

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable / Not reportable
Case no. **2337/2018**

In the matter between:

LIZL SMITH obo PATRICIA SAKMAN

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Neutral Citation: *Lizl Smith obo Patricia Sakman v Road Accident Fund*
(2337/2018)

Coram: **Manye AJ**

Heard: **04, 05 and 10 June 2024**

Delivered: **17 October 2024**

JUDGMENT

Manje AJ

Introduction:

[1] The Plaintiff, Patricia Sakman claims damages from the Road Accident Fund (the defendant) arising out of bodily injuries sustained in a motor vehicle accident which occurred on 31 May 2015 between Xhariep Dam and Norvalspont, in the Free State Province, between a motor vehicle with registration number: DDM[...] (herein referred to as the first insured vehicle) at the time driven by one Mr T Mwnautlala and a vehicle with registration number: ND 7[...] (herein referred to as the second insured vehicle) at the time driven by one Mr T Makhonxa. At the time of the

aforesaid collision, the plaintiff was pregnant and was travelling as a passenger in the second insured vehicle.

[2] On 10 December 2018 before the Honourable Acting Judge President Musi, it was ordered that:

- i) Defendant is liable for the payment of 100% of the plaintiff's proven or agreed damages arising from the collision that occurred on 31 May 2015;
- ii) The defendant is liable for the payment of plaintiff's taxed or agreed party and party costs in respect of the merits on the High Court scale up to the date of that order.

[3] The only heads of damages for determination by this Court is the issue of general damages and the contingencies to be applied. By agreement between the parties, this determination should be based on the expert medico-legal reports inclusive of joint minutes. As a consequence, no oral evidence was led. The plaintiff and the defendant's legal representatives submitted heads of argument addressing same.

[4] The injuries sustained by the plaintiff as a result of the collision and the *sequelae* thereof are common cause between the parties. Treatment received by the plaintiff and her future treatment is also common cause between the parties. The parties agree that the plaintiff is entitled to be awarded general damages and further that she is unemployable in the open labour market. There is no agreement between the parties on the amount to be awarded for general damages.

[5] As I have already indicated above the only issue to be determined by this Court is the general damages and the contingencies. The plaintiff raises a contingency on the future loss of earnings of 18% and the defendant seeks to apply for a contingency of 20%.

[6] In *De Jongh v Du Pisanie*¹ the following fundamental principles in relation to

¹ *De Jongh v Du Pisanie* 2005 (5) SA 457 (SCA).

the award of damages are stated as follows:

‘The Court must take care to see that its award is fair to both sides – it must give just compensation to the Plaintiff, but it must not pour legalese from the horn of Plaintiff at the Defendant’s expense.’²

[7] The determination of appropriate award for general damages involves a consideration of the plaintiff’s pain and suffering, loss of amenities of life and applicable disabilities. The determination is also factual as it involves having regard to all the relevant facts and circumstances relevant to the plaintiff and the nature and extent of her injuries. The permanency, severity and the impact of the injuries sustained on the lifestyle of the plaintiff form part of the consideration. The discretion of the Court to award fair and adequate compensation is wide.

[8] The injuries that the plaintiff sustained and the *sequelae* thereof have been documented in the expert reports that have been admitted without oral evidence. The plaintiff sustained an array of injuries and a multiplicity of orthopaedic surgeries and amputation above the elbow of the left arm which limits her lifting and normal functioning on a day-to-day.

[9] The plaintiff’s legal representative submitted in the heads of argument that the claim for general damages in an amount of R2 300 000.00 will be adequate compensation for the plaintiff’s general damages. To this end the Court is referred to cases which, in their view, are comparable cases in support of the submission that the amount for general damages claimed will be adequate.

[10] In respect of loss of income, I must mention that at the commencement of the hearing, the Court was presented with an actuarial calculation dated 16 May 2024, and by agreement between the parties this actuarial report is considered correct in all respects, and on that basis, it defines the correct position of the plaintiff’s progress pre-accident and that post-accident she was unemployable.

[11] Counsel for the plaintiff submitted that the plaintiff is 29 years old and in terms

² Ibid para 60, citing *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284 (D) at 287E-F.

of the admitted calculations, she was likely to work up to the age of 65 pre-accident. She further argues that having regard to the aforesaid, the plaintiff had future employment prediction of 36 years and, applying the general principle, the contingency should be 18%. On the other hand, the defendant argued for the application of contingency of 20%.

Contingencies:

[12] The evidence of experts irrefutably establish that the Plaintiff's injuries have impaired her earning capacity and this has resulted in a loss. Undeniably there has been a loss of earning capacity, the value of which must be calculated in terms of what the plaintiff would have earned in money if she had not become incapacitated.

[13] The claim for loss under the *lex Aquilia* in our law is wholly compensatory and is, in a case In *Dippenaar v Shield*³ the court stated as follow:

‘in our law, under the Aquilia, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had is the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such a loss diminishes the estate.’⁴

[14] It is trite that the court is to make a reasonable allowance for ‘contingencies, the result of which it is impossible to assess’.⁵ The determination of percentage of contingency deduction is primarily based on the guidelines of what is often referred to as a ‘sliding scale’ is used under which is to allocate a 1/2% (half a percent) for a year to retirement age, i.e 25% for a child, 20% for a youth and 10% in the middle age.⁶

[15] It is true that ‘Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the

³ *Dippenaar v Shiel Insurance Co Ltd* 1979 (2) SA 904 (A).

⁴ *Ibid* at 917A-B.

⁵ *Smith v RAF* 2013 JDR 0902 (ECG) para 15.

⁶ *Road Accident Fund v Guedes* 2006 (5) 583 (A) at 588D.

loss.’⁷

[16] Taking into consideration the submissions by both legal representatives, I consider that a 20% contingency deduction to the plaintiff’s total loss of income is to be applied.

Order:

[17] In light of the above I make the following order incorporating the draft order with courts necessary amendment as follows:

1. That judgment is granted in favour of the plaintiff against the defendant in the following terms:

1.1 The defendant shall pay the capital amount of R1 700 000.00 (one million seven hundred thousand rand) as compensation for delictual damages to Lizl Smith N.O. (the plaintiff) in her representative capacity as curator *ad litem* to Patricia Sakman (the plaintiff);

1.2 The amount of R1 700 000.00 (one million seven hundred thousand rand) shall be paid directly to the attorneys for the plaintiff, Renier van Rensburg Incorporated, with the following bank account details:

Name of account: Renier van Rensburg Incorporated Trust account
Bank: Standard Bank – Melville
Branch Code: 006105
Account number: 4[...]

1.3 Payment is to be made on 17 April 2025 which is 180 (one hundred and eighty) days from date of judgment which is 17 October 2024.

1.4 Interest on the aforesaid amount *a tempore morae* from 17 April 2025 to date of payment.

⁷ *Southern Insurance Association v Bailey* 1984 1 SA 98.

1.5 That the attorneys for the Plaintiff, Renier van Rensburg Incorporated, are ordered:

1.5.1 to cause a Trust (the Trust) to be established in accordance with the Trust Property Control Act no. 57 of 1988;

1.5.2 to deposit all the proceeds minus the deductions as per paragraph 1.6 hereof in an interest-bearing account, for the benefit of the patient, as contemplated in the Legal Practice Act 28 of 2014, pending the establishment of the Trust;

1.5.3 to pay all monies held in the Trust by them for the benefit of the patient, immediately to the Trust upon creation of the Trust;

1.5.4 the Trust instrument contemplated above shall make provisions for the following:

1.5.4.1 that the patient is the sole beneficiary of the Trust;

1.5.4.2 that the first Trustee shall be Lee-Anne Edwards (in her capacity as *nominee* of the ABSA Trust Limited and is hereby authorized to act as trustee or failing the trustee, such an employee of ABSA Trust Limited as they may nominate;

1.5.4.3 that the trustee(s) are to provide security to the satisfaction of the Master;

1.5.4.4 that the ownership of the Trust property vest in the trustee(s) of the trust in their capacity as trustee(s);

1.5.4.5 procedures to resolve any potential dispute, subject to the review of any decision made in accordance therewith by this Honourable Court;

1.5.4.6 that the trustee(s) be authorized to recover the remuneration of, and costs incurred by the trustee(s), in

administering the undertaking in terms of s 17(4)(a) of Act 56 of 1996 in accordance with the Certificate of Undertaking to be provided by the defendant;

1.5.4.7 the trustee(s) shall be entitled to:

1.5.4.7.1 an acceptance fee of 0.75% of capital received plus VAT;

1.5.4.7.2 a management fee of 1% per annum plus VAT, calculated on the capital held under administration. In addition,

1.5.4.7.3 a termination fee of 2% plus VAT upon finalization of the Trust;

1.5.4.7.4 charge market-related fees in respect of specialised services which it may have performed on behalf of the Trust.

1.5.4.8 the trustee(s) may further employ the specialized services of accountants, tax consultants or any other professional service provider which would be needed to perform its duties towards the Trust and the beneficiary. The trustee(s) is/are authorized to pay market-related fees in respect of the services rendered by such accountants, tax consultants and service providers from the Trust capital or Trust income.

1.5.4.9 the suspension of the patient's contingent rights in the event of cession, attachment, or insolvency, prior to the distribution or payment thereof by the trustee(s) to the patient;

1.5.4.10 that the amendment of the Trust instrument be subject to the leave of this Honourable Court;

1.5.4.11 the termination of the Trust upon the death of the patient, alternatively upon the consensus of the trustee(s), in

which event the Trust assets shall pass to the estate of the patient;

1.5.4.12 that the Trust property and the administration thereof be subjected to annual audit.

1.6 The plaintiff's attorneys shall be entitled to make payment of fees and/or expenses incurred in respect of:

1.6.1 the fees and disbursements owing and due to Renier van Rensburg Incorporated;

1.6.2 an amount of R150 000.00 directly to the patient pending the creation of the Trust;

1.6.3 the curator *ad litem*;

1.6.4 accounts rendered by the expert witnesses; and

1.6.5 counsel and appearing attorneys employed on behalf of the plaintiff, from the aforesaid funds held by them for the benefit of the patient.

1.7 The defendant is to provide an undertaking to the plaintiff in his representative capacity in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for the costs of the future accommodation of the patient in a hospital or nursing home or treatment of or rendering of a service to her or supplying of goods to her arising out of the injuries sustained by her in the motor vehicle collision on 31 May 2015 which costs shall include:

1.7.1 the agreed or taxed costs to be incurred in the establishment of a Trust to *inter alia* protect, administer and/or manage the capital amount and the proceeds thereof referred to above;

1.7.2 the costs of the trustee(s) in administering the capital amount referred to above;

1.7.3 the costs of the furnishing of the annual security.

1.7.4 the costs of the appointment of a case worker (occupational therapist and/or social worker);

1.8 The defendant is to pay the plaintiff's taxed or agreed costs on a party and party High Court scale, including the following:

1.8.1 the costs of trial on 4, 5 and 10 June 2024;

1.8.2 the costs incurred by senior counsel;

1.8.3 the costs of the curator *ad litem*;

1.8.4 the costs of the plaintiff's attorneys, which include reasonable travelling costs, costs for preparing for pre-trial conferences, and costs for actual attendance to pre-trial conferences, the costs of and consequent to compiling all pre-trial agendas and pre-trial minutes, including counsel's charges, the costs of holding roundtable meetings between the legal representative for both plaintiff and the defendant, including counsel's charges in respect thereof, irrespective of the time elapsed between pre-trials, all costs for preparing for trial, and the plaintiff's attorneys hourly fees in attending to trial on the 4th, 5th and 10th of June 2024 which shall include all costs previously reserved (if any), the reasonable costs of consulting the plaintiff and plaintiff's parents;

1.8.5 the costs of:

1.8.5.1 obtaining expert medico-legal reports delivered in terms of Rule 36(9)(a) and (b) by experts listed below as well as the patient's travelling and lodging costs in attending the plaintiff's experts and, if applicable Defendant's experts;

1.8.5.2 reservation, qualifying, attendance and accommodation fees for the following of Plaintiff's experts,

namely:

- 1.8.5.2.1 Dr Herman Edeling, Neurosurgeon;
- 1.8.5.2.2 Ms A Gibson, Neuropsychologist;
- 1.8.5.2.3 Dr L A Fine, Psychiatrist; and
- 1.8.5.2.4 Dr E Jacobs, Industrial Psychologist.

1.8.6 the travelling and accommodation fees of Plaintiff's attorneys, counsel and Curator *ad Litem* to attend the trial on 4th, 5th and 10th June 2024;

1.8.7 the costs of experts attending to RAF.4 Serious Injury Report;

1.8.8 the costs of experts to attend to the commissioning of expert affidavits;

- 1.8.8.1 Dr J J Schutte, Medical Practitioner;
- 1.8.8.2 Dr D Irsigler, Medical Practitioner;
- 1.8.8.3 Dr van Aswegen, Neurosurgeon;
- 1.8.8.4 Dr Herman Edeling, Neurosurgeon;
- 1.8.8.5 Ms M A Gibson, Neuropsychologist;
- 1.8.8.6 Dr L A Fine, Psychiatrist;
- 1.8.8.7 Ms E Prinsloo, Educational Psychologist;
- 1.8.8.8 Mr B White, Plastic and Reconstructive Surgeon;
- 1.8.8.9 Dr S Burgin, Gynaecologist;
- 1.8.8.10 Dr L F Oelofse, Orthopaedic Surgeon;
- 1.8.8.11 Dr Hans Volkersz, Orthopaedic Surgeon;
- 1.8.8.12 Sunninghill Radiology, Radiologists;
- 1.8.8.13 Mr G Shnier, Orthotist Prosthetist;
- 1.8.8.14 Ms M Georgiou, Occupational Therapist.
- 1.8.8.15 Ms S Gouws, Occupational Therapist;
- 1.8.8.16 Dr E Jacobs, Industrial Psychologist; and
- 1.8.8.17 Alex Munro, Actuary.
- 1.8.8.18 Algorithm Consultants and Actuaries.

1.8.9 the reasonable travelling and accommodation costs of the patient and her mother, who is hereby declared as necessary

witnesses in respect of trial for 5 and 10 June 2024;

1.8.10 the costs of six (6) sets of trial bundles;

1.9 The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:

1.9.1 the plaintiff shall serve the notice of taxation on the defendant's attorneys of record;

1.9.2 the plaintiff shall allow the defendant fourteen (14) court days to make payment of the taxed costs from the date of settlement or taxation thereof;

1.9.3 should payment not be effected timeously, the plaintiff will be entitled to recover interest on the aforesaid amounts *a tempore morae* from date of allocator to date of final payment.

T.L. MANYE, AJ

AppearancesOn behalf of the Plaintiffs:

Advocate Aad Den Hartog

Cell number: 082 413 6901

E-mail: denhartogaad@gmail.com

Ms L Smith

Cell number: 079 695 2986

E-mail: lizlsmi@gmail.com

Instructed by:

Renier van Rensburg Incorporated Attorneys

Mr R van Rensburg

Telephone number: 001 646 6888

E-mail: renierl@renierslaw.co.za

On behalf of the Defendant:

Office of the State Attorney

Ms C Bornman

Cell number: 079 840 9150

E-mail: charleneb@raf.co.za