The first figure is arrived at assuming retirement at age 57.

[21] The defendant submitted that relevant factors to determine an appropriate contingency in the case of the plaintiff are the following; the employment history of the plaintiff, whether the plaintiff was a steady employee, whether plaintiff regularly changed jobs, state of general health of the plaintiff and any other factor relating to plaintiff's responsibility. The defendant submitting that the plaintiff's earning capacity pre-accident and her earning capacity post-accident do not differ much, and thus applying contingency of 15% pre-accident and contingency of 20% post-accident calculates plaintiff's total loss of future earnings to R634 269.

[22] The courts when making awards for potential or future losses, the practice is to make use of contingency deductions to provide for any future events or circumstances, which are possible but cannot be predicted with certainty. The determination of contingencies is a process of subjective impressions or estimation. It is guided largely by the court's consideration of the circumstances of the case and the impression they create in the mind of the court. The contingency deductions are a key in converting uncertainties to concrete calculations as well as in exercising trade-offs *intra* uncertainties. The determination of contingencies must be founded

on relevant considerations and be within the range of acceptable realities of life. The determination is made in the context that the future is uncertain and it is difficult to judge how a person's career prospects would be and would have been over a considerable period. What factors would have an impact and in what degree in the career of the individual. The deduction for contingencies is meant to take into account the vicissitudes of life. They include the possibility that the plaintiff may have passed on early in life, may have lost employment, may have not progressed in her career, may have changed career, may have not qualified in her career, may have less than a normal expectation of life.

[23] The rate of the discount cannot of course be assessed on any precise logical basis: the assessment must be largely arbitrary and must depend upon the Judge's impression of the case. (*Southern Insurance Association Ltd v Bailey NO* 1984(1) SA 98 (A) at 116H.) In order to assess the plaintiff's future loss of earnings a comparison should be made between what would she would have earned pre-morbid and what she is likely to earn post-morbid. Experts are frequently called in to assist the court, but courts are not bound by the opinion of experts. It is the duty of the experts to furnish the court with the necessary scientific criteria for testing the accuracy of the expert's conclusion to enable the court to form an independent judgment by the application of the *criteria* to the facts. The value of the expert evidence depends on a large measure on the qualifications and experience of the expert, the application by the experts of the *criteria* to the facts of the case and the logical connection between the expert's conclusion and the basis of the conclusion.

[24] The court in *Goodall v President Insurance* 1978 (1) SA 389 (W) at 392-3 referred to a case where 20 per cent contingency was fixed for a 25 year old plaintiff and a contingency of ten (10) per cent for a 46 year old plaintiff.. In the so-called sliding scale method a contingency of half a percent per year to the retirement age in the 'but for' scenario working out to 25% for a child, 20% for a youth and 10% for middle age are the normal range. In the 'but for' scenario Road Accident Fund usually agrees to deductions of 5% for past loss and 15% for future loss as the so-called normal contingencies. In *Duma v Road Accident Fund* [2019] JOL

41486(KZP) the court for a 47-year-old plaintiff incapable of assuming any form of employment, applied a contingency deduction of 7% pre-morbid and 7% post-morbid.

[25] The defendant, in my view, overemphasised the fact that post accident the plaintiff suffered no significant loss of income. This was due to her industriousness in finding alternative temporary employment. It is significant that the plaintiff had chosen her career, obtained the necessary tertiary qualification and secured suitable employment. The injury has had a huge impact on that. Her career is now in a limbo. She is in the mercy of prospective employers. Her bargaining power is reduced significantly. She receives compensation once. Compensation is required to be fair and just. I am of the view that scenario 2A by the plaintiff's counsel fits the situation of the plaintiff and it results in a fair and just compensation to the plaintiff.

[25] The plaintiff loss of past earnings are determined at R45 000.00. The past medical expenses are agreed at R54, 015.35 and her loss of future earnings is determined at R2 224 319.00. In the result, it sis ordered a follows:

3. Judgment is granted in favour of the plaintiff in the sum of R2 323 334.35.

4. The amended draft order marked X and signed is made an order of court.

**Mngadi J**

APPEARANCES

| | | |
|---|---|---|
| Case Number | : | 579/2018P |
| Plaintiff represented by | : | K C McIntosh SC |
| Instructed by | : | Askew Martin and Drain Inc. |
| | : | DURBAN |
| Defendant | : | Ms Govender |
| Instructed by | : | Office of State Attorney |
| | | DURBAN |
| Date of Hearing | : | 26 October 2022 |
| Date of Judgment | | |

**IN THE HIGH COURT OF SOUTH AFRICA**
**KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO. 579 / 18

On the day of October 2022

Before the Honourable

In the matter between:

**FJOLA DOGG KONRADSDOTTIR** Plaintiff

and

**ROAD ACCIDENT FUND** Defendant

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**DRAFT ORDER**

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UPON hearing counsel; and

UPON reading the summons and other documents filed of record:

**IT IS ORDERED THAT:**

1. Judgement is entered for the Plaintiff in the sum of two million three hundred and twenty three thousand 2 323 334,35 in full and three hundred and thirty four rand thirty five cents final settlement of the Plaintiff's claim for past medical expenses and loss of earnings.

2.

The Defendant is directed to furnish to the Plaintiff an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 1996 for 100% of the costs of all future accommodations of the Plaintiff in a hospital or nursing home and all medical treatment or the rendering of a service or the supplying of goods to him, arising out of the injuries she sustained in the motor vehicle collision that occurred on 30 March 2017 and to compensate her therefore after they have been incurred.

3.

Payment of the amount in paragraph 1 above is to be effected within ~~14 days~~ 180 days from the date of this order.

4.

The Defendant is directed to pay interest on the amount referred to in paragraph 1 at a rate of 7.75% per annum calculated from ~~14 calendar~~ 180 days from granting of this order to date of payment.

5.

The Defendant is directed to make payment of the Plaintiff's taxed or agreed party and party costs to date on the High Court scale. These costs shall include, but not be limited to :

5.1 The reasonable and necessary costs of senior counsels including senior counsel's costs for his preparation for trial, preparation of written submissions as well as the reasonable costs of counsel and the attorney for attending upon any necessary consultations with the Plaintiff and the undermentioned expert witnesses.

5.2. The fees and expenses reasonably incurred by the undermentioned witness for, inter alia the preparation of their reports and any supplementary reports, joint minutes, deposing to affidavits and RAF 4 Forms as well as the experts reasonable qualifying fees, their reasonable reservation fees, and their reasonable fees for attending upon any necessary consultations with the Plaintiff's senior counsel and attorney to testify at the trial on 21 – 23 February 2022 and 24 – 26 October 2022 (with the quantum of their fees to be determined by the taxing master) namely:-

a) Prof L Schlebusch – Clinical psychologist;
b) Dr Z Seedat – Orthopaedic Surgeon;
c) Ms. F Jonck – occupational therapist
d) Ms. S Hill – industrial psychologist ;
e) Dr H Oskarsson – specialist psychiatrist;
f) Mr. W Loots – actuary (reports only)

5.3. The reasonable attendance fees of the following experts for their attendance at Court for the trial on 24 - 25th October 2022;

a) Prof L Schlebusch – Clinical psychologist;
b) Dr Z Seedat – Orthopaedic Surgeon;
c) Ms. F Jonck – occupational therapist

d) Ms. S Hill – industrial psychologist

5.4. The reasonable travelling costs of the Plaintiff for the attendance of the medical assessments by the occupational therapist and industrial psychologist appointed by the Defendant (with the quantum to be determined by the taxing master).

5.5. The reasonable travelling costs of the Plaintiff for the trial on 24 – 26 October 2022(with the quantum to be determined by the taxing master).

5.6. Any and all reserved costs become costs in the cause as set out above.

6.

It is recorded the Defendant's link no: is 4170052

7.

The Plaintiff is directed, in the event of the aforementioned costs not being agreed, to:

(a) serve the notice of taxation on the Defendant's attorneys of record; and

(b) allow the Defendant one hundred and eighty (180) calendar days to make payment of the taxed costs.

The Defendant is directed to make the payment referred to in paragraph 1 above directly to the Trust Account of the Plaintiff's attorneys, whose details are as follows:-

**ASKEW MARTIN & ADRAIN INC. – TRUST ACCOUNT**

BANK : NEDBANK

BRANCH: [redacted]

BRANCH CODE: [redacted]

ACCOUNT NO: [redacted]

REF: [redacted]