

REPUBLIC OF SOUTH AFRICA



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

Case Number: 067224/23

(1)	REPORTABLE: <i>No</i>
(2)	OF INTEREST TO OTHER JUDGES: <i>No</i>
(3)	REVISED:
<i>15/11/2024</i>	
DATE	SIGNATURE

In the matter between:

NIKIWE EMILY MBUCUANE

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

Delivered. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 10h00 on 15 November 2024.

JUDGMENT

Maluleka AJ

1. This division entertain litigation against the Road Accident Fund in any given week of term for default judgment roles handle of various judges. In most, if not all of them the Road Accident Fund failed and or neglected to comply with the court rule.
2. In this case the Road Accident Fund was served with a notice of Bar on the 22nd of August 2023 after filing their notice of intention to Defend in this matter on 23 July 2023.
3. The matter was proceeding by the way of default application in terms of Rule 32.
4. The issue of merits was settled between the parties by way of offer and acceptance on the 25th of January 2024.
5. The default court was only requested to deal with the issues of past and future loss of earnings.
6. The following history of the matter is relevant;

- 8th of October 2021: the accident in question occurred. The plaintiff was a passenger and sustained injuries.
 - 8th October 2021: plaintiff is admitted in hospital at 8:00 in the morning.
 - 8th October 2021: plaintiff is discharged from the hospital at 11:35 walking on her own.
 - 8th October 2021: hospital records states painful left and right leg. No other abnormalities found. Painful knees only when fully mobile, she says it is very painful. Plaintiff is referred to lumbar spine, left and right tibia and fibula x ray.¹
7. The Plaintiff was off work for three days following the accident. Post accident she resumed her employment. She was employed as administration clerk and was responsible for administrative duties such as sending emails, taking cutting sheets to the factory and doing filling. She was office bound most of the day. She need to go to the factory at least once a day, which required walking various distances and climbing multiple flights of stairs. The cutting sheets are printed on paper which she carried from the office to the factory.
8. The Plaintiff complain of left knee and lower back pain when executing her work duties. She alleges that she experiences pain when walking from her office to the factory and when using flights of stairs. The Plaintiff counsel could not give the court the distance between her office and the factory.

¹ Hospital Records, caseline 06-50, pages 06-92

9. The Plaintiff obtained several experts reports while the Road Accident Fund had none. An application by the Plaintiff in terms of Rule 38[2] of the uniform Rules of court for the evidence of the plaintiff's expert witnesses to be accepted by way of affidavits was granted.
10. The expert medico legal reports of interests in this matter is the report of the Orthopaedic Surgeon and Industrial Psychologists.
11. The Plaintiff was assessed by the orthopaedic surgeon on the 27th of September 2022. The Plaintiff was 51 years old at the time of accident and now she is 54 years old.
12. The orthopaedic surgeon's outcome diagnosis and prognosis are as follows:
 - 12.1. Lumbar spine degenerative Spondylosis prognosis for this condition is poor. Even if the patient gets appropriate intervention, she will have residual symptoms and progression of the disease. She will need adjacent level lumbar spine fusion and discectomy to relieve her symptoms.
 - 12.2. Left knee joint osteoarthritis and the injury has poor prognosis. She will continue to have residual symptoms even after the proposed treatment.

12.3 The loss of income and future employability:

12.3.1 At present, she is employed as an administrative clerk. With the recommended treatment, her symptoms are expected to improve, however she will continue to have residual symptoms which can impact her work performance. Based on her presentation and prognosis, early retirement of 55 years is expected.

13. The Plaintiff was further examined by the Industrial Psychologist on the 27th of September 2022 and follow up on the 23rd of August 2023.

13.1. Her job responsibilities are as follows:

- She was responsible for administrative duties such as sending emails taking cutting sheets to the factory and doing filing
- She was office bound most of the day
- She needs to go to the factory at least once a day, which required walking various distances and climbing multiple flights of stairs. The cutting sheets are printed on paper which she carried from the office to the factory

13.2. Her job classification according to Ms Du Ploy, occupational therapist page 11 work is classified as light physical demand

14. The collateral information obtained from Ms I Lubbe senior administrator reported as follows;
 - a. Ms Mbucwane is still managing with her inherent job requirements.
 - b. She was unaware of any physical constraints that were having a negative influence on how work as most of her work is deskbound.
 - c. However, Ms Mbucwane often complains with climbing stairs but according to her this has not escalated to such an extent that she can she has requested to be moved to the ground floor.
15. The Plaintiff did not suffer any back injury as a result of the accident she only suffered left and right knee soft tissue injury and right knee is now noted to be normal.
16. The senior administrator is not aware of any constraints suffered by the Plaintiff as a result of her accident related injuries. Ms Lubbe is not aware of frequent sick leave taken by the plaintiff as a result of the accident related injuries
17. The Plaintiff's x-ray report dated the 6th of October 2022 concluded as follows;
 - 17.1. Lumbar sacral spine with pelvis X-ray conclusion
 - No previous lumbar fractures. The Bony pelvic is intact.

- Mild mid and lower lumbar degenerative Spondylosis changes noted and lower lumbar disc pathology cannot be ruled out at this stage. Subtle disc space narrowing.
- Also mild hip space narrowing signs which could indicate early degenerative or someone supposed to be correlated clinically. Femur head contours however are well preserved. No previous pelvis or hip fractures.

17.2. Both knees X-ray conclusion:

- Very early bone density loss
- Normal alignment of both knees
- No signs of previous fractures
- Underlying meniscus pathology cannot be ruled out.

18. The Plaintiff is claiming R100 000.00 for past loss of earnings and R1 500 000.00 for future loss of earnings.
19. She returned to her employment after three day recovery period and she was fully remunerated. She remains employed as an Administration clerk. She suffered no past loss of earnings due to the accident.

The law

20. In the matter of Mafiri v Road Accident Fund², the court said, the onus is on the Plaintiff to prove her case on balance of probabilities. She is required to adduce

² Mafiri v Road Accident Fund (62529) [2024] ZAGPPHC 131 (12 February 2024) unreported

sufficient evidence of her injuries and the sequel as a result of the injuries to enable the court to assess and quantify her claim for past and future loss of income or earning capacity.

21. In *Southern Insurance Association v Bailey* NO³ it was stated:

“... Any inquiry 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, or 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 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 guess-work, 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.

...

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 little more than an estimate; But Even so, if

³ 1984 (1) SA 98 (A) at 113F – 114E.

it is certain that pecuniary damage has been suffered, the court is bound to award damages.

...

It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damage suffered, still, if it is the best evidence available, the court must use it and arrive at a conclusion based on it."

22. Regarding the evaluation of credibility and reliability of expert evidence, Wallis JA (Fourie and Koen AJJA concurring) in *Pricewaterhouse Coopers Incorporated and Others v National Potatoe Co-operative Ltd and Another* [2015] 2 All SA 403 (SCA)9 referred to *Wightman v Widdington (Succession de)* 2013 QCCA 1187 (CanLII) where it was remarked thus: "

Legal principles and tools to assess credibility and reliability:

[326] "Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist"

[327] "As long as there is some admissible evidence on which the expert's testimony is based it cannot be ignored; but it follows that the more an expert relies on facts not in evidence, the weight given to his opinion will diminish".

[328] An opinion based on facts not in evidence has no value for the Court.

[329] With respect to its probative value, the testimony of an expert is considered in the same manner as the testimony of an ordinary witness. The Court is not bound by the expert witness's opinion.

[330] An expert witness's objectivity and the credibility of his opinions may be called into question, namely, where he or she: 9 At page 441 para [98]

- accepts to perform his or her mandate in a restricted manner;

presents a product influenced as to form or content by the exigencies of litigation;

- shows a lack of independence or a bias;

- has an interest in the outcome of the litigation, either because of a relationship with the party that retained his or her services or otherwise;

- advocates the position of the party that retained his or her services; or

- selectively examines only the evidence that supports his or her conclusions or accepts to examine only the evidence provided by the party that retained his or her services."

23. The plaintiff counsel, submitted that the Plaintiff has proven its case and should be awarded her loss of earnings on the basis that she will retire at the age of 55 years earlier than the normal retirement age.

24. There is no doubt that the Plaintiff suffered soft tissue injuries of her right and left knees. However, one cannot slavishly accept that this injury is of serious nature and will ultimately result in the Plaintiff having to take retirement at 55 years.

25. Citing *Gouws*,⁴ the high court reasoned that the Tribunal's findings on the issue of causation constituted an expression of opinion, which it deemed permissible. In *Gouws*, this Court held that the determination of causation lies solely within the authority of the court and not the Tribunal.
26. In this matter, I followed the second approach as stated in the *Southern Insurance Association v Bailey*.
27. The Plaintiff did not suffer lower back injury from this accident as she was only treated for left and right knee soft tissue injury. The Orthopaedic surgeon state that the right knee is normal and she is currently only symptomatic in her left knee.
28. The Plaintiff Industrial Psychologist concluded that, likely post-morbid earnings level be as follows.
- a. It is suggested for quantification purposes that her pre and post accident earnings scenarios be regarded as similar.⁵ The court agrees with this quantification method after considering the matter.
29. The court rejects the conclusion of the Plaintiff Orthopaedic surgeon and Industrial Psychologist that the Plaintiff will retire at the age of 55 as a result the injuries suffered from the accident. This conclusion is not supported by evidence as the only injury that is affecting her is the left knee soft tissue injury. The lower back injury cannot be attribute to the accident as it is only mention and referred to when the Plaintiff was examined by the Orthopaedic Surgeon which is 11

⁴ *Road Accident Appeal Tribunal and Others v Gouws and Another* [2017] ZASCA 188; [2018] 1 All SA 701 (SCA); 2018 (3) SA 413 (SCA) para 36.

⁵ Industrial Psychologist, caseline 08-5, page 08-124

months after the accident. There is no evidence of follow up treatment for the left, right knee injury and lower back.

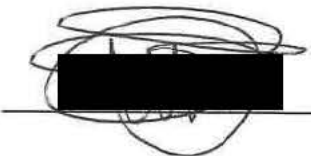
30. The Plaintiff did not suffer a past loss of income. It is ordered that for quantification purpose that her pre morbid and post morbid earnings be regarded as similar.
31. The Plaintiff loss of earnings capacity is calculated as follows:

	Future income
Income if accident did not occur	1 621 258
Less contingency deduction 15%	243 188
	1 378 069
Income given accident did occur	1 621 258
Less contingency deduction 20%	324 251
	1 297 006
Difference	81 063

32. In the circumstances, the Court find that the appropriate amount to be awarded to the plaintiff in respect of the future loss of earnings capacity should be in the sum of R 81 063.00 (Eighty-One Thousand and Sixty-Three Rands only).

The following order shall ensue:

1. Defendant is held liable for 100% of the plaintiff's claim.
2. The defendant shall pay plaintiff R 81 063.00 (Eighty-One Thousand and Sixty-Three Rands only) for loss of working capacity.
3. The defendant shall provide an undertaking in favour of the plaintiff for plaintiff's future medical and hospital expenses in terms of section 17(4) of the Road Accident Fund Act 1996.
4. The claims for general damages is separated in terms of Rule 33(4) of the Uniform Rules of Court and postponed *sine die*.
5. The defendant is liable for plaintiff's costs on Scale A including the fees of the experts who filed reports in this matter and Plaintiff counsel.

A handwritten signature in black ink, appearing to be 'MALULEKA', is written over a solid black rectangular redaction box. The signature is somewhat stylized and loops around the box.

Maluleka AJ

Acting Judge of the High Court

Gauteng Division, Pretoria

Date of hearing:

30 September 2024

Date of judgment:

15 November 2024

Appearances:

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no appearance