

SOUTH AFRICA / JUDGMENT

Smit v Road Accident Fund (A2024/064500) [2025] ZAGPJHC 626 (20 June 2025) [2025] ZAGPJHC 626

COURT

South Gauteng High Court, Johannesburg

BEFORE

Wilson, Noko, Botsi-Thulare

CASE / FILE NUMBER

A2024/064500

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Court

a quo case number: 43843/2020

Appeal

Case Number: A2024/064500

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED:

20 JUNE 2025

In

the matter between:

ANNELIZE

SMIT

Appellant

And

ROAD

ACCIDENT

FUND

Respondent

Coram:WILSON J, NOKO J, BOTSI-THULARE AJ

JUDGMENT

BOTSI-THULARE AJ (Wilson J et Noko J concurring)

Introduction

- [1] The appellant, Annelize Smit, was a passenger in a motor vehicle which was involved in an accident on 18 December 2018. As a result of this accident, Ms. Smit suffered an injury on the bladder, the kidney, as well as rib fractures and a long contusion with pneumothorax on the right side. Ms. Smit claimed for general damages and past and future loss of income from the respondent (RAF).
- [2] On 13 September 2023, Mpofu AJ (court a quo) found that RAF is liable for 100 percent of Ms. Smit's proven damages in the amount of R1 052 325.80. The court a quo further awarded an amount of R3 000 000.00 to Ms. Smit as compensation for her past and future loss of income. Discontent with the portion of the order of the court a quo on past and future loss of earnings, Ms. Smit applied for leave to appeal to the full court but the application was dismissed by Mpofu AJ on 4 December 2023.
- [3] Ms. Smit petitioned the Supreme Court of Appeal and leave to appeal to the full court was granted by the Supreme Court of Appeal on 7 March 2024. The appeal is only in respect of past and future loss of income.

Proceeding before court a quo

- [4] The evidence before the court a quo was that, at the time of the accident, Ms. Smit was 24 years old. She worked for a cruise ship as a beautician and massage lady before the accident. However, because of the accident and the extent of the injuries she sustained, she went to live with her dad in a farm in the Northern Cape. Her plans were that she would eventually go back to the cruise ship, and she would work as a beautician or a masseuse.
- [5] It was recorded that after completing Grade 12, Ms. Smit completed a three-year National Diploma in Health & Skincare offered by the South African Association of Health and Skincare Professionals from 2013 to 2015. Between February 2016 to June 2016, Ms. Smit was employed as an Aesthetician by Steiner Onboard Spa Disney Cruise Ship in Florida (USA), the Cayman Islands and Mexico. At that time, she was earning R31 100.00 per month which amounted to R140 000.00 for that period.
- [6] From July 2016 until the date of the accident, Ms. Smit was self-employed and working as a beautician and reflexologist at her mother's medical clinic in Kuruman. After deductions such as bank charges, she earned R78 053.98 over the 12-month period from January to December 2017, which is an average of R6 504.50 per month.

- [7] The expert report by the Occupational Therapist classified Ms. Smit's job as a beautician and reflexologist as mostly light

physical work with an inherent requirement of standing and/sitting for prolonged periods of time, making use of both her left and right hand with strength especially when doing massages/reflexology treatments.

- [8] The Orthopaedic Surgeon recorded that Ms. Smit sustained the following multiple injuries because of the accident:

- a. An extensive period of loss of consciousness with retrograde and ante grade amnesia;
- b. Multiple extensive facial scars, including a 12 cm scar above the left eye, a 16 cm ragged scar over the mid right cheek, a 1 cm scar over left cheek and a curved 7 cm ragged scar over the chin;
- c. Broken teeth in the upper and lower left sided jawbone that were not repaired or corrected, wherefore her bite is off on the left side;
- d. A whiplash type injury to the cervical spine;
- e. Fractures of the 2nd to 5th left posterior ribs as well as a pneumothorax of the chest;
- f. A fracture of the radius and ulna of the right forearm both treated with a plate and screw fixation which remain in place. Further, the alignment of the right elbow and wrist joints are out as to length. The right forearm has a 32 cm scar over the right ulna and a 19 cm long scar over the proximal right radius;
- g. An intra-articular fracture of the distal radius of the left wrist. A locking solar plate was inserted. The fracture is mal-united with radial shortening, ulnar plus and an unreduced radio-ulnar joint. There is a 12 cm long volar scar over the left forearm;
- h. A fracture of the pubic ramus of the pelvis;
- i. A segmental mid-shaft fracture of the left femur. The fracture was treated surgically with a locked intramedullary nail through a 17 cm long insertion scar at the left hip and a 12 cm long anterior mid-shaft scar for reduction of the segmental fracture and distal locking scars. There is malunion of the femur with a rather marked leg length discrepancy;
- j. Bodily scarring from the accident as well as from the surgery performed.

- [9] On the future management of Ms. Smit's injuries, the Orthopaedic Surgeon recorded that she has achieved maximum medical improvement. However, she sustained a serious head injury and has persistent symptoms involving headaches and alterations in her mental status, cognition, and highest integrative functions (MSCHIF).

- [10] The Orthopaedic Surgeon further recorded that Ms. Smit's neck movement is not restricted, but there are clear early degenerative changes visible on x-ray. The need for neck surgery is not foreseen, but provision should be made for conservative treatment and surgery at a later stage in her life. Ms. Smit would require non-surgical treatment such as analgesics, anti-inflammatories, muscle relaxants neck brace and physiotherapy.
- [11] According to the Orthopaedic Surgeon, if Ms. Smit experiences an acute exacerbation of pain, she might benefit from a short course of in-patient traction treatment. In addition, surgery would consist of further investigations into CT, MRI scans and an anterior neck decompression with fusion with or without instrumentation.
- [12] The Orthopaedic Surgeon is of the opinion that Ms. Smit is unable to perform bimanual beautician work due to her left wrist function and therefore she will not be able return to the beautician profession.
- [13] Ms. Smit reportedly could not perform any work, for approximately 12 months post-accident, up to December 2018. She has not returned to her previous job as beautician since the accident. She started working in January 2019 for her father on his farm, assisting him with general administration and bookkeeping functions.
- [14] The Occupational Therapist described Ms. Smit's admin work in an office environment on the farm as mostly sedentary and partly light physical work. The Occupational Therapist recorded that Ms. Smit can now only type effectively with one hand while making use of her left hand in a limited fashion. Her ability to type with both hands is diminished by at least 50-60%.
- [15] Accordingly, the Occupational Therapist accepted that Ms. Smit has been unable to work effectively in her job as a beautician and that she may find it very difficult to compete on the open labour market in an admin type of job.
- [16] The Industrial Psychologist postulated that, but for the accident, Ms. Smit would have secured employment as a beautician on board a cruise ship staffed by Steiner Transocean by 1 March 2018 for an 8-month period. Her earnings would have amounted to R31,100 per month (assumed in February 2016 terms).
- [17] It is further postulated that Ms. Smit would have been promoted to Spa Manager in the Western Cape area by January 2024 at the age of 30 years, within 5 years of being appointed as a beautician. Her earnings would have amounted to R35 750.00 per month. As a spa manager, she would most likely have reached her career ceiling at the age of 45 years, whereafter annual inflationary increases should be accounted for, until normal retirement age at 65 years.

[18] The Actuary calculated Ms. Smit's Net Past loss of earnings to be in the amount of R541 687.00. The Net Future Loss was calculated to be in the amount of R5 795 790.00. This means that the Actuary postulated Ms. Smit's past and future loss of income to be in the amount of R6 337 477.00.

[19] After considering the above evidence, the court a quo ordered that Ms. Smit is entitled to payment of R1 052 325.80 for general damages and R3 000 000.00 as compensation for her past and future loss of income.

Appeal proceedings

[20] As grounds for appeal, Ms. Smit argues that the court a quo erred in concluding that:

- a. the factual evidence regarding Ms. Smit's pre-accident career path promoted a round estimate approach on the total loss of income to be awarded, instead of a more scientific / mathematical approach.
- b. the addendum report of the Occupational Therapist regarding Ms. Smit's post-accident retirement age.
- c. Ms. Smit may perform work in a coaching capacity, despite the findings by the Occupational Therapist and Industrial psychologist, which remains uncontested; and that
- d. the amount of R3 000 000.00 is fair and reasonable for compensation for past and future loss of income.

[21] RAF argues that the court a quo exercised a discretion regarding Ms. Smit's future loss of income, which is by nature speculative and a plunge into the unknown.

Further, Ms. Smit's pre accident career path depended on various factors that are variable and uncertain. Permutations on

possible promotion were highly uncertain and dependable on industrial trends.

[22] RAF argues further that the higher contingencies applied are justified. According to RAF, post-accident Ms. Smit is employable, and this was catered for in the robust approach followed by the court a quo when assessing future loss of income.

[23] Accordingly, RAF argues that the appeal should be dismissed with costs.

Whether this court can interfere with the amount awarded by the court a quo

[24] I am mindful that this court is considering this matter as a court of appeal. In this regard, it is trite that where the amount of damages is capable of accurate calculation, as is the case with special damages, a court of appeal will interfere if it differs with the trial court on the exact amount of the award.[1]

[25] However, where the quantification of the damages is a matter of estimation rather than calculation, the court has a wide discretion to award what it considered in the circumstances to be fair and adequate compensation.[2] In such circumstances, an appeal court is generally slow to interfere with the award by the trial court. A court of appeal cannot simply substitute its own award for that of the trial court.

[26] The Supreme Court of Appeal in *RAF v Guedes*[3] stated the following regarding the proper approach of an appeal court in appeals against awards of damages:

“The appeal court will interfere with the award of the trial court:

(i) where there has been an irregularity or misdirection (for example, the court considered irrelevant facts or ignored relevant ones; the court was too generous in making a contingency allowance; the decision was based on totally inadequate facts).

(ii) where the appeal court is of the opinion that no sound basis exists for the award made by the trial court.

(iii) where there is a substantial variation or a striking disparity between the award made by the trial court and the award that the appeal court considers ought to have been made. To determine whether the award is excessive or inadequate, the appeal court must make its own assessment of the damages. If, upon comparison with the award made by the trial court there appears to be a "substantial variation" or a 'striking disparity', the appeal court will interfere.”

[27] It is trite that once it has been concluded that interference is justified in terms of the principles set out above, a court of appeal is obliged to interfere. Ms. Smit contends that there exists no sound basis for the award made by the court a quo because there has been a misdirection by the court a quo in that the court a quo considered irrelevant facts and ignored relevant ones which resulted in the decision being based on totally inadequate facts.

[28] In this regard Ms. Smit was correct. The court a quo did not set out the basis on which it chose to depart from the actuarial evidence led of Ms. Smit’s loss of income. No obvious reason for doing so leaps out from the record. In departing from the strongly-reasoned and uncontested expert evidence placed before it, the court a quo disregarded relevant evidence without justification. That is plainly a material misdirection.

[29] Accordingly, I am of the considered view that this court is justified to interfere with the award of past and future loss of income made by the court a quo.

Whether the court a quo erred in the determination of the award for past and future loss of income.

- [30] When a claimant's loss of earning capacity is assessed, courts essentially use one of two methods.[4] The first is establishing a reasonable and fair amount based on the proven facts and the prevailing circumstances. This entails the determination of a lump-sum that the court regards to be fair and just in the given circumstances. The second approach is to establish an amount by a mathematical calculation based on the proven facts of the case.
- [31] According to Millard,[5] courts are likely to follow the first approach in circumstances where it is impossible to make a mathematical calculation, for example, where the claimant is a minor who has not yet embarked on a career path.
- [32] In the same way, in *Mashaba v Rood Accident Fund*[6] it was 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 before applying a mere robust approach.
- [33] Considering the evidence, which was before the court a quo, I am of the view that court a quo should have followed the actuarial calculation approach in deciding on the amount of compensation for past and future loss of earnings

rather than the robust approach. It follows therefore that the court a quo erred in awarding an amount of R3 000 000.00 as compensation for Ms. Smit's past and future loss of income.

Fair and reasonable compensation for past and future loss of income

- [34] On the determination of the amount for compensation of past and future loss of income, the Supreme Court of Appeal in *Road Accident Fund v Kerridge*[7] confirmed that any claim for future loss of earning capacity/income requires a comparison of what the claimant would have earned had the accident not occurred, with what a claimant is likely to earn thereafter.
- [35] In *Santam Versekeringsmaatskappy Bpk v Byleveldt*[8] the Appellate Division stated the following:

"Basically, it is true, the compensation our Courts award is also for impairment of the capacity to earn, but generally it is measured by reference to the loss of earnings. Where the injured party was in normal employment at the time he was injured and would have continued in it but for his incapacitation, such employment is ordinarily regarded as reflecting his earning capacity. His loss of earnings, actual or prospective, is, therefore, usually taken as the true measure of the impairment of his earning capacity."

- [36] It is not in dispute that Ms. Smit sustained injuries in the accident relevant to this matter and still suffers from the sequelae of those injuries. Her injuries limit her physical ability to perform all the work-related tasks required of her as a beautician and reflexologist. RAF conceded Ms. Smit is compromised post-accident. It is accepted that Ms. Smit's life has changed physically due to the accident.

- [37] The Industrial Psychologist opined that Ms. Smit would have been promoted to Spa Manager in the Western Cape area by January 2024 at the age of 30 years, within 5 years of being appointed as a beautician. Her earnings would have amounted to R35 750.00 per month. As a Spa manager, she would most likely have reached her career ceiling at the age of 45 years, whereafter annual inflationary increases should be accounted for, until normal retirement age at 65 years.
- [38] When the court considers an order for future losses, it is expected to use contingency deductions to provide for any future circumstances that may occur but cannot be predicted with precision. It is now trite that the deduction of contingencies remains the prerogative of the court, in normal circumstances.
- [39] It is accepted that the extent of the period over which a plaintiff's income has to be established directly influences the extent to which contingencies must be accounted for. With the unforeseen contingencies, the longer the period can influence the accuracy of the amount deemed to be the probable income of the plaintiff, the higher the contingencies must be applied.
- [40] It should be noted that the actuarial calculations are helpful, though not binding, as the court has wide discretion to award what it considers fair and reasonable compensation. That discretion must, however, be exercised on admissible facts, and a court will not generally depart from prima facie reliable actuarial calculations unless it identifies facts which justify doing so. For example, the court will nearly always make or adjust a contingency deduction so that relevant and foreseeable future events which might otherwise have reduced a plaintiff's

future earning capacity are considered.[9] Contingencies have been described as 'the vicissitudes of life, such as illness, unemployment, life expectancy, early retirement, and other unforeseen factors'.[10]

- [41] The actuarial calculations in this matter are based on a scenario that Ms. Smit's will be employable and earn the income she would have earned pre-morbid. I have in this matter considered Ms. Smit's circumstances and the content of the expert reports, which are not contested by RAF. There is no basis on the record for departing from the actuarial evidence: that a 15% contingency deduction on the pre-morbid calculation and 45% on the post-morbid calculation of the plaintiff's future uninjured earnings is fair and reasonable.

Conclusion

- [42] It is concluded that the court a quo erred by applying its discretion in favour of a round estimate as opposed to the actuarially calculated amount. There was, in my view, no reasonable substantiation for deviating from an award in the amount actuarially calculated to be R6 337 477.00.

Costs

[43] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there be good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances.

[44] Ms. Smit has been successful, and there is no reason why she should not be entitled to costs.

Order

[45] In the result, I make the following order:

1. The appeal is upheld.
2. The portion of the award made by the court a quo in respect of loss of earnings is set aside and replaced with the following order –

“The Respondent is liable for R 6 337 477.00 in respect of the past and future loss of income”.

3. The Respondent is ordered to pay the costs of the appeal, such costs to include the costs for the application for leave to appeal in the court a quo, as well as the petition to the Supreme Court of Appeal.

MD BOTSI-THULARE

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

SDJ WILSON

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

MV NOKO

APPEARANCES

Counsel for the Appellant: Advocate D Smit

Instructed by:

Mr U Jordaan

Counsel for the Respondent: Advocate M Madasile

Instructed by:

Date of Hearing:

14 May 2025

Date of Judgment:

20 June 2025

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties /their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be the 20th of June 2025

- [1] Administrator-General, SWA v Kriel 1988 (3) SA 275 (A) at 289.
- [2] Commercial union Ass Co of SA v Stanley 1973 (1) SA 699 (A) at 703. In this case the court of appeal was of the view that the award by the trial court was too high, but it nevertheless declined to interfere.
- [3] 2006
- (5) SA 583 (SCA) at para 8.
- [4] Southern Insurance Association v Bailey NO 1984 (1) SA 98.
- [5] D Millard, 'Loss of earning capacity: The difference between the sum-formula approach and the 'somehow-or-other' approach', Law, Democracy & Development 2007, vol 11:1'.
- [6] [2006] JOL 16926 (T) at para 56.
- [7] [2018] ZASCA 151 at para 40.
- [8] 1973
- (2) SA 146 (A).
- [9] Burns v National Employers General Insurance Co Ltd [1988] 3 All SA 476 (C).
- [10] Footnote 3 above at para 3.

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