



IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

(1)	REPORTABLE: YES/NO	(2)	OF INTEREST TO OTHERS JUDGES: YES/NO
(3)	REVISED		
SIGNATURE		DATE	

Case Number: 1099/2022

In the matter between:

LIMPHO NESTERINA NKOSI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 23 August 2024.

JUDGMENT

COETZEE, AJ

INTRODUCTION:

[1] This case concerns a third-party claim instituted by the Plaintiff against the Road Accident Fund ("the Defendant") arising from injuries sustained in a motor vehicle collision on 3 March 2021, just one day before the Plaintiff's 24th birthday. At the time of the accident, the Plaintiff was a student at Mapulaneng College, pursuing a certificate in Public Management. She is currently 27 years old and unemployed. The Defendant has previously conceded liability and agreed to compensate the Plaintiff for 100% of her proven or agreed damages. The current proceedings before this Court are focused solely on the determination of the quantum of damages. The Plaintiff has presented testimony from six expert witnesses, while the Defendant has closed its case without presenting any witnesses.

[2] The dispute between the parties concerns the Plaintiff's claims for past and future loss of earnings or earning capacity, as well as the appropriate amount for general damages. The Plaintiff has formally withdrawn the claim for past medical expenses due to the lack of supporting vouchers. The Defendant has agreed to provide a statutory undertaking under Section 17(4) of the Road Accident Fund Act 56 of 1996, as amended, and has acknowledged the seriousness of the Plaintiff's injury.

[3] During a pre-trial conference on the 24th of November 2023, the Defendant admitted that the Plaintiff had been admitted to the Matikwana hospital, "as per the hospital records at hand". However, these hospital records were neither submitted into

evidence nor made available to the court. Additionally, in the same pre-trial conference, the Defendant admitted that the Plaintiff sustained a soft tissue injury to the left knee and fractures to the left tibia and fibula, "as documented on page 2 of the report by Dr. A.I. Khan", an orthopaedic surgeon.

[4] At the start of the trial the Plaintiff's counsel initially proposed to present evidence by way of affidavit but subsequently opted to call all the experts appointed by the Plaintiff to testify in person. This change in strategy appeared to be both hasty and unplanned, suggesting a lack of adequate preparation. Of particular concern was the sequence in which the experts were called to testify. The general principle is for a party to call its witnesses in any order he or she deems appropriate. However, the customary practice is for expert witnesses to be called after witnesses of fact, particularly when the experts are required to provide opinions on matters established by those factual witnesses. While the conduct of the trial is primarily within the discretion of the parties as they present their respective cases, this established sequence ensures that expert testimony is properly grounded in the factual evidence already before the court. Despite the court's repeated concerns regarding the order in which the experts were called, Plaintiff chose to proceed without heeding the caution.

[5] This approach was particularly problematic because, although the Defendant admitted the Plaintiff's injuries, it disputed the treatment, the sequelae of the injuries, and all other material facts pertaining to the quantum. This resulted in no common cause

facts between the parties. Consequently, the Plaintiff bore the full burden of proving every aspect of the case.

[6] The Court encountered significant challenges in this matter. Firstly, neither the Plaintiff nor any factual witnesses were called to corroborate the expert opinions presented. Secondly, the Plaintiff failed to produce any documentary evidence to support the basis on which the expert opinions were formed. The experts' opinions were predicated on documents that were not submitted to the Court, on communications with individuals acquainted with the Plaintiff who did not testify, and on statements made by the Plaintiff herself. It is noteworthy that the Plaintiff's counsel did not seek to have any of the hearsay evidence admitted under Section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1998, nor did the Defendant object to the introduction of such hearsay evidence. No explanation was provided for the absence of testimony from these individuals or the failure to present the relevant documents to the Court. The only facts formally admitted before the Court were the injuries conceded by the Defendant during the pre-trial conference. The Court is thus faced with the challenging task of discerning the credible evidence from the experts from a considerable amount of irrelevant material, relying on the experts' independent examinations, assessments, and claimed expertise.

[7] The Plaintiff's expert witnesses were called to testify in the following sequence: an Educational Psychologist, a Clinical Psychologist, an Industrial Psychologist, an Orthopedic Surgeon, an Occupational Therapist, and an Actuary.

EXPERT EVIDENCE:

[8] The Plaintiff's first witness, educational psychologist Ms. Tau, confirmed her credentials and provided a detailed analysis of the Plaintiff's educational history, cognitive functioning, and the impact of the accident on her academic and cognitive abilities. Ms. Tau's report included assessments of the Plaintiff's cognitive, emotional, and motor functioning. She opined that the Plaintiff's cognitive functioning, which was within the low average to average range prior to the accident, had deteriorated to below average post-accident. She further suggested that, but for the accident, the Plaintiff would have had the potential to attain an N6 qualification. She recommended that the Plaintiff might only achieve an N5 qualification post-accident and should consider an alternative career path due to her physical challenges.

[9] During cross-examination, the Defendant scrutinized the foundation of Ms. Tau's conclusions, particularly concerning the Plaintiff's pre-accident academic performance. It was disclosed that the Plaintiff had failed Grade 10 in 2012, a year marked by the loss of both her parents, which had profoundly impacted her emotional well-being. Additionally, the Plaintiff's National Senior Certificate results, assumingly accurately reflected in Ms. Tau's report, demonstrated varying levels of achievement, suggesting below-average performance. Despite this, Ms. Tau maintained that the Plaintiff's pre-accident cognitive potential was average, relying on the educational history provided by the Plaintiff and the absence of documented learning difficulties. However, Ms. Tau conceded that the Plaintiff's performance in key subjects was below average prior to the accident and

acknowledged that therapy could potentially improve the Plaintiff's emotional challenges, though not entirely.

[10] The second witness for the Plaintiff, neuropsychologist Mr. Metse M. Mphelo, confirmed his assessment of the Plaintiff, which included an evaluation of the accident's impact on her emotional, psychological, cognitive, and mental functioning. His assessment was based on an interview, clinical observations, and medical records from Matikwani Hospital and Mapulaneng Hospital, though no other medico-legal reports were available to him. Mr. Mphelo testified that the Plaintiff was enrolled in an N5 Public Management program but could not complete it due to the accident, though this assertion lacked documentary support. His testimony regarding the Plaintiff's loss of consciousness and subsequent recovery was similarly based on her own account, without corroborating evidence. Mr. Mphelo deferred opinions on physical injuries to an orthopedic surgeon and persistent headaches to a neurologist. His assessment results indicated that the Plaintiff demonstrated average abilities in some cognitive tests but performed below average in memory, attention span, and concentration tests. He recommended psychiatric evaluation and long-term psychotherapy.

[11] During cross-examination, Mr. Mphelo confirmed that his assessment of the Plaintiff's injuries, pre-morbid functioning, post-accident complaints, cognitive challenges, and emotional and behavioral changes was based solely on the Plaintiff's self-reporting. He acknowledged the lack of pre-accident data, which prevented him from making any definitive conclusions about the Plaintiff's neurocognitive condition prior to the accident.

[12] The Industrial Psychologist, Ms. Moipone Kheswa, testified that her report was based on an interview with the Plaintiff who provided her with amongst other things information about her educational and employment history, the treatment she received and her current complaints. Her report was also based on medical reports, labor market analysis, and collateral information from the Plaintiff's cousin, Mr. Vhonani Mokgane, and a lecturer, Mr. Khoza. Once again, these alleged facts were not proved. None of this information was confirmed under oath, rendering the foundation of her opinion questionable.

[13] Ms. Kheswa confirmed the following information regarding the Plaintiff's academic progress at Ehlazeni TVET College: From January to June 2019, while pursuing an N4 in Public Management, the Plaintiff failed two modules and passed two others. From June to December 2019, she successfully completed the two remaining modules. In the first semester of 2020, while studying towards an N5 in Public Management, academic activities were suspended due to the COVID-19 pandemic. From June to December 2020, shortly before the collision, the Plaintiff failed all her N5 Public Management modules and had already applied to switch to a course in Hospitality and Tourism due to the discontinuation of her previous program. Ms. Kheswa concluded that the Plaintiff had not suffered any past loss of income but was unlikely to reach her pre-accident earning potential due to the impact of the accident on her cognitive abilities.

[14] Dr. Khan provided testimony regarding the Plaintiff's physical injuries, confirming a comminuted fracture of the left tibia shaft, which included a large posterior butterfly

fragment and fracture displacement. Although the fractures have healed, he observed poor bone healing, leading to ongoing pain and restricted movement. Dr. Khan opined that the Plaintiff's chronic pain and reliance on support for walking have significantly hindered her ability to pursue her studies. While he acknowledged that she could continue her education, he noted that her future work capacity would be limited to light duties, with potential difficulties in the open labor market. In his RAF4 report, Dr. Khan confirmed that the Plaintiff has not yet reached maximum medical improvement. He recommended further medical treatment to enhance her condition and assigned a whole person impairment rating of 10%.

[15] Occupational Therapist Mr. Mashaba assessed the Plaintiff's functional limitations and concluded that her left lower limb injury has significantly impaired her ability to perform physical tasks and continue her studies. Due to the severity of her mobility restrictions, he determined that she would be unable to travel to school, particularly using public transportation. Mr. Mashaba further noted that individuals living with chronic pain are more susceptible to psychological distress, including anxiety and depression. He opined that the Plaintiff's career options would be limited to sedentary work, as she would be unable to engage in physically demanding occupations.

DISCUSSION:

[16] In the matter of *Mathebula v RAF* (05967/05) [2006] ZAGPHC 261 (8 November 2006) at par. 13 the following was said:

"An expert is not entitled, any more than any other witness, to give hearsay evidence as to any fact, and all facts on which the expert witness relies must ordinarily be established during the trial, except those facts which the expert draws as a conclusion by reason of his or her expertise from other facts which have been admitted by the other party or established by admissible evidence."

[17] The Court, after careful consideration of the evidence presented, finds that the conclusions reached by the experts were derived from a combination of unsubstantiated hearsay and collateral evidence rather than from proven facts. This conclusion is supported by the following points:

- a) The Plaintiff's educational performance prior to the accident was below average, as evidenced by her failure in Grade 10, although it is acknowledged that this occurred during the year she lost both parents and was struggling emotionally. Her National Senior Certificate results, along with her subsequent academic performance at college, further reflect inconsistency in her academic achievements. This pattern suggests that, even in the absence of the accident, the Plaintiff may have encountered significant challenges in completing an N6 qualification. Moreover, she would likely have had to change her career path regardless, due to the discontinuation of the course she was pursuing. Ms. Tau's opinion that the Plaintiff might have attained an N6 qualification but for the accident fails to adequately consider the Plaintiff's pre-accident academic difficulties, rendering her conclusions speculative.
- b) Ms. Tau's assessment was heavily reliant on the Plaintiff's self-reported academic performance and cognitive potential. During cross-examination, it was revealed

that the Plaintiff's academic achievements were below average, which casts doubt on Ms. Tau's assertion that the Plaintiff's cognitive functioning was average before the accident. This indicates that Ms. Tau's opinions may have been based on incomplete or inaccurate data provided by the Plaintiff, rather than independently verified facts.

- c) Mr. Mphelo's assessment was primarily based on the Plaintiff's self-reports and limited medical records, without corroborating evidence from other medico-legal reports. His conclusions regarding the Plaintiff's inability to complete her studies due to the accident lacked documentary support and were therefore reliant solely on the Plaintiff's account, rendering them speculative. He further conceded that his findings concerning the Plaintiff's pre-morbid functioning, post-academic complaints, and emotional and behavioral changes were entirely based on the Plaintiff's statements.
- d) Ms. Kheswa's report was based on information provided by the Plaintiff and additional collateral sources such as the Plaintiff's cousin and a lecturer. This collateral information was not confirmed under oath, leading to questions about its reliability. Furthermore, the information from these sources was not corroborated by independent evidence, undermining the validity of Ms. Kheswa's conclusions about the Plaintiff's potential earnings and academic progress.

- e) Both Mr. Mphelo and Ms. Tau acknowledged the absence of pre-accident data, which limits the ability to make definitive conclusions about the Plaintiff's neurocognitive condition and academic potential before the accident. This lack of baseline data means that their opinions about the impact of the accident on the Plaintiff's prospects are speculative.

[18] The experts' reliance on speculative conclusions cast doubt on the reliability of their assessments regarding the Plaintiff's damages and future earning capacity.

LOSS OF EARNINGS:

[19] The Plaintiff has submitted to the Court an actuarial calculation, based on the report of Ms. Kheswa, which estimates an amount of R40,284.00 for past loss of earnings. However, it is pertinent to note that, at the time of the collision, the Plaintiff was still pursuing her studies and was likely to alter her career trajectory irrespective of the collision. Consequently, under normal circumstances, the Plaintiff would have commenced employment in January 2024 or January 2025, regardless of the collision. Furthermore, Ms. Kheswa's report confirms that the Plaintiff has not sustained any past loss of earnings. Therefore, no amount is awarded for past medical expenses.

[20] The projected uninjured future income was estimated to be R13 502 500.00. The calculation provides that the Plaintiff would have obtained an N6 qualification and started earning R94 773.00 per year (based on March 2023 rates) from January 2024 until June 2025. After a gap, her income would resume in October 2025 at R282 000.00 per year

(the lower quartile of Patterson B4), followed by steady compound real increases to R982 000.00 per year by age 45 (the upper quartile of Patterson C5), with inflationary adjustments continuing until age 65.

[25] The projected earnings in this calculation assumed that the Plaintiff would have obtained an N6 qualification. In her report, Ms. Tau observed that the Plaintiff's potential earnings could have progressed in accordance with the educational level she might have achieved and the availability of employment at the relevant time. Ms. Tau suggested that the Plaintiff had the potential to complete her N6 qualification; however, this potential should not be mistaken for a certainty. The calculation assumes an ideal scenario where the Plaintiff would have successfully obtained this qualification, despite her prior academic challenges, including her failure to pass all N5 modules in the six months preceding the collision.

[26] While there is considerable uncertainty regarding whether the Plaintiff would have completed her N6 qualification under pre-accident conditions, this uncertainty persists in the post-accident scenario. The Plaintiff's symptoms related to pain and functional impairment may, with appropriate treatment, improve to a degree that would enable her to resume her studies, albeit potentially in a reduced capacity and within a different career path. It is further acknowledged, based on expert opinion, that in the post-accident scenario, the Plaintiff will likely be limited to sedentary work.

[27] In assessing damages the following was stated in the leading case of *Southern Insurance Association Ltd v Bailey* 1984 1 SA 98 (A) 113H-114E:

“Any enquiry into damages for loss of earning capacity is of its nature speculative... 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 the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award.”

[28] Where the method of actuarial computation is adopted, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations". He or she has "a large discretion to award what he considers right". One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the plaintiff may in the result have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. (see *Southern Insurance Association Ltd* supra 116G-H).

[29] The Plaintiff contended a direct loss of income and a loss of earning capacity, totaling R10,510,944.00. Conversely, the Defendant contended that the Plaintiff's loss of earnings should be addressed by applying a higher post-accident contingency deduction to both the same pre- and post-accident earnings. The Defendant proposed a contingency differential of 7.5% amounting to R933,843.60.

[30] The court recognizes that the Plaintiff has experienced and will continue to experience a future loss of earning capacity, the precise quantification of which is challenging due to the nature of the evidence presented. Considering the circumstances and the court's evaluation of what is just, it is deemed appropriate to apply a 25% contingency differential to the Plaintiff's projected pre-collision earnings. This results in an amount of R3 375 625.00 (R13 502 500.00 multiplied by 25 %). The same result is achieved by making the following calculation:

Uninjured future loss:	R13 502 500.00
Minus 25 % contingency deduction:	<u>R3 375 625.00</u>
Total uninjured future earnings:	<u>R10 126 875.00</u>

Injured future earnings:	R13 502 500.00
Minus 50 % contingency deduction:	<u>R6 751 250.00</u>
Total injured earnings:	<u>R6 751 250.00</u>

Total: R10 126 875.00 - R6 751 250.00 = R3 375 625.00

GENERAL DAMAGES:

[31] I now turn to the general damages suffered by the Plaintiff. The Plaintiff has suggested an award of R600 000.00, while the Defendant has recommended an amount

of R400 000. The court has considered the Plaintiff's admitted injuries, future treatment, prognosis, and the expert assessments.

[32] In the matter of *Hluthwa v Road Accident Fund* 2017 (7A4) QOD 60 (GJ) 2017 (7A4) QOD p 60, the injured person, a 23-year-old male cleaner, sustained soft-tissue injuries of the axial skeleton; injury to the left knee; fracture of the right tibia and fibula. The court accepted the evidence of a neurosurgeon who testified on behalf of the plaintiff to the effect that he suffered a severe brain injury. The neurosurgeon attributed the plaintiff's significant loss of cognitive functions such as deterioration of memory and concentration as well as personality or behavioral changes to an injury to the frontal lobes or their deeper connections. The court concluded that, on consideration of all the evidence, it is clear that the plaintiff suffered pain, discomfort and loss of amenities immediately after the accident and in the months following the accident. He continued to suffer discomfort two years after the accident. Post-accident, there is no doubt that the plaintiff's general enjoyment of life has been diminished by the accident. The court awarded an inflation adjusted amount of R663 000.00 for general damages in 2024 terms. However, the case is different from the current one because the Plaintiff did not sustain a head injury; instead, the injuries are primarily orthopaedic.

[33] In the matter of *Kubayi v Road Accident Fund* 2013 (6E4) QOD 27 (GNP) 2013 (6E4) QOD p27, the injured person an adult male (age not supplied) sustained an open fracture of the distal tibia and fibula. As a result of the external fixation, he developed an infection in the area. His physical impairment includes: pain in his left ankle exacerbated

by prolonged static positions or repetitive movement, strenuous rigorous activity as well as hot weather; loss of functional range movement in the left ankle; swelling of the left ankle and muscle atrophy of the left foot; leg length discrepancy of approximately 1.5cm; scar on the left leg, which partially conceals a healing wound; decreased rate of performance in walking and stair climbing. The court awarded an inflation adjusted amount of R526 000.00 for general damages in 2024. This matter is distinguishable from the present case, as the Plaintiff in the current matter also sustained a knee injury and is expected to require additional future medical treatment..

[34] After reviewing comparable legal cases, the court considers an award of R550 000.00 to be fair and reasonable.

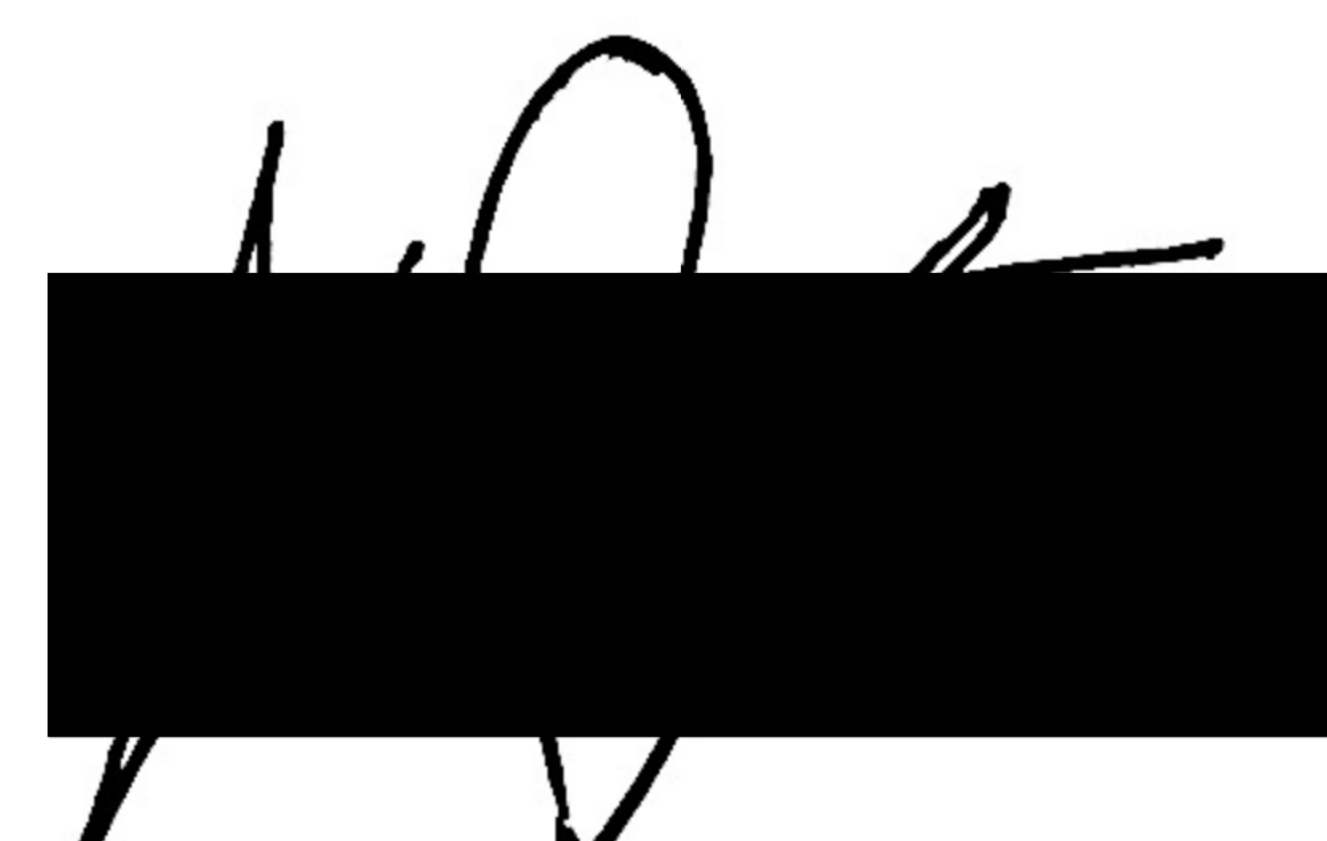
ORDER:

[35] In the premises, the court makes the following order:

1. The Defendant shall make payment to the Plaintiff of the amount of R3 925 625.00 (Three Million Nine Hundred and Twenty-Five Thousand Six Hundred and Twenty-Five Rand in respect of loss of earnings and Five Hundred and Fifty Thousand Rand in respect of general damages).
2. The Defendant shall furnish the Plaintiff with an Undertaking to compensate her, in terms of Section 17(4)(a) of the Road Accident Fund Act No 56 of 1996, for payment of 100 % of the costs of future accommodation of the

Plaintiff in a hospital or nursing home, or for the treatment of, or rendering of service, or for the supplying of goods or related expenses to the her, as detailed in the medico-legal reports, in respect of injuries sustained by her in the motor vehicle collision, which occurred on 3 March 2021.

3. The Defendant shall make payment of the Plaintiff's taxed or agreed party and party costs of suit, as agreed or taxed, in the discretion of the Taxing Master, which costs shall include the costs of the experts appointed by the Plaintiff and the costs of counsel on scale B.



L. COETZEE
ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

Appearances:

Counsel for the Plaintiff:	Adv. N. Mabena
Instructed by:	TP Sithole Ince
On behalf of the Defendant:	Ms. T. Malope
Instructed by:	State Attorney, Nelspruit
Heads of argument submitted:	16 April 2024
Date of judgment:	23 August 2024