

SOUTH AFRICA / JUDGMENT

Kumalo v Road Accident Fund (52996/15) [2025] ZAGPPHC 693 (1 July 2025)

[2025] ZAGPPHC 693

COURT

North Gauteng High Court, Pretoria

BEFORE

P D Kekana

CASE / FILE NUMBER

52996/15

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 52996/15

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 01/07/2025

SIGNATURE

In the matters between: -

NONTUTUZELO ELIZABETH KUMALO

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

The matter was heard in open court and the judgment was prepared and authored by the judge whose name is reflected herein and was handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date of handing-down is deemed to be 1 July 2025.

JUDGMENT

KEKANA AJ

INTRODUCTION

- [1] This is a claim by the plaintiff against the Road Accident Fund for damages arising from a motor vehicle collision which occurred on or about 04 November 2011 at or near Vaal Fisheries, North Street.
- [2] The issues for determination are firstly, whether the defendant is liable for the plaintiff's damages; and secondly, if liability is established, the amount of the plaintiff's claim in respect of general damages and loss of earnings and/or loss of earning capacity. The plaintiff seeks an order directing the defendant to compensate him for 100% of his proven damages. The matter is defended.

RULE 38(2) APPLICATION

- [3] The Plaintiff brought an application that the evidence relating to the medico-legal reports of the medical experts and the actuarial report of the Actuary, be allowed by affidavit in terms of the provisions of Uniform Rule of Court 38(2). The court granted the application.

EVIDENCE

- [4] The plaintiff testified and did not call any witnesses. She testified that on the 04 November 2011 at Vaal Fisheries, North Street she was knocked by a motor vehicle bearing registration letters and numbers H[...] (hereinafter referred to as the "insured motor vehicle") whilst crossing the road. She was stepping on the pavement when a motor vehicle struck her from behind and she fell forward. She stood up and checked herself. The driver got out of the vehicle and apologised. Realising she was not bleeding, she walked away. It was only when she was later at the taxi rank that she felt a change in her body, she felt pain in her leg. The following day, she went to the hospital because the pain got worse. She spent 4 days at the hospital in Klerksdorp. She was treated for the painful hip, arm and spinal cord muscles.
- [4] Before the accident, she was self-employed as a hawker. She sold clothes and achar at SASSA pay points. Since the accident, she has been unable to work. She now sells peanuts and Simba chips at home because she cannot walk long distances. She cannot sit for a long time and struggles with back pain. During cross-examination, she stated that she looked before crossing the road and there was no vehicle approaching. The motor vehicle that struck her was in the process of parking.

- [5] It was submitted on behalf of the defendant that the plaintiff failed to look at all sides and therefore, an apportionment of 90/10 should be made. On the other hand, it was submitted that there was no contributory negligence and therefore the defendant should be held liable for 100% of the plaintiff's proven damages.

ANALYSIS - MERITS

- [6] It is trite that the plaintiff bears the onus to prove negligence on the part of the defendant. Once a prima facie case is established, the defendant must rebut the inference of negligence or face an adverse finding.
- [7] The plaintiff's evidence regarding the circumstances of the accident was not seriously challenged in material respects. It is common cause that the plaintiff was a pedestrian who had crossed the road and was stepping onto the pavement when she was struck from behind by the insured motor vehicle. The defendant did not call any witnesses, including the driver of the insured vehicle, and thus the only version before the court is that of the plaintiff.
- [8] In assessing the issue of negligence, the court in *Ntsala v Mutual & Federal Insurance Co Ltd* 1996 (2) SA 184 (T) at 190 held that:
- "Once the plaintiff proves an occurrence giving rise to an inference of negligence on the part of the defendant, the latter must produce evidence to the contrary: he must tell the remainder of the story, or take a risk that judgment be given against him."*
- [9] In *Ngubane v South African Transport Services* [1990] ZASCA 148; 1991 (1) SA 756 (A), the court explained that contributory negligence is established when the plaintiff fails to act with the degree of care that a reasonable person would have exercised under the same circumstances. However, the onus rests on the defendant to prove such contributory negligence on a balance of probabilities.
- [10] In the present matter, the defendant has failed to discharge that onus. The plaintiff's version is that she looked for oncoming traffic before crossing and that no vehicles were approaching at the time. Furthermore, she was struck from behind while stepping onto the pavement. There is no evidence to suggest that she acted in any way that contributed to the collision.
- [11] The fact that the vehicle struck the plaintiff from behind, strongly suggests that the driver of the insured vehicle failed to keep a proper lookout. The defendant's failure to call the driver or offer any alternative version of events leaves the plaintiff's evidence uncontroverted.
- [12] In *SANTAM Insurance Co Ltd v Vorster* 1973 (4) SA 764 (A), the Appellate Division held that in pedestrian-motorist collisions, courts must evaluate the evidence in its totality and determine whether the pedestrian contributed to the cause of the accident. In this case, there is no evidence to support a finding of contributory negligence.

- [13] Accordingly, I find that the plaintiff acted reasonably in the circumstances and that the sole cause of the accident was the negligent conduct of the driver of the insured vehicle. The defendant is therefore liable for 100% of the plaintiff's proven damages.

QUANTUM

- [14] I now turn to the issue of quantum.

THE PLAINTIFF'S INJURIES

- [15] It is not in dispute that as a result of the collision, the plaintiff sustained a soft tissue injury of the thoraco-lumbar spine, with resultant spondylosis. She presented with right hip pain with paraparesis of both lower limbs and thoracic and sacral pain.
- [16] According to the orthopaedic surgeon, Dr Peter Kumbirai, the plaintiff's injuries have resulted in a 10% risk of progression to radiculopathy over the next 5 to 10 years, potentially necessitating decompression surgery. The plaintiff continues to experience chronic spinal pain which significantly limits her functional capacity, particularly in relation to occupations requiring physical exertion.
- [17] The clinical psychologist, Dr C.D. Roode, diagnosed the plaintiff with symptoms of clinical depression and anxiety, including suicidal ideation, agitation, poor concentration, and feelings of worthlessness. These psychological symptoms were causally linked to the injuries sustained in the collision.
- [18] The occupational therapist, Mr Lefatane Makgato, stated that the plaintiff had been a self-employed hawker selling clothes, fruits and achar. Post-accident, she returned to her occupation but has been unable to perform her duties effectively due to persistent pain. She now depends on others to assist her in her informal trade.
- [19] According to the industrial psychologist, Dr Talifhani Ntsieni, the plaintiff's injuries have negatively impacted her psychological and occupational functioning. Further that she has suffered a significant diminution in her competitiveness in the open labour market. Her earning potential has been reduced, and she remains reliant on sympathetic assistance and accommodations in her current self-employment.

ANALYSIS - QUANTUM

- [20] The plaintiff bears the onus to prove the loss of earnings and earning capacity on a balance of probabilities. The legal position is well-established in *Southern Insurance Association Ltd v Bailey* NO 1984 (1) SA 98 (A) and *Rudman v RAF* 2003 (2) SA 234 (SCA), which require the court to assess the difference in patrimonial value between pre- and post-accident earning potential, factoring in contingencies and future risk. Where precise evidence is not available, the court must do the best it can on the evidence before it. The approach is not to "guess" but to exercise a sound judicial discretion based on the available

facts

and probabilities.

[21] In *RAF v Guedes* 2006 (5) SA 583 (SCA) at para 8, Zulman JA stated the following regarding loss of earnings:-

“The court exercises a wide discretion when it assesses the quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right. Courts have adopted the approach that in order to assist in such a calculation, an actuarial computation is a useful basis for establishing the quantum of damages. Even then, the trial court has a wide discretion to award what it believes is just”.

Pre- and Post-Accident Employment

[22] Dr Kimburai indicated that the plaintiff was self-employed, selling food and clothing items, while on the other hand, Dr Roode noted that she managed two tuckshops, regularly walking between them to monitor stock levels. Dr Makgato stated that the plaintiff worked as a cleaner in 2005 before becoming self-employed, running a tavern and two shops. She later ceased these operations due to marital difficulties. By the time of the accident, she had been working as a hawker since 2000, selling clothes and vegetables. Dr Makgato further noted that at the time of the assessment, the business was being run by her son and a friend. In a follow-up report, Dr Makgato stated that she was operating two tuckshops.

[23] Dr T Ntsieni reported that the plaintiff was employed as a cleaner from February to December 1994 and had also been selling clothes, atchar, meat, and fruit from 1992 until November 2011. After a period of staying home, she resumed her business in January 2014, although she now relies on her son and a friend due to mobility issues. Her son delivers atchar and fish to customers after school, and her friend sells atchar door-to-door, including at hospitals and pension points.

[24] The evidence regarding plaintiff's occupational history is full of discrepancies. In the report of the clinical psychologist, she is reported to have been running two tuckshops at the time of the accident, while the orthopaedic surgeon and the occupational

therapist reported that she was self-employed as a hawker selling clothes and food. In her evidence before this court, she testified

that she was a hawker at the time of the accident, selling potatoes, atchar, clothes, hampers containing cooking oil, maize meal, sugar and flour.

[25] There are also discrepancies regarding post-accident employment. She testified that she continues to sell Simba chips and peanuts at home and at the hospital when she goes for her checkup, her friend assists her in selling. In the reports she was said to be selling atchar and fish with the assistance of her son, daughter and a friend.

[26] The industrial psychologist put forward a pre-accident income of R5 000 to R7 000, while Post-accident, she stated that she earns approximately R2 400 per month, but this is with the assistance of the friend and his son. No collateral information was provided. All the information regarding the plaintiff's earnings was provided by the plaintiff.

Consequently, the expert reports are based on information that has not been proved before this court.

[27] In *Nkala v RAF* (16158/2018) [2025] ZAGPJHC (10 March 2025) para 5, it was stated that: "The plaintiff is required to prove its case, which includes the claim for loss of earnings. In the absence of factual proof of income, the postulations hold no merit relating to a claim for loss of income."

[28] In *Mathebula v RAF*

[2006] ZAGPHC 261 at para 13, the court held that expert evidence must be based on facts established through admissible evidence during trial unless admitted or proven by competent witnesses. The failure to adduce oral evidence renders their opinions of no evidentiary weight. See also *Mlotshwa v RAF* (9269/2014) [2017] ZAGPPHC 109 (29 March 2017) at para 20-22 and *Boy Petrus Modise v Passenger Rail Agency of South Africa* case number A5023/2013 (11 June 2014) at para 10.

[29] In this matter, the information regarding the plaintiff's income that the experts relied on was not established through admissible evidence before this court. The plaintiff gave inconsistent evidence regarding her employment or activities pre- and post-accident. Neither her friend nor children nor customers were called to testify. Consequently, the opinion of the industrial psychologist and the actuary regarding the plaintiff's income is of no evidentiary value.

[30] I therefore find that the plaintiff has failed to prove her claim for loss of earnings.

GENERAL DAMAGES

[31] The plaintiff has also brought a claim for general damages for pain and suffering, emotional shock, discomfort, and loss of amenities of life. The injuries sustained by the plaintiff resulted in chronic thoraco-lumbar and sacral pain, paraparesis in the lower limbs, degenerative spinal changes, and psychological consequences including depression, anxiety, and suicidal ideation. The defendant made an offer which has been uploaded with the amount redacted.

[32] The clinical psychologist, Dr Roode, confirmed that the plaintiff developed symptoms of clinical depression linked to the trauma of the accident and its aftermath. The orthopaedic surgeon confirmed that her spinal condition is permanent and may deteriorate further. She can no longer perform the physical functions she previously managed independently

- [33] In determining a fair award, the court is enjoined to consider the nature and extent of the injuries, their impact on the plaintiff's lifestyle, emotional well-being, and future prospects. The court is further guided by comparable awards in case law, updated for inflation and the time that has lapsed since those judgments.
- [34] In *De Jongh v Du Pisanie* NO 2005
- (5) SA 457 (SCA), the Supreme Court of Appeal confirmed that awards for general damages must be fair to both parties, having regard to past awards in comparable cases, but adjusted for present-day values. The court also recognised that there is no mathematical formula for such awards, and each case must be considered on its own facts.
- [35] The plaintiff continues to suffer from constant pain in her lower and middle back, which may worsen into nerve damage in the future. She is no longer able to carry heavy items, stand for long periods, or move around independently while working. She also struggles with serious psychological issues, including depression, anxiety, memory problems, and suicidal thoughts. These physical and mental challenges have reduced her ability to enjoy life, move freely, live independently, and support herself through work.
- [36] It is trite that the court enjoys a wide discretion in determining the appropriate quantum for general damages. This discretion must, however, be exercised judiciously after a careful consideration of all the relevant facts and circumstances, so as to arrive at an amount that is fair and adequate compensation for the injured party. (See *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA)).
- [37] While previous awards in comparable matters may serve as useful guidelines, they cannot be applied rigidly. Each case must be assessed on its own merits, taking into account the unique facts, nature and extent of the injuries suffered, and the consequences thereof. Courts are cautioned against mechanically matching previous awards, as few cases are directly comparable. (See *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA)).
- [38] Nonetheless, where comparable cases are available, they may afford some guidance. In *SA Eagle Insurance Co Ltd v Hartley* [1990] ZASCA 106; 1990 (4) SA 833 (A) at 841D, the court recognised that cases with at least some similarities are useful as a benchmark. In *Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A) at 536A–B, it was held:
- “Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time, it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration.”*

[39] The court was referred to a number of previous awards in support of the plaintiff's case. Comparable cases considered by the court are as follows:

Stestenko v Road Accident Fund 2023 ZAGPPHC 155 78479/2017 3 March 2023. Injuries: Fracture of the mid-body of the sternum, fractures of the anterior right 4" and lateral right 6" ribs with hemopneumothorax, Spinal fractures involving superior end plate of T12, compression fracture of L1, superior end plate fracture of L2 and burst fracture of LS, blunt abdominal trauma with small bowel perforation. The current value of the award is R596 218.00,

[40] In Nkepanang v Road Accident Fund (RAF324/22) [2024] ZANWHC 239 (17 September 2024) the plaintiff suffered the following injuries: a) Laceration on the left wrist; b) Right cheek soft tissue injury;

c) Right shoulder neck of humerus fracture; and (c) Thoracolumbar spine soft tissue injuries. The court awarded R400 000 for general damages.

[41] Having considered the nature and extent of the injuries sustained by the plaintiff in the present matter, the pain and suffering endured, the residual impact on his quality of life, and guided by comparable past awards, I am of the view that an award of R500 000.00 constitutes fair and reasonable compensation for general damages in this case.

[42] Having considered the totality of the evidence, the applicable legal principles, and the submissions made on behalf of the parties, the court is satisfied that the plaintiff has succeeded in proving her claim on a balance of probabilities. In light of the injuries sustained, the resultant impairment, and the impact on the plaintiff's earning capacity, the court finds that a fair and reasonable award in respect of general damages for pain and suffering, loss of amenities of life, and emotional trauma is R500 000.00.

Accordingly, the following order is made:

1. Application in terms of rule 38(2) is granted
2. The defendant is liable for 100% of the defendant's proven damages.
- 3 The defendant shall furnish the plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for the costs of the future accommodation of the plaintiff in hospital or nursing home or treatment of or rendering of a service to the plaintiff or supply of goods to the plaintiff arising out of the collision that occurred on the 4 November 2011, after such costs have been incurred and upon proof thereof;
4. The defendant is ordered to pay the plaintiff the total amount of R 500 000.00 in respect of general damages.
5. Absolution from the instance in respect of loss of earnings.
6. The defendant is ordered to pay the plaintiff's taxed or agreed costs of suit.

P D KEKANA

ACTING JUDGE OF THE HIGH COURT

Heard on: 12 February 2025

Delivered on: 1 July 2025

Appearances:

On behalf of the Plaintiff: ADV MULIBANA

On behalf of the Defendant: ADV MBUYISA

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