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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 2023/116432

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED: YES / <u>NO</u>
09 July 2024 _____	
DATE	SIGNATURE

In the matter between:

SIKOSANA NTANDOYENKOSI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MAKGATE AJ:

INTRODUCTION

1. The Plaintiff in this case is Sikosana Ntandoyenkosi, a major female of full legal capacity, born on 26 August 1992. The Plaintiff has instituted an action against the Road Accident Fund (“RAF”), after she sustained injuries during a motor vehicle accident which occurred on 22 September 2021.

2. The matter came before me by way of a default judgment application in that, despite the RAF having filed a notice to defend, it has failed to deliver its plea, thereby resulting in the Plaintiff filing a notice of bar, which the Defendant has not reacted to.

3. At the hearing of the default judgement application, Adv Tshungu appeared for the Plaintiff. I was informed that the matter is proceeding on both aspects of liability and quantum.

4. The Plaintiff has filed an application in terms of Rule 38(2) of the Uniform Court Rules wherein, instead of calling for viva voce evidence, counsel sought to rely on the affidavits filed and requested that same be read into record as evidence. I however ordered that, in respect of the liability aspect, I would require the Plaintiff to testify in the matter.

FACTUAL BACKGROUND

5. In terms of the particulars of claim, the Plaintiff alleges that on or about 22 September 2021 at approximately 17:00 at or near North Reef road and Germiston road, Bedfordview, Germiston, Gauteng Province, she was hit by a motor vehicle with registration number J[...] ("the insured vehicle) driven by Xolani ("the insured driver") whilst a pedestrian.

6. Following the accident, the Plaintiff lodged a claim against the RAF on the 21 June 2023. Summons were served on the RAF on 10 November 2023. A notice to defend dated 22 November 2023 was delivered by email. The requisite time within which to file a plea lapsed without any action being taken by the RAF. This prompted the Plaintiff to serve a notice of bar on the 22 February 2024 which was also not reacted to. Therefore, the matter is properly enrolled to be heard as a default judgment application.

7. The Plaintiff seek an order in the following:

7.1. That the RAF compensate her 100% of her proven damages.

7.2. Compensation in an amount of R2 039 621.00 (Two million thirty-nine thousand, six hundred and twenty-one rand).

7.3. Payment of interests in the event the RAF fails to make payment within the 180 days from the date of the order.

7.4. Postponement of the general damages, sine die.

7.5. Plaintiff's party and party costs on High Court Scale B.

8. It is only the Plaintiff that testified. The permission to adduce evidence by way of affidavits in terms of Rule 38(2) of the Uniform Rules of Court in respect of the Plaintiff's experts was granted. The Plaintiff was led by her counsel, Adv Tshungu.

EVIDENCE

9. The Plaintiff's testimony was as follows: -

9.1. On the day of the accident, she was a pedestrian and was crossing Germiston Road when she was unfortunately hit by a taxi. She alleges that the insured driver skipped the robot.

9.2. According to her, she was coming from work and on her way to catch a taxi home. The time of the accident was around 17h00.

9.3. She further testified that the accident did not occur at the pedestrian crossing, but further away from the intersection. In fact, she confirmed the point of impact as drawn in the sketch plan,¹ which demonstrates that the accident occurred in the middle of Germiston Road.

¹ Caselines 11-92

9.4. The reason she did not cross at the pedestrian crossing was because when she arrived there, the robots were red for her. Since she was in a hurry to catch a taxi and the taxi que was long, she then decided to walk further and crossed in the middle of the road.

10. The Plaintiff's contention is that the sole cause of the accident was due to the negligent driving of the insured driver in one or more of the following:

10.1. He failed to keep a proper look out;

10.2. He failed to obey the rules and signs of the road;

10.3. He drove at an excessive speed;

10.4. He failed to apply his brakes when it was required of him to avoid the accident;

10.5. He drove recklessly without due regard and in consideration for the safety of other road users; and

10.6. He failed to consider the rights of the other road users.

11. In the circumstances, counsel for the Plaintiff submitted that the RAF be found 100% negligent.

12. I am not persuaded by these submissions. The Plaintiff on her own version, testified that the reason she did not cross at the designated crossing was because the robot was red for her. Also, she was in a hurry to be in the taxi que as it was already long. The accident happened during the afternoon rush hour on a busy road. The Plaintiff was not a stranger to the area as she was from work. She knows how busy the road is around 17h00.

13. In the case of **DHLIWAYO SHADRACK MAZANGWA vs ROAD ACCIDENT FUND**,² the following was said at paragraph 18

[18]. In general, there is a duty on all road users to keep a proper lookout on the road in order to avoid colliding with other road users. It is expected of a driver to exercise reasonable care and vigilance not only towards a pedestrian(s) he sees or ought reasonably to see on or near the road and that he is obliged to exercise the same reasonable care towards an unseen pedestrian whose presence he should reasonably foresee or anticipate³. On the other hand, and in relation to a pedestrian, the court in *Swanepoel v Parity insurance*⁴ the court held that, in crossing a busy road, a pedestrian has a duty to make sure that he chooses an opportune moment to do so.

14. In determining the degree of negligence in the case of Mazangwa, *supra*, the court apportioned the Plaintiff liability at 50%.

15. Similarly, in the case of **KHOMOLA vs ROAD ACCIDENT FUND**,⁵ wherein the plaintiff crossed a busy road at a point that was not designated for pedestrians, the court find that she contributed to the negligence and apportion her liability at 50%.

16. The Plaintiff concedes that the point of impact was not at the intersection but, meters away from the intersection. There is no plausible reason why the Plaintiff did not cross at the designated crossing. Therefore, in determining whether the insured driver's negligence was the cause of the accident and that there is no contribution on the part of the Plaintiff, I find that both parties did contribute to the accident.

17. It is common cause that the Plaintiff was crossing the road at a place not designated for pedestrian crossing and therefore I am of the view that the Plaintiff was to some extent also negligent.

² (A598/17) [2020] ZAGPPHC 435 (7 August 2020)

³ See *Olivier v Rondalia* 1979 (3) SA 20 (A)

⁴ 1963 (3) SA 736 (WLD)

⁵ (21945/2018) [2024] ZAGPPHC 345 (12 April 2024)

18. There is no basis to depart from the authorities referred to above. I therefore apportion her liability at 50%.

QUANTUM

19. As a result of the collision, the Plaintiff sustained the following bodily injuries; fracture of the right Tibia / Fibula; and lumbar back sprain.

20. Dr Schnaid, an orthopaedic surgeon, assessed the Plaintiff on the 14 March 2024. He reported that the X-Rays demonstrates a healed comminuted fracture of the mid shaft of the tibia, with an intramedullary nail in situ and that the segmental fibula fracture has united. Also, the fracture has healed with acceptable alignment. However, in view of the Plaintiff's obesity, removal of the fixative should be made, until her weight has been reduced close to normality, as ambulation in the tibia, which is not fixated, will predispose to refracturing of the tibia. Regarding the lumbar spine and pelvis, he reported that there is a lumbar back sprain, and the X-Rays are normal.

21. Ms M P Shakoane, an occupational therapist, she evaluated the Plaintiff on the 19 March 2024. She reported that the Plaintiff has grade 11 level of education, and no tertiary education. She has a work history limited to working as a domestic worker. Her work required up to medium physical exertion, and it has inherent mobility requirements which included standing, walking, kneeling, climbing, and working at heights.

22. She remarked that the Plaintiff was unemployable at the time of her assessment as she did not return to her pre-accident job because of the injuries sustained in the accident. In the circumstances, the Plaintiff will have trouble performing work with inherent mobility requirements. She will require reasonable accommodation in the form of rest breaks as and when required. This renders her a vulnerable employee in the open labour market.

23. Talent Matarure, the industrial psychologist, prepared a report that is dated 21 April 2024. The industrial psychologist reported as detailed below.

24. The Plaintiff has completed her Form 3 level of education in 2008. She was employed as a domestic worker earning R3700,00 per month with no benefits. Her employer has confirmed employment, and the industrial psychologist is in possession of the letter. She was 29 years old at the time of the accident and in the established phase of her career.

25. According to the industrial psychologist, pre accident, the Plaintiff was mainly employable in the unskilled to low semi-skilled categories of employment earning above the median quartile of the unskilled workers. Considering her age, level of education and working experience, she was likely to have been promoted to a supervisory position or secure alternative employment she is qualified for, reaching her career ceiling earning between the median and upper quartiles of semi-skilled labourers by age 40 – 45, receiving applicable inflationary increases thereafter. She would have worked until the normal retirement age of 65 years depending on a variety of factors such as her health status, personal circumstances, and conditions of employment amongst others.

26. According to the expert, post-accident, the Plaintiff reported that she was admitted in hospital for one week and recuperated from home for one year. During this period, she did not receive her salary. She has not returned to her pre-accident employment due to the injuries sustained during the accident and she has since remained unemployed.

27. The industrial psychologist opines that the Plaintiff's employability has been significantly compromised in the open market. Her employment opportunities have been curtailed and she may be disadvantaged in terms of effectiveness, efficiency and productivity when compared to her uninjured counterparts. The industrial psychologist further reported that the Plaintiff did not participate in any further training / education after the accident.

28. In the circumstances, the industrial psychologist proposed that a higher post-morbid contingency be applied to compensate the Plaintiff as she has been rendered

practically unemployable in the open market until such time, she has received the recommended rehabilitation.

29. Gert du Toit on behalf of Independent Actuaries & Consultants, a firm of actuaries, prepared a report on the Plaintiff's loss of earnings. The report is informed by the opinion of the industrial psychologist, including that the Plaintiff's pre-accident income was based on the Plaintiff being employed as a domestic worker, earning R3700.00 per month.

30. The actuary has provided two scenarios. The 1st scenario is based on the Plaintiff obtaining employment. Whereas the 2nd scenario is based on the Plaintiff remaining unemployable.

31. None of the experts have found the Plaintiff to be unemployable. In the circumstances, I will only consider the scenario 1, which is calculations based on the Plaintiff obtaining employment, thereby disregarding the scenario 2. The basis being that the evidence before the court is that the Plaintiff has a reduced earning capacity. There is no evidence demonstrating that she is unemployable. She can still find employment subject to limitation. This does not render her unemployable. She simply has a reduced earning capacity.

32. In terms of scenario 1, the actuary has applied 5% contingencies for past loss of income and 10% in respect of future loss of income in the pre-morbid scenario. Whereas in the post-morbid, 50% has been applied.

33. The court enjoys a discretion in its determination of the contingency deduction; it must decide what is fair and reasonable.⁶ The exercise is not an exact science. To that effect, Trollip JA observed in **Shield Insurance Co Ltd v Booysen**,⁷ that the determination of contingencies involves 'a process of subjective

⁶ *Fulton v Road Accident Fund* 2012 (3) SA 255 (GSJ), at paragraphs [95] to [96]; and *Nationwide Airlines (Pty) Ltd (in liquidation) v SA Airways (Pty) Ltd* [2016] 4 All SA 153 (GJ), at paragraph [147]

⁷ 1979 (3) SA 953 (A), at 965G.

impression or estimation rather than objective calculation'. Similarly, in **Goodall v President Insurance Co Ltd**,⁸ Margo J remarked:

“In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practised by ancient prophets and soothsayers, and by modern authors of a certain type of almanack, is not numbered among the qualifications for judicial office.”

34. Practically, the determination of a contingency deduction has the result that damages are reduced by anything between 5% and 50%.⁹ The facts and circumstances of each case dictate how and where the line must be drawn.

35. The Plaintiff did not return to work on her own volition and there is no evidence that she is declared medically unfit as opined by her experts. According to Dr Schnaid, the Plaintiff has a healed comminuted fracture of the mid shaft of the tibia, with an intramedullary nail in situ and that the segmental fibula fracture has united. It is however opined that the Plaintiff suffers from obesity, which condition is not accident related. Her difficulty only rests on pain and endurance. There was never any attempt on her part to return to work post the accident. The Plaintiff was only hospitalised for a week and discharged.

36. Further to the above, according to the calculations, the Plaintiff who is currently an unskilled labourer, will in less than 13 years progress from being an unskilled labourer earning in the medium quartile to the upper quartile of the semi-skilled worker. This is unrealistic.

37. The realistic scenario of the Plaintiff is as per scenario 1 of the actuarial calculations having regard to the accident wherein the following is stated “*subject to treatment and the outcome thereof.*” *We have therefore assumed that the if the claimant is able to procure employment, following successful medical treatment,*

⁸ 1978 (1) SA 389 (W).

⁹ Van der Plaats v SA Mutual Fire & General Insurance Co Ltd [1980] 2 All SA 129 (A).

earnings comparable with those applicable at the time of the accident (R3 700 per month) will prevail from 1 June 2025 (one year after the date of calculation)."

38. Of some importance is the question of residual earning capacity. To that effect, the experts have expressed the view that the Plaintiff is still employable subject to limitations. As a result, 15% deductions on scenario 1 having regard to the accident is fair and just. According to the Plaintiff's actuarial calculations having regard to the accident, she is going to earn an amount of R 1 099 223.00. In the circumstances, a just and reasonable compensation due to the Plaintiff is R1 099 223.00 less 15% contingency deductions which equals to an amount of R934 339.55.

39. Because I have already apportioned 50% of liability towards the Plaintiff, a total amount due to the Plaintiff having regard to the apportionment is a total sum of R467 169.76.

40. In the result, the following order is made:

Order

[1] The Defendant is liable for 50% of such loss as agreed or as proven by the Plaintiff.

[2] The Defendant is ordered to pay to the Plaintiff the amount of **R R467 169.76 (Four hundred and sixty-seven one hundred and sixty-nine and seventy-six cents)**, as damages for loss of income and earning capacity, because of the injuries sustained by the Plaintiff.

[3] The Defendant is directed to pay interest on the above amounts, at the prescribed legal rate, calculated from 180 calendar days after the date of this order until date of payment, in relation to paragraph (2), above.

[4] The Defendant is ordered to furnish the Plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996.

[5] The Plaintiff's claim for general damages is postponed *sine die*.

[6] The Defendant is ordered to pay the Plaintiff's costs on High Court Scale B, including the reasonable qualifying and travelling expenses, if any, for all medico-legal experts of the following experts:

- (a) Dr E Schnaid – Orthopaedic surgeon
- (b) Ms Shakoane – Occupational therapist
- (c) Mr Talent Matarure – Industrial psychologist
- (d) Independent Actuaries and Consultants

T J MAKGATE
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Plaintiff: Adv S Tshungu instructed by Titus & Associates

For the Respondent: Mr Mtshemla, Road Accident Fund unit in the Office of the State Attorney, Johannesburg

Date of Hearing: 11 June 2024

Date of Judgment: 09 July 2024