

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

634/2022

In the matter between:

MAKHOTI PRECIOUS THATO

Plaintiff

AND

ROAD ACCIDENT FUND

Defendant

Heard: **23 JANUARY 2024**

Delivered: The date for the hand-down is deemed to be on **8 MARCH 2024**

ORDER

The following order is made:

1. The Defendant is ordered to pay the following amounts
Loss of earnings R 1 430 953.05

To the Plaintiff in settlement of the Plaintiff's claim.

2. An undertaking in terms of section 17 (4) (a) of the Road Accident Fund Act 19 of 2005 by the Defendant for future medical expenses.
3. The Defendant is ordered to pay costs of suit up until **23 January 2024** including the costs of obtaining the expert witnesses.

JUDGMENT

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- [1] The plaintiff instituted a claim for damages suffered because of injuries from a motor vehicle accident. The matter proceeded on both merits and quantum. General damages were settled in the amount of R500 000-00 (five hundred thousand rand). Only the plaintiff testified in relation to the merits. Her evidence was not challenged or disputed in any way.

- [2] The merits were briefly as follows: On **29 September 2021** the plaintiff was a passenger in a taxi on her way to work. The driver of the taxi took a different route which was unknown to the plaintiff. When she enquired where the driver was going, she received no response. Upon realising that the vehicle was moving towards the bush she demanded that the driver stop the vehicle so she could alight. Again, there was no response. She decided to open the door of the vehicle whilst in motion and fell to the ground. The driver drove over her and stopped the vehicle. She tried to run and

was assisted by an unknown man who took her home. Thereafter she was taken to the hospital. She was injured on her right ankle. She was operated on, and a metal inserted on her ankle.

[3] As stated above there was no cross examination by the defendant nor was there any evidence adduced to challenge the evidence of the plaintiff. Having heard the evidence as presented by the plaintiff, I was satisfied that there was negligence, and the defendant should be held 100% liable for the proven damages. The matter proceeded on quantum, specifically on loss of earning.

[4] 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 and presented by the plaintiff:

- Orthopaedic Surgeon
- Occupational Therapist
- Industrial Psychologist
- Actuary

Plaintiff's Expert Reports

Orthopaedic Surgeon: Dr H.L. Moloto

[5] According to the Orthopaedic Surgeon the plaintiff sustained severe injury of the right ankle which has left her with chronic pain

and loss of function of the right ankle. As a result of the injury, she can mainly do sedentary work as the injury affected her ability to work as a teacher which requires long hours of standing. The surgeon indicated that the plaintiff's life expectancy has not been affected by the accident.

Occupational Therapist: Success Moagi

[6] It was noted that the plaintiff's role and performance as a Pre-school teacher has been affected by the accident, but her communication skill was still appropriate. She however has a low self-esteem as she can no longer wear the shoes that she used to and must live with the scars on her right ankle. The recommendations made in relation to daily activities were that the plaintiff requires 8 hours a week of domestic assistance to relieve the burden she places on her mother and for daily chores. As she has difficulty walking, the Occupational Therapist recommends a general transport allowance to allow her to use motorised transport for short trips around her community as she does not have a driver's licence. She will require some assistive devices for daily use in the house like a highchair, bathmat, crutches if she does go for surgery. In her opinion, the Occupational Therapist opined that the plaintiff's physical capacity, rate of work and work qualification safely and functionally meets the weightlifting capacity of load that falls within sedentary to static mid-range of light types of work category, meaning not exceeding 7,5kg. Further that she is less competitive in the workplace in terms of efficiency, effectiveness, and productivity in comparison to a healthy individual of the same age within her vocational skills and vocational exposure. As a job

seeker, she is best suited for sedentary to modified light types of work category.

Industrial Psychologist: Moipone Kheswa

[7] The Industrial Psychologist opined that the plaintiff's work ability has been compromised and this has a negative impact on her overall employment and earning capacity. Her future employability seems severely curtailed, and her job opportunities seem severely limited because of the accident and its sequelae. Ms Kheswa further indicated that the recommended treatment will not resolve the plaintiff's problems but will assist her to be better functional in her environment. On future loss of earnings, she concluded that the plaintiff is rendered an unequal competitor for gainful employment as a much more vulnerable employee having to compete with able-bodied individuals for employment.

[8] In the actuarial report the total future loss of income is calculated as R9 279 493.00 and less contingencies applied is R6 495 445.00.

Submissions

[9] The Plaintiff's case is that total loss of earnings be awarded based on the plaintiff's occupation at the time of the accident, qualifications, her application of admission at the University of Free State and the presence of an established career path. It was

argued that as a teacher the plaintiff will not meet the demands of the job because of the accident. If she does qualify as a teacher, she will not be able to compete in an open market with her peers.

- [10] The Defendant on the other hand argued that in the absence of the reports from the Clinical Psychologist and the Educational Psychologist on the psychological sequelae caused by the accident, the court is not able to make the award as prayed for. Further that despite the accident, the plaintiff is still able to obtain a teachers' qualification and secure employment as a teacher. It is the defendant's case that a capacity loss of earning should be considered as opposed to actual loss of earning and a contingency of 30% on pre-morbid and 45% post with the total loss of earning calculated at R1 430 953.05.

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 because of the accident on **29 September 2021**. As stated only the plaintiff's experts filed reports and opined on the effects of the injuries on the plaintiff after the accident. Prior to the accident the plaintiff had no difficulties in relation to the work and performance of general daily activities. Post the accident, there is no doubt that the plaintiff now has challenges relating to the performance of her work and some of her daily activities like walking and standing for long periods. It is not disputed that the plaintiff did suffer loss of earning because of the accident. The plaintiff was a pre-school teacher before the accident, which job she had to leave as she could no longer cope and perform as expected. She also testified that she applied to the University of Free State to study for a teacher's qualification.

[16] The argument for the plaintiff is to the effect that there is total loss of earnings as she will not be able to compete fairly in the teaching profession due to the sequelae of her injuries. Further that there are no career opportunities for the plaintiff to pursue with the condition she is in post the accident. However, the experts have classified the work that the plaintiff can do as being sedentary to static. There was no evidence led that the plaintiff will not be able to complete her studies in obtaining a teacher's qualification. The argument advanced was that she will not be able to do sedentary work in the teaching profession. This argument was not based on any expert opinion. The defendant argued that the plaintiff is still able to attain her qualification and secure employment as a teacher.

[17] According to the experts herein the plaintiff is restricted physically and there is nothing wrong with her mental capacity. I agree with the submission that the plaintiff can register and obtain a qualification in the teaching profession. There is nothing preventing her from securing employment as a teacher with limited physical ability. She did not testify that her previous employer was unhappy with her performance, nor did she engage her employer about the conditions of her employment to accommodate her difficulties.

[18] 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 there should be contingencies applicable of 30% on pre-morbid earnings and 45% on future income. The total loss being R 1 430 953.05.

Order

[19] Consequently, the following order is made:

1. The Defendant is ordered to pay the following amounts
Loss of earnings R 1 430 953.05
To the Plaintiff in settlement of the Plaintiff's claim.
2. An undertaking in terms of section 17 (4) (a) of the Road Accident Fund Act 19 of 2005 by the Defendant for future medical expenses.
3. The Defendant is ordered to pay costs of suit up until **23**

January 2024 including the costs of obtaining the expert witnesses.

J T DJAJE
DEPUTY JUDGE PRESIDENT
NORTH WEST HIGH COURT DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING : 23 JANUARY 2024

JUDGMENT RESERVED : 23 JANUARY 2024

DATE OF JUDGMENT : 08 MARCH 2024

COUNSEL FOR THE PLAINTIFF : ADV G MOKONOTO

COUNSEL FOR THE DEFENDANT : MR SETATI

