

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: **305/2019**

In the matter between:

PUSELETSO SELLO

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

CORAM: PJJ ZIETSMAN AJ

HEARD ON: 25 OCTOBER 2023

DELIVERED ON: 09 NOVEMBER 2023

Introduction

- [1] The Plaintiff instituted action against the Defendant (“RAF”) as a result of damages she suffered from injuries sustained during a single motor vehicle accident that occurred 16 June 2018.
- [2] The plaintiff claimed past hospital and medical expenses, estimated future medical treatment, past- and future loss of income and general damages.
- [3] On the first day of trial, the RAF conceded the merits of the matter and agreed to provide the plaintiff with an undertaking in terms of section 17(4) of the Road Accident Fund Act, 56 of 1993 for the plaintiff’s future hospital and medical expenses.

- [4] The remaining issues for adjudication are the plaintiff's claim for general damages, past- and future loss of income and past hospital expenses.

The evidence

- [5] No *viva voce* evidence was presented during the trial.
- [6] Instead, the RAF conceded that the plaintiff's experts reports filed of record shall serve as both factual- and opinion evidence before court.
- [7] Thus, the following expert reports were received as evidence:

- 7.1 Dr LF Oelofse, an Orthopaedic surgeon, dated 8 August 2019,
- 7.2 Clair Hearne, a Clinical Psychologist, dated 25 November 2019,
- 7.3 Ms Yani de Klerk, an Occupational Therapist, dated 9 July 2021,
- 7.4 Mr Ben Moodie, an Industrial Psychologist, dated 31 July 2022; and
- 7.5 Mr Johan Sauer, an Actuary, dated 12 October 2023.

General Damages

- [8] The plaintiff was 28 years old at the time of the accident. She is married with two children and her highest level of education is grade 7. According to the expert reports the plaintiff was a self-employed vendor in the informal sector of the labour market.
- [9] The accident occurred on 16 June 2018 and the plaintiff was taken to Pelenomi Hospital. Mrs De Klerk, the occupational therapist, recorded that the plaintiff discharged herself as she had a 6 month old baby at home. She returned to hospital on 18 June 2018 – 2 days later – and underwent an open reduction and internal fixation of her left forearm. She was discharged from hospital on 27 June 2018¹.
- [10] The Plaintiff admitted to Mrs Hearne, the clinical psychologist, that she has no recollection of the accident as she was under the influence of alcohol² and that

¹ Expert summary of Ms Y de Klerk, paragraph 3.2

² Expert summary of Mrs Claire Hearne, paragraph 6.11.

fact explains, to my mind, why the plaintiff discharged herself with a broken left forearm.

- [11] Dr Oelofse, the orthopaedic surgeon, diagnosed the plaintiff with a united radius and ulna fracture with painful instrumentation, residual wrist pain, early post-traumatic osteo-arthritis of the wrists joint and hypertrophic scarring.

- [12] He opines that the plaintiff will develop degeneration in her wrists which will progressed to end-stage osteoarthritis and she will require multiple courses of conservative treatment and surgery. The plaintiff also experiences pain in her forearm and wrist which is aggravated by physical activity and cold weather.

- [13] Ms Hearne is of the opinion that the plaintiff requires psychotherapeutic intervention to assist her in coping with the effects of the accident and the management of her condition.

- [14] Mr Van Eeden, who appeared for the plaintiff, argued that general damages of R500 000-00 would fairly compensate the plaintiff for the non-pecuniary damages suffered by her. Mr Van Eeden relied, in his written submissions, on various cases³ where awards ranging from R650 000-00 to R400 000-00 were made. I have considered the cases but the injuries suffered by the claimants in all of those cases are of a much more serious nature, or involved a much wider spectrum of injuries, than those suffered by the plaintiff.

- [15] I am thus of the view that the cases on which the plaintiff relies are not sufficiently comparable to the injuries suffered by the plaintiff.

- [16] The RAF argued that general damages of R400 000-00 should be awarded and in support of such submission Mrs Mkhwanazi relied on the judgment of Khwinana AJ in *BB v Road Accident Fund*.⁴ In *BB* the court awarded general damages of R600 000-00 (before apportionment) but, unfortunately, the

³ The plaintiff relied on: *Saayman v Commercial Insurance Co of SA* 1972 (2) ECD; *Lombard v RAF* (47666/2017)[2020] ZAGPPHC 335; *Lee v RAF* [2010]. ZAGPPHC 276; *Mohlaba v RAF* (12010/2014)[2016] ZAGPPHC 12.

⁴ Judgment is reported in the South African Legal Information Institute (SAFLII) as *BB v Road Accident Fund* (39437/2011) [2021] ZAGPPHC 453 (13 July 2021).

judgment is not an instrument of clarity with regards to the injuries suffered by the claimant. Thus, regrettably, the case of *BB* is not of any assistance.

[17] I had regard to the following comparable cases:

17.1 In *Bouwer v A F Marais Construction (Pty) Ltd*⁵ a building foreman sustained a fracture of the left radius and ulna, a contusion injury to the left lower chest wall, and a laceration. An open reduction of the fractured radius and ulna was performed and the fractures were secured by plates and screws. Four months after the accident it was found that union of the fracture had not occurred and a bone graft operation was performed. The claimant was discharged with his arm in plaster. When this was removed it was found that his arm was bend and exercises to strained it caused further pain. He was left with medial angulation and shortening of the radius with the companying radio-ulna subluxation which would necessitate further surgery involving the excision of the lower end of the ulna. The court awarded R2500-00 as general damages on 30 September 1975. The 2023 value of the award is R153 000-00.

17.2 The claimant in *Ferber v Caledonian Insurance Company Co*⁶ suffered a fracture of both her radius and ulna, a large bruise on her forehead, torn ligaments in the back of her neck and bruise on the right thigh. An open operation was performed to reduce the fracture of the arm, but there was displacement of the bones and a metal plate had to be inserted to prevent re-displacement. She also had two permanent scars on her forearm, each about 4-5 inches long, but were likely to become less visible as time went on. Ms Ferber was awarded general damages of £800 on 9 October 1952. The 2023 value of the award is R247 000-00.

⁵ 1975 2 C&B 585 (SE).

⁶ (2) 1952 (1D4) QOD 347 (C).

- [18] In *De Jongh v Du Pisanie N.O.*⁷ the SCA recognised the tendency towards higher awards for general damages in the more recent past, but held that that can hardly be justified and, ultimately, the tendency towards higher awards is just one of the considerations that a court may have regard to in the exercise of its wide discretion.
- [19] It is trite that a trial court has a wide discretion to award what it considers fair and reasonable in the circumstances⁸. I have considered the plaintiff's injuries, and the sequelae thereof, and I am of the view that an award of R250 000-00 represents reasonable compensation for the non-pecuniary damages suffered by her.

Loss of income

- [20] The plaintiff's claim for loss of income was premise on the report of the industrial psychologist, Mr Ben Moodie and the actuarial calculation of Johann Sauer actuaries and Consultants.
- [21] As mentioned above the RAF conceded the aforementioned reports save for the contingencies to be applied to the actuarial calculation.
- [22] Mr Moodie postulates that, given the Plaintiff's low level of education, she would have been limited to performing work of a practical/unskilled-simi-skilled nature, irrespective of the accident.
- [23] The Plaintiff's work history included work as a domestic worker, a cook and a vendor. Thus, the plaintiff mainly relied on physical labour to earn a living.
- [24] Mr Moodie is further of the opinion that, given the Plaintiff's work history, it seems reasonable to assume that the plaintiff would have continued working as a vendor, building her client base and growing her business where possible. However, the plaintiff was conducting a cash business and there was no way of proving the Plaintiff's earnings. In the circumstances Mr Moodie opined that but for the accident the plaintiff would have been able to reach earnings

⁷ 2005 (5) SA 457 (SCA) at par [65] – [66]

⁸ *AA Mutual Insurance Association Ltd v Maqula* 1978 (1) SA 805 (A); *De Jongh v Du Pisanie N.O. supra*

between the median and higher end earnings of a Spaza Shop Owner as per the quantum yearbook (2022) of Mr Robert Koch.

- [25] Mr Van Eeden submitted that, given the fact that the court cannot rely on the accuracy of the Plaintiff's financial information contingencies of 20% in the past uninjured scenario and 30% in the future uninjured scenario should be applied.
- [26] Ms Mkhwanazi argued that since the plaintiff was not able to provide any proof of her income a contingency deduction of 35% in the past uninjured scenario should be applied and only 30% in the future uninjured scenario, however she was not able to substantiate the reason why the suggested deduction in the future scenario is lower than the past scenario.
- [27] I agree with Mr Van Eeden's submissions that a contingency deduction of 20% in the past uninjured scenario and 30% in the future uninjured scenario would be fair and reasonable in the circumstances.
- [28] Both Mr Van Eeden and Ms Mkhwanazi argued that a contingency deduction of 50% in the future injured scenario should be applied.
- [29] I am mindful of the difficulties that the plaintiff will face, especially the likeliness that her gap in the market is likely to have already been filled, the fact that her pre-accident gross earnings cannot be guaranteed, the current unemployment rate of 34.9% as well as her accident related injuries and the sequelae thereof.
- [30] However, the plaintiff's post-accident earnings was calculated at 4 hours per day⁹ (i.e. half a day's work) commencing on 24 January 2025.
- [31] Thus, the actuarial calculation already caters for the period that the Plaintiff will take to re-enter the labour market and it only provides for half a day's earnings of a five day work week, therefore recognising the difficulties that the Plaintiff will encounter in the labour market.

⁹ Expert summary of Mr. Moodie, paragraph 6.8 read with the expert summary of Mr. Sauer, par 3.

[32] I therefore disagrees with the extraordinary high contingency deduction in the future injured scenario, as suggested by the legal representatives.

[33] I am of the view that, given the sequelae of the Plaintiff's injuries and the fact that the actuarial calculation already caters for a reduced future earning capacity and time for the Plaintiff to re-enter the labour market, a contingency deduction of 35% in the future injured scenario is fair and reasonable.

[34] In applying the aforesaid contingency deductions to the actuarial calculation the plaintiff's loss of income amounts to R1 113 035,00.

Past hospital and medical expenses

[35] The plaintiff did not present any evidence in support of her claim for past-medical and hospital expenses.

Order

[36] The parties favoured me with a draft order which I amended in accordance with my findings.

[37] Accordingly the following order is issued:

1.

1.1 The Defendant shall pay the Plaintiff the capital sum of **R1 363 035,00** in respect of loss of earning capacity and general damages, set out as follows:

Loss of earning capacity: R 1 113 035,00

General damages: R 250 000,00

Total: R 1 363 035,00

1.2 The Defendant shall pay the abovementioned amount into the Plaintiff's Attorneys trust account, with the following details:

ACCOUNT HOLDER : VZLR INC

BRANCH : ABSA BUSINESS BANK HILLCREST

BRANCH CODE : 632005

TYPE OF ACCOUNT : TRUST ACCOUNT
ACCOUNT NUMBER : 3[...]
REFERENCE : MAT125074

- 1.3 In the event that the Defendant does not, within 180 (one hundred and eighty) days from the date on which this order is handed down, make payment of the capital amount, the Defendant will be liable for payment of interest on such amount at 11.75% (the statutory rate per annum) calculated fourteen days from date of this order.
- 1.4 The Defendant shall furnish the Plaintiff with an Undertaking in terms of Section 17(4)(a) of Act 56 of 1996, in respect of future accommodation of the Plaintiff in a hospital or nursing home or treatment of or the rendering of a service or supplying of goods of a medical and non-medical nature to the Plaintiff (and after the costs have been incurred and upon submission of proof thereof) arising out of the injuries sustained in the collision which occurred on **16 June 2018**.
2. The Defendant to pay the Plaintiff's taxed or agreed party and party cost of suit, which cost shall include:
 - 2.1 The reasonable qualification fees of all the Plaintiff's experts of whose reports had been furnished to the Defendant and / or its experts:
 - 2.2.1 Dr MB Deacon - Orthopaedic Surgeon
 - 2.2.2 Ms Yani de Klerk - Rita van Biljon Occupational Therapist
 - 2.2.3 Mr B Moodie - Industrial Psychologist
 - 2.2.4 Mr J Sauer - Actuary
 - 2.2.5 Ms C Hearne - Clinical Psychologist
 - 2.2 Cost of Counsel
3. In the event that costs is not agreed:
 - 3.1 The Plaintiff shall serve a notice of taxation on the Defendant's attorney of record;

3.2 The Plaintiff shall allow the Defendant fourteen court days to make payment of the taxed cost.

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Counsel for the Plaintiff:

Adv JC van Eeden
Du Plooy Attorneys
BLOEMFONTEIN

Counsel for the Defendant:

Ms Mkhwanazi
Road Accident Fund
BLOEMFONTEIN