



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA  
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: **2002/2018**  
Heard: **06 - 08/03 & 14/06/2023**  
Delivered: **01/09/2023**

In the matter between:

**LIZELLE KGAKGAMATSO WOLF** Plaintiff

and

**ROAD ACCIDENT FUND** Defendant

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**JUDGMENT**

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**Mamosebo J**

- [1] This is an action for damages for personal injury claimed in terms of the Road Accident Fund Act, 56 of 1996. The only remaining issue that stands for determination is whether the plaintiff is entitled to a claim for past and future loss of earnings or earning capacity.
- [2] Summons was issued on 14 August 2018 and the matter proceeded to trial before Mayet AJ. The Road Accident Fund (RAF)

conceded 80% liability on the merits and an order by agreement between the parties was granted on 26 May 2020. The RAF also furnished an undertaking to the plaintiff in terms of s 17(4)(a) of the Road Accident Fund Act, 56 of 1996, as amended, for 80% of the costs of the future accommodation of the plaintiff in a hospital or nursing home or the treatment of or the rendering of a service or the supplying of goods to her arising out of injuries sustained by her in the motor vehicle collision of 11 June 2016 in terms of which undertaking the defendant will be obliged to compensate her in respect of the said costs after being incurred and on proof thereof.

- [3] The claim for general damages was settled between the parties on 06 March 2023 in the amount of R280,000.00 after the agreed apportionment. She now claims damages in the sum of R1,825,552.00 from the Road Accident Fund, comprising R218,956.00 for past loss of income and R1,606,596.00 for future loss of income.
- [4] The plaintiff testified at the trial. Further evidence was given on her behalf by Dr Louis Francois Oelofse, Orthopaedic Surgeon; Ms Louise Liebenberg, Occupational Therapist; Dr Everd Jacobs, Industrial Psychologist and Mr Willem Boshoff, actuary.
- [5] The plaintiff, Ms Lizelle Kgakgamatso Wolf, was a pedestrian on 11 June 2016 when she was knocked down by a motor vehicle outside Jan Kempdorp. She sustained injuries on her left ankle and was rushed by her brother to Jan Kempdorp Hospital where she received treatment and was later discharged. On Monday, 4 days later, she visited her family doctor, Dr Fischer, who referred her to Gariep Mediclinic in Kimberley. Her diagnosis at Gariep was a left ankle fracture which required surgery resultantly leading to her admission in hospital for about three days. She ambulated on crutches wearing a moonboot for about 6 months.

- [6] Prior to the accident she enjoyed sporting activities like jogging and coaching netball but cannot do so after her injury. However, such sporting activities were temporarily halted in 2019/2020 due to the Covid 19 pandemic. She explained that since sustaining this injury she can neither run, wear high heels, walk or stand for extended periods nor invigilate during examinations. She experiences nagging and persistent pain daily which she treats by applying an ointment she referred to as "stinksalf" and takes oral analgesics which only provide temporary relief. She returned to work after two months where she remained until her employment contract expired. She has not removed the instrumentation inserted in her ankle as according to her it is not necessary to fix what is not broken. She only attended two physiotherapy sessions post her discharge from the hospital.
- [7] The plaintiff passed Grade 12 at Alabama Secondary School followed by a B.Tech Degree and a Diploma in Education. She is a qualified teacher employed by the Department of Education aspiring to work until 65 years of age. At the time of the accident she was employed as a teacher at Vaalharts Combined School on a one-year contract basis which was not renewed at its expiry. She maintains the non-renewal was because of her injury. She was unemployed and stayed home for a period of nine months. Since September 2017 she was temporarily employed but has been permanently employed at Thothonyane Secondary School since 01 January 2019. She has an immunosuppressive disorder for which she takes antiretroviral treatment.
- [8] Dr Louis Francois Oelofse is a registered Orthopaedic Surgeon with the following qualifications: MBChB (Pretoria), FCS (SA) Ort, MMed (Pretoria) Ort and also completed the American Board of Independent Medical Examiners (ABIME) course in 2013 which qualifies him to determine the patient's impairment. He examined

the plaintiff on 28 February 2018, one year and eight months after the accident. He completed the plaintiff's RAF4 form and a report. His diagnosis of the plaintiff was: 1. United left bimalleolar fracture with: (a) residual painful instrumentation; (b) residual painful ankle joint; (c) moderate decreased range of movement (ROM) of the ankle joint; (d) post traumatic osteoarthritis (OA) of the ankle joint; (e) possibility to develop adjacent joint OA; and (f) visible scarring. He relied on documentation from Gariep Medi-clinic, the RAF1 form, and the information gathered from the plaintiff during their interview. In his assessment of the plaintiff to determine the Whole Person Impairment (WPI) he concluded that despite the plaintiff's WPI being only 10% according to the narrative test, she has serious long-term impairment which could cause loss of bodily function.

- [9] According to Dr Oelofse the plaintiff has developed osteoarthritis which qualifies her for the narrative test. The plaintiff underwent an Open Reduction and Internal Fixation (ORIF) of the left ankle described as a Weber C fracture. She now has a united left bimalleolar fracture. However, she has decreased mobility and her ability to walk for long distances, kneeling, squatting, carrying weights or walking up or down the stairs has been affected. Her ankle tends to swell when she is on her feet for extended periods. In short, the damage to her ankle is permanent and could deteriorate over time. She has a probability of more than 50% for her ankle joint to degenerate to end-stage osteoarthritis within her total lifespan. This opinion is based on her age, being 32 years at the time of the accident, the lapse of 18 months since the accident and information gathered during the interview with the ankle joint now showing signs of osteoarthritis. The radiologists found that the fracture has healed.
- [10] Dr Oelofse further opined that the plaintiff must be accommodated in a light or sedentary environment or position. Should that be the

case, she will be able to work to the retirement age of 55 to 60 years. Should she not be accommodated as aforesaid then she must not be allowed to work again. The doctor further testified on the future medical procedures that the plaintiff might require. The instrumentation (syndesmosis screw) might need to be removed, she may also have to rely on analgesics for pain and physiotherapy sessions. To address movement, she may need long-term rehabilitation and biokinetics failing which, infiltration and local steroid injections of the ankle joint in theatre. Should the above fail, she may need a total ankle replacement or arthrodesis of the ankle joint and physiotherapy.

- [11] Ms Louise Liebenberg is an Occupational Therapist who evaluated the plaintiff on 22 July 2021, five years after the accident. She compiled the report dated 08 October 2021. Her expertise was conceded by the Fund. She observed that the plaintiff walked with a slight antalgic gait with decreased weight-bearing over the left lower extremity and did not meet the distance norm for her age. She was, however, able to ascend and descend the flight of stairs with the handrail assistance. The plaintiff underwent several exercises and tests as guided by Ms Liebenberg who consequently opined that she is best suited for sedentary to occasional light work demands. Ms Liebenberg's view is that the plaintiff is an unequal competitor.
- [12] Dr Everd Jacobs is an Industrial Psychologist who relied on the reports by Dr Oelofse and Ms Liebenberg, the plaintiff's payslip, the letter from the plaintiff's employer and her identity document to compile his report. The RAF did not question his expertise. His role is to determine the plaintiff's uninjured career scenario and the injured scenario and to prepare a report on both scenarios. He interviewed the plaintiff via Zoom on 22 July 2021; obtained collateral information on 06 December 2021 from her Head of

Department at Thothonyane Secondary School, Mr EA More; obtained the certificate of employer at the time of the accident attached to the papers as "Annexure D" completed by the Vaalharts Combined School Deputy Principal on 15 June 2017; and obtained a letter from the employer, Mr ECW Geswindt, Acting Principal, Vaalharts Combined School, confirming the period of employment from January to December 2016 attached to the papers as Annexure "E".

- [13] Plaintiff was appointed permanently as a teacher. Her past loss of income is limited to the nine months of unemployment. During her temporary employment for one year as a teacher she earned about R15,000.00 per month. Post-morbid, she has been on a salary scale of a teacher with a 3-year qualification (R210,675.00 - R465,570.00 in 2021). The payslip reflects that in April 2021 she was earning R17,909.00 per month on a salary notch of R214,908.00. She is also a member of the medical aid scheme with the employer contribution of R3,052.00 per month. The employer contributes R2,328.00 per month in respect of her pension.

- [14] The table/agenda given to the actuary for the calculation of her past loss of income is the following:

Earning capacity: R15,000.00 per month in 2016

Time period: June 2016 - December 2021

Loss: No income for 9 months (feels her contract was not renewed due to her injuries).

The agenda given to the actuary for the calculation of her future loss of income is the following:

**Uninjured** (had the accident not happened)

Earning capacity: R214,908.00 per annum in 2021 + benefits  
[medical fund and pension fund]

Progressions: Notch increases as per policy  
Career plateau: R346,995.00 per annum in 2021 (age 50; HOD position)  
(6 notches or lowest notch depending on her position)  
Retirement age: 65 years  
Time period: January 2022 – November 2050

**Injured** (injured state after the accident)

Earning capacity: R214,908.00 per annum in 2021 + benefits  
Progressions: Notch increases as per policy  
Career plateau: Same (no progression to HOD)  
Retirement age: 55 – 60 years (Dr Oelofse)  
Time period: January 2022 – November 2040/45 (early retirement)

- [15] Dr Jacobs maintains that his opinion is based on the medical evidence and the assertion by the plaintiff that she loves teaching and does not intend to change her profession. In cross-examination, the time period for past loss of income was corrected to June – December 2016 and not 2021 as reflected in the agenda to the actuary. It was also highlighted to Dr Jacobs that the reason for the plaintiff not returning to work on 15 January 2017 was due to her one-year contract having expired as recorded in clause 11 of the employer's certificate at page 328 of the papers, to which he agreed. It was also pointed out to Dr Jacobs that there would have to be an HOD vacancy before she could apply for it and that between 2017, when she joined the teaching profession to 2023, a period of five years, there has not been a vacant HOD position advertised. He agreed.

- [16] Pursuant to the completion of the industrial psychologist's report, which was based on the opinion that the plaintiff was not an equal competitor, the plaintiff, ironically, was appointed permanently in January 2023. Dr Jacobs contacted the HOD, Mr EA More, on 06 December 2021 as collateral, who confirmed being aware of her involvement in a motor vehicle accident which had caused her injuries. Dr Jacobs conceded to not taking the aspect of her being permanently appointed into consideration when he drew up the agenda. He maintained that the plaintiff's loss of benefits is calculated from age 50 until her retirement age. It was put to Dr Jacobs that the evidence before court does not substantiate the future loss of earnings or earning capacity to which he disagreed vehemently, maintaining that there will be a total loss of income should the plaintiff go on early retirement at either the age of 55 or 60.
- [17] The last witness to testify on behalf of the plaintiff was Mr Willem Hendrik Boshoff of the firm Munro Forensic Actuaries. He is a qualified actuary whose qualifications and experience were not challenged nor impugned. His instructions were to calculate the plaintiff's loss of earnings. He relied on the industrial psychologist's report, medical reports and the plaintiff's single payslip.
- [18] The actuary made the following assumptions:
- 18.1 Estimated the earnings by interpreting the documents provided;
  - 18.2 Allowed a non-pensionable cash allowance of R1,352.00 per month (salary level 6 - 7) from April 2021 until the end of March 2022 as per the PSCBC Resolution 1 of 2021;
  - 18.3 Allowed for the translation to the new notch codes in July 2018 and July 2019 as per the Department of Basic Education (DBE);

- 18.4 Allowed annual notch increases as per the Department of Public Service and Administration (DPSA) (after an initial 24-month period starting from 1 April following the date of appointment). Notch increases at 1.5% above earnings inflation from July 2020.
- [19] The argument on plaintiff's behalf in respect of the claim for past loss of earnings was as a result of the non-renewal of her one-year contract, which rendered her unemployed for 9 months. The counter-argument on behalf of the RAF was that the contract had expired and there was no collateral evidence confirming that the non-renewal was due to her injuries. A close scrutiny of clause 11 of the employer's certificate attached to the papers as Annexure "D" at p 328, is unambiguous. Immediately below the open spaces to be filled by the employer and in brackets the following appears: "*State the reason why client did not return*". The only reason furnished by the Deputy Principal is that she did not return to work on 15 January 2017 because her contract had ended. In brackets was specified after 12 months. There is nothing said about her injuries being the cause of the non-renewal.
- [20] Clause 17 of the employer certificate requires any other information. Under this head the Deputy Principal wrote:
- "During the time of injury, the educator was unable to perform any physical duties and at times had to work from home as her health was affected."*
- Nothing is said about her injury being the cause of the non-renewal of her contract. It essentially shows that the employer provided reasonable accommodation to the plaintiff. Notwithstanding, a reasonable inference can be drawn that the injuries may have contributed to the non-renewal of her contract as everyone else's contract was renewed.

- [21] As alluded to earlier, it is common cause that the plaintiff was appointed as a permanent teacher at Thothonyane Secondary School since 01 January 2019. Taking cue from the remarks by Nicholas JA in *Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A)* at 113F – 114A pronouncing that:

*"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. 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. See Hersman v A Shapiro & Co 1926 TPD 367 at 379 per STRATFORD J:*

*'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages.'"*

- [22] The learned Judge went on to sound the following caution at 117A to D:

*"It is, however, erroneous to regard the fortunes of life as being always adverse: they may be favourable. In dealing with the question of contingencies, WINDEYER J said in the Australian case of Bresatz v Przibilla (1962) 36 ALJR 212 (HCA) at 213:*

*"It is a mistake to suppose that it necessarily involves a 'scaling down'. What it involves depends, not on arithmetic, but on considering what the future may have held for the particular individual concerned... (The) generalisation that*

*there must be a 'scaling down' for contingencies seems mistaken. All 'contingencies' are not adverse: All 'vicissitudes' are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune? Each case depends upon its own facts. In some it may seem that the chance of good fortune might have balanced or even outweighed the risk of bad."*"

- [23] The *onus* rested on the plaintiff to prove on a balance of probabilities that she stands to suffer future loss of income or alternatively loss of earning capacity.
- [24] The plaintiff maintained that pre-accident she stood a good chance of career progression up to Head of Department, Principal or Curriculum Coordinator since she possesses the required academic qualifications but her physical limitations and inability to participate in sporting or extra-mural activities will hamper her progression. I took note however, that since she assumed the position of a teacher and before her injury, she has never applied for a senior position and there has not been any HOD vacancy that she was aware of.
- [25] The plaintiff is now 37 years old. She was 32 years at the time of the accident. She has been taking HIV medication since the age of 21. She now has a united left bimalleolar fracture. Evidently, she has also developed osteoarthritis as a result of the injury. Both Dr Oelofse and Ms Liebenberg opined that she may be suited for light or sedentary work post-morbidly. Her being permanently employed by the Department of Education, a sympathetic employer, argued by Ms Rabie, for the Defendant, should be taken into consideration by this Court when assessing whether there is loss of income or loss of earning capacity.

- [26] The following were questions grappled with by Dr Jacobs as appearing in his report at clause 11.2.1: (i) to address if the claimant can work again; (ii) whether early retirement is on the cards; (iii) whether the claimant's capacity and performance ability were restricted due to the injuries; and (iv) whether the claimant is still competitive to aspire for vacancies, promotions and labour market opportunities.
- [27] According to Dr Jacobs past loss of income is calculated from the date of the accident (June 2016) to date of his report (December 2021). This cannot be the case since she was unemployed only for a period of nine (9) months at the expiry of her one-year contract. Notwithstanding that she 'felt' that her contract was not renewed due to her injuries, this aspect was not substantiated. It is doubtful whether this was the case but in the absence of any contradicting evidence, she is afforded the benefit of the doubt.
- [28] In as far as her loss of earning capacity is concerned, the following are significant. She has sustained orthopaedic injuries supported by Dr Oelofse who, nevertheless, found her to be suitable to work in a light duty/sedentary position. In *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) at 241H - 242B, Jones AJA cautioned:

*"A physical disability which impacts upon capacity to earn does not necessarily reduce the estate or patrimony of the person injured. It may in some cases follow quite readily that it does, but not on the facts of this case. There must be proof that the reduction in earning capacity indeed gives rise to pecuniary loss."*

It is common cause that since 01 January 2023 she has been permanently employed as a teacher by the Department of Education. A teacher's retirement age is 65 years. As a teacher she has an option to retire early due to incapacity, an option which is catered for in the Terms and Conditions of Employment of Educators Determined in terms of s 4 of the Employment of

Educators Act, 1998. It is also significant to note that the RAF has furnished an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act. The uncontradicted opinion of Dr Oelofse is that the osteoarthritis may necessitate her early retirement.

- [29] I have in the meantime requested the actuary to re-calculate the contingencies mindful of the following: first, that the plaintiff has been permanently employed as a teacher by the Department of Education (DoE); secondly, that the RAF has furnished an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act; thirdly, that she has not applied for the Head of Department (HOD) position even in her uninjured state and there has not been an HOD vacancy that she is aware of since her qualification as a teacher; and fourthly, that the DoE is a sympathetic employer. Her permanent appointment as a teacher has, in my view, dispelled the contention that she is an unequal competitor. The actuary has further been requested to confirm that the past loss of income is calculated from June – December 2016 and not to 2021 and the additional benefits for state employees as guided by Koch Quantum Yearbook, 2021 to be revised from 1.5% to 1% as recommended by the Industrial Psychologist. The responses of the actuary were taken into consideration.
- [30] The Road Accident Fund's non-participation and its failure to appoint experts to present a balanced medical view of the plaintiff's injuries is unhelpful to the courts. Notwithstanding that the plaintiff has succeeded in proving her case on a balance of probabilities, I am persuaded by the amount claimed in respect of the future loss of earnings or earning capacity as per the draft order Part B as it stands.
- [31] Mr Coetzer, plaintiff's counsel, handed up two draft orders, Part A and Part B, in the event that this Court finds that the plaintiff is

successful in her claims. Part A relates to the order by agreement between the parties for which the plaintiff is successful in respect of General damages. Part B is in respect of the heads of damages which were disputed by the RAF, namely, past and future loss of earning or earning capacity which, in my view, required a recalculation by the actuary.

- [32] The following order is made:

Part A

By agreement between the parties the following order is made:

1. The defendant shall pay General damages in the sum of R280,000.00 (Two Hundred and Eighty Thousand Rand) which amount is calculated after apportionment, to the plaintiff's attorneys, Honey Attorneys Trust Account:

Nedbank- Maitland Street Branch, Bloemfontein  
Branch Code: 11023400  
Account No: 1102475912  
Reference: Y Vosloo/J03780

2. In the event that the defendant does not, within 180 (One Hundred and Eighty) days from the date on which this order is handed down, make payment of the capital amount, the defendant will be liable for the payment of interest on such amount at 10.50% (the statutory rate per annum) calculated 14 (fourteen) days from date of this order.

Part B

Regard being had to the pleadings filed on record and expert evidence presented the following order is made:

1. The defendant is liable to pay the plaintiff the sum of R1,825,552.00 (ONE MILLION EIGHT HUNDRED AND TWENTY FIVE THOUSAND FIVE HUNDRED AND FIFTY-TWO RAND) which amount is calculated as follows after apportionment:
  - 1.1 Past loss of income R218,956.00
  - 1.2 Future loss of income R1,606 596.00

into the following bank account:

Honey Attorneys Trust Account:  
Nedbank- Maitland Street Branch, Bloemfontein  
Branch Code: 11023400  
Account No: 1102475912  
Reference: Y Vosloo/J03780

2. The plaintiff shall allow the defendant 180 (One Hundred and Eighty) court days to make payment of the capital amount from date of this order, failing which the plaintiff will be entitled to recover payment of interest at the applicable interest rate.
3. The defendant must make payment of the plaintiff's taxed or agreed party and party costs which is subject to the Taxing Master's discretion.

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**M.C. MAMOSEBO**  
**JUDGE OF THE HIGH COURT**  
**NORTHERN CAPE DIVISION**

For the Plaintiff:                  Adv. JC Coetzer

Instructed by: Honey Attorneys  
c/o Haarhoffs Attorneys

For the Defendant: Ms B Rabie  
Instructed by: Office of the State Attorney  
Kimberley