

**IN THE HIGH COURT OF SOUTH AFRICA  
MPUMALANGA MBOMBELA COURT  
(MAIN SEAT)**

**Case No: 933/2022**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE: **30.08.24**

SIGNATURE

In the matter between:

**NYALUNGU XOLISILE LOLUTHAN**

PLAINTIFF

And

**THE ROAD ACCIDENT FUND**

DEFENDANT

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**JUDGMENT**

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**MSIBI AJ**

**INTRODUCTION:**

[1] The plaintiff, an adult female residing at stand no 2[...] N[...] Township in Mpumalanga Province, has instituted an action for damages against the defendant for damages suffered as a result of the injuries that she sustained in a motor vehicle collision that occurred on 1 April 2021. The other insured

motor vehicle was never identified. The action is defended by the Road Accident Fund ("RAF")

## **THE MERITS**

- [2] At the start of the trial I was informed that the merits have become settled in that the defendant offered a concession on merits 100 % in favour of the plaintiff and the plaintiff accepted the offer. General damages have already been settled in the amount of R500 000 by agreement between the parties.
- [3] The issues for determination by this court is therefore the quantum of past and future loss of earnings and earning capacity. The plaintiff, the Occupational Therapist and the Industrial Psychologist testified during the trial. The defendant did not lead any evidence, nor submit expert reports.
- [4] The plaintiff confirmed the fact that she was involved in a motor vehicle accident on 1 April 2021. At the time of the collision the plaintiff was a driver of a Ford Motor vehicle, bearing registration letters and numbers F[...] P[...] G[...]. Following the accident she had pain all over her body. She had sustained upper and lower back injuries and a fracture of her left arm on her wrist. She went to hospital where she received treatment, a plaster of paris was administered on her left arm. She recuperated at home.
- [5] Ms Nyalunga stated that she completed her matric in 2004 and thereafter obtained an office admin certificate in 2007 at ADTI College in Nelspruit. She previously worked at a Spar super market where she was retrenched in 2013. She did not have documents to prove that she worked at Spar. Prior to the accident the plaintiff has been suffering from a chronic medical condition that necessitated that she takes medication on a daily basis. At the time of the accident, she was employed at Shell garage as a petrol attendant, earning R800 to R1200 weekly. She worked at Shell garage from 2019 up to the date of the accident.

- [6] In 2023 she was employed by Dinawo Waybridge as a data capture. She had to do the capturing manually and on a laptop. She struggled to cope with the long standing hours. She was a left hand dominant worker who had to train her right hand to do the capturing due to the accident. She had to constantly use painkillers to cope with the pain. Her basic salary was R7000 and with overtime R11 000. Her contract was not renewed due to the fact that she was struggling to cope with her work. The plaintiff is currently not working.
- [7] The Orthopaedic Surgeon, **Dr Joseph Sibanyoni**, examined the plaintiff 2 years after her injuries. In his report he states that the plaintiff sustained a left distal radius fracture, left hip injury and lower back injury. She received emergency medical treatment, a backslab and analgesics.
- [8] A clinical examination of the plaintiff revealed mild swelling of the left wrist, left wrist tenderness and restricted movement. The expert also noted left hip restricted movement, tenderness of the lumbar spine and restricted range of movement of the lumbar spine.
- [9] Radiological reports of the left wrist revealed sclerosis at the distal radius, also known as post traumatic arthritis. A small bone fragment was noted in relation to the medial aspect of the carpometacarpal joint. This may indicate a small fracture and non-union of the fracture fragment. Radiological reports of the lumbar spine revealed evidence of post traumatic arthritis.
- [10] The plaintiff's work potential is negatively affected by the accident in that it may be a challenge for her to be in prolonged employment. In short, her working life has been shortened by the injuries that she sustained. Her whole person impairment is 23%, she qualifies for general damages, due to serious permanent impairment. The plaintiff had no orthopaedic history. She has been on ARV treatment before the accident.
- [11] The neurosurgeon **Dr Akhona Mazwi** confirms the physical injuries noted by the orthopaedic surgeon. Neurological examination established that the plaintiff has normal concertation, a normal memory and a normal vision. The

plaintiff experienced left wrist trauma. Her life expectancy will not be affected by the injuries. The expert noted a whole person impairment of 10%.

- [7] The Occupational **Therapist Saddy Gregory Mashaba** testified that from his physical findings, the plaintiff demonstrated difficulties in performing demanding heavy work due to pain, reduced muscle strength, limited range of motion, pain and weakness of the left forearm and hand. She had difficulty performing activities that involve bilateral handling of objects due to her left arm residual symptoms. She also demonstrated difficulties performing activities that involve dynamic posturing (prolonged standing, walking bending and squatting) due to pain on the lumbar spine and left hip.
- [8] The Occupational Therapist opines that she will not be able to meet the demands of her previous employment as a petrol attendant. The injury on her left dominant hand also limits her ability her work.
- [9] The expert further opines that the plaintiff's residual physical abilities appear to be more suited for sedentary type of work. However, the expert is of the opinion that her limited vocational experience will disadvantage her when seeking sedentary type of employment due to lack of experience and the injury on her dominant left arm. The majority of sedentary jobs in the open market involve prolonged static sitting which will exacerbate the pain in her lumbar spine. As such she will be an unequal competitor in the open labour market. Her functional abilities have been severely compromised by the injuries, even with further medical management and rehabilitation, it is unlikely that she will regain her pre-accident functional capacity.
- [10] During cross-examination the expert conceded that he had no collateral information regarding the plaintiff's employment at Spar. The only collateral that she produced was with regard to her employment at Shell garage, where he was able to speak to the manager, Mr Z M Gama, who indicated the plaintiff's work performance was excellent. He was considering employing her permanently.

[11] In her report, the **Industrial Psychologist Ms Faith Chamisa Maulana**, stated that the plaintiff was employed as a petrol attendant. Even with further medical management and rehabilitation, it is unlikely that she will regain her pre-accident functional capacity. Prior to that she was employed at Spar as a shop assistant. As a petrol attendant she was a casual worker, only called to relieve when an employee is who was on leave. She was earning R800 to R1200, 00 per week. Her earnings amounted to R51000 00 per annum.

[12] The expert stated that the plaintiff's annual earnings fell between the median and upper quartile earnings of unskilled workers and or between the lower and median earnings of semi-workers skilled workers as suggested in tea Quantum Yearbook (R. Koch, 2021). The suggested earnings of unskilled and semi- skilled workers as noted in the Quantum Yearbook (R. J. Koch 2021) is:

- Unskilled workers: R21, 400-00 –R37 200 – R88 000,00
- Semi-skilled workers: R37,200 – R88 000 00 – R193 000 00

[13] The industrial psychologist contacted Mr Z M Gama a manager at Shell garage, who confirmed the plaintiff's work history and performance. He stated that her work performance was excellent and there was a possibility of her being permanently employed.

[14] The expert stated that the plaintiff returned to work after an unspecified period of unpaid sick leave. She cannot recall her period of recuperation while on sick leave. She has suffered loss of income. Upon her return to work she was suffered pain as a result of her injuries, which was worsened by cold weather. Her contract ended in November 2021 due to her inability to work night shifts because of the pain. From her payslips she established that the plaintiff later worked as a clerk at Danoher People Solution (Pty) Ltd based in Malelane, in Mpumalanga. She was earning a basic salary of R7, 077, 56 per month. Her employment contract ended on 19 January 2024 due to her inability to work night shifts. Her employment with the company was confirmed

with Mr Mpilo Dladla, the company site clerk. She was unemployed at the time of assessment.

- [15] Mr Dladla, the site clerk at Danoher People Solution informed her that the plaintiff worked night shift for one month. She was thereafter scheduled for day shift since she was complaining of pains. Her contract ended on 19 January 2024. The expert opines that her physical limitations will negatively impact her employment potential, therefore she is a vulnerable employee in the open labour market.
- [16] In formulating an opinion regarding Ms Nyalunga's pre and post-accident prospect , the expert considered the following factors: The plaintiff's age at the time of the accident, she was 39 years of age at that time. She is currently 42 years of age. She obtained matric and an Office Administrative Assistant certificate. She worked as a shop assistant, petrol attendant and clerk.
- [17] The expert opines that if not for the accident the plaintiff would have been permanently employed and she would have secured an entry level position. Her job would have been graded at the Peterson A3 median earnings (monthly basic salary). Progression would have stemmed from the job training, promotions and workplace experience. She would have progressed reaching her career ceiling by the age of 45. Her job would have been graded at the Peterson B1 median earnings (annual guaranteed package). Then, the plaintiff's earnings would have increased in line with inflationary increases until the age of 65, at retirement.
- [18] At the time of re-assessment by the Occupational therapist, the plaintiff was still unemployed. The expert further noted that employers rarely hire individuals with physical limitations not sustained in their working environment. The plaintiff has been rendered an unequal competitor in the open labour market.
- [19] The Industrial psychologist recommends treatment as recommended by the relevant experts and that her physical limitations be addressed by a

significantly higher than normal post-accident contingency deduction when comparing her to uninjured peers. The expert concluded that the motor vehicle accident and the sequelae thereof has had a negative impact on the plaintiff's working ability and competitiveness in the open labour market.

### **THE ACTUARY**

[20] The plaintiff's loss of earnings since the collision and her future loss of earnings have been calculated by Mr Itai Karidza, a consulting actuary of the firm Tsebo Actuaries on 16 February 2024. The basis of the calculations which were not counter-attacked, included the minutes of the Industrial psychologist and the actuary's interview with the plaintiff. According to the expert the plaintiff was employed as a petrol attendant at the time of the accident. She was earning R52 000 00 per annum in terms of 2021 monetary terms. After the accident, she was on unpaid leave until October 2021. The contract of employment ended in November 2021. The plaintiff was employed thereafter but the contract of employment was not renewed due to her limited work potential which was a result of pains that she suffered.

[21] The capital value of the plaintiff's past loss of earnings, calculated at a 10 % contingency amounted to R82 000 00. Her future loss of earnings calculated at a 20% was amounted at R2 595 444. The total capital value of the plaintiff's loss of earnings including contingencies amounted to R2 677 673.00

### **SUBMISSIONS**

[22] It is submitted that as a result of the accident the plaintiff will not be able to compete fairly in the open labour market and that career opportunities for her are slim despite the fact that she has obtained a tertiary qualification. The fact that she is currently not employed attest to her unfortunate limitations. She might need to be accommodated by a sympathetic employer. She might have to retire earlier than the normal age of retirement. It is not in dispute that she should be compensated fairly applying just and reasonable contingencies.

- [18] It was argued on behalf of the defendant that the plaintiff has failed to prove chances of career progression with permanent employment due to the fact that she was never employed on a permanent basis nor ever promoted in her history of employment, the only allegation of permanent employment was in relation to her work at as a shopping assistant at Spar. Proof of employment at Spar was never obtained. Neither were the occupational nor the industrial experts able to follow such information as they did with her other employers. There is no evidence in support of the Industrial expert's postulation that she would have reached her career ceiling by the age of 45. Her age and pre-accident chronic condition should actually aggravate contingencies.
- [19] The onus rest on the plaintiff to prove on a balance of probabilities that she has suffered loss of income and earning capacity and the extent of her loss. The only experts that filed reports are those appointed by the plaintiff. From the said reports the plaintiff suffered serious injuries and pecuniary loss. The plaintiff has discharged the onus that rests on her.

### **APPLICABLE LEGAL PRINCIPLES**

- [20] It is trite that in the assessment of these kinds of damages, which cannot be assessed with any amount of mathematical accuracy; the court has a wide discretion.<sup>1</sup> The principles applicable to calculation of loss of earnings and earning capacity were set out in **Southern Insurance Association Ltd v Bailey NO<sup>2</sup> Nicholas JA** stated as follows:

*“In a case where the court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary while the results of an actuarial computation may be more than “informed guess”, it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial judge’s “gut feeling” (to use the words of appellant’s counsel) as to what is fair and*

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<sup>1</sup> AA Mutual Insurance Association Ltd v Maqula 1978 (1) SA 805.

<sup>2</sup> 1994(1) SA 98 (A) at 114



*reasonable is nothing more than a blind guess (cf Goldie v City Council of Johannesburg 1948(2) SA 913 (W) at 920)”*

[21] In **Herman v Shapiro**<sup>3</sup> the court said the following:

*“Monetary damage having been suffered, it is necessary for the court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the court is very little more than an estimate, but even so, if it is certain that pecuniary damage has been suffered, the court is bound to award damages”*

### **CONTINGENCIES**

[22] It is trite that general contingencies cover a wide range of considerations which vary from case to case. Five percent and 15 percent for past and future loss of earnings, respectively, have become accepted as ‘normal’ contingencies. The usual considerations include taxation, early death, employment, promotion prospects, divorce etc. (Robert J Koch The Quantum Yearbook 2015) The actuarial took these factors into account.

General damages have already been settled between the parties in the amount of R500 000.

[23] I agree with the Counsel for the defendant that higher than normal contingencies to accommodate the plaintiff’s history of employment and pre-existing health should be applied. The plaintiff’s loss of earnings will be adjusted as follows:

#### **Pre- morbid**

|                    |               |              |
|--------------------|---------------|--------------|
| Uninjured earnings | R163 006 –40% | R97 803      |
| Injured earnings   | R64 476 – 0%  | R64 476      |
|                    |               | Loss R33 328 |

#### **Post- morbid**

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<sup>3</sup> 1926 TPD 367 at 379

|                    |                 |            |                 |
|--------------------|-----------------|------------|-----------------|
| Uninjured earnings | R4 157 770 –35% | R2 702 550 |                 |
| Injured earnings   | R974 363—40%    | R584 618   | loss R2 117 932 |

**Total loss of earnings** **R2 151 260**

### **Order**

[24] The defendant is ordered to pay the following amounts

|                  |                   |
|------------------|-------------------|
| Loss of earnings | R2 151 260        |
| General Damages  | R500 000          |
| <b>Total</b>     | <b>R2 651 260</b> |

1. The defendant shall be liable for interest on the abovementioned amounts, at the prescribed legal rate, 14 days after the date of this order until date of payment.
2. The defendant is ordered to pay costs on a party and party scale.

**S MSIBI**

ACTING JUDGE OF THE HIGH COURT  
MPMALANGA DIVISION MBOMBELA MAIN SEAT

### Appearances

For the plaintiff: Mr Mkhabela instructed by MH Mkhabela Attorneys, Hatfield Pretoria.

For the defendant: Advocate Sithole instructed by Office of the State Attorney, Mbombela