

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: 2580/2019

Heard on: 04/09/2023

Delivered on: 12/01/2024

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

In the matter between:

ANTHEA SINEAD DALY

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

MAMOSEBO J

- [1] The only issue for determination with regards to the quantum claim is the plaintiff's loss of income as a result of the motor vehicle accident that occurred on 21 June 2015. Liability was conceded at 100% by the Road Accident Fund (RAF). The plaintiff accepted an amount of R500,000.00 for general damages. Past medical expenses are not in issue. Counsel for the plaintiff, Mr Van Onselen, submitted that although the RAF had tendered an undertaking in terms of s 17(4)(a) for future medical expenses directly to the plaintiff at its offices, she has to date not received the written undertaking.

- [2] The action was set down for a week, 4 – 7 September 2023. Notwithstanding that the plaintiff had already filed the various medico-legal reports by the orthopaedic surgeon, clinical psychologist, neurologist, “anaesthetist with an interest in pulmonology”, occupational therapist, industrial psychologist and an actuary by February 2023, there were no reports filed by the RAF. On the first date of trial, 04 September 2023, the plaintiff brought an application in terms of Rule 38(2) of the Uniform Rules of Court for evidence to be adduced on affidavit in trial proceedings *in lieu of vivo voce* evidence. The Rule provides:

“The witnesses at the trial of any action shall be examined viva voce, 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 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.”

- [3] Mr Van Onselen motivated the adducing of evidence on affidavit as saving costs and time since the RAF furnished no similar expert evidence to counter their opinions. Mr Mogano was placed in an invidious situation with no grounds to object to the Rule 38(2) application but to agree to the procedure. The pronouncements by Plasket AJA in *Madibeng Local Municipality v Public Investments Corporation* 2008 (6) SA 55 at 61F – H (para 26) are salutary:

“[26] The approach to rule 38(2) may be summarised as follows. A trial court has a discretion to depart from the position that, in a trial, oral evidence is the norm. When that discretion is exercised, two important factors will inevitably be the saving of costs and the saving of time, especially the time of the court in this era of congested court rolls and stretched judicial resources. More importantly, the exercise of the discretion will be conditioned by

whether it is appropriate and suitable in the circumstances to allow a deviation from the norm. That requires a consideration of the following factors: the nature of the proceedings; the nature of the evidence; whether the application for evidence to be adduced by way of affidavit is by agreement; and ultimately, whether, in all the circumstances, it is fair to allow evidence on affidavit.”

Consequently, and since the parties agreed to place evidence on affidavit before court, the application was considered and granted.

- [4] The plaintiff/applicant, Ms Anthea Shinead Daly (Daly) was the only witness who gave *vivo voce* evidence on 05 September 2023. She is 32 years old and resides in Kathu. She complains of upper back pain and severe chest pain restricting her breathing, severe hip pain making it difficult to stand, walk or sit for extended periods. Bending also causes a lot of pain. Taking pain medication continuously caused her ulcers. She was employed at Kumba Mine since 2010 as a Maintenance Operator. She assisted the artisans in the workshop lifting heavy objects, fixing engine parts for the mining machines, tipping trucks etc and cleaning engine parts.
- [5] The accident occurred on 21 June 2015. She did not return to work immediately thereafter. However, upon her return, she was subjected to fitness tests by her employer and did not pass them. Dr Nothando Moyo-Mubayiwa, is a medical doctor employed by Anglo American, Kumba Iron Ore. She sought the opinion of Dr Jan F Greyling, the applicant's treating specialist, on whether the plaintiff could perform sedentary administrative work and drive a motor vehicle within the mining area or whether she was restricted to do so, and if restricted, Dr Greyling was to specify the period of restriction.
- [6] Dr Moyo-Mubayiwa compiled a work report on the capacity of the plaintiff (OMP Report on Work Capacity) dated 29 April 2016 using the medical reports compiled by Sue-Ellen Poya (Occupational Therapist), Dr Chris De

Beer (OMP), Colleen Fandam (Physiotherapist & Ergonomist) and Dr Greyling (Orthopaedic Surgeon). The medical panel reached this conclusion:

“Ms Vogt [maiden surname of the plaintiff] is permanently unfit for her occupation of Maintenance Operator or any occupation that requires heavy lifting and physical exertion. She will require alternative placement in administrative positions or sedentary work. Reasonable accommodation in a sedentary position will be possible following appropriate rehabilitation and modifications of her work station.”

The panel also recorded that her condition was manageable.

[7] The following recommendations were made:

“It is recommended that Ms Vogt is permanently unfit to continue her occupation of maintenance operator and any other occupations that require heavy physical exertion. Alternative placement in administrative positions is recommended.”

[8] The mine at that time was restructuring. A medical conference was conducted with the plaintiff and she was then assisted by her union representative, Mr Jacobus Hager. Three options were on the table: namely, medical boarding, retrenchment or taking a voluntary severance package. She opted for the latter on advice of Hager and took it in 2016. Since then she has not found any employment. She explained that although in her curriculum vitae she has recorded the experience of a Planning Assistant and secretarial experience at Mikom from 01 November 2012 until 31 July 2013 and as Planning Assistant and Toolstore Assistant from 01 August 2013 she was merely helping out. She has no formal training for administrative work. She has, to date, only applied for two vacancies which were not advertised but was unsuccessful.

[9] Hager confirmed plaintiff's evidence on affidavit that because the mine was going through a restructuring phase and retrenching employees, there were

no vacancies for sedentary positions available to the plaintiff. The plaintiff was advised by her union to opt for a voluntary severance package as opposed to being medically boarded. The voluntary package was recommended not only because it did not impose long-term limitations on her future employment prospects but also offered her a more advantageous financial arrangement. She signed the Voluntary Separation Agreement on 04 May 2016.

[10] Dr Greyling is the orthopaedic surgeon holding the MBChB and MMed Orthopaedics qualifications. He consulted with and assessed the plaintiff on 30 October 2019 and thereafter compiled a report. He also completed the RAF 4 form. Before the accident the plaintiff had scoliosis of the thoracic spine seen on the x-rays which did not cause her pain or discomfort but caused her left shoulder to be higher than the right shoulder. She has a family history of hypertension, cancer, asthma and diabetes. She smokes one pack of 20 cigarettes a day. She walks with a mild limping gait.

[11] Doctor Greyling recorded the following injuries from the information provided by the plaintiff, the clinical findings and radiological studies: severe sternal fracture, various rib fractures 4 – 8 located close to the sternum, left superior and inferior pubic rami fracture and spinal compression fractures at levels T4 – T8. She complained to the doctor about severe chest and upper back pain which restricts her breathing at times and hip pain when standing or walking for extended periods. She suffered from migraines before the accident but they have become worse after the accident. She has had to take pain and anxiety medication daily since the accident. She also suffers from a lower back pain and regular numbness on her left lower leg. She experiences increased pain when attempting to execute household tasks like doing laundry or cooking or lifting her children. She reported swelling at the back of the hip at times.

[12] Dr Greyling observed a decreased range of movement of the lumbar spine. Radiological examinations also revealed a thoracic malalignment from T4 to T8 located close to the sternum. The x-rays revealed healed left superior

and inferior pubic rami fractures. According to the report the plaintiff will have difficulty competing in the labour market due to the permanent pain and decreased range of movement. She is limited to sedentary work. Dr Greyling recommends physiotherapy, occupational therapy, anti-inflammatory and analgesic medication. The doctor did not anticipate any future surgeries.

[13] Dr Liesl Smith is a Neurologist qualified in MBChB, MFamMed, MMed Neurology and a lecturer at the Department of Neurology, University of the Free State and a practicing neurologist. Plaintiff's neurological examination is normal and she did not sustain any permanent neurological sequelae.

[14] The Clinical Psychologist, Dr Cobus Etzebeth, is qualified in BSoc Sc, BA Hons (Psych), B Psych Trauma Counselling and MA (Clinical Psychology). He recorded that although fluctuation in concentration, attention and memory were reported, he did not observe them during the assessment. There is an extensive history of attempted suicide both by her mother and herself. She has tried six times to commit suicide and seems to have a history of depression. She smokes and consumes alcohol. Her consultations with the psychologists preceded the accident and were mainly for her attempted suicides. *Dr Etzebeth recommends that the plaintiff should be availed an orthopaedic evaluation of her reported lingering pain to alleviate her sense of dysphoria.* To address her psychological symptoms and neuro-cognitive difficulties (depression and adjustment challenges) the doctor recommends 20 sessions of psychotherapy with a clinical psychologist. Given her history of attempted suicide, borderline personality traits and family history of bipolar disorder, psychiatric intervention seems indicated and a start on Psychopharmacological treatment is recommended.

[15] Dr Dorelle Kirsten is an Anaesthetist with a special interest in Pulmonology conditions. Her qualifications are MBChB and MMed (Anaes.) Since she is clearly not a Pulmonologist it is incomprehensible why counsel would create such an impression not only in his oral submissions but also in his heads of argument. This is not acceptable. I do not accept the views expressed by

Dr Kirsten because it is not her field of specialty. Having interest in a particular field does not make one an expert in that regard.

- [16] Ms Nicabeth Paul is an Occupational Therapist in possession of a B.OccTher. She was employed at Susan Maree Occupational Therapists. She assessed the plaintiff and compiled a report. On 31 October 2019 when she assessed the plaintiff she presented with postural asymmetry, shortness of breath and high pain levels. Plaintiff reported to her that she repaired motors and assembled its parts. She also charged truck batteries, the heaviest of which weighed 20kg, and ideally had to be lifted by two people. She had to be on her feet the entire day in the battery room where the batteries are charged. She would occasionally perform sedentary tasks by assisting the administration clerk. Test results show that the plaintiff would be able to sustain sedentary work. This, however, demands postural breaks in sitting and standing. Although the plaintiff reported memory loss during the test session with Ms Paul she did not present any memory difficulties. She considered the reports of Dr Greyling, Dr Kirsten, Mr Etzebeth, and Dr JR Muller, the Radiologist. Ms Paul further says at para 6.4 of her report:

“After the week she went back to Kathu for work. She was seen by the medical panel. They decided that she has to do light duty on the surface, but they were unable to find a position. She was declared fit to work, but there were no positions available. Her union advised her to take the offered severance package and she agreed.”

Ms Paul agrees with the other doctors that the plaintiff will benefit from receiving physiotherapy, psychological intervention and occupational therapy.

- [17] Dr Everd Jacobs is an Industrial Psychologist with the following qualifications: B.P.L, B.P.L (Hons), M Econ:Bsk and D.Com (Industrial Psychology). He consulted with and assessed the plaintiff on 31 October 2019 and again on 09 May 2020. His instructions were to consider the plaintiff's probable career path. He considered the reports of Dr Greyling, Dr

Smit, Dr Kirsten, Ms Paul, Mr Etzebeth, RAF 1, the affidavit regarding the accident, a copy of the ID, photos of injuries, payslips, certificates, pension pay-out quote, and there was no collateral. At 9.5 in the report the doctor records that *plaintiff has not worked since the accident. Her income was made available via payslips.*

- [18] During the first interview doctor Jacobs gathered the following information from the plaintiff: She completed Grade 12 at Warrendale High School in 2008; completed courses as a maintenance operator and scaffold erector; participated in a learnership programme in welding and scaffolding at Kumba; she is not a qualified artisan; at the time of the accident she was permanently employed at Kumba as a maintenance operator since 2010; she never returned to the mine due to the injuries; she received her salary for approximately three months after the accident; no further salary was received until she took the severance package as a result of the retrenchment process at the mine one year and one month after the accident; she said she felt at risk with her injuries; her pension pay-out was R109,393.00.
- [19] During the follow-up telephonic interview on 09 May 2020 the plaintiff stated that she is still unemployed and not looking for employment. As stated she received her salary and back pay allowances for only three months. When she wanted to return to work the retrenchment process was underway. Her union advised her to take a package and she was also medically unfit to continue. She could not avail the severance package letter to Dr Jacobs since it was given to her attorney. She only worked for Kumba and had no other employer.
- [20] The plaintiff closed her case. The defendant also closed its case without leading any evidence.
- [21] It is common cause that the plaintiff was left with serious injuries deemed permanent by Dr Greyling. She was, however, found suitable to perform sedentary work with no physical exertion. Simply put, no heavy-duty work.

Her union representative advised her to take the voluntary severance package because, according to them it offered more advantages than the retrenchment or medical boarding. Whereas the medical panel recommended on Friday, 29 April 2016, that plaintiff be accommodated in sedentary work by virtue of her condition being manageable, only five days thereafter, on Wednesday 04 May 2016 the Union wrote the following where the medical incapacity committee recommendation was supposed to appear: *“took voluntary severance package (VSP) case closed.”* This team comprised: Dr Nothando Moyo (OMP), J Dreyer (OHP/Coordinator), Anthea Vogt (plaintiff), J Hager (Solidarity Union Representative) and B Shabalala (Human Resource).

[22] I find it difficult to reconcile the medical panel's conclusion and recommendation for the plaintiff's reasonable accommodation with her decision to take a voluntary severance package. This was an informed decision having taken advice from her union representatives. She was not retrenched but opted to take a voluntary package. If the actuary worked on an assumption that she was retrenched during July 2016 it cannot be correct because she signed for the severance package on 04 May 2016.

[23] The actuarial report itself records the following:
“The normal life expectancy for a 29-year-old female according to the South African Life Tables 1984/1986 (similar to Life Table 2 in The Quantum Yearbook, 2020 of Dr R.J Koch) is 48.28 additional years.

We have been provided with a report of Industrial Psychologist Dr E.J Jacobs dated 11 May 2020. The following is noted from Dr Jacobs' report:

‘Mr C Etzebeth (Clinical Psychologist):

The accident has aggravated her symptoms as per her psychiatric history of attempted suicide and prior diagnosis for depression...”

In the absence of further information we have assumed a normal life expectancy in respect of Ms Daly.”

- [24] In his report and under the subject background, the actuary, relying on the information furnished to him by Dr Jacobs, recorded that the plaintiff was a Maintenance Operator, Grade 2. But, upon close scrutiny of the medical report by Dr Moyo, the plaintiff was a Maintenance Operator Grade 1. There is surely a difference in the outcome based on her grade.
- [25] The actuarial report sought to establish capitalised value of the loss of income sustained by the plaintiff as a result of the accident. The actuary used the plaintiff's personal information and her life expectancy for the assessment. He assumed a normal life expectancy of 48.28 additional years for the plaintiff which was revised to 44.44 in the subsequent report. The actuary qualified the life expectancy assumption by recording that the actuarially correct method is to work directly with the life table.
- [26] Since the RAF did not present countervailing evidence, the challenge by Mr Magano, appearing for the RAF, was directed at the contingencies applied by the actuaries to make the calculations or to dispute correctness thereof. The first actuarial report reflects a net past loss of R1,071,227.00 and a net future loss of R5,740,348.00, all to the total amount of R6,811,575.00.
- [27] The legal representatives, Messrs Magano and Van Onselen, could not agree on the contingencies to be applied and presented. The actuary was requested to provide revised calculations based on the submissions by both parties. A further report dated 04 September 2023 was filed which took into consideration the expert reports including that of Dr Jacobs, the industrial psychologist's addendum report dated 10 August 2023. A normal life expectancy of 44.44 additional years was assumed. It is settled that the general contingency deductions are a matter for negotiation between the legal representatives or for the discretion of the Court. The actuary was instructed by the legal representatives *in casu* to compute the general contingency deductions based on the following two scenarios:

Scenario 1 (by the plaintiff)

Earnings	Past	Future
Pre-accident	25.0%	35.0%
Post-accident		35.0%

Scenario 2 (by the RAF)

Earnings	Past	Future
Pre-accident	35.0%	35.0%
Post-accident		35.0%

The actuary applied the loss limit of R228,430.00 per year as determined at the date of the accident. He applied the principles articulated in *Road Accident Fund v Sweatman* 2015 (6) SA 186 (SCA) also reported in [2015] 2 All SA 679 (SCA). Loss after the application of the limit:

In scenario 1 (Plaintiff): net past loss with a contingency deduction of 25% is R1,680,600.00 and net future loss with a contingency deduction of 35% is R1,926,806.00 to the total net loss of R3,607,406.00.

In scenario 2 (RAF): net past loss with a contingency deduction of 35% is R1,523,827.00 and net future loss with a contingency deduction of 35% is R1,926,806.00 to the total net loss of R3,450,633.00. There is a difference of R156,773.00 in the two scenarios.

[28] Notwithstanding that the RAF did not lead any evidence leaving the evidence of the plaintiff uncontradicted, I cannot turn a blind eye to the following:

28.1 Constitutionally, everyone has a right to fair labour practices which includes the plaintiff. She, however, on advice of her union representative, accepted, what they perceived as the best option, a

voluntary severance package. This happened a few days after the decision was made that she was suitable to perform sedentary work. The industrial psychologist wrote the following *“she said the mine was busy with retrenchments and she felt she is at risk with her injuries.”* She could have waited for her placement following the decision that she was suitable for sedentary work.

28.2 It is significant that despite the industrial psychologist having pointed out the clinical psychologist’s finding that *“the accident has aggravated her symptoms as per her psychiatric history of attempted suicide and prior diagnosis for depression”*, the actuary still went ahead and remarked *“in the absence of further information we have assumed a normal life expectancy ...”*. The report neither specifies the missing further information nor whether any clarity was sought before compiling it.

28.3 Besides being a heavy smoker of 20 cigarettes a day and the several suicide attempts as well as a history of depression, the actuary assumed a normal life expectancy. This has the potential of ill-health, absence from work and her carrying through to completion the actual suicide like the father of her first-born child reportedly did. All these combined carry a less than normal expectation of life.

28.4 The actuary assumed that she was a Maintenance Operator Grade 2 whereas the OMP report by Dr Moyo-Mubayiwa dated 29 April 2016 recorded her job title as Maintenance Operator Grade 1. The difference may be significant.

[29] In *Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A)* Nicholas JA held:

Where the method of actuarial computation is adopted in assessing damages for loss of earning capacity, 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". One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the plaintiff may in the result have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. The rate of discount cannot, of course, be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case. In making such a discount for "contingencies" or the "vicissitudes of life", it is, however, erroneous to regard the fortunes of life as being always adverse: they may be favourable."

- [30] The courts have raised numerous concerns pertaining to the inaction and unhelpfulness of the RAF in the cases involving claims against the RAF. This case is no exception. The time has come for the RAF to take the courts seriously and to heed its admonitions. Dr Kirsten is not the pulmonologist as stated in the draft order but an anaesthetist with a special interest in pulmonology as recorded in her report. Litigants and their lawyers ought to take better care. No aspersions are cast at Dr Kirsten.
- [31] Regard being had to the above, it will be sensible if I award an amount that is in my view fair and reasonable. The mathematical calculations are in this scenario not sound. The plaintiff's vicissitudes of life warrant higher contingencies. The fact that she made an informed decision to quit her employment without affording due retrenchments processes to fruition is a further risk that she opted to take. There is no basis or cogent reason for me to accept the calculations by the actuary and I much rather opt to interfere with the amount computed.
- [32] It therefore follows that the plaintiff stands to succeed in her claim for future loss of earnings/earning capacity in the globular amount of R1,500,000.00, having had regard to all the credible evidence and authority adverted to.

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

1. The defendant is liable to compensate the plaintiff for 100% of her proven or agreed damages resulting from the injuries the plaintiff sustained in the motor vehicle collision which occurred on 21 June 2015.

2. Defendant shall pay the following amount to the Plaintiff's attorneys, Adams & Adams, in settlement of the claim for Loss of Earnings:

2.1 Loss of earnings:	R1,500,000.00
TOTAL:	R1,500,000.00

3. The aforesaid amount in the sum of R1,500,000.00 (One Million Five Hundred Thousand) shall be payable by direct transfer into the trust account, details of which are as follows:

Nedbank
Account Number: 1[...]
Branch Code: 1[...]
Pretoria
Ref: JPR/MTKM/P4790

4. The plaintiff shall allow the defendant 180 (ONE HUNDRED AND EIGHTY) court days to make payment of the capital amount from the date of this court order, failing which the plaintiff will be entitled to recover interest at the applicable interest rate.

5. The defendant shall furnish the plaintiff with a written undertaking in terms of s 17(4)(a) of the Road Accident Fund Act, 1996, for payment of 100% of the costs for the future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of a service or supply of goods to her, after the costs have been

incurred and on proof thereof, resulting from the accident that occurred on 21 June 2015.

6. The plaintiff's claim in respect of past medical expenses is separated from the other heads of damages in terms of the provisions of Rule 33(4) of the Uniform Rules of Court and postponed *sine die*.
7. The defendant must make payment of the plaintiff's taxed or agreed party and party costs on the High Court scale which is subject to the taxing master's discretion.
8. The defendant shall pay the plaintiff's taxed or agreed party and party costs on a High Court scale to date of this order, which shall include the reasonable qualifying, preparation, reservation and appearance fees (where applicable) of the following expert witnesses:

8.1	Dr JF Greyling	Orthopaedic Surgeon
8.2	Dr L Smit	Neurologist
8.3	Dr DL Kirsten	Anaesthetist
8.4	Mr C Etzebeth	Clinical Psychologist
8.5	Ms N Paul	Occupational Therapist
8.6	Dr E Jacobs	Industrial Psychologist
8.7	Mr G Whittaker	Actuary

I have further allowed for fees to be paid to

8.8 Mr J Hager a necessary witness for trial

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

8.10 It is recorded that the plaintiff's instructing attorneys did not act on a contingency fee basis.

9. In the event that costs are not agreed:

- 9.1 The plaintiff shall serve a notice of taxation on the defendant's attorney of record;
- 9.2 The plaintiff shall allow the defendant 14 (fourteen) court days to make payment of the taxed costs from date of settlement or taxation thereof;
- 9.3 Should payment not be effected timeously, the plaintiff will be entitled to recover interest at the applicable interest rate on the taxed or agreed costs from date of allocator to date of final payment; and
- 9.4 The plaintiff shall not issue a writ prior to the expiry of the 180-day period.

MAMOSEBO J
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

For the plaintiff:	Adv. C.R. Van Onselen
Instructed by:	Adams & Adams c/o Stefan Greyling Inc

For the defendant:	Mr A. Mogano
Instructed by:	The State Attorney