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| 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
NORTH WEST DIVISION, MAHIKENG**

CASE NO: RAF

131/2019

In the matter between:

SELOGILWE KAMOGELO GRACE

Plaintiff

AND

ROAD ACCIDENT FUND

Defendant

Heard: 07 MAY 2024

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **06 JUNE 2024**

ORDER

I make the following order:

- 1 The Defendant is ordered to pay the following amounts
Loss of earnings R 1 908 646.
To the Plaintiff in settlement of the Plaintiff's claim.
2. The Defendant shall be liable for interest thereon at 11.75% from the date of judgement to date of payment.
3. Defendant to pay costs on scale B.

JUDGMENT

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[1] In this action for damages the plaintiff sued the defendant for injuries sustained from a motor vehicle accident in which she was a passenger. She sued for loss of income, future medical expenses, and general damages. The merits were settled with the defendant accepting 100% liability of the plaintiff's proven damages. The general damages were settled in the amount of four hundred thousand rand (R400 000.00) and an undertaking in terms of section 17(4) of the Road Accident Fund Act 56 of 1996 was made in relation to future medical costs for the plaintiff. The only outstanding issue is the determination of loss of earning.

[2] The plaintiff was a passenger in a bus on **23 January 2018** on the R510 road near Rustenburg. She fell out of the bus after it was set in motion by the driver. She sustained injuries and was

hospitalised at Job Shimankana Hospital in Rustenburg. The injuries sustained were on the right ankle with a fracture and a dislocation.

[3] There was an application in terms of Rule 38(2) of the Uniform Rules of Court to have the evidence of the plaintiff's experts heard on submission of affidavits. The application was granted. The defendant did not present any expert evidence. The following expert reports were relied on by the plaintiff:

- Orthopaedic Surgeon
- Educational Psychologist
- Occupational Therapist
- Industrial Psychologist
- Actuary

Plaintiff's Expert Reports

Orthopaedic Surgeon: Dr R.S. Ngobeni

[4] The Orthopaedic Surgeon examined the plaintiff on **19 July 2019** and noted that she walks with antalgic gait. She had right ankle lateral aspect scar-longitudinal measuring about 12cm x 1cm and a right ankle medial aspect surgical longitudinal scar measuring 6cm x 1cm. According to the Orthopaedic Surgeon, duties that require long hours of standing or walking will be a challenge for the

plaintiff. She is not a good competitor for her peers due to the chronic ankle pain.

Educational Psychologist: Ms Esther Monyela

- [5] The date of assessment was **25 May 2023**. A Differential Aptitude Test was conducted, and the plaintiff's results indicated a low average academic achievement which is a drop in her performance as compared to her pre-accident academic functioning. This was due to the emotional challenges experienced post-accident that affected her intellectual functioning negatively. Under socio-emotional functioning, Ms Monyela opined that the plaintiff is distressed by her health condition and that resulted in her being withdrawn and timid. Her self-esteem and social life are affected negatively. Pre-accident she was of average intelligence and would have passed grade 12 with admission to a bachelor's degree and compete fairly in the open labour market. Post-accident her performance dropped, and she managed to pass grade 12 with lower level of admission to college of education which is NQF level 6.

Occupational Therapist: Ms Poppy Khunou

- [6] The plaintiff was assessed by Ms Khunou on **19 July 2022**. The plaintiff works as an equipping helper responsible for providing employees with equipment and consumables underground at the mine. Her work is classified as light category, and she could manage with up to low-medium occupational duties in the open

labour market. She would not cope with medium to heavy duties that require prolonged standing, walking, or squatting. Ms Khunou opined that due to the injuries sustained by the plaintiff she has been rendered an unequal competitor and a vulnerable employee in the open labour market. She continues to suffer loss of enjoyment of amenities of life. She is a well orientated person and aware of her surroundings, therefore no cognitive deficits were noted. She also denied any psychological deficits.

Industrial Psychologist: Ms Khulukazi Fungiwe Dlakavu

[7] At the time of assessment, on **22 June 2022**, the plaintiff was 22 years of age. The Industrial Psychologist opined that the plaintiff may have been able to continue with her schooling to attain grade 12 qualification and thereafter pursue either NQF6 or 7 before entering the open labour market as a semi-skilled worker at level B1/B2 and progressed to her peak at C3/C4 by the age of 45 years. Post -accident she attained her grade 12 and is employed at Impala Platinum Mine as an Equipping Helper in the underground storehouse since **2020**. She complains of pain on her ankle that she can't stand for long periods, cannot run, or lift heavy objects. Ms Dlakavu opined that based on the assessment by the experts, the plaintiff is unable to work at the same level of productivity and efficiency as her peers for work in the medium and heavy physical demands. She faces restrictions in terms of accessing alternative opportunities in the open labour market.

[8] In the actuarial report loss of earning was calculated at R2 316 639.00 with contingencies applied.

Submissions

[9] The plaintiff's case is that the preferred scenario in the calculation of the loss of earning is the one where the plaintiff did not pursue tertiary education. It was submitted that the factors to be considered are the effects of the injuries sustained by the plaintiff, that she might retire at an early age, that the plaintiff is being accommodated by a sympathetic employer and that prospects of obtaining another employment are slim. Further that the plaintiff will continue to experience a decline in her physical work capacity. The argument for the plaintiff was that the contingencies should be 15% on pre-accident and 25% on post-accident with the total loss of R2 316 639.00.

[10] The Defendant on the other hand argued for a total loss of R810 139.40.

Law

[11] In relation to the assessment of damages for loss of earning the following was said in **Southern Insurance Association v Ballie NO 1984 (1) SA 98 (A)**: *"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..."

- [12] In the unreported case of **Matshaba v Road Accident Fund 2006 JOL 16926 (T)** Prinsloo J held that: *"where career and income details are available, the actuarial calculation approach is more appropriate and a court must primarily be guided by the actuarial approach, which deals with loss of income or earnings before applying the robust approach, which normally caters for loss of earning capacity. This would help the court to ensure that the compensation assessed and awarded to the plaintiff is as close as possible to the actual facts relied upon."*
- [13] The object of the RAF is to give prejudiced plaintiffs the fullest possible compensation by placing them, insofar as possible, in the same position in which they were before the damage-causing event. **See Pretorius v Road Accident Fund 2013 JDR 1096 (GNP).**

[14] In **Sandler v Wholesale Coal Suppliers Ltd 1941 (A) 194** it was stated that: *“It is no doubt exceedingly difficult to value the damage in terms of money, but that does not relieve the Court of the duty of doing so upon the evidence placed before it. This is a principle which has been acted on in several cases in South African Courts.”*

Loss of earnings

[15] The plaintiff in this matter sustained serious injuries and the only experts that filed reports are those appointed by the plaintiff. It is clear from the reports that because of the accident, the plaintiff experiences challenges due to pain and her performance at work is affected. At the time of the accident, she was a scholar, but she managed to attain her grade 12 and secured employment at the mine. It is not disputed that the plaintiff did suffer loss of earning because of the accident and should be compensated.

[16] It was submitted that as a result of the accident the plaintiff will not be able to compete fairly in the open labour market and that the career opportunities for her are slim. She did not pursue a tertiary qualification and is currently employed as an Equipping Helper at the mine. It is not in dispute that the plaintiff has limitations, and should be compensated fairly and applying fair, just, and reasonable contingencies. In my view the scenario 2 as suggested in the actuarial report where the plaintiff did not pursue tertiary education is appropriate and the contingencies applicable of 20%

on pre-morbid earnings and 25% on future income. The total loss of earning being R 1 908 646.

Order

[17] Consequently, the following order is made:

- 1 The Defendant is ordered to pay the following amounts
Loss of earnings R 1 908 646.
To the Plaintiff in settlement of the Plaintiff's claim.
2. The Defendant shall be liable for interest thereon at 11.75%
from the date of judgement to date of payment.
3. Defendant to pay costs on scale B.

J T DJAJE

**DEPUTY JUDGE PRESIDENT OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG**

APPEARANCES

DATE OF HEARING : 07 MAY 2024

DATE OF JUDGMENT : 06 JUNE 2024

COUNSEL FOR THE PLAINTIFF : ADV SELOLO

COUNSEL FOR THE DEFENDANT : MS MATHEBULA