

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 715/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHERS JUDGES: NO

(3) REVISED

Date: 22/09/2024

In the matter between:

NHLANHLA ZELDA KUBAYI

PLAINTIFF

And

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

AMIEN AJ:

Introduction

[1] In a civil trial between the Plaintiff and Defendant, the Plaintiff sued the Defendant for damages under the Road Accident Fund Act 56 of 1996, which damages arose from a motor vehicle accident.

[] The Plaintiff was an unrestrained passenger in a minibus taxi, which was involved in a motor vehicle collision on 25 November 2018. After the accident, she was hospitalised for about three weeks, after which she recuperated at home until the end of 2018.

- [2] It is trite that as a passenger in the motor vehicle that was involved in an accident, the merits are 100% in Plaintiff's favour.
- [3] The issues to be determined before this Court are the claims for loss of earnings and general damages.
- [4] Unless otherwise indicated, the following information was extracted from the report of the Industrial Psychologist, Ms Renée Van Zyl.

Injuries sustained

- [5] The Plaintiff sustained a fracture of the right femur and a laceration on the forehead.
- [6] There were seven (7) fatalities in the accident, four of whom were friends of the Plaintiff. Consequently, the Plaintiff suffered post-traumatic stress.
- [7] The Plaintiff was discharged after being hospitalised for three (3) weeks.
- [8] The Plaintiff operated with the aid of crutches for a period of eight (8) months.
- [9] The Plaintiff complained of right hip pain and thigh pain when walking, jogging, climbing stairs, and sitting.
- [10] The Plaintiff also experienced right knee pain during severe weather and when climbing stairs, which started five (5) months after the accident.
- [11] There was one (1) centimetre of residual calf muscle wasting on the right leg compared with the left leg, which resulted in mild leg shortening.
- [12] The injury sustained in para 10 above, coupled with non-union of the fracture caused the Plaintiff to need bone grafting and resulted in chronic pain.
- [13] The Plaintiff also suffered marginal spine shortening of more than one (1)

centimetre.

- [14] The Plaintiff walks with a marginal abnormal gait pattern and has an oblique scar in the centre of her forehead.

Past loss of earnings

Pre-morbid past loss of earnings

- [15] At the time of the accident, the Plaintiff was 24 years old and in possession of a BA degree in Psychology. She was also studying for an Honours degree in Psychology.
- [16] The Plaintiff was a student counsellor at the University of Johannesburg and prior to the accident, was earning R5 000.00 per month.
- [17] Up until the accident, the Plaintiff earned a total of R55 000.00.

Post-morbid past loss of earnings

- [18] In April 2019, the Plaintiff obtained her Honours degree in Psychology.
- [19] The Plaintiff commenced her MA in Clinical Psychology at the University of Limpopo in 2019.
- [20] The Plaintiff completed the theoretical part of her studies at the end of 2019.
- [21] In 2020, the Plaintiff operated as an intern at Weskoppies Hospital and completed her internship at the end of 2020.
- [22] As an intern, the Plaintiff earned R48 262.24 per month.
- [23] From January to March 2021, the Plaintiff was unemployed while working on her mini dissertation.
- [24] In April 2021, the Plaintiff secured employment as a Registered Counsellor at

Company Wellness Solutions until April 2022.

- [25] While working at Company Wellness Solutions, the Plaintiff earned R7 300.00 per month.¹
- [26] The Plaintiff resigned from Company Wellness Solutions after one year after receiving one verbal warning and one written warning.
- [27] The Plaintiff remained unemployed from May to August 2022.
- [28] The Plaintiff completed her mini dissertation in 2022 and was awarded a MA degree in Clinical Psychology in March 2022, after which she successfully wrote her board exams in June 2022.
- [29] In September 2022, the Plaintiff commenced her community service at Tembisa Hospital and earned R41 000.00 per month, equating to R492 000.00 per annum.²
- [30] The Plaintiff appears to have also earned R600.00 per session from September to December 2023 as a locum at her friend's private practice.³ The Plaintiff's heads of argument do not indicate how many sessions were conducted during that period. Assuming that no less than one session per month was conducted, it could be assumed that the Plaintiff earned about R1 800.00 in total as a locum.
- [31] It also appears that the Plaintiff is currently working as a clinical psychologist at Elim Hospital in Limpopo and earns R856 443.12 per annum.

Calculating past loss of earnings

- [32] The actuarial figures quantify the pre-morbid past loss of earnings as R1 517 600.00 and the post-morbid past loss of earnings as R866 885.00.

¹ Plaintiff's heads of argument para 7.6.

² Plaintiff's heads of argument para 7.6.

³ Plaintiff's heads of argument para 7.6.

- [33] By applying a 5% contingency to the pre-morbid past loss of earnings and 0% contingency to the post-morbid past loss of earnings, the total past loss of earnings is calculated as R574 835.00.

Future loss of earnings

Pre-morbid future loss of earnings

- [34] Had the accident not occurred, the Plaintiff would have completed her Honours degree in Psychology in 2018, and the theoretical part of her master's degree in 2019.
- [35] The Plaintiff would then have completed her post-graduate internship at Weskoppies Hospital in 2020, her mini dissertation in March 2021, and her board exams in June 2021.
- [36] By this time, the Plaintiff would probably have entered the labour market as a Registered Counsellor.
- [37] In September 2021, the Plaintiff would most likely have commenced her one-year community service at Tembisa Hospital, after which she would have entered the labour market in 2022 as a Clinical Psychologist.
- [38] From the above, it appears that the Plaintiff was about one year behind in her studies and commenced her internship and community service about one year after she would have had the accident not occurred.
- [39] Had the Plaintiff entered the labour force as a qualified clinical psychologist, it would most likely also have been about one year later than she would have had the accident not occurred.
- [40] The Plaintiff therefore suffered a one-year delayed career growth because of the accident, which amounts to R745 785.00 as a basic salary per annum.

[41] Subject to a 15% contingency, the Plaintiff's pre-morbid future loss of earnings amounts to R633 917.25.

Post-morbid future loss of earnings

[42] Since the Plaintiff suffered only a one-year delayed career growth, it is the view of this Court that she did not suffer any post-morbid future loss of earnings.

Total loss of earnings

[43] In light of the above, the Plaintiff's total loss of earnings is R1 208 752.25.

General damages

[44] The Defendant referred this Court to two cases with similar facts namely, *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) and *Morris v Road Accident Fund* (99303/15) [2018] ZAGPPHC 486 (12 July 2018).

[45] In the *Marunga* case, the Supreme Court of Appeal held that to determine a fair and reasonable amount for a general damages award when a party is injured resulting from a motor vehicle accident, the following factors must be considered:

45.1. The physical injuries sustained by the Plaintiff and their consequences.

45.2. The treatment received by the Plaintiff and their experiences flowing from the injuries and their consequences.

45.3. In the case of a fracture, the evidence of the orthopaedic surgeon and their prognosis.

[46] The Supreme Court of Appeal in *Marunga* reminded us that a court has "a wide discretion to award what it considers to be fair and adequate compensation to

the injured party”.⁴

[47] Referring to the dictum of Potgieter JA in the case of *Protea Insurance Company v Lamb* 1971 (1) SA 530 (A), the Supreme Court of Appeal in *Marunga* quoted *Protea Insurance*: “[there is] no hard and fast rule of general application requiring a ... court ... to consider past awards ... awards in decided cases might be of some use and guidance.”⁵

[48] In *Morris*, Senyatsi AJ held:⁶

“It is trite that the amount to be awarded still lies in the Court’s discretion which it should exercise judiciously and the Court will use the amounts awarded in similar cases only as a guideline to exercise its discretion.”

[49] In *Marunga*, the Supreme Court of Appeal awarded general damages of R175 000.00, which subject to inflation, most likely translates to R518 000.00 in today’s monetary terms.

[50] In *Morris*, the North Gauteng High Court, Pretoria awarded general damages of R675 000.00, which translates roughly to about R885 000.00 in terms of current value.

[51] Taking the above into consideration as well as that at the time of the accident, the Plaintiff sustained a right femur fracture, which resulted in a shortening of the leg and associated chronic pain, laceration on the forehead, as well as post-traumatic stress arising from the death of her four friends, it is the view of this Court that the Plaintiff is entitled to general damages.

[52] A fair and adequate compensation for general damages for the Plaintiff is R600 000.00.

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

⁴ Para 23.

⁵ Para 24.

⁶ Para 20.

53.1. The Defendant is declared liable for payment of 100% of the Plaintiff's agreed or proven damages in consequence of the injuries sustained resulting from the motor vehicle collision which took place on 25 November 2018 in which the Plaintiff was involved.

53.2. The Defendant shall pay to the Plaintiff the sum of R1 808 752.25 in full and final settlement of the Plaintiff's claim, which amount shall be paid within 180 days to the credit of the trust account of the Plaintiff's Attorneys of record, Savage Jooste & Adams Inc, Pretoria, whose trust account details are as follows:

Nedbank Name: Nedcor-Arcadia
Account Type: Trust Account
Branch Code: 1[...]
Account Number: 1[...] Reference
Number: M[...]

53.3. The above amount is calculated as follows:

Loss of Earnings - R1 208 752.25.
General Damages - R600 000.00.

53.4. The Defendant will not be liable for any interest on the said payment provided payment is made timeously.

53.5. In the event of the default of the Defendant, interest will be payable on the full amount owing at that time at the rate of 11.75% interest per annum, calculated from the 15th day after the date of this order to the date of payment.

53.6. 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, to compensate the Plaintiff for the cost of

future accommodation in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the Plaintiff resulting from injuries sustained by her as a result of an accident that occurred on 25 November 2018, after such costs have been incurred and upon proof thereof.

- 53.7. The Defendant is to pay the costs associated with the Rule 38(2) expert reports.
- 53.8. The Defendant is to pay the Plaintiff's taxed or agreed party and party costs on a High Court scale B, including the costs up to and including 5 August 2024, which costs are subject to the Taxing Master's discretion.
- 53.9. Should the parties not be able to agree on the amount of the legal costs' payable by the Defendant, the Plaintiff shall serve a Notice of Taxation on the Defendant's attorneys.
- 53.10. The Plaintiff shall allow the Defendant 180 court days to make payment of the costs so taxed.
- 53.11. Should the Defendant default, interest will be payable on the full amount owing at that time at the rate of 11.75% interest *per annum* calculated from the 15th day up to and including the date of payment.
- 53.12. Counsel for Plaintiff confirms that a contingency fee agreement was concluded between the Plaintiff and her Attorneys, and that such agreement complies with the Provisions of the Contingency Fee Act.

W AMIEN
ACTING JUDGE OF THE HIGH COURT

PRETORIA

APPEARANCES:

Counsel for the Plaintiff: Adv Mogagabe

Instructed by: Savage Jooste & Adams Inc.

Counsel for the Defendant: Ms T Gaokgwathe

Instructed by: State Attorney