

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

Case No:41117/21

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
7 October 2024

In the matter between:

P*** M******

Plaintiff

And

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

SK HASSIM J

[1] The defendant has conceded that it is liable to compensate the plaintiff for the full loss suffered by her in a motor vehicle accident which occurred on 4 December 2020 while she was a passenger in the insured vehicle. She was born on 16 October 1990 and was 30 yrs old when the accident occurred.

[2] The defendant has agreed to furnish an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, Act No 56 of 1996 in respect of the plaintiff's claim for future medical expenses.

[3] The defendant has not delivered any expert reports.

[4] The plaintiff has delivered reports, amongst others, by the following expert witnesses:

- (i) Orthopaedic Surgeon- Dr Mafeelane.
- (ii) Neurosurgeon, Dr Mazwi.
- (iii) Counselling Psychologist, Ms Lerato Mokgethi.
- (iv) Occupational therapist: Ms Hankwebe.
- (v) Industrial psychologist, Talifhani Ntsieni.
- (vi) Actuary, Ms Julie Valentini of Munro Forensic Actuaries.

[5] The industrial psychologist in her report refers to a report from a clinical psychologist, Ms C Khoarai. So do the various experts in their respective reports. Neither a report nor an affidavit by Ms Khoarai is uploaded to CaseLines. The plaintiff's counsel in her heads of argument refers to a clinical psychologist's report. It is cross referenced to Caselines section 005-5. This is not a clinical psychologist's report but the orthopaedic surgeon's report. I do not know whether the plaintiff consulted a clinical psychologist, or not.

[6] Two disputes remain. The one concerns the quantum of the plaintiff's claim for loss of earnings, and the other the quantum of her claim for general damages. My assessment of the compensation to be awarded to the plaintiff is based on the uncontested evidence of the plaintiff's expert witnesses. The defendant's counsel informed me that the defendant did not dispute the injuries suffered by the plaintiff nor that the plaintiff suffered a loss of earnings. The remaining dispute regarding this head of damage is what percentage should be deducted for contingencies on the plaintiff's pre-morbid future earnings.

[7] At the commencement of the hearing, the plaintiff's counsel, Ms Mthembu sought leave to amend the particulars of claim. A notice of amendment was

uploaded to CaseLines (at 021- 1 to 021-3). The defendant's attorney, Ms Mothiba informed me that the defendant did not oppose the amendment. The amendment was granted.

[8] The plaintiff also applied in terms of Rule 38(2) of the Uniform Rules of Court ("the Rules") for leave to adduce the evidence of the plaintiff's expert witnesses on affidavit. The application was not opposed. I issued the order.

[9] The plaintiff sustained a bilateral soft tissue injury to both knees, an injury to the right shoulder, and a mild head injury. A laceration to the forehead has left a 15cm scar¹ on the right side of the plaintiff's forehead. X-rays taken of the right shoulder on 21 June 2022 showed a slight deformity of the distal shaft of the clavicle. This is an indication of a united fracture and resultant diastasis of the adjoining acromioclavicular joint.

[10] The head injury has left the plaintiff with mild to moderate neurocognitive impairment. The plaintiff's neuro cognitive performance displayed retained capacity and normal functioning on tasks requiring simple/complex visual memory, constructional abilities and visual motor integration. The plaintiff however found to have difficulty in performing tasks requiring working memory and double mental tracking, visual scanning, learning rate, visuo-motor processing, and psycho-motor speed, verbal conceptual and abstract reasoning. Her performance was inconsistent on immediate auditory attention and concentration, as well as on immediate memory.

[11] She suffers chronic post concussive headaches, experiences tearing and redness of the right eye as well as pain and blurred vision, and dizziness after standing for long periods, or when descending stairs. She is forgetful and has difficulty concentrating. There is a 2% risk of her developing epilepsy.

[12] The 15 cm unsightly scar on the right side of the forehead, which is difficult to conceal, is permanent. It has affected the plaintiff's confidence and self-esteem. There is however a prospect of the scarring improving with scar revision treatment.

¹ This is the length of the scar according to the plastic surgeon.

[13] She has pain in the knees and the right shoulder. Her left knee and ankle were found to be 1cm larger than the right ankle and knee due to swelling. As a result, the plaintiff has a limping gait², her walking speed is reduced and she has difficulty maintaining a kneeling position, climbing stairs, is unable to squat, or lift and carry weights heavier than 10kg.

[14] She had difficulty coping with grief pre-accident. Her clinical profile suggests depressive, anxiety and post-traumatic stress disorder related symptoms which indicates that the plaintiff is struggling to adjust to the changes brought about by the accident. The plaintiff's mood related disturbances are compounded by the long-term effects of chronic pain as well as the impact of the change in her physical functioning. The plaintiff's performance on cognitive testing, and her clinical psychological profile have a bearing on her vocational prospects.

[15] The plaintiff reported to the counselling psychologist and the occupational therapist that her highest level of education was Grade 7. However, according to the industrial psychologist she passed grade 8 in 2006. The industrial psychologist's opinion is based on this. The defendant did not challenge this.

[16] In 2007, the plaintiff obtained a grade C security certificate. At the time of the accident the plaintiff was employed as a general worker at Mabhula trading store where she had been employed since 5 June 2019. Her responsibilities were cleaning and packing stock. She worked seven days a week from 7h00 to 17h00, earning R1 800.00 per month which at the time ranged within the lower quartile 2020 on the unskilled labourers' scale in the non-corporate sector.

[17] Considering that the plaintiff has a grade 8 education and was at the date of the accident thirty-five years from retirement, it is likely that there would have been increases to the plaintiff's pre-accident earnings. At the age of approximately 45 she would have reached her ceiling in the upper quartile of the unskilled labourers' scale.

² The orthopaedic surgeon who examined the plaintiff on 21 June 2020 noted in his report that the plaintiff's gait was normal and there was nothing of note regarding the foot, ankle, and the knee.

Subsequent increases up to retirement age would most likely have been inflationary related.

[18] The plaintiff returned to work three weeks after the accident. She was not paid for the time away from work. She returned to her pre-accident employment during January 2021 but left two days later because of dizziness and swelling in the left knee. In June 2022, she secured temporary employment as a part-time general worker at a catering company where she cooked, served guests and washed dishes. She earned R200.00 per day. The contract ended in August 2022. She has been unemployed since then. According to the experts the plaintiff is unemployable.

[19] The plaintiff's pre-accident work can be classified as light and medium work with frequent standing, walking, lifting, carrying and the repetitive use of the upper limbs. Because the plaintiff's injuries are located on her right dominant side, her functional capacity has been significantly limited.

[20] Whilst the plaintiff's physical complaints are capable of being managed with the recommended treatment, the diastasis of the adjoining right acromioclavicular joint could cause continual pain in the right shoulder. This will impact upon the plaintiff's ability to carry out tasks which involve the repetitive lifting of the right hand above the head and lifting and carrying heavy objects. Additionally, due to the left knee injury and lower back pain, the plaintiff will have difficulty doing work which requires standing or stooping for long periods without a break.

[21] Given the plaintiff's functional limitations and neuropsychological challenges, she will find it difficult to cope with most work available in the unskilled labour sphere. The plaintiff will consequently not be able to participate in labour-intensive work and cope with full-time employment. Having lost the job she was doing in June 2022 she will have difficulty finding alternative employment. She will need a sympathetic employer who will allow her to take breaks while working.

[22] As a result of the injuries sustained in the accident, the plaintiff can perform only sedentary, light and, minimal medium type work. However, due to her educational background, she will not be able to secure sedentary office type work.

According to the industrial psychologist, the plaintiff's employment options are limited and if she were to secure employment, it is likely to be in the nature of short contracts or "piece jobs".

[23] Compared to her healthy peers, the plaintiff will not be able to perform functions as efficiently and effectively as them. She has therefore since the accident been rendered vulnerable in the workplace and is an unequal competitor in the open labour market. This will hinder her career progression and future employability.

[24] There is a likelihood that the plaintiff will not reach her pre-accident potential and earnings, and that she might be unemployed indefinitely. She is likely to suffer a future loss of earnings equivalent to her pre-accident earning potential.

[25] In a nutshell, the plaintiff's case is that she is unemployable. The defendant has not refuted this.

[26] Ms Mthembu did not argue that but for the accident the plaintiff would have been employed as a security guard. She correctly submitted that this was unrealistic and realistically the plaintiff would have continued earning as an unskilled worker. She submitted that a 5% deduction for contingencies in respect of past loss of earnings, both pre-morbid and post-morbid, is fair and reasonable. As far as a deduction for contingencies in respect of pre-morbid future earnings is concerned, she argued that a 15% deduction would be fair and reasonable.

[27] Ms Mothiba did not challenge the deduction for contingencies proposed by the plaintiff on both pre-morbid and post-morbid past loss of earnings. She however argued for a higher deduction on the future earnings pre-morbid than had been proposed by the plaintiff. She submitted that a 30% deduction for contingencies on pre-morbid future earnings was warranted because collateral information to support the plaintiff's version of her employment history was not available. This is not accurate. While there is no collateral information to support her two jobs as a domestic worker, the plaintiff's employer at the time of the accident has given a certificate of employment. It is not out of the ordinary that a domestic worker,

especially one who held such a job for a short period of time ³ will not be able to provide years later ⁴ the details of the former employer. If the defendant wished to explore the reason for the absence of records or wished to draw an inference therefrom, the defendant should have tested the plaintiff's version under cross-examination.

[28] Another reason why the defendant's attorney argued for a higher contingency on the plaintiff's pre-morbid future earnings is because of the plaintiff's pre-existing medical conditions. In this regard, she referred to the hospital records which reflect that on 1 November 2011 the plaintiff sought treatment at St Patrick's hospital for an injury sustained to the right foot in a fall. She had presented with tenderness over the base of the fifth metatarsal. On 2 March 2016, she sought treatment at Saint Patrick's hospital for a severe headache and runny nose which had been ongoing for a week. According to the hospital records the plaintiff had complained of sensitivity to light. The following annotation appears in the hospital records-

"Plan HCT-Reactive.

Pre-test counselling done.

Post counselling done"

[29] The following annotation was made in the hospital records on 7 December 2020:

"post MVA-last Friday known RVD on Haart"

[30] The defendant's attorney argued that the entry on 1 November 2011 and the entry on 2 March 2016 demonstrate the existence of pre-existing conditions. She argued that because none of the plaintiff's experts in their respective reports mentioned the plaintiff's pre-existing conditions it follows that the plaintiff did not

³ The plaintiff was employed as a domestic worker for four (4) months in 2009 and for seven (7) months in 2011.

⁴ Approximately 15 years have passed since 2009 and 13 years since 2011. Almost 4 years have passed since the accident.

disclose these to them. In my view, even though the plaintiff may not have reported the pre-existing conditions recorded in the hospital records to the experts, the experts in their respective reports stated that they had reviewed the hospital records as well as the RAF1 Form completed and signed by Dr Beke. Dr Beke recorded two pre-existing medical conditions ⁵ in the RAF1 medical report but noted that they had no impact on the injuries sustained in the accident.

[31] It might be that the pre-existing conditions had no impact on the injuries sustained by the plaintiff in the accident, but the pre-existing conditions may have affected the plaintiff's ability to earn an income and therefore her pre-morbid future earnings. This in turn would affect the plaintiff's claim against the defendant for compensation for loss of earnings. While questions whether the plaintiff disclosed pre-existing conditions to the experts or not, and whether the experts considered the pre-existing conditions and their impact on a plaintiff's pre-morbid functioning, are relevant, in this case they are of no moment because the defendant firstly, elected not to instruct its own experts and secondly, did not oppose the plaintiff's application in terms of rule 38(2).

[32] Ms Mothiba highlighted that the counselling psychologist had reported that the plaintiff suffered severe depression and extremely severe anxiety and stress. It was also reported that the plaintiff's mother's death in a motor vehicle accident in 2011 and the death of the plaintiff's sister ⁶ had affected the plaintiff significantly and she had struggled to cope with the grief. This, it was argued, demonstrated a predisposition to depression and the sadness which the plaintiff was reportedly experiencing may not be attributable to the accident entirely.

[33] There are some questions that the plaintiff and perhaps even the expert witnesses should have been called to answer. The one issue that comes to mind is when precisely the plaintiff's HIV positive status was diagnosed. The plaintiff disclosed to the counselling psychologist that she had been diagnosed HIV positive in January 2022. I am not persuaded that the plaintiff was diagnosed as late as

⁵ RVD B20 and STI S90.

⁶ Two of the plaintiff's sisters died. One in 2016 due to HIV positive related illnesses, and the other in 2019 after childbirth. The counselling psychologist does not identify which sister's death affected the plaintiff.

January 2022. The annotation in the hospital records on 2 March 2016 “Plan HCT-Reactive”⁷ is something that should have been explored by the defendant. What should also have been explored are the two pre-existing medical conditions which Dr Beke identified with reference to codes⁸ which appear to me to be diagnostic codes. To this one can add the inconsistencies in the information which the plaintiff conveyed to the different experts.⁹ Additionally, there are inconsistencies between information in an expert report and records before the court. The counselling psychologist recorded that according to the hospital records the plaintiff had as a result of the accident twisted her right foot and presented with a tender base of the fifth metatarsal (see: CaseLines 006-84 para 9). Of course, this is not correct. The plaintiff had twisted her right foot in a fall she took on 1 November 2011.

[34] However, the defendant agreed to forego *viva voce* evidence and thereby deprived itself the opportunity to challenge the veracity of the facts on which the experts’ opinions are based. The defendant has regrettably fallen short of what is expected of a defendant. Firstly, it elected not to call its own expert witnesses. Secondly, it elected not to cross examine the plaintiff and her expert witnesses.

[35] The defendant attempts to address the shortcomings in the presentation of its case by arguing for a higher deduction for contingencies. A deduction for contingencies is aimed at addressing “unforeseen contingencies-the vicissitudes of life, such as illness, unemployment, life expectancy, early retirement and other

⁷ “HCT” refer may be an abbreviation for a haematocrit test or it may an acronym for “HIV Counselling and Testing”. The word “Reactive” suggests to me a blood test.

⁸ RVD B20 and STI S90.

⁹ By way of example the orthopaedic surgeon examined the plaintiff on 21 June 2022 and the plastic surgeon on 22 June 2022. Both recorded that she was unemployed. The counselling psychologist interviewed the plaintiff on 24 June 2022 and the industrial psychologist on 20 June 2022 and 18 October 2022. They both recorded that she was employed in June 2022.

The orthopaedic surgeon, the plastic surgeon, and the industrial psychologist record that the plaintiff has grade 8. Whereas the counselling psychologist and the occupational therapist record that the plaintiff has a grade 7.

According to counselling psychologist she was employed at Mabhula store from 2017 to 2020. And according to the industrial psychologist she was employed therefrom 2017-2018. However, the employment certificate records the plaintiff commenced employment at Mabhula store on 5 June 2019 until 7 January 2021.

The plastic surgeon in his report records a scar of 15 cm. The orthopaedic surgeon on the other hand noted a 7cm scar.

unforeseen factors”¹⁰. It is not a tool to which a defendant may resort to decrease the compensation which a plaintiff has proven is due.

[36] While I agree that a higher deduction for contingencies should be applied to the plaintiff’s premorbid future earnings, I do not agree that a higher deduction for contingencies is warranted on the grounds identified by the defendant. In the absence of medical evidence on the impact that the plaintiff’s pre-existing conditions or the HIV positive diagnosis would have had on her premorbid future earnings, I find no basis for taking these circumstances into account in deciding an appropriate deduction for contingencies on pre-morbid (i.e., uninjured) future earnings. However, in my view a deduction for contingencies higher than 15% is warranted because of the plaintiff’s extended periods of unemployment premorbid.

[37] The plaintiff left school in 2006. She obtained a Grade C security certificate from Lisakhanya Security in 2007. The first record of employment is as a domestic employee for four (4) months during 2009. After resigning the plaintiff was unemployed for more than a year. In February 2011, the plaintiff obtained employment as a domestic employee, but her mother’s death intervened causing her to leave employment in September 2011 to care for her children who had hitherto been cared by her mother. After being unemployed for about seven (7) years and nine (9) months she started working at Mabhula Trading Store on 5 June 2019 and was employed there when the collision intervened.

[38] Thus, over a period of around fourteen (14) years (i.e., from leaving school in 2006 to the date of the accident in 2020) the plaintiff was cumulatively employed for about two (2) years and five (5) months only. Considering the extended periods of unemployment, a 20% deduction for contingencies on the plaintiff’s pre-morbid future income in my view is fair and reasonable.

[39] This brings me to the plaintiff’s claim for general damages. The plaintiff suffered a mild head injury, a fracture of the distal shaft of the clavicle and soft tissue injuries to both knees. She was hospitalised for two days and spent three weeks

¹⁰ Road Accident Fund v Guedes 2006 (5) SA 583 (SCA) para 3.

recuperating from her injuries. She endured severe pain after the accident and continues to suffer frequent severe chronic post-concussive headaches, dizziness, blurred vision, swollen knees, bilateral knee pain and pain and swelling of the left ankle. The plaintiff walks with a limp.¹¹ She is unable to walk long distances or sit for prolonged periods and cannot carry heavy loads. She has difficulty in carrying out household chores, and gardening. She has visual problems. Her memory is poor, she has difficulty concentrating and she has become withdrawn. She gets frustrated, is irritable and aggressive. She experiences severe depression and extremely severe anxiety and stress. There is a 15cm scar on the right side of the plaintiff's forehead. Though there are no features of scar hypertrophy, the scar is unsightly and disfiguring. It has resulted in low self-esteem and a lack of confidence. There is a 2% risk of future epilepsy. I remain mindful that the plaintiff experienced severe headaches and sensitivity to light prior to the accident. She was also emotionally affected by her mother's and sibling's death. I have taken these facts into account in assessing an appropriate award for general damages. Ms Mthembu submitted that a fair and reasonable award for general damages is R750 000.00. Ms Mothiba on the other hand submitted that an award of R550 000.00 would be fair and reasonable. Having considered the cases and the awards relied on by the parties, as well as the circumstances of this case, I am of the view that an award of R600 000.00 for general damages is fair and reasonable.

[40] Consequently, I make the following order:

- (a) The defendant is liable to compensate the plaintiff to the full extent of her proved or agreed loss.
- (b) The defendant shall pay to the plaintiff R2 100 740.00 for damages suffered by her as a result of the motor vehicle accident which occurred on the 04 December 2020 made up as follows:
 - (i) Past and future loss of earnings R1 500 740.00

¹¹ This is recorded by the occupational therapist after her assessment on of the plaintiff on 23 June 2023. However, the orthopaedic surgeon who assessed the plaintiff two days earlier (on 21 June 2022) on a clinical examination found the plaintiff's gait normal and recorded "Nothing to note" in relation to a physical examination of foot, ankle and knee.

(ii) General damages: R 600 000.00

- (c) The sum referred to in (b) above shall be payable within 180 (one hundred and eighty) days from date of service of this order.
- (d) The defendant shall not be liable for interest, if paid is made within the period stipulated in (c) above. Should the Defendant fail to make payment as aforesaid, then the Defendant shall be liable to pay interest at the rate prescribed from time to time in terms of the Prescribed Rate of Interest Act, Act No 55 of 1975.
- (e) The Defendant shall pay the amount referred to in (b) above into the Plaintiff's attorneys of record's trust account with the following particulars:

Name of Bank:	First National Bank
Account Holder	: Sotshintshi Attorneys
Account Number	: 6[...]
Branch Number	: 2[...]
Type of Account	: Trust Account
Branch Name	: Hatfield (PRETORIA)

- (f) Defendant must furnish to the Plaintiff the undertaking certificate in terms referred to in section 17 (4) (a) of Act 56 of 1996, for the cost of future accommodation of the plaintiff in a hospital or nursing home, or the treatment of or rendering of a service or the supplying of goods to her arising out of injuries sustained by her in a motor vehicle accident which occurred on the 04 December 2020.
- (g) Subject to the discretion of the taxing master, the Defendant shall pay Plaintiff's taxed or agreed costs on the High Court party and party scale, which costs shall include:

- (i) The costs of counsel including the costs for 06 and 07 March 2024;
 - (ii) The costs of preparing bundles for trial, if any were prepared;
 - (iii) The costs for obtaining experts reports, including reasonable travelling, accommodation and subsistence costs, if any were incurred.
- (h) There is a valid contingency fee agreement entered into between the plaintiff and the attorney.

S K HASSIM

Judge: Gauteng Division, Pretoria
(electronic signature appended)

Applicant's Counsel: Adv Mthembu
Respondent's Counsel Ms Mothiba (State Attorney)

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 7 October 2024.