

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO:2747/2022

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO THE JUDGES: YES / NO
(3) REVISED.

Signature: [Redacted] Date: 25 July 2024

In the matter between:

TLAKOLA MARY

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MONENE AJ

[1] On 12 April 2021 the plaintiff, a major female educator, was a driver of a motor vehicle which collided with another on the D19 public road in the Jerusalema area within the geographical area of this court.

[2] On being admitted at Medi-Clinic hospital in Polokwane she was determined to have suffered a pilon fracture of the right ankle, right distal fracture, a back contusion and experiencing thoracolumbar spine pain.

[3] In the aftermath of all that she instituted proceedings against the defendant under cover of section 17 of the Road Accident Fund Act 56 of 1996.

[4] As is now standard reaction to these kinds of actions the defendant offered absolutely no defense to the plaintiff's claim having neither entered an appearance to defend nor a plea.

[5] The matter served before this court in default with the plaintiff praying that I determine the plaintiff's general damages, the loss of earnings and the need for the defendant to make an undertaking in respect of the future medical needs of the plaintiff to the extent that those medical needs would be arising from the injuries sustained in the said motor vehicle accident. Merits or liability had been finalized 100 percent in

plaintiff's favour per order of Kganyago J dated 1 August 2023. This court derived jurisdiction to entertain general damages from another order per Kganyago J in the wake of which the defendant had failed to decide on the seriousness of the plaintiff's injuries pursuant to a Regulation 3(3)(c) compulsion.

[6] To attend to the issues which lay before me for determination the plaintiff sought and was granted leave to prosecute her case on paper in terms of Uniform rule 38(2).

LOSS OF EARNINGS

[7] As already alluded to supra the main take homes as to the injuries suffered by the plaintiff in the injury were a right distal tibia fracture and a back contusion. This was testified to by Dr Peter Kumbirai, the orthopedic surgeon who went on to indicate that part of the treatment received by the plaintiff was open reduction and internal fixation of the right pilon with plate and screws. The sequelae of the injuries suffered manifested, according to this expert, in the form of her having problems in engaging normally in activities which require prolonged standing, walking and lifting of heavy weights as she used to pre-morbid.

[8] The occupational therapist, Mabote's evidence was that the plaintiff has a limited range of right ankle movement, cannot balance on the right leg unsupported and has difficulty performing erstwhile simple tasks. It was opined further by this witness that although the plaintiff can still meet (albeit with pain and difficulty) the needs of her job

as an educator her impairment will increase as time goes and as she ages such that she may be forced into an early retirement which at the ages of 50 or 55 may result in her suffering total loss of income.

[9] Siphesihle Mkabile, an industrial psychologist, expertly opined that post-morbid the plaintiff struggles to stand or sit and walk for longer periods, complains of pains which make her take leave from work often and struggles to finish and submit work on time. This expert's evidence in sum is captured in the following words at the conclusion of her report:

"The writer opines that this accident has rendered Ms Tlhakola an unequal competitor for gainful employment as well as much more vulnerable employee having to compete with well-bodied individuals for employment. As much as Ms Tlhakola is still employed, her efficiency, effectiveness and productivity have been jeopardized because of the accident in question, and simply implies that any increase to her current earnings will not occur except through inflation."

[10] Armed with all the above background information and expert opinions Robert Koch of Koch Consulting Actuaries, an actuarial scientist, gave evidence of his computations, the long and short of which was a total loss of earnings of R1 653 771.00 to which no contingencies were factored.

[11] In the backdrop of the above uncontested expert evidence, I must determine loss of earnings suffered by the plaintiff in respect of which he lodestar to a proper approach remains, in my view, **Southern Insurance Association v Bailie v NO 1984(1) SA 98(A) at 112E-114F** where the following was said:

"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augururs or oracles. 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 evidence. The validity of this approach depends upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative."

[12] I am unable to fault the expert evidence led before me in any manner and readily accept that evidence without any reservations. What then remains for me is to determine whether in my discretion, contingencies must be applied to the amount of

loss of earnings arrived at, at the tail-end of the reports or not. That is the case it being trite that the factoring in of a contingency percentage is a purely discretionary matter.

[13] Counsel for the plaintiff submitted that considering the age of the plaintiff who is in her early fifties the contingency to be factored in must be lower than that of persons of younger age. Submitting that on the rationale of **Bee v RAF [2018] (4) SA 366(SCA) at para 116** and **RAF v Kerridge 2019 (2) SA 233(SCA) at para 44**, he proposed loss of earnings at R1 323 016,80 being a sum arrived at on factoring a five percent contingency deduction on past loss and a fifteen percent contingency deduction on future loss of earnings.

FUTURE MEDICAL TREATMENT

[14] According to the orthopedic surgeon's evidence the plaintiff still needs treatment in the form of pain management, physiotherapy, and rehabilitation.

[15] Given the back pains which according to the occupational therapist will get worse with time exacerbated by aging, it cannot be gainsaid that the plaintiff will, going forward, need medical attention.

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[16] In those premises a case for an order compelling an undertaking for medical expenses in the future has been mounted successfully.

GENERAL DAMAGES

[17] It is so that I have a wide but precedence guided discretion to award a plaintiff compensation for general damages. That discretion is as per **NK obo ZK v MEC for Health, Gauteng ZASCA 13(15 March 2018) para 9** guided not by what the money will be used for but by loss of amenities of life and his pain and suffering.

[18] I am alive to the fact that past awards are merely a guide and are not to be slavishly followed but am equally counselled by Kganyago J's words in **Marakalala Hendrick v The Road Accident Fund (1382/2014) ZALPPHC (04/06/2019) at para [18]** that where the sequelae are substantially similar, awards should be consonant with one another.

[19] In arguing for general damages of R900 000.00 counsel for the plaintiff referred this court **Mokwena v RAF (75931/2017) [2020] ZAGPPHC 320(3 July 2020)** where a right humerus fracture and a left fibula fracture attracted R850 000.00 in general damages. He also referred me to **Jessica Louise Wooley (3123/19 P) KZN Pietermaritzburg (5 August 2022)** where a tibia and fibula fracture also attracted an award of R850 000.00.

[20] In my view in both the two matters referred to by counsel for the plaintiff as comparators the plaintiffs presented with injuries and sequelae sharper than those of the plaintiff in *casu*. Similarly, the plaintiff *in casu* is of much more advanced age than the plaintiffs in those matters mitigating for a shorter span of loss of amenities of life given the life expectancy. It is also no small measure to be considered that the plaintiff in *casu* is still capable of proceeding with her pre-morbid work and will have her pains on the fracture and on her back adequately ameliorated by pain management catered for in the future medical expenses undertaking reflected upon *supra*.

[21] All this, in my view, militates for an award far below those in the comparative awards referred to by counsel for the plaintiff. That amount in my view, given the mild sequelae in this matter, which extend not much higher than pain in the arm and on the back, is an amount of R500 000.00.

[22] In the result I make the following order:

22.1 The defendant shall pay the plaintiff a total sum of R1 823 016.80 (**ONE MILLION EIGHT HUNDRED AND TWENTY-THREE THOUSAND SIXTEEN RANDS AND EIGHTY CENTS ONLY**) computed from R500 000.00 general damages and R1 323 016.80 in respect of the loss of earnings suffered by the plaintiff in relation to the motor vehicle accident in *casu*.

22.2 The amount in order number 22.1 above shall, within 180 days from date of this order, be paid by direct transfer into the trust account of Ishmael Phala Attorneys the details of which shall be provided to the defendant within 14 days of this order.

22.3 In the event of the above capital amount not being paid timeously, the defendant shall be liable for interest at the prescribed rate of interest per annum, calculated from the date of mora to date of payment.

22.4 The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4) (a) of Act 56 of 1996 in respect of all medical treatment, medical costs and the supply of any medicine and goods and services arising out of the injuries sustained by the plaintiff in the motor vehicle accident implicated in this matter.

22.5 The defendant is ordered to pay the cost of this suit on a High Court scale inclusive of the costs attendant to obtaining the expert reports relied upon in evidence and the costs of counsel on scale B.

22.6 The plaintiff shall, if the parties disagree as to the costs referred to supra, serve a notice of taxation on the defendant and shall allow the defendant 14 court days post taxation to make payment of the taxed costs.



MALOSE.S. MONENE

ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on

⁰⁶
: 17 May 2024

Judgement delivered on

: 25/07/2024

For the Plaintiff

: Adv. JLH Letsoalo

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For the Defendant

: No appearance

Judgment transmitted electronically