

SOUTH AFRICA / JUDGMENT

Lambrechts v Road Accident Fund (998/21) [2025] ZAGPPHC 17 (3 January 2025) [2025] ZAGPPHC 17

COURT

North Gauteng High Court, Pretoria

BEFORE

Pienaar

CASE / FILE NUMBER

998/21

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Policy**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NO: 998/21****(1)****REPORTABLE: NO****(2)****OF INTEREST TO OTHER JUDGES: NO****(3)****REVISED****DATE:**

1/1/2025

SIGNATURE:

In

the matter between: DEBBIE
 LAMBRECHTS
 APPLICANT/PLAINTIFF
 and
 THE
 ROAD ACCIDENT FUND
 RESPONDENT/DEFENDANT

JUDGMENT

PIENAAR, AJ

Introduction

1. The matter came before me on the default judgment trial roll on 3rd October 2024. When the matter was called, there was no appearance for the RAF, despite due notice of the trial date being given to it. The application for default judgment before me was served on the defendant on 27 September 2024 and the notice of set down was served on 9 September 2024.
2. The plaintiff served and filed a notice of intention to amend the particulars of claim to a total, claimed in respect of loss of income, in the amount of R2 625 455,00. In this notice of intention to amend, the defendant was given 10 days within which to object, should they wish to do so in terms of Rule 28(2).
3. The issues to be determined are the liability of the Fund and, if the Fund is liable, the amount of compensation for future medical expenses and loss of earnings and earning capacity. The Plaintiff seek an order, that the RAF compensate her 100% of her proven damages.
4. The Fund did not admit the RAF 4 serious injury assessment of the Plaintiff, and the Fund did not make any offer on General Damages. Therefore, the issue of General Damages is postponed sine die.
5. Counsel for the Plaintiff brought an application in terms of Rule 38(2) to use the medico legal reports, which application I granted.

Merits

6. The Plaintiff pleaded that on the 24th December 2017 at approximately 16:00 and on the N12 Highway between Kimberley and Windsorton, Northern Cape, a collision occurred between a motor vehicle, bearing registration letters and numbers B[...] driven by Mr Mokale and a motor vehicle with registration letters and numbers C[...] driven by the Plaintiff.

7. The Plaintiff relied on the sworn statement of Ms Debbie Lambrechts. She confirmed that the accident occurred on 24 December 2017 at approximately 15:30 while she was the driver of motor vehicle with registration numbers C[...]. She was driving from Kimberley in the direction of Windsorton, on the N12 Highway. The road is a one-way lane in each direction with a yellow line on both sides with a broad shoulder. As she was driving, she noticed a motor vehicle in the yellow line, ahead of herself. Just as she overtook this vehicle with registration letters and numbers B[...], the vehicle moved into her

lane of travel and collided into the left side of her vehicle.

8. The merits evidence before me is; the police docket on reckless and negligent driving, the claimant's section 19 (f) affidavit confirming the accident, and the ID copy of the claimant. According to the docket a case of reckless and negligent driving was open against both drivers.
9. According to the statement of the Insured Driver, Mr Mokale, he was driving his Toyota Hilux bakkie on the left side of the road. He saw a white Toyota coming from behind and he drove to the yellow lane so the car can pass. As he was driving on the yellow line waiting for the car to pass, he heard a big bang sound from behind and he lost

control of the car.

10. The photos of the plaintiff's vehicle show that it had damages on the bonnet and on the left side.

The Law

11. The onus of proving negligence on a balance of probabilities rests with the Plaintiff.
12. Section 1(1)(a) of the Apportionment of Damages Act 34 of 1956 gives a discretion to the trial court to reduce a plaintiff's claim for damages suffered on a just and equitable basis and to apportion the degree of liability. Where apportionment is to be determined, the court is obliged to consider the evidence as a whole in its assessment of the degrees of negligence of the parties.
13. It is trite that even if a matter is not defended, the Plaintiff still bears the onus to prove its case on a balance of probabilities.
14. What bothers me is that the Insured Driver confirmed (in his statement) that he was driving in the yellow lane, and the Claimant drove into the back of his bakkie. There was a case open for reckless and negligence driving against both drivers.
15. It is clear that this Court is faced with two conflicting versions which are mutually destructive.

16. Considering the evidence by the Plaintiff and the docket, the accident report, sketch plan and key to plan and photo's of the damages to the vehicle placed before me and the circumstances of the collision, I believe the plaintiff should have veered more to the right and avoided the collision.
17. Accordingly, the court finds that the Defendant can compensate 60% of the Plaintiff's proven damages.

Quantum

18. The Plaintiff has served and filed the following medico legal reports on the Defendant:

18.1 Dr Theo Enslin - Orthopaedic Surgeon

18.2 Dr H B Enslin

- Orthopaedic Surgeon

18.3 Alison Crosbie

- Occupational Therapist

18.4 Dr G Marus

- Neurosurgeon

18.5 Dr M Mazabouw - Neuro & Clinical Psychologist

18.6 Dr C Visser

- Psychiatrist

18.7 Dr M Huth

- Neurologist

18.8 Dr J A Watts

- Clinical Psychologist

18.9 Lorette Theron

- Industrial Psychologist

18.10 Algorithm

- Actuaries

Dr Theo Enslin - Orthopaedic Surgeon

19. Dr Enslin reported that Ms Lambrechts sustained the following injuries as result of the accident:

19.1 A head injury with loss of consciousness for one hour

19.2 A 35% compression fracture of T9 (pre-existing, aggravated by the second accident on 24 December 2017)

19.3 A soft tissue injury to the cervical spine

19.4 A soft tissue injury to the lumbar spine

19.5 A soft tissue injury to the left knee

19.6 A soft tissue injury to the right knee

20. She sustained a head injury and had loss of consciousness for an hour. Her memory is affected. She does not recall events around the accident. She sustained a compression fracture of T9 in an accident that occurred in 1995 when she was 18 years old. She didn't submit a claim to the Road Accident Fund for the accident in 1995.

21. She sustained an injury to her back, neck and head at the age of eighteen. She continued to experience symptoms until the accident on 24 December 2017. She could possibly have sustained a compression fracture of T9 due to the high speed impact.

Dr M Mazabow addendum report - Neurosurgeon

22. The January 21, 2019 admission notes described Mrs Lambrechts as a "known epileptic", and she was confused at that time, having had two seizures at home on that day. She also demonstrated below-average performances on several tests, including of clerical speed/accuracy, working memory, complex visuo graphic reproduction, processing-speed, arithmetic reasoning, forward planning and visual memory/recall (simple and complex), with poorer-than-expected visual recognition memory, and with variable concentration and marked fatigability also evident.

23. This grading of a mild concussion would be supported by Mrs Lambrechts' pattern of cognitive test-results (including her above average rote verbal memory, her average narrative memory and double-mental tracking) which is not typical of traumatic brain injury.

24. Dr Marus reported that she would be regarded as having sustained a mild concussive brain injury. Long-term neuro cognitive problems would usually to be expected after this type and severity of brain injury.

Dr J A Watts - Clinical Psychologist

25. Ms Lambrechts is struggling with a severe PTSD, exacerbated by pre-morbid psychic fragility. It would appear her employment may have been at risk pre- accident. Post accident, it appears her inability to cope resulted in her leaving.

Dr C Visser - Psychiatrist

26. Psychiatrically, Ms Lambrecht presents with an agitated depressive syndrome in keeping with recurrent Major Depressive episodes with anxious distress or a mixed mood state. The coexistence of sadness with talkativeness, pressure, jocularity and subtle grandeur favors a mixed presentation, strongly suggestive of a Bipolar Mood Disorder. In summary her presentation looks like a Bipolar Depression.

Mrs Caroline Keyter - Occupational Therapist

27. Ms Lambrechts has the physical ability to perform administrative or sedentary type of work with reasonable accommodations in workplace. She suffers from ongoing discomfort and pain, and she needs to adjust her postures regularly during an eight hour day. For future employment she will require an employer who is more understanding and supportive of her challenges and willing to allow reasonable accommodation in the workplace.
28. Ms Lambrechts reported that she was in a motor vehicle accident at the age of 18 years in 1995 and paralyzed for a month due to a neck, head and possible back injury. For this accident, 50% apportionment will be considered due to her previous back and neck pathology.

Lorette Theron - Industrial Psychologist

But for the accident:

29. But for the accident she would probably have continued her career in a clerical/administrative position. She probably had the potential to earn in line with a General Clerk or Legal Clerk. She is 40 years old at the time of the accident and herewith it is not foreseen that she would have progressed beyond the level of Legal Clerk. Should she have relocated, she would probably have started as a General Clerk again. The average earnings of the Clerk B1 and Clerk Legal B upper positions be calculated (median - annual package), with annual inflationary increases until retirement at 65 years.

Now as result of the accident:

30. Now as a result of the accident, Ms Lambrechts has been compromised. She is probably limited to finding very simple and routine employment that only pays according to the National Minimum Wage. She should be fairly compensated for the decline in her earnings and eventually may become unemployable sooner, and it is therefore recommended that a higher than usual post morbid contingency deduction be applied.

Algorithm Actuaries

31. According to the actuary report, a 9% contingency has been applied for future pre morbid scenario and 24% apportionment has been applied for future post morbid scenario.
32. It is trite that it is for the court to determine the percentage of contingencies is to be applied. Contingencies is a method used to arrive at fair and reasonable compensation. The question of contingencies was dealt with in Southern Insurance Association Ltd v Bailey N.O.[1]:

"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. Where the method of actuarial computation is adopted, it does not mean that the trial Judge is 'tied down by inexorable actuarial calculations'. He has 'a large discretion to award what he considers right' (per HOLMES JA in Legal Assurance Co Ltd v Botes 1963 (1) SA 608 (A) at 614F)."

33. Based of the Plaintiff's medical expert reports on the impact that the plaintiff's pre- existing conditions, we must apply a higher contingency for future pre morbidly, 25% and future post morbidly 40% contingency.

Uninjured Injured Past loss of income 619 273 - 5% = R588 309,00 103 059 - 5% = R97 906,00 Future loss of income 2 972 402 - 25% = R2 229 301,50 802 584 - 40% = R481 550,40 Sub total R2 817 610,50 R579 456,40 Total R2 238 154,10

34. In the circumstances, having considered all of the evidence and taking into account the probabilities of the circumstances of the matter, I make the following order:

ORDER:

1. The Defendant is liable for 60% of such damages as the Plaintiff may be able to prove;
2. The Defendant shall pay to the Plaintiff the amount of R2 238 154,10 less 40% R1 342 892,46 for loss of earnings;
3. The amount of R1 342 892,46 shall be paid to the Plaintiff within 180 (hundred and eighty) days of the date of this court order to the Plaintiff Attorneys of record Erasmus de Klerk Inc, which amount shall be payable by direct transfer into their trust account, details of which are as follows:

Account holder : Erasmus de Klerk Inc

Bank

: ABSA

Branch number : [6.....]

Account number : [4]

Type of account : Trust account

Reference no : Labuschagne-L2023/L508

4. Will bear interest at the rate of 11,75% per annum calculated from the date of the Court Order and including the 181st calendar day after the date of this Order to and including the date of payment thereof;

5. The defendant shall furnish the plaintiff with an undertaking in terms of Section 17(4) (a) of the Road Accident Fund Act, No. 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 injuries sustained by the plaintiff in the collision that occurred on 24th December 2017, after such costs have been incurred and upon proof thereof of 60% apportionment in favour of the claimant.
6. The issues of general damages are separated in terms of Rule 33(4) and is postponed sine die.
7. The costs to be incurred in the establishment of a trust to inter alia protect, administer and/or manage the capital amount and the proceeds thereof referred to in the above paragraph, supra

7.1 The remuneration of the trustee in administering the capital amount;

7.2 Upon acceptance of appointment by the First Trustee and upon the issuing of Letters of Authority by the Master of the High Court, an amount calculated to be equal to 0,25% of the Trust Fund;

7.3 During the existence of the Trust, the total amount calculated to be equal to 1% per annum of total funds under administration by the Trust;

7.4 Upon termination of the Trust, 2% (two percent centum) of the amount, (net of all outstanding liabilities of the Trust as at the date of death of the Beneficiary) of the value the property of the Trust.

7.5 The costs of the furnish of annual security in terms of section 77 of the Administration of Estates Act, Act 687 of 1965 (as amended).

8. That the attorneys for the Plaintiff, Erasmus de Klerk Incorporated, are ordered:

8.1 To cause a trust ("the trust") to be established in accordance with the Trust Property Control Act No. 57 of 1988, within six months of date of granting of this order and shall approach the above Honourable Court for condonation and further direction should the trust not be established within the said period of six months;

8.2 To deposit all proceeds in terms hereof in an interest-bearing trust account, for the benefit of the Plaintiff, as contemplated in the Legal Practice Act pending the establishment of the trust;

8.3 To pay all monies held in the trust by them for the benefit of the Plaintiff, immediately to the trust, upon creation of the trust.

9. The trust instrument completed above shall make provision for the following:

9.1 that the Plaintiff is the sole beneficiary of the trust during her lifetime and after her death, her lawful descendants;

9.2 that the first trustees shall be HJ van Heerden as representative of Enonix (Pty) Ltd. ;

9.3 that the trustee(s) are to provide security to the satisfaction of the Master during the lifetime of the Plaintiff;

9.4 that the ownership of the trust property vest in the trustees of the trust in their capacity as trustees;

9.5 procedures to resolve any potential disputes;

9.6 that the trustees be authorised to recover the remuneration of, and costs incurred by the trustees, in administering the undertaking in terms of Section 17(4)(a) of Act 56 of 1996 in accordance with the certificate of undertaking to be provided by the Defendant;

9.7 that the amendment or termination of the trust instrument be subject to the leave of this Honourable Court during the lifetime of the Plaintiff;

9.8 that the trust property and the administration thereof be subjected to an annual audit during the lifetime of the Plaintiff.

10. Subject to the discretion of the Taxing Master, the Defendant must make payment of the Plaintiff's taxed or agreed party and party costs on the High Court Scale, which costs include (but are not limited to):

10.1 The costs consequent upon obtaining the medico legal and expert reports, addendum medico legal reports and actuarial reports, the the qualifying and reservation fees (if any) of such experts, as well as the Plaintiff's accommodation and travelling expenses to attend the Plaintiff's experts, namely:

10.1.1 Dr T Enslin (Serious Injury Assessor)

10.1.2 Dr HB Enslin (Orthopaedic Surgeon)

10.1.3 Alison Crosbie (Occupational Therapist)

10.1.4 Dr JA Watts (Clinical Psychologist)

10.1.5 Dr G Marus (Neurosurgeon)

10.1.6 Dr M Mazabow (Neuro Psychologist)

10.1.7 Dr C Visser (Psychiatrist)

10.1.8 Dr M Huth (Neurologist)

10.1.9 Lorette Theron (Industrial Psychologist)

10.1.10 Algorithm (Actuary)

10.2 The costs of Counsel and the attorney on scale C (which is to include, inter alia, preparation, drafting of heads of argument, perusal, and the Counsel's Day fee for 3 October 2024).

10.3 The costs for the accommodation and transportation for the Plaintiff to attend Court.

10.4 The costs of the Application in terms of R38(2) and the costs associated with obtaining the default judgement.

10.5 The above costs will also be paid into the aforementioned trust account.

11. The Plaintiff's attorneys shall be entitled to make payment in respect of: -

11.1 the expert witnesses set out in paragraph 8.1 supra;

11.2 counsel employed on behalf of the Plaintiff; and

11.3 Attorney fees;

from the aforesaid funds held by them in trust for the benefit of the patient.

12. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs: -

12.1 The Plaintiff shall serve the notice of taxation on the Defendant.

12.2 The taxed or agreed costs will:

12.2.1 be payable within 180 days from the date of taxation; and

12.2.2 bear interest at the rate of 11,75% per annum calculated from and including the 181st calendar day after the date of taxation to and including the date of payment thereof.

13. The Defendant is ordered to within 10 (TEN) days of date of this Order to notify the Plaintiff in writing whether it accepts that the Plaintiff is entitled to an award of General damages. Should the Defendant fail to notify the Plaintiff as Ordered the Plaintiff will be entitled to refer this issue to the HPCSA Appeals Tribunal for

determination.

14. It is noted that there exists a contingency fee agreement between the Plaintiff and her Attorney of Record (Erasmus de Klerk Inc).

PIENAAR M

ACTING JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties representatives by email, by being uploaded to Caselines. The date and time for hand-down is deemed to be 3rd January 2025.

Heard on : 3rd October 2024

Delivered on : 31st December 2024

Appearances:

On behalf of the Plaintiff : Adv M J Fourie

Instructed by : Erasmus de Klerk Attorneys

On behalf of the Defendant : No appearance

[1] 1984 (1) SA 98 (A) at 113G and 116G-117A

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