

SOUTH AFRICA / JUDGMENT

Moroke v Road Accident Fund (51152/21) [2024] ZAGPJHC 823 (27 August 2024)

[2024] ZAGPJHC 823**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Nemutandani

CASE / FILE NUMBER

51152/21

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Source record**Amended 20 September 2024****SAFLII****Note: Certain****personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII****Policy****REPUBLIC OF SOUTH****AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****Case****Number: 51152/21****1.****REPORTABLE: NO****2.****OF INTEREST TO OTHER JUDGES: NO****3.****REVISED: YES****In**

the matter between: THATO
 CONSTANSIA MOROKE
 PLAINTIFF
 and
 ROAD
 ACCIDENT FUND
 DEFENDANT

JUDGMENT

NEMUTANDANI AJ

INTRODUCTION

[1] The plaintiff, Ms Thato Constansia Moroke instituted action proceedings in her personal capacity against the defendant for damages in terms of the Road Accident Fund Act [1] “the Act”, pursuant to a motor vehicle collision.

[2] At the commencement of trial, this court was informed that the defendant has already tendered concession of merits and an Undertaking certificate for future medical expenses. The parties requested this court to make an order to that effect. The plaintiff

approaches this court for a determination of general damages, past and future loss of earnings. The defendant has not accepted the plaintiff’s claim for general damages. Consequently this court is not competent to make a determination of this head of damage.

[3] I am therefore ceased with determination of loss of earnings only.

[4] The plaintiff brought an application in terms of Rule 38(2) of the Uniform Rules of Court for the admission into evidence of all the

experts report by way of affidavit. The defendant did not appoint any experts and this court was informed that the defendant will rely on plaintiff’s reports. Having regard to the nature of the claim and the proceedings, together with the fact that the affidavits of various experts and their reports are filed on record, I exercised my discretion to accept the evidence on oath.

BACKGROUND

[5] On or about the 5 February 2017 a single motor vehicle collision occurred when the driver of a motor vehicle bearing registration

letters and numbers Y[...] driven by Mr Modila Aubrey lost control of the motor vehicle and it overturned. The plaintiff was a passenger in the said motor vehicle. The plaintiff sustained injuries as a result of the said motor collision.

- [6] At the time of accident, the plaintiff was employed as a Cook at Buhle's Kitchen. The collateral information obtained from her employer is to the effect that she also assisted as a waitress and as a cashier. The consequence of the injuries sustained in the motor vehicle collision, are that the plaintiff struggled to cope with her work demands post- accident.

INJURIES SUSTAINED AND SEQUELAE

- [7] The following expert reports for the plaintiff were admitted:

- a) Dr ND Chula (Neurosurgeon);
- b) A Hofmeyr (Neuropsychologist);
- c) Dr Bongani Ngele (Neurologist
- d) T Motsepe (Occupational Therapist);
- e) C Cilliers (Industrial Psychologist);
- f) Manala Actuaries and Consultants (Actuaries).

- [8] The plaintiff was seen at St Rita's hospital with a history of motor vehicle accident. On admission, the medical diagnosis was recorded as soft tissue injury. These included laceration on her left forearm, on her left ear and abrasion on left of her forehead. GCS was recorded at 15/15. No fractures were noted on the X rays.

- [9] According to the RAF 1 Form completed by Dr Morudo the plaintiff was admitted on the same day of the accident and was discharged after three days. The injuries are noted as sustained soft tissue injuries with voltaren and tramadol medications administered in treatment thereof[2].

DR CHULA, NEUROSURGEON

- [10] The Neurosurgeon in his report[3] notes that plaintiff sustained mild to moderate head injury with associated soft tissue injury neck, thoracic spine and lower back

which resulted in anxiety, memory impairment, poor work performance and post-traumatic stress. The neurological examination, found that the plaintiff has an abrasion scar on the forehead. She also had a 3cm scar on right hand. Post-accident, she developed post traumatic seizures and her life expectancy has not been affected by the accident. In his RAF 4 Form, Dr Chula opines that the plaintiff's

whole-person impairment is 42% and also qualifies the plaintiff under the narrative test noting that there is a serious long-term

impairment or loss of body function and severe mental disturbance.

ANN HOFMEYER, NEUROPSYCHOLOGIST

[11] The Neuropsychologist assessed the plaintiff on the 10 February 2021. In her report[4], the Neuropsychologist opines that the plaintiff has decreased intellectual capacity and areas of difficulty in various domains of neurocognitive functioning including:

1. Simple attention measure fell outside the acceptable range and attention capacity was below expectations.
2. Average mental tracking abilities and visual attention.
3. Severely impaired spatial constructional memory.

Abstract nonverbal reasoning was at low end of average when her score was adjusted for poor quality education.

[12] Psychologically, plaintiff is found to be at a moderate level of risk for a depressive disorder according to her endorsement of symptoms of depression (Beck Depression Inventory ii). Plaintiff endorsed a highly significant level of post-traumatic stress symptoms likely warranting a diagnosis of Post-Traumatic Stress Disorder (PTSD). She has become hyper vigilant and she has tried dealing with her feelings and symptoms. This can result in prolonging of her post traumatic anxiety and rendering her increasingly vulnerable to depression. The two can also be comorbidity between PTSD and major depressive disorder.

[13] The Neuropsychologist concludes that the plaintiff sustained a mild traumatic brain injury with possible (though unlikely probable) specific focal injury leaving her with residual post concussive symptoms and a clinical picture complicated by likely

psycho-emotional overlay.

DR NGELE, NEUROLOGIST

[14] Dr Ngele noted that the plaintiff's case underscores the significant impact of the accident on her physical, neurological and psychological well-being. The injuries sustained, including head trauma, seizures, lower back pain and psychological distress, have resulted in ongoing challenges and limitations in daily functioning.

THANDIWE MOTSEPE, OCCUPATIONAL THERAPIST

[15] In the assessment with the Occupational Therapist, plaintiff was noted to have physical limitations of her waistline with pains

getting worse with minimal exertion and when she leans over time. The pain also increases when she stands over time. She also presents with injuries to her right shoulder girdle along the superior scapular angle radiating to her mid medial border of the scapula. She presents with challenges with working above shoulder level against resistance such that her movement are confined to below shoulder level.

[16] She presents with cognitive challenges which compromises her performance in all areas of occupation. The Occupational Therapist

concludes that post-accident, the plaintiff is only confined to jobs falling into sedentary with occasional isoinertial light category of work given her decreased physical endurance and low pain tolerance. She still remains compromised with regards to keeping up with performing jobs that are sedentary as compromised by her low mental endurance.

LOSS OF EARNINGS AND/OR EARNING CAPACITY

CARO CILLIERS, INDUSTRIAL PSYCHOLOGIST

Pre-accident

- [17] The collateral information obtained from the plaintiff's employer at the time of the accident, Ms Motsamai, is that the plaintiff was employed as a cook and waitress at Buhle's Kitchen. After the accident she was off work for five months and returned to her employment in July 2017. During the period of absence, she only received an amount of R 1 000.00 as a once off goodwill payment. At the time of the accident the plaintiff earned R 3 500.00 with no additional benefits. In isolated occurrence she would receive additional R 200.00 for over time. Around November/ December 2017, plaintiff resigned due to personal/ family reasons. The plaintiff returned to her pre-accident employment in June 2018 and resigned again in November 2020 without notice. At this time, the plaintiff was earning R 3000.00 due to Covid-19 lockdown.
- [18] Pre accident, it is reported that her performance was good and post-accident her performance was no longer good. She was forgetful, uncooperative and would argue with clients.
- [19] The Industrial Psychologist concludes that the plaintiff's pre accident earnings equates to R 42 000.00 per annum and falls between the median and upper earning quartiles of the suggested income for unskilled workers as per Koch.
- [20] The Industrial Psychologist projects that the plaintiff would have reached her career plateau at age 45 earning at the upper (R 110 000.00 per annum) earning quartile of unskilled scale as suggested by Robert Koch 2024. After career plateau has been reached inflationary increases would have been applicable until retirement at age 60 – 65 years old.

Post-accident

- [21] The plaintiff worked at Skin Sculpting Spa for the period September 2021 to November 2021 when she resigned. She was earning R 3 000.00 per month. The collateral information obtained from the owner, Ms Merara is that the plaintiff battled with the demands of the job. She would become fatigued when standing for extended periods of time. She added that the plaintiff was forgetful and irritable. The plaintiff resigned of her own accord and would have kept her and accommodated her had she not resigned.

- [22] From November 2022 to date, the plaintiff is employed at Buhle's kitchen as a cook. Recent collateral information obtained from the employer, Ms Ntsamai is to the effect that her performance is still poor and she gets confused, forgetful and irritable. She is on sympathetic employment and she is still earning the R 3 500.00 she earned pre accident.
- [23] The Industrial psychologist opines that considering the expert opinions at hand, the plaintiff has been negatively affected by the accident which has reduced her physical, psychological and neurocognitive functioning. She is considered more vulnerable in the open labour market. She is likely to continue to experience periods of sporadic employment as well as periods of unemployment. It is further opined that any sort of career growth has been curtailed by the injuries and sequelae. She will however be able to maintain suitable employment until normal retirement at age 60 – 65 years.

LEGAL POSITION

- [24] In *Rudman v Road Accident Fund*[5] the court held that:

“To claim loss of earnings or earning capacity, a plaintiff must prove the physical disabilities resulting in the loss of earnings or earning capacity and also actual patrimonial loss”. The measure of proof is a preponderance of probabilities, which entails proving that the occurrence of the loss is more likely than not”.

- [25] In the matter of *Union and National Insurance Co Limited v Coetzee*[6] the court held that there must be proof that the disability gives to a patrimonial loss, which in turn will depend on the occupation or nature of the work which the patient did before the accident or would probably have done if he had not been disabled.

- [26] In *Mvundle v RAF*,[7] Kubushi J stated that:

“It is trite that damages for loss of income can be granted where a person has in fact suffered or will suffer a true patrimonial loss in that his or her employment situation has manifestly changed. The plaintiff's performance can also influence his/her patrimony if there was a possibility that he/she could lose his/her current job and/or be limited in the number and quality of his/her choices should he/she decide to find other employment”.

- [27] It is trite that the percentage of the contingency deduction depends upon a number of factors and ranges between 5% and 100%, depending upon the facts of the case[8].

- [28] In the leading case of *Southern Insurance Association Ltd v Bailey*[9] the Court stated:

“Any enquiry into damages for loss of earning capacity is of its nature speculative... 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-possums attitude and make no award.”

[29] According to *AA Mutual Insurance v Van Jaarsveld*[10] the court has discretion in allowing contingencies. The Court has a wide discretion that must, however, be based upon a consideration of all the relevant facts and circumstances. Justice and fairness for the parties is served by contingencies to be applied on the proven facts of the case. The discretion of the Court may not be usurped by the evidence of the experts such as the actuary. Actuaries’

evidence only serves as a guide to the Court.[11] There are many factors that come into calculation such as the possibility of forced retirement before the age of 65, the possibility of death before 65 years of age, the likelihood of suffering an illness of long duration, unemployment, inflation and deflation, and alteration in cost.

[30] In order to determine a plaintiff’s claim for future loss of income or earning capacity, it becomes necessary to compare what the claimant would have earned “but for” the incident with what he would likely have earned after the incident. The future loss represents the difference between the pre-morbid and post-morbid figures after the application of the appropriate contingencies.

[31] The Plaintiff’s future employability is an important consideration and the associated risks as identified by the experts. The Plaintiff’s physical injuries and how those injuries impact her working capacity is also an important consideration. The causal link between the injuries and the impact that it has on the plaintiff’s earning capacity must also be ventilated and considered.

[32] General contingencies cover a wide range of considerations, which vary from case to case and there are no fixed rules as regards general contingencies. Robert Koch provides the following guidelines:

Sliding scale: ½ % per year to retirement age, i.e. 25% for a child, 20% for a Youth, and 10% in middle age. Normal contingencies: the RAF usually agrees to deductions of 5% for past loss and 15% for future loss.

[33] In *Ubisi v Road Accident Fund*[12] the Court, in awarding a pre-morbid contingency deduction of 20% and a post-morbid deduction of 50% stated that:

“On the value of income having regard to the accident it is submitted that a higher than usual contingency of 70% be applied, considering

the opinion of Dr Blignaut, the defendants expert, with whom Dr Booysen concurs that even after surgery he does not think that the plaintiff will be able to compete or secure work in the open labour market. The plaintiff has shown resilience on the objective facts, albeit conflicting at times by seeking employment unconstrained by his medical deficits”.

ACTUARIAL CALCULATION

[34] The Actuaries calculated the plaintiff's loss as follows:

Past loss

Value of income uninjured

R 244 433

Less Contingency deduction

-

R 244 433

Value of income injured

R 151 500

Less contingency deduction -

R 151 500

NET PAST LOSS

R 92 933

Future Loss

Value of income uninjured

R 2 005 573

Less contingency deductions

-

R 2 005 573

Value of income injured

R 954 776

R 954 776

NET TOTAL LOSS

R 1 050 797

NET TOTAL LOSS

R 1 143 730

ANALYSIS

[35] It is noted from the Neuropsychologist's report[13] that the motor vehicle in which she was a passenger lost control and rolled. Two of the passengers succumbed to the injuries sustained.

This is indicative of the fact that the impact was severe. It was submitted for the defendant that this court should be mindful of the fact that the head injury was not recorded in the RAF 1 form. To this end, I have considered that over and above the soft tissue injuries, lacerations and abrasions on the plaintiff's forehead and forearm were noted.

[36] I have further considered the uncontested filed expert reports and collateral information obtained from plaintiff's employers. I am satisfied that the plaintiff has on a balance of probability demonstrated that the opinions of experts are founded on logical reasoning considering the available information in respect of injuries and effect on plaintiff's employment life.

[37] Although the plaintiff is still employed, based on the collateral information obtained, the plaintiff is not performing her duties as pre-accident. The Industrial Psychologist notes that although the plaintiff is sympathetically employed, should the challenges persist, she is at risk of losing her employment which will result in her remaining unemployed for the remainder of her work life.

[38] I have considered all the facts and conclusions as alluded to by the medical experts. The plaintiff's highest level of education is grade 11 and she has no post school qualification and/or training certificates. It is evident that the plaintiff will still be able to work however she has been compromised. She can no longer compete with other physically and psychologically uncompromised individuals. The plaintiff's opportunities for reaching her pre accident career plateau have been diminished by the accident.

[39] The plaintiff entered the labour market at age 19 and was 23 years of age at the time of the accident and is currently 30 years old. She would have reached upper quartile earning at age 45 but for the accident. The evidence establishes that the plaintiff is a resilient individual who strived to remain employed amid physical and psychological limitations.

[40] The parties are in agreement that 5% contingency should be applied on past loss of earnings. Adv Van Wyk argued that 5% contingency should be applied on uninjured future loss and 15% on injured future loss. Ms Mhlongo argued that 30% should be applied on uninjured future and 20.5% on injured future loss.

[41] I have considered the actuarial calculations and the submissions by both parties. It is my considered view that an application of 5% on past loss, 25% on uninjured future and 40% on injured future will be reasonable and fair in the circumstances. Resultantly, fair compensation for past loss of earning is an amount of R 88 282.00 and R 931 314.00 for future loss of earnings. I find that a total amount of R 1 019 596.00 stands to be awarded to the plaintiff for loss of earnings.

[42] There is no reason to deviate from the general principle that costs follow the result.

ORDER

[43] In the result the following order is made:

1. The Defendant is held 100% liable for the Plaintiff's damages.
2. The Defendant shall pay an amount of R 1 019 596.00 (One Million Nineteen Thousand Five Hundred and Ninety Six Rands Only) to the Plaintiff in respect of past and future loss of earnings.
3. The aforesaid amount shall be paid into the trust account of the Plaintiff's Attorneys, RASEKGALA ALFRED ATTORNEYS INC within 180 (one hundred and eighty) days in settlement of the Plaintiff's claim by direct transfer into their Trust Account, the details whereof are the following:

ACCOUNT HOLDER: R[...]

ACCOUNT TYPE: T[...]

BANK:

S[...]

BRANCH: S[...]

ACCOUNT NUMBER: 2[...]⁵

BRANCH CODE: 0[...]

BANK: [.....]

BRANCH CODE: [.....]

ACCOUNT HOLDER: [R ... INC]

ACCOUNT NUMBER: [...]

4. The Defendant is directed to furnish the Plaintiff, within 180 days from service of this order, with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act.

5. Should payment of the capital and interest not be affected in terms of this order the Plaintiff will be entitled to recover interest to be calculated in accordance with the Prescribed Rate of Interest Act, Act 55 of 1975 read with Section 17(3)(a) of the Road Accident Fund Act.
6. The Defendant shall pay the plaintiff taxed or agreed costs of suit on High Court Scale as between party and party applying scale B in terms of Rule 67A.
7. The determination of general damages is postponed sine die.

F.S NEMUTANDANI

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

Delivered: This judgment was handed down electronically by circulation to the parties' and/or parties' legal representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10:00 on 27 August 2024

APPEARANCES:

COUNSEL FOR PLAINTIFF: INSTRUCTED BY: ADV VAN WYK RASEKGALA ALFRED ATTORNEYS INC JOHANNESBURG REF: Mr. RASEKGALA/RAF/CIV/14/2019 rasekgalaw@gmail.com 063 883 7203 COUNSEL FOR DEFENDANT: INSTRUCTED BY: MS N MHLONGO/ MS M MOORE STATE ATTORNEY, JOHANNESBURG REF: 4908642 moiponebrendam@raf.co.za/ 011 233 3000 DATE HEARD:

JUDGMENT

DELIVERED: 24 MAY 2024 27 AUGUST 2024

- [1] 56 of 1996, as amended by Act No 19 of 2005 and its Regulations
- [2] Caselines 19-11
- [3] Caselines 21-1
- [4] Caselines 08-19
- [5] 2003 SA 234 SCA
- [6] 1970
- (1) SA 295 (A) AT 300 A
- [7] Unreported North Gauteng High Court case 63500/2009 (17 April 2012)
- [8] AA Mutual Insurance v van Jaarsveld 1974 (4) SA 729 (A)
- [9] 1984
- (1) SA 98 (A) 113H-114E

[10] 1974

(4) SA 729 (A)

[11] RAF v Guedes 2006 (5) SA 583 (SCA) at para 8

[12] (31563/2014) [2014] ZAGPPHC 453 PARA 11

[13] Caselines 08-38 at paragraph 10.1

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