



**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

|     |                                      |
|-----|--------------------------------------|
| (1) | REPORTABLE: NO                       |
| (2) | OF INTEREST TO OTHER JUDGES: [N]     |
| (3) | REVISED: [Y]                         |
| (4) | Signature: [Redacted] Date: 28/08/24 |

**CASE NO.: 26439/2019**

In the matter between:

**ASANDA NOSIPHO MBALI**

Plaintiff

and

**THE ROAD ACCIDENT FUND**

Defendant

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## JUDGMENT

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### Kumalo J

#### Introduction

[1] The plaintiff, Ms. Mbali, instituted a claim against the defendant (the RAF) for damages suffered as a result of injuries sustained in a motor vehicle collision. A notice of set down was served on the RAF although the RAF's defence was struck out on 2 November 2022. A notice of intention to amend the particulars of claim was served on the state attorney on 5 July 2023. The amended particulars of claim were served on the state attorney on 20 July 2023.

[2] The issues to be decided are liability, future medical expenses, loss of earnings, and general damages. Since the RAF has not formally acknowledged that the injuries suffered by Ms. Mbali are serious, the issue of general damages stands to be postponed *sine die*.

#### *Liability and future medical expenses*

[3] Ms. Mbali was a passenger in a motor vehicle when the accident occurred. As a result, the RAF is to be held fully liable for the plaintiff's proven damages. It follows that the RAF is liable for the plaintiff's future medical expenses and should issue an undertaking in terms of section 17(4) of the Road Accident Fund Act 56 of 1996.

### *Loss of earnings*

- [4] The plaintiff presented the evidence of its expert witnesses by way of affidavit.
- [5] Ms. Mbali was 19 years and 4 months old when the accident occurred. She was a first-year student at a TVL College at the time.
- [6] The plaintiff sustained blunt chest injuries, a head injury with soft tissue swelling on the right forehead and face, soft tissue injuries to both shoulders, and a soft tissue injury to the right ankle. The injuries and *sequelae* are comprehensively dealt with in the expert reports. The most essential findings of the respective experts are recorded below.
- [7] Dr. Okoli, a specialist neurosurgeon, opines that Ms. Mbali suffers from anxiety and panic attack disorders as symptoms of post-traumatic stress disorder.
- [8] Dr. Oelofse, an orthopedic surgeon, recorded Ms. Mbali's complaint that she suffers neck, back, and shoulder pain. He opines that Ms. Mbali will 'most probably do better with successful treatment'.
- [9] Dr. Mogaladi, a cardiothoracic surgeon, recorded the plaintiff's complaints. He found her lungs to be normal, stated that she 'has probably recovered fully,' and recommended physiotherapy for chest pain control.

- [10] Dr. Mureriwa, a clinical psychologist, opines that Ms. Mbali's functional and community mobility are disrupted by pain and that cognitive problems impair her academic performance. He holds the view that her below-average test performance is a significant drop from her estimated average pre-accident capacity. Her neurocognitive functioning appears to have dropped from average to below average.
- [11] The occupational therapist (OT) opines that Ms. Mbali is suitable for sedentary to light physical demand work levels. The OT recorded the complaints raised relating to pain. The OT is of the view that Ms. Mbali's residual work and vocational capacity have been diminished.
- [12] Dr. Laauwen, an educational psychologist, states that Ms. Mbali attained her senior certificate with an overall average of 49.1% with a diploma endorsement. The accident occurred while Ms. Mbali was in her first year at Lovedale TVET College, where she had enrolled for a course in Business Management. She did not complete the year after the accident. In 2018, she repeated her first year but dropped out after failing two modules. In 2019, she bore a son and took a gap year. In 2020, she enrolled for a Diploma in Management at Walter Sisulu University. She completed her course in December 2022. She indicated in 2023 that she would like to register for a B Tech and Honours in management.
- [13] Ms. Mbali's academic transcripts for 2020-2022 indicate that she passed five of her academic modules with distinction. She failed only one module. I find it necessary to reflect that Ms. Mbali obtained her Diploma and the results indicated, despite Dr. Mureriwa reporting in 2022, that her neuropsychological

results fell in the below-average range, that her visual memory was below average and that her injuries have given rise to significant slowing of cognitive responses. These marks were obtained despite Ms. Mbali's reported poor concentration, and the pain she still suffers.

[14] If regard is had to the overall average obtained by Ms. Mbali when she attained her senior certificate and the results reflected in the academic transcript, I find it difficult to see how it can be found that the accident caused a decline in her academic performance post-2020. In the majority of tests administered by the educational psychologist, Ms. Mbali's scores measured within the average range. Her short-term memory, which refers to her ability to memorise information and temporarily store it in her memory, fell within the high average range. Her verbal memory fell in the below-average range. This suggests that she may experience difficulties in retaining and recalling new auditory verbal information. Dr. Laauwen opined that Ms. Mbali's average IQ would allow her to advance her studies beyond NQF Level 6 but stated that her unattended physical challenges compromised her posture and contributed to discomfort and pain. She, among others, recommended physiotherapy for posture and pain relief, and that Ms. Mbali must apply to the Disability Unit of the university for a concession for additional time to accommodate her slower pace at processing learning material and the pain she experiences with prolonged sitting and writing.

[15] The industrial psychologist, Dr Moodie opined that but-for the accident, Ms. Mbali would have been able to complete her Diploma in Financial Management at the end of 2019, but would likely have experienced difficulty securing employment in the first two years due to the high unemployment rate. She could

have secured intermittent employment during this period and would probably have been able to secure employment within the formal sector, entering on a Patterson level B2/B3 earning. She would have been able to enroll for an Advanced Diploma and advance in a straight line to the median of Patterson level D3/D4 before reaching her career ceiling at age 45-48.

- [16] Dr Moodie's postulation does not discount the fact that Ms. Mbali fell pregnant in 2019 and took a gap year for the purpose of raising her child. He also did not take this into account when he postulated Ms. Mbali's post-accident career progression but stated, contrary to what other expert witnesses reported, that she decided not to return to College in 2019 and took the 2019 year off 'to recover from her accident-related injuries and sequelae thereof'.
- [17] As for the post-accident scenario, Dr. Moodie postulates that Ms. Mbali will experience an additional two-year delay in career progression and that her career ceiling is likely to be significantly lower than before. He proposes that Ms. Mbali will not likely exceed earnings commensurate to a Paterson level C1/C2.
- [18] In postulating Ms. Mbali's post-accident career progression, Dr. Moodie did not discount Dr. Laauwen's opinion that Ms. Mbali's average IQ would allow her to advance her studies beyond NQF Level 6, and that she might be assisted by the Disability Unit of the university.
- [19] Ms. Mbali was a student when she was injured in the accident. There can thus, strictly speaking, not be any loss of income as she was not earning an income



at the time. When dealing with claims of this nature, there must be proof of loss of earning capacity before there can be any future loss of earnings.<sup>1</sup> The evidence proves that Mr. Mbali's ability to earn an income was negatively affected by the injuries suffered as a result of the accident. I agree that Ms. Mbali suffered a delay in her career development. Her ability to perform to her pre-accident capacity has been negatively impacted, but several expert witnesses opined that Ms. Mbali would benefit greatly from physiotherapy.

[20] The damages suffered by Ms. Mbali relating to her loss of earning capacity must now be quantified. The court must determine the amount that would put Ms Mbali in the position she would have been in if she had not sustained the injuries. When a plaintiff's loss of earning capacity is assessed, one of two methods is essentially employed – the first approach is to establish a reasonable and fair amount based on the proven facts and the prevailing circumstances, and the second is to establish an amount by mathematical calculation.<sup>2</sup> Courts are likely to follow the first approach in circumstances where a mathematical calculation is not possible, and be alive to the fact that a mathematical calculation is only as reliable as the facts and assumptions used to arrive at an answer.<sup>3</sup>

[21] When regard is had to the actuarial calculated, it is evident that a significant difference exists between what is calculated for the future uninjured earnings

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<sup>1</sup> D Millard *Loss of earning capacity: The difference between the sum-formula approach and the 'somehow-or-other' approach* Law, Democracy and Development. (2007) 11:1, 15-32, 17.

<sup>2</sup> *Southern Insurance v Bailey* 1984 (1) SA 98 (A) 114C.

<sup>3</sup> *Lebona v President Versekeringsmaatskappy* 1991 (3) SA 395 (W) 400H-401A. See also H Kloppe *Law of Third Party Compensation* 2000) 177.

and the future injured scenario. I take issue with the fact that a five-year delay before entering into the labour market is ascribed to the accident. I agree that the 2017- 2018 delay can be ascribed to the accident, but not the year that followed on the plaintiff falling pregnant. The calculation followed the industrial psychologist's recommendation, and therefore also did not provide for the possibility of Ms. Mbali earning on Patterson D3/D4 level later in life, but restricted her to Paterson C1/C2.

[22] After carefully considering the evidence, I am of the view that to apply a 40% contingency deduction to the future having-regard-to-the-accident scenario that already provides for a significantly reduced income, would not be fair to the defendant. If regard is had to the fact that Ms. Mbali fell pregnant before completing her studies, a higher contingency deduction applied to the postulated uninjured earnings would also not be unreasonable.

[23] I am of the view that the actuarial calculation as it stands is not sufficient to quantify the plaintiff's loss. In the current matter the mathematical calculation does not suffice, although I considered it as a guideline in establishing a reasonable and fair amount for the plaintiff's capacity loss, based on the proven facts and the prevailing circumstances. I am of the view that the amount of R4 000 000.00 will, in the circumstances, constitute sufficient compensation to the plaintiff for the loss of earning capacity.

[24] I find no evidence that Ms. Mbali is incapable of managing her own affairs, and thus the issue of the creation of a trust at the expense of the RAF is postponed *sine die*.



## ORDER

In the result, the following order is granted:

1. The defendant is 100% liable for the plaintiff's proven damages;
2. The issue of general damages is separated and postponed *sine die*;
3. The defendant shall pay the plaintiff the amount of R4 000 000.00 (Four Million Rand) in respect of loss of earning capacity;
4. The defendant must furnish the plaintiff with an undertaking in terms of section 17(4) of the Road Accident Fund Act 56 of 1996 in respect of the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him after the costs have been incurred and on proof thereof, resulting from the accident that occurred on the 10th August 2017;
5. The defendant must pay the plaintiff's agreed or taxed High Court costs as between party and party, subject to the discretion of the Taxing Master, such costs may include, but are not limited to the following:
  - 5.1. Counsel's costs on scale B;
  - 5.2. The costs incurred in respect of the compilation of the Plaintiff's expert reports, and the compilation of the expert affidavits and court attendance fees, on the 03rd August 2023, if any and on proof thereof, for the following experts that the Plaintiff has attended:
    - 5.2.1. Dr L.F Oelofse – Orthopaedic Surgeon;
    - 5.2.2. Dr BA Okoli, a Neurosurgeon;
    - 5.2.3. Dr JFL Mureriwa - Clinical Psychologist;
    - 5.2.4. Dr HM Laauwen – Educational Psychologist;

- 5.2.5. Dr SM Mogaladi – Cardio Thoracic Surgeon;
- 5.2.6. Ncumisa Ndzungu - Occupational Therapist;
- 5.2.7. Ben Moodie – Industrial Psychologis;
- 5.2.8. Munro Forensic Actuaries;
- 5.2.9. Dr JJ Schutte, a General Practioner
- 5.2.10. Sandton radiology.

6. The issue of whether the award must be protected at the cost of the defendant is separated from the remainder of the issues, and the plaintiff may follow ordinary motion court proceedings if it persists in the relief sought in this regard.

  
MP Kumalo

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

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| For the plaintiff:   | Adv. M Leopeng |
| Instructed by:       | Godi Attorneys |
| Date of the hearing: | 30 August 2023 |
| Date of judgment:    | 27 August 2024 |

