

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

Reportable: NO
Of interest to other Judges: NO
Circulate to Magistrates: NO
Case no: **A99/2023**

In the matter between:

T[...] S[...] S[...]

Appellant

And

THE ROAD ACCIDENT FUND

Respondent

Coram: JP DAFFUE, C REINDERS et I VAN RHYN JJ
Heard: 02 DECEMBER 2024
Delivered: 06 DECEMBER 2024

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 12H00 on 06 DECEMBER 2024.

Summary: This is an appeal to the full court with leave to appeal having been granted by the Supreme Court of Appeal. A single judge of this division dismissed a claimant's claim for loss of past and future income notwithstanding an agreement between the parties that the contingencies to be applied to the calculated loss was the only outstanding issue to be adjudicated. The full court held that a 20% contingency on past loss of income and 40% on future loss of income should be applied and awarded damages in the sum of R623 728.00.

ORDER

1. The appeal is upheld with costs, inclusive of the costs of the application for leave to appeal to the court *a quo* as well as the costs of the application for leave to appeal to the Supreme Court of Appeal, counsel's fees in respect of the appeal to be calculated on scale C.

2. The judgment and order of the court *a quo* dated 21 September 2022 is set aside and replaced with the following order:

‘1. The defendant shall pay to the plaintiff the amount of **R 623 728.00 (Six hundred and twenty-three thousand seven hundred and twenty-eight rand) (the capital)** in respect of past and future loss of income resulting from a motor vehicle collision that occurred on **14 December 2014**, the 20% merits apportionment having been deducted already.

2. The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for 80% of the costs of the future accommodation of the plaintiff in a hospital or nursing home or the treatment of or the rendering of a service or the supplying of goods to the plaintiff arising out of injuries sustained by her in the motor vehicle collision mentioned above, in terms of which undertaking the defendant will be obliged to compensate her in respect of the said costs after the costs have been incurred and on proof thereof.

3. The defendant shall pay the plaintiff's taxed or agreed party and party costs on the High Court scale until date of this order, including but not limited to the costs set out hereunder:

3.1 the reasonable qualifying and reservation fees and expenses (if any) of the following experts:

- 3.1.1 Dr RS Kahn (general practitioner);
- 3.1.2 Dr JJ Schutte (general practitioner);
- 3.1.3 Drs van Dyk and Partners (radiologists);
- 3.1.4 Dr LF Oelofse (orthopedic surgeon);
- 3.1.5 A Stroebe of Rita van Biljon Occupational Therapists;
- 3.1.6 Dr EJ Jacobs (industrial psychologist);
- 3.1.7 Munro Forensic Actuaries; and

3.2 the costs of counsel on scale C of the Uniform Rules of Court.

4. Payment of the above shall be made as follows:

4.1 the capital shall be paid without set-off or deduction within 180 (hundred and eighty) calendar days from date of the granting of this order directly into the trust

account of the plaintiff's attorneys of record by means of electronic transfer, the details of which are the following:

Honey Attorneys	-	Trust Account
Bank	-	Nedbank, Maitland Street, Bfn
Branch Code	-	11023400
Account No.	-	1[...]
Reference	-	HL Buchner/J03677;

4.2 the taxed or agreed costs shall be paid within 180 (hundred and eighty) days of taxation, and shall likewise be effected into the trust account of the plaintiff's attorney.

5. Interest shall accrue at 7% per annum (the statutory rate), compounded, in respect of:

5.1 the capital, calculated from 14 (fourteen) days from date of this order; and

5.2 the taxed or agreed costs, calculated from 14 (fourteen) days from date of taxation, alternatively date of settlement of such costs.

JUDGMENT

JP DAFFUE J (C REINDERS and I VAN RHYN JJ concurring)

Introduction

[1] On 21 September 2022 a single judge of this division dismissed the appellant's claim for loss of earnings pursuant to injuries sustained in a motor vehicle collision. This is an appeal to the full court against the order and judgment of the learned judge, leave having been granted by the Supreme Court of Appeal.

[2] The central issue in the appeal is the court *a quo*'s failure to adjudicate the dispute based on the agreement entered into between the parties and the consequent dismissal of the claim with costs on the basis that the appellant had failed to prove that the injuries sustained by her had a cognisable effect on her pre- and post-morbid earnings.

The parties

[3] The appellant in the appeal was the plaintiff in the court *a quo*. She was 16 years old on 14 December 2014 when she sustained injuries as a pedestrian, after being struck by a motor vehicle driven by the insured driver. She was 24 years old at the time of the hearing. The appellant was represented by Adv PJJ Zietsman SC before us, instructed by Honey Attorneys.

[4] The respondent in this appeal is the Road Accident Fund. It defended the appellant's claim in the court *a quo*, having been represented by an attorney during the hearing. It decided not to oppose the appeal. Consequently, we received no heads of argument from the respondent.

The litigation history

[5] The following is a brief summary of the litigation history:

- a. summons was issued on 3 July 2017 and the respondent filed its plea on 10 October 2017;
- b. at some stage the particulars of claim were amended resulting in the appellant claiming damages in the total amount of R1 597 870.00 in respect of future medical expenses, general damages and past and future loss of income, the latter head of damages being in the amount of R1 062 150.00;
- c. according to the orthopaedic report of Dr LF Oelofse, the appellant was diagnosed with left tibia and fibula fractures and that an open reduction and internal fixation (ORIF) had been performed on her left lower leg, while it appears from his supplementary report that he was of the view that there was a mal-union of the appellants left lower leg which had a profound impact on her amenities of life, productivity and working ability;
- d. on 4 September 2018 the respondent conceded the merits 80% in favour of the appellant and undertook to furnish her with the required statutory undertaking for future medical expenses in terms of s 17(4)(a) of the Road Accident Fund 56 of 1996 (the RAF Act);

- e. the parties conducted a pre-trial conference where after the minutes dated 3 February 2022 were filed with the court;
- f. prior to the quantum trial the appellant abandoned her claim for general damages, the effect being that the only issue to be adjudicated by the court *a quo* was the claim for past and future loss of earnings;
- g. on the first day of the quantum trial, to wit 26 July 2022, the parties agreed that the plaintiff's expert reports shall be admitted and accepted as evidence without the necessity to present *viva voce* evidence; therefore the only issue to be addressed to the court *a quo* was the contingencies to be applied to the actuarial calculation of the appellant's actuary, which agreement was recorded in paragraph 5 of the court *a quo*'s judgment;
- h. judgment was handed down on 21 September 2022 where after the appellant's application for leave to appeal was dismissed on 13 March 2023, but on 31 May 2023 the Supreme Court of Appeal granted leave to appeal to the full court.

The failure to adjudicate the dispute based on the parties' agreement

[6] The court *a quo* found that there was an onus on the appellant to tender sufficient evidence in order for it to quantify the appellant's loss of past and future earnings. It found that the appellant did not present evidence that she could not work as a result of the injuries sustained. In conclusion, the court *a quo* stated that even if it was to apply higher contingencies to reduce the quantum of the claim, that would not 'cure the inadequacy of the plaintiff's evidence'. Consequently, due to the appellant's alleged failure to proffer sufficient evidence to prove her alleged loss of income, the claim for past and future loss of income was dismissed with costs. Notwithstanding the court *a quo*'s finding, it ordered the respondent to provide the usual undertaking in terms of s 17(4)(a) of the Act for 80% of the costs to be incurred as a result of the injuries sustained on 14 December 2014.

[7] Although it is apparent from a reading of the expert reports that there might have been much leeway to cross-examine the appellant, her mother, as well as the experts on some factual allegations, the legal principle has now become trite. In

*Road Accident Fund v Taylor and related matters*¹ Van der Merwe JA dealt with a similar situation in a unanimous judgment of the Supreme Court of Appeal and concluded as follows:

[49] The majority had no regard to these common law principles. In the absence of development of the common law, the court was bound to apply them. Unless it determined that they were clearly wrong, the court was bound by the decisions of this court that I have referred to. See *Steve Tshwete Local Municipality v Fedbond Participation Mortgage Bond Managers (Pty) Ltd and Another* [2013] ZASCA 15; 2013 (3) SA 611 SCA para 14. The majority also did not consider any of these decisions. Although it referred to *Eke v Parsons*, it failed to have regard to its impact on the issues under consideration. On these issues, I regret to say, the judgment of the majority in *Maswanganyi* is clearly wrong and should not be followed.

[50].....

[51] To sum up, when the parties to litigation confirm that they have reached a compromise, a court has no power or jurisdiction to embark upon an enquiry as to whether the compromise was justified on the merits of the matter or was validly concluded. When a court is asked to make a settlement agreement an order of court, it has the power to do so. The exercise of this power essentially requires a determination of whether it would be appropriate to incorporate the terms of the compromise into an order of court.'

[8] Less than a year later the Constitutional Court stated the following in *Mafisa v Road Accident Fund*² pertaining to unilateral alterations made by a High Court judge to a settlement agreement entered into between the parties:

[53] In the present matter, the Court was presented with a settlement to be made an order of court. If the Court were disinclined to do so, the parties should have been informed of its concerns and given the opportunity to consider their position, whether they wished to address the issues raised or not. However, the caveat here is that there would have had to be admissible evidence before the Court, which was not the case here. The High Court, in reaching its conclusion, had regard to the information obtained from the expert reports in the court file which were never placed as

¹ 2023 (5) SA 147 (SCA)

² 2024 (4) SA 426 (CC) paras 53-55; see also the recent full bench judgment of this division: *Marais v Road Accident Fund* (128/2018) [2019] ZAFSHC 40 (25 April 2019).

evidence before it. It found the industrial psychologist's report unpersuasive and held that it failed to prove that the applicant sustained damages with respect to past and future loss of earnings. The High Court went on to refuse the agreed award for loss of earnings. In doing so, it ignored the warnings of the Supreme Court of Appeal set out in *Motswai*. In the present matter, there was no live dispute between the parties. They had settled their litigious dispute, thereby terminating the court's authority or jurisdiction to pronounce on it. As the validity and terms of the compromise were not in dispute, it was not open to the court to pronounce on it either.

Conclusion

[54] In light of the above, the High Court exceeded its jurisdiction when it unilaterally amended the settlement agreement. Its unilateral alterations to the agreement were improper. As there was no hearing since the parties had settled the dispute between them, it was improper and irregular for the High Court to have considered the actuarial and industrial psychologist's reports to reject the agreed settlement for loss of earnings, as those reports were not properly before the Court. It also failed to raise its concerns with the applicant and the RAF to enable them to decide whether to provide additional material in an effort to persuade the Judge or elect not to do so. Had it done so, the parties could have elected to address the Court's concerns or declined to do so. In the latter case, the Court would have been entitled to refuse to make the settlement an order of court on any of the grounds provided for in *Eke* if this were justified. In the result, the appeal must be upheld and the order of the High Court set aside.

Remedy

[55] As there is no evidence of impropriety in relation to the settlement agreement, there is no basis for a remittal. Furthermore, there is nothing that caused the Judge to refuse to make the settlement agreement an order of court, apart from the actuarial and industrial psychologist reports (which are not evidence). The order of the High Court must be replaced with one making the original settlement agreement agreed to by the parties an order of court...'

[9] Notwithstanding my earlier remark pertaining to some allegations in the expert reports, the terms of the settlement agreement are clear and there is no evidence of impropriety pertaining thereto. Consequently, there is no basis upon which we can either refuse to adhere to the settlement agreement, or remit the matter to the court

a quo. This court should adjudicate the claim in order to obtain finality. All the agreed facts are before us.

Calculation of the appellant's loss of income with reference to contingencies

[10] In the court *a quo* Adv HJ van der Merwe, at the time appearing for the appellant, submitted that the standard contingencies of 5% in respect of past uninjured earnings and 15% in respect of future uninjured income as applied by the actuary, on instructions from the attorney, should be accepted as correct. Having taken into account the agreed 80/20% merits apportionment in favour of the appellant, he submitted that an amount of R849 720.00 should be awarded, being 80% of the actuary's calculation of total loss of earnings in the amount of R1 062 150.00 after deduction of the aforesaid contingencies.

[11] When I explained my difficulty with the low contingency percentages, Mr Zietsman obtained an instruction and submitted that contingencies of 5% in respect of past loss of earnings and 23½% in respect of future loss of earnings should be applied. Having considered the short period between the date of the injury and the calculation of the actuary, he tried to convince us that a 5% deduction in respect of past loss of earnings was fair. Mr Zietsman's submission pertaining to the contingency percentage on future loss of earnings is in line with the sliding scale principle of 0.5% per *annum* which is a useful tool to use. Bearing in mind the age of the appellant, the suggested percentage would usually be acceptable. However, every case must be adjudicated on its particular facts. The circumstances of claimants differ.

[12] The sliding scale principle as a tool in considering contingencies was accepted as a guideline in *Road Accident Fund v Guedes (Guedes)*.³ This is obviously not a foolproof method to be applied blindly in all cases for the reason mentioned in the previous paragraph. It is apparent that notwithstanding the Supreme Court of Appeal's reference to the sliding scale, it did not apply that formula in *Guedes*.⁴ In accordance with the sliding scale, 25% is usually applied to a child, 20% for a youth and 10% in middle age.

³ 2006 (5) SA 583 (SCA) (20 March 2006).

⁴ *Ibid* paras 17-19.

[13] It is settled law that the trial court has a wide discretion to award what it considers to be fair and adequate compensation to an injured party. *In casu*, this court is requested to make an award and the same principle shall apply. Obviously, damages cannot be assessed with any amount of mathematical accuracy.

[14] The parties' heads of argument in the court *a quo* form part of the appeal record. The respondent's attorney submitted that contingencies of 10% on past loss and 30% on future loss, pre-morbid, should be applied. She went further and submitted that 50% be deducted in respect of post-morbid income, such income being the same as calculated in respect of pre-morbid income. This was incorrect insofar as the actuary accepted nil income post-morbid based on the expert reports.

[15] In *Bonnesse and Another v Road Accident Fund and Others*⁵ Pickering J accepted a 25% contingency factor in respect of a 13 year old female child. In *AA Mutual Association Ltd v Maqula*⁶ the former Appeal Court considered a 50% contingency to be fair and just, stating that the court *a quo*'s contingency allowances were 'far too generous.'

[16] The following factors are relevant in order to determine what would be fair and reasonable in the circumstances of this case:

- a. the appellant was 16 years old when she was injured in December 2014 after having been unsuccessful to pass grade 6;
- b. generally, learners in grade 6 are 12 years old and it would have been expected of the appellant to be in grade 10 at the age of 16;
- c. clearly, the appellant's intellectual capacities, pre-morbid, were far below par which would on its own cause tremendous difficulty to earn an income even if not injured, bearing in mind the high unemployment rate in our country, especially in respect of uneducated people;

⁵ (1505/2009) [2014] ZAECPHC 7 (20 February 2014).

⁶ 1978 (1) SA 805 (A) at 813D.

- d. appellant would pre-morbid have to compete in an unstable labour market with other unskilled labourers with much more superior school records (grades 10, 11 or 12);
- e. the appellant's mother confirmed to Ms Stroebe, the occupational therapist, that the appellant's alleged forgetfulness remained the same after the accident, confirming the medical records that she did not suffer from a head injury;
- f. the appellant's poor academic record must be ascribed to her intellectual capabilities or lack thereof;
- g. the appellant worked for a mere four weeks as an assistant in a butchery until injured and consequently, no proper employment record exists;
- h. unlike most other children, the appellant's future was bleak, even before she sustained her injuries.

[17] Upon realising that he had made an error in calculation during oral argument in suggesting the amount to be awarded to the appellant, Mr Zietsman informed us after the hearing accordingly. He also calculated contingencies based on 20% in respect of past loss and 40% on future loss of income insofar as we might not have been persuaded as to the percentages of contingencies to be applied as suggested during oral argument. These figures are more in line with the percentages I had in mind upon studying the appeal record as expressed during oral argument. Having mentioned some 'vicissitudes of life' relating to the appellant earlier herein, I am satisfied that contingencies based on 20% in respect of past loss and 40% on future loss of income shall be applied. This adds up to a total loss of income in the amount of R623 728.00.

Order

[18] The following order is made:

- 1. The appeal is upheld with costs, inclusive of the costs of the application for leave to appeal to the court *a quo* as well as the costs of the application for

leave to appeal to the Supreme Court of Appeal, counsel's fees in respect of the appeal to be calculated on scale C.

2. The judgment and order of the court *a quo* dated 21 September 2022 is set aside and replaced with the following order:

‘1. The defendant shall pay to the plaintiff the amount of **R 623 728.00 (Six hundred and twenty-three thousand seven hundred and twenty-eight rand) (the capital)** in respect of past and future loss of income resulting from a motor vehicle collision that occurred on **14 December 2014**, the 20% merits apportionment having been deducted already.

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3. The defendant shall pay the plaintiff's taxed or agreed party and party costs on the High Court scale until date of this order, including but not limited to the costs set out hereunder:

3.1 the reasonable qualifying and reservation fees and expenses (if any) of the following experts:

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- 3.1.3 Drs van Dyk and Partners (radiologists);
- 3.1.4 Dr LF Oelofse (orthopedic surgeon);
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- 3.1.6 Dr EJ Jacobs (industrial psychologist);
- 3.1.7 Munro Forensic Actuaries; and

3.2 the costs of counsel on scale C of the Uniform Rules of Court.

4. Payment of the above shall be made as follows:

4.1 the capital shall be paid without set-off or deduction within 180 (hundred and eighty) calendar days from date of the granting of this order directly into the trust account of the plaintiff's attorneys of record by means of electronic transfer, the details of which are the following:

Honey Attorneys	-	Trust Account
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4.2 the taxed or agreed costs shall be paid within 180 (hundred and eighty) days of taxation, and shall likewise be effected into the trust account of the plaintiff's attorney.

5. Interest shall accrue at 7% per annum (the statutory rate), compounded, in respect of:

5.1 the capital, calculated from 14 (fourteen) days from date of this order; and

5.2 the taxed or agreed costs, calculated from 14 (fourteen) days from date of taxation, alternatively date of settlement of such costs.

JP DAFFUE J

I concur

C REINDERS J

I concur

I VAN RHYN J

Appearances

For appellant:	Adv PJJ Zietsman SC
Instructed by:	Honey Attorneys Bloemfontein

For respondent:	No appearance.
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