

SOUTH AFRICA / JUDGMENT

Mashilo v Road Accident Fund (164/24)

[2025] ZAMPMHC 38 (12 August 2025)

[2025] ZAMPMHC 38**COURT**

Middelburg High Court, Mpumalanga

BEFORE

J T Leso

CASE / FILE NUMBER

164/24

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Source record**SAFLII****Note: Certain****personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII****Policy****THE****HIGH COURT OF SOUTH AFRICA****MPUMALANGA DIVISION,****MIDDELBURG****CASE NO:164/24****(1)****Reportable: No****(2)****Of interest to other Judges: No****(3)****Revised: Yes****DATE****12 August 2025****SIGNATURE****In**

the matter between:

TAYS
MANDLA MASHILO
PLAINTIFF
and
THE
ROAD ACCIDENT FUND
DEFENDANT

This judgment was
prepared and authored by the judge whose name is reflected herein and
is handed down electronically and by circulation
to the parties/their
legal representatives by email

JUDGMENT

Leso AJ

Introduction

- [1] The plaintiff filed an action against the Road Accident Fund (RAF) claiming that he sustained injuries as a result of a motor vehicle accident which occurred on 30 August 2020 at 13h30 on the N17 near Warburton, Mpumalanga.
- [2] The plaintiff claims damages or loss in the following:
- 2.1 The amount of R1 101 894.00 for future loss of income.
- 2.2 The amount of R500 000.00 towards general damages.
- 2.3 The amount of R500 000.00 towards future medical expenses.

Background

- [3] On the day of the trial, the defendant's legal representative indicated that there was no development regarding the settlement after a pre-trial conference was held on 1 November 2024 to facilitate the settlement of merits and quantum.
- [4] The applicant moved an application, in terms of Rule 38(2) of the Uniform Rules of Court, seeking that the facts, assumptions and opinions as contained in the expert reports be admitted into evidence and that the experts' evidence be led on paper. The defendant's counsel did not raise any objection, and the affidavits of the experts were admitted as evidence. Consequently, the following experts' reports constituted evidence before the court:
- 4.1 Dr HB Enslin- Orthopaedic Surgeon.
- 4.2 Ida Mostert- Occupational Therapist.

4.3 Lise Van Gass- Industrial Psychologist.

4.4 J Potgieter- Actuary; J le Roux.

[5] Various affidavits have been prepared and filed in support of the Plaintiff's claim. The rulings sought relate to the affidavits deposed to by the various experts on behalf of the Plaintiff.

[6] Rule 38(2) allows for evidence to be adduced by affidavit in trial proceedings. The rule provides as follows:

"The witnesses at the trial of any action shall be examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit."

[7] As a general rule of the law of evidence in South Africa, hearsay evidence is not admitted. Hearsay evidence is defined in section 3(4) of the Law of Evidence Amendment Act 45 of 1988 (LEAA) as "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence". The exception to this rule is regulated by section 3 of the LEAA, which states that:

"(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless–

- (a) each party against whom the evidence is to be adduced agrees to the admission of the evidence at such proceedings;
- (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at the proceedings; or
- (c) the court, having regard to–
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account,

- [8] In the absence of any objection on this application, having considered the nature and purpose of the evidence to be presented and in the interest of time and costs, the plaintiff was granted leave to proceed on the affidavits of the experts, and the expert reports were admitted into evidence in terms of section 3(1) of the LEAA.
- [9] The trial was almost concluded without the participation of the defendant's legal representative after she had indicated that she had no instructions. Additionally, she did not file the heads of argument, which created the impression that the defendant's attorneys were not participating in the proceedings. The court corrected the error by proceeding to finalise some heads of damages in terms of Rule 42(1)(c).
- [10] The merits, loss of earnings, earning capacity, as well as future medical expenses and needs, were not contentious, and the defendant's legal representative did not present arguments on these issues.
- [11] I briefly summarise the plaintiff's case on the merits, including the loss of earnings, followed by the issue of general damages, which I will address in more detail.

Merits

- [12] The evidence of the plaintiff contained in the affidavit confirms that on 30 August 2020, he was a passenger in a white Nissan with registration numbers and letters J[...], driven by Alice Ncobile Mithunye on the N17 near Warburton, Mpumalanga. This evidence accords with the plaintiff's particulars of claim, save for the allegations on how the accident occurred. The plaintiff stated that he does not know how the accident occurred, and he relies on the accident report dated 30 August 2020, which confirms the averments that the vehicle of the insured driver overturned after it was passed by a truck.
- [13] As a result of the accident, the plaintiff suffered the following injuries:
- 13.1 Head injury (bruising, soft tissue injury to the head and injury to the left jaw).
- 13.2 Back injury (bruising, soft tissue injury).
- 13.3 Waist injury (bruising, soft tissue injury).
- [14] The plaintiff's section 19(f) affidavit, together with the other hearsay evidence in the form of OAR and the medical records, confirms the plaintiff's claim. The defendant pleaded and denied the allegations made by the plaintiff on the merits of the case and challenged the plaintiff to prove the same. In the meaningful pre-trial minutes signed by both the plaintiff and the defendant's counsel, the defendant admitted the date and place of the accident, the fact that the plaintiff was a passenger, locus standi of the plaintiff and the jurisdiction of the court. During oral submissions, the defendant's counsel did not make any submissions.

- [15] It is a well-established law in our country that a passenger injured in a motor vehicle accident can claim compensation from the RAF if the accident was caused by the negligence of the insured driver. The passenger needs to prove 1% negligence against the insured driver for the RAF to be held liable for their damages.
- [16] The plaintiff made his case and proved negligence on the part of the insured driver; therefore, the defendant should be held liable for the damages or loss to be proven by the plaintiff.

Loss of Income

- [17] The plaintiff relied on the Industrial Psychologist report dated 28 August 2023 and the addendum report dated 17 March 2025, as well as the report by the actuary dated 29 August 2023 and the addendum report dated 20 March 2025, to prove the loss of income.
- [18] The purpose of the industrial report is to establish the extent to which the injuries sustained by the plaintiff in the accident and the sequelae thereof impact on his ability, employability and earning capacity. It is recorded that the plaintiff is an adult male who was 26 years old at the time of the accident. He has a grade 11 educational level and a Code 14 driver's licence.
- [19] In the initial report, it is reported that pre-morbid, the plaintiff was employed as a shuttle driver at the time of the accident, earning R3 200.00 per month, and he resigned after securing a better job opportunity at Mbuyelo Mining Services as a dump truck operator from May 2023 until April 2024, earning R13 500 per month. From October 2024 to date, he has been employed at IPP Mining and Materials as an ADT operator, and his total salary amounted to R14 055.88 with overtime allowance.
- [20] On the plaintiff's employment potential or residual work capacity, the Orthopaedic Surgeon reported that he would not be able to compete for work with heavy or very heavy physical demands due to the permanent damage to his upper lumbar spine. He will remain symptomatic in the long term, and his symptoms are anticipated to increase in time due to the deformity of the lumbar spine. The Occupational Therapist found that he has the capacity to perform light physical work and medium work in terms of the position of tolerance, and his work as an ADT operator is medium physical work with high position tolerance demands, and as such, he does not meet all the inherent demands of his work. The experts opine that the plaintiff's work capacity and occupational choices,

and future employment prospects, have been significantly compromised by his injuries and the sequelae thereof.

- [21] The plaintiff had originally claimed an amount of R500 000.00, and the amount was increased to R1 074 688.00 in line with the actuarial report of J Potgieter. During the trial, the plaintiff's counsel filed heads of arguments, and the amount claimed was R1 101 894.00 in line with the actuarial calculations of J Le Roux. On the actuarial calculation of the plaintiff's loss of future income, an amount of R1 101 894 was determined. A contingency of 15% was applied had the accident not occurred, whereas a contingency of 40% was applied having

regard to the accident. The expert assumed that the plaintiff's income would have been the same had the accident not occurred.

- [22] In *Hall v Road Accident Fund*,^[1] when dealing with loss of income and the contingency deductions, the court referred to the often quoted case of *Southern Insurance Association Ltd v Bailey NO*,^[2] the court stated 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 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.”

- [23] Similarly, in this case, the court will use its discretion on the applicable contingency. Having applied a contingency of 15% had the accident not occurred, and having regard to the accident, I have applied a contingency deduction of 25% to arrive at the total loss of earnings in the amount of R440 758.00 (Four Hundred and Forty Thousand, Seven Hundred and Fifty-Eight Rand). In my view, the defendant's assumptions regarding the plaintiff's future employability prospects were rather over-optimistic in the circumstances of this case.

Future Medical Expenses

- [24] On future medical expenses, section 17(4)(a) of the Road Accident Fund Act 56 of 1996 (RAF Act) addresses the Fund's responsibility for covering costs associated with ongoing medical care for injuries sustained in an accident. This section aims to ensure that accident victims receive necessary ongoing medical care without facing financial burdens related to their treatment. The Fund can provide a certificate of undertaking, guaranteeing payment for future medical expenses to either the claimant or directly to the medical service provider. Alternatively, a court can order the Fund to furnish an undertaking to cover these future costs.
- [25] The plaintiff relied on the medical reports in support of his claim for future medical expenses. The Orthopaedic Surgeon opines that the plaintiff will remain symptomatic in the long term, and his symptoms are anticipated to increase in time due to the deformity of the lumbar spine. And the Occupational Therapist opined that he would need further medical attention.

- [26] The plaintiff claims that the defendant furnished a statutory undertaking in terms of section 17(4)(a) of the RAF Act to compensate the claimant for future medical expenses. Further, the plaintiff seeks an order rescinding the default judgment granted in favour of the respondent on 22 June 2018. The said judgment included both monetary relief and a foreclosure order in terms of Rule 31(2)(a) and Rule 46A of the Uniform Rules of Court.
- [27] The defendant had not admitted liability in respect of this loss; however, during oral submission, the defendant's counsel did not argue or oppose the claim by the plaintiff.

General Damages

- [28] The claim that the plaintiff qualifies for damages was a contentious issue. The general provision of section 17(1) of the RAF Act has always been that the Fund is liable to compensate claimants for loss arising from bodily injury sustained in motor vehicle accidents. The obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for serious injury as contemplated in subsection (1A).
- [29] The RAF must determine whether a claimant's injuries are serious or not to justify the award of compensation in the form of general damages. This determination is an administrative exercise that is performed by the RAF in the manner prescribed by the Regulations.
- [30] The plaintiff's counsel argued that the defendant has conceded the plaintiff's claim for general damages even though the plaintiff's claim was not assessed in terms of regulation 3(3). The basis of the submission was the pre-trial meeting and minutes, which form part of the trial bundle.
- [31] The plaintiff's counsel relied on some of the provisions in the pre-trial minutes of the pre-trial conference held on 1 November 2022, recorded as follows:

"12.6 Does the defendant agree that the issues in dispute are merits, future medical expenses, general damages and loss of earnings?"

Answer: Agreed.

12.7 Is the examination of any person or item required in terms of rule 36?

Answer: At this stage, the defendant intends to proceed on reports of the plaintiff's rights reserved.

12.8 Does the defendant admit the seriousness of the injuries as it pertains to the claim of general damages?

Answer: Not Admitted.

12.9 The plaintiff records that the defendant has not rejected the plaintiff's RAF report of Dr Ensilin(Orthopaedic surgeon). The

plaintiff requests the defendant to indicate in writing on or before the first judicial case management whether the plaintiff's RAF serious injuries report is admitted or rejected, in the absence of which it will be assumed that the contents of the report are not in contention and that the plaintiff's injuries should be regarded as serious." (My emphasis.)

[32] I should instantly point out that there was no answer or response by the defendant recorded in paragraph 12.9, and the election on the seriousness of the injuries was not recorded in the first case management meeting, which was held on 6 November 2024. In the case management meeting, the matter was certified trial-ready, and the pre-trial minutes formed part of the case management bundle in court.

[33] Ms Nefolofodwe argued on behalf of the defendant that paragraph 12.9 was noted without the participation of the defendant and that the pre-trial minutes must be read in their entirety in order to understand whether the defendant conceded to the general damages. She stated that the defendant must first assess the plaintiff and confirm whether or not he qualifies for serious injuries. Contrary to the submission by Advocate Kruger, who represented the plaintiff, she argued that the court has no jurisdiction to entertain the loss suffered, and the plaintiff must follow the assessment as prescribed by regulations.

[34] Counsel for the plaintiff relied on the unreported judgment in *Stestenko v Road Accident Fund*,^[3] where Tolmay J said the following: "General damages falls within the discretion of the court, comparable cases often guide the court in determining a fair and reasonable amount." He also relied heavily on the unreported judgment in *Adv Sayed N.O v Road Accident Fund*.^[4] Similarly, in this case, it was submitted on behalf of the plaintiff that the RAF had previously made some concessions at the pre-trial

conference, which amounted to an acceptance of the seriousness of the injuries as contemplated in *Road Accident Fund v Duma and Three Similar Cases*.^[5]

[35] The facts of this case are at variance with the facts of the stated cases by the plaintiff's counsel on the issue of the concessions made at the pre-trial conference, which amounted to an acceptance of the seriousness of the injuries. There is no doubt that the defendant did not participate in paragraph 12.9. It is also clear from this paragraph that the plaintiff was still waiting for the response from the defendant with specific terms or conditions that the election be made in writing on or before the first judicial case management.

[36] In *Road Accident Fund v Duma and Three Similar Cases*, the High Court held that the plaintiffs had suffered "serious injury" and awarded general damages to them. The RAF's

contention on appeal was that the High Court should have held in each case that the issue whether the plaintiff had suffered "serious

injury" had not been determined by the method prescribed by the regulations promulgated under the RAF Act, and therefore, the High Court should not have awarded general damages.

[37] The Supreme Court of Appeal considered the High Court's judgments in the four cases on appeal and those upon which they rely and found that the approach is fundamentally flawed as it seems to set out from the premise that it is ultimately for the court to decide whether the plaintiff's

injury was "serious" so as to satisfy the threshold requirement for an award of general damages. Proceeding from that

premise, these decisions assume that if the RAF should fail to properly or timeously reject an assertion to that effect by the third party, the rejection can be ignored. If the medical evidence before the court shows that, on balance, the plaintiff was indeed seriously injured, the court can proceed to decide the issue of general damages.

[38] The Supreme Court of Appeal stated the following

"In accordance with the model that the legislature chose to adopt, the decision whether or not the injury of a third party is serious enough to meet the threshold requirement for an award of general damages was conferred on the Fund and not on the court. That much appears from the stipulation in regulation 3(3)(c) that the Fund shall only be obliged to pay general damages if the Fund – and not the court – is satisfied that the injury has correctly been assessed in accordance with the RAF 4 form as serious. Unless the Fund is so satisfied the plaintiff simply has no claim for general damages. This means that unless the plaintiff can establish the jurisdictional fact that the Fund is so satisfied, the court has no jurisdiction to entertain the claim for general damages against the Fund. Stated somewhat differently, in order for the court to consider a claim for general damages, the third party must satisfy the Fund, not the court, that his or her injury was serious."[6]

[39] I align myself with the findings of the Supreme Court of Appeal in the above-stated cases, and I disagree with the plaintiff's

submission that this court has jurisdiction to deal with the general damages.

Conclusion

[40] On Merits, the negligence of the insured driver has been established. The defendant is solely responsible for the damages suffered by the plaintiff as a result of the accident that occurred on 30 August 2020.

[41] I am satisfied that the plaintiff made out a case for the liability against the defendant. In the absence of any contrary version from the defendant, the merits of the case are 100% in favour of the plaintiff.

[42] On future medical expenses, loss of income and costs, I am satisfied that a case has been made out in respect of these losses.

[43] This court has no jurisdiction to adjudicate the issue of general damages. This issue must be dealt with in terms of regulation 3(3).

Order

[44] In the result, the following order is made:

1. The application to lead experts' evidence on affidavit in terms of Rule 38(2) is granted.
2. The defendant is liable to pay the plaintiff an amount of R440,758.00 (Four Hundred and Forty Thousand, Seven Hundred and Fifty-Eight Rand) for loss of future income.
3. The defendant must give the plaintiff an undertaking to provide for future medical expenses, costs and needs in terms of section 17(4) of the Road Accident Fund Act 56 of 1996.
4. The issue of general damages is postponed sine die.
5. The defendant is ordered to pay the costs on a party and party scale.

J T LESO

ACTING JUDGE OF THE HIGH COURT

Appearances

For the applicants: Adv N S Kruger Instructed By: PAS Attorneys Email: Veronica@pasprok.co.za stephkru@law.co.za For the respondent: Ms A Nefolofodwe Instructed By: The State Attorney Email: andani@raf.co.za Hearing Date: 29 April 2025

Judgment

delivered on: 12 August 2025

[1] Hall v Road Accident Fund

[2013] ZAGPJHC 129 para 49.

[2] Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A) at 113G-114C.

[3] Stestenko v Road Accident Fund

[2023] ZAGPPHC 155 para 26.

[4] Adv Sayed N.O v Road Accident Fund

[2024] ZAGPPHC 1325.

[5] Road Accident Fund v Duma and Three Similar Cases 2013

(6) SA 9 (SCA).

[6] Ibid para 19.

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