



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

Delete whichever is not applicable

(1) Reportable: No.

(2) Of interest to other judges: No

(3) Revised

2025/02/03

Date



CASE NO:638 /2018

R.M MOALUSI

PLAINTIFF

AND

THE ROAD ACCIDENT FUND

DEFENDANT

This judgment has been handed down remotely and shall be circulated to the parties by way of email. Its date and time of hand down shall be deemed to be 03/02/2025

JUDGEMENT

INTRODUCTION

1. This is a claim for personal injuries against the Road Accident Fund arising out of the motor vehicle accident that occurred on the 13th of January 2017.
2. Both merits and quantum are matters for determination by this court, even though the merits have been agreed upon by the parties and only require a court order.

3. The plaintiff prays for an order in respect of loss of earnings, and the postponement of Future medical expenses and General Damages .

4. Rule 38(2)¹ application was presented to the court by counsel. I granted such order admitting the Plaintiff's expert reports into evidence to allow the matter to proceed (with the proviso that as is usually applicable and should the need arise, *viva voce* evidence can be called for)

FACTUAL BACKGROUND

MERITS

5. From merit documentation at 015, plaintiff's identity document accords with the affidavit confirming her date of birth as 13 March 1983, and further that she was a passenger in one of the insured vehicles.

6. The OAR (accident report), which the parties admitted as evidence, confirms that a collision occurred on Friday, 13 January 2017, at 06:45.

7. It is worth noting that the parties in this process engaged in settlement negotiations and successfully reached an agreement, which is submitted as per the heads of argument that it be made an order of court.

8. This settlement is based on the letter of offer from RAF dated 31 July 2023, and the Notice of Acceptance of the offer dated August 1, 2023. The letter of offer was issued by claims officer Anita Lourens, who extended a tender that stated 100% merit assessment in favour of the claimant. This offer was accepted through the notice provided.

¹ the Civil Proceedings Evidence Act 25 of 1965 read with Uniform Rule 38(2).

QUANTUM.

9. In support of his claim and for compliance, the plaintiff's attorneys filed the RAF1 form which was completed by Dr JJ Shutte who extracted information from the hospital notes. According to the evidence presented, he sustained a fracture on the right ankle and soft tissue injuries, abrasion. The nature of emergency treatment was emergency transport and hospital care. She was taken to Dr G Mukhari hospital.
10. Following the hospital records, she was treated on 13 January 2017 and was discharged the same day but booked off duty until 30/01/2017 as she needed to elevate her leg. She attended the hospital again for orthopedic problem as an outpatient on 26/01/2017 and a below-the-knee plaster of Paris was applied to her right leg for six weeks and replaced for another six weeks. She was referred to the Podiatry department and also attended physiotherapy
11. In her amended particulars of claim, the plaintiff avers that as a result of the injuries she suffered a past and future loss of earning which she is hereby claiming in the sum of R1708.00 and R 2 197 516.00 respectively.
12. Dr. HB Enslin's Orthopaedic Addendum report indicates that the plaintiff sustained an injury to her right ankle, including damage to the peroneal tendons, plantar fascia, and a rupture of the anterior talofibular ligament. Despite using a moon boot for six weeks and crutches for nine months, her symptoms persist, with severe pain and swelling worsening since September 2017. She has PTSD and anxiety.
13. She experiences difficulty running, jumping, climbing stairs, and mild pain in her left ankle from compensating. Clinical examination reveals tenderness in the right ankle, although radiological exams have been normal, except for a subtle stress reaction noted in 2018. MRI results show permanent damage to the plantar fascia and talofibular. The plaintiff struggles with work and commuting, requiring prolonged conservative treatment. She will need to remain sedentary for the rest of her life.

14. Occupational Therapy Rita Van Biljoen assessment findings indicate the plaintiff is suited for sedentary to occasional light work. While she can perform her role as a pharmacy assistant, should she seek other positions in a pharmacy, frequent walking demands may pose challenges due to her right ankle injury, which restricts walking to occasional performance (6-33% of a normal workday). This may exacerbate her pain and musculoskeletal limitations. Therefore, intermittent rest breaks should be allowed, although they may negatively impact her work speed and productivity.

15. Additionally, Dr. Ballyram's report indicates a diagnosis of major depressive disorder, which may affect her ability to handle stress and concentrate, potentially making her vocationally vulnerable.

16. The Industrial psychologist Ben Moodley's report notes that the plaintiff was absent from work for about a week following her accident but received full pay and no loss of benefits during her recovery.

17. She has returned to work and resumed normal duties, though she experiences pain and stiffness in her right ankle from prolonged sitting, requiring her to elevate her leg for circulation. She indicated that **she lost out on overtime**, however, according to the employer certificate, **she did not lose out on any benefit while recuperating**. He reported further that he was in possession of various payslips and according to the payslips, **she never worked any overtime at that point in time**.

18. Her work hours have remained unchanged, and her salary increased from **R7,885.24 to R8,454.44 by March 2018**, with overtime **now** included—something she did not work prior to the accident according to earlier payslips.

19. Moodley concludes that the plaintiff can continue working in an administrative role until retirement, although she may face pain and discomfort. He recommends compensation for any post-accident issues affecting her daily functioning.

20. According to the actuarial report of John Sauer on 24/05/2023, the past loss of earnings is R1 694.00. the total loss of earnings is R1817 000. Earnings had the

accident not happened would be **R123 268** annually which is comprised of overtime and 13th cheque, this is the amount she was earning in 2018(after the accident).In 2017 she was earning R114 841annually (at the time of the accident).

21. The calculations are as follows:

	Pre morbid	Post morbid	Loss
Future Earnings	R 2 593 294	R 2 593 294	
Contingency 10% /80%	- R 259 239	- R 2 074 635	
	R2 333 965	R 518 659	
Total loss			R18 15306

21.1. **Had the accident not occurred,**

according to Ben Moody's report: R.M. Molusi's monthly salary as a pharmacy administrator was R8,454 (as of 2018/06/30).

Additional income: 13th check

Average overtime payment: R715 per month

Non-taxable company contributions: R398 per month

Annual income: R123,268 (in 2018/06/30 monetary terms) or R114,841 (in 2017/01/13 monetary terms).

Projected income with inflationary increases until retirement at age 65

21.2. **Earnings after the accident:**

According to reports by Ben Moody and Dr. Enslin:

- No income for 1 week (until 2017/01/19) due to full loss of sick leave
- Post-morbid earnings are projected to be the same as pre-morbid earnings
- However, a higher future contingency deduction is applied to account for:
- Increased employment vulnerability
- Reduced labor capacity
- Uncertainty

- Possible periods of unemployment
- Early retirement

Post-morbid earnings are projected to be the same as pre-morbid earnings

THE ISSUE

22. Whether this Court can make a settlement agreement between the parties an order of court?

23. Whether there is loss of earnings or earning capacity, if so, whether the amount claimed for this head of damage is fair and reasonable.

THE LEGAL PRINCIPLES AND ANALYSIS

MERITS

24. When requested to do so, the court has the authority² to make a settlement agreement a court order, as long as the order is not *contro bonos mores*. It was held in *Maswanganyi*³ case that for the court to make the settlement an official court order, it must have the jurisdiction—the power to adjudicate, determine, and dispose of a matter.

25. In exercising its discretion, the court must consider all relevant factors in light of the guidelines set out by the Constitutional Court in *Eke* order⁴. In this court decision it was held that when parties approach a court to make a settlement agreement an order of court, the court power must be exercised, in terms of a fair procedure and with regard to the following considerations, it must;

- relate directly or indirectly to the dispute between the parties;
- not be objectionable in that it must accord with the Constitution and the law and not be offensive to public policy;

² S173 of the Constitution of the Republic of South Africa

³ *Maswanganyi v RAF* 2019 (5) SA 407 (SCA)

⁴ *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC) paras 25-26

c. hold some practical and legitimate advantage [paras 25-26].

26. In the present case, the defendant's offer and the plaintiff's acceptance are clearly related to this case, as demonstrated by the full details, including the names of the plaintiff and the reference number, which are consistent as provided in the communications from both parties. Upon reviewing the letter of offer and acceptance, I noticed that the terms are legally objectionable and can be enforced by the plaintiff, and this brought some finality to the issue of liability.

27. In light of the above, I am satisfied that the order that I am required to make is competent and proper.

LOSS OF EARNING

28. In *Mvundle v RAF*⁵ Kubushi J stated that:

"It is trite that damages for loss of income can be granted where a person has in fact suffered or will suffer a true patrimonial loss in that his or her employment situation has manifestly changed. The plaintiff's performance can also influence his/her patrimony if there was a possibility that he/she could lose his/her current job and/or be limited in the number and quality of his/her choices should he/she decide to find other employment.

29. It is trite that the percentage of the contingency deduction depends upon a number of factors and ranges between 5% and 100%, depending upon the facts of the case⁶

30. In the leading case of *Southern Insurance Association Ltd v Bailey*⁷ the Court stated:

⁵ Unreported North Gauteng High Court case 63500/2009 (17 April 2012)

⁶ *AA Mutual Insurance v van Jaarsveld* 1974 (4) SA 729 (A)

⁷ **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.....

31. In **Southern Insurance Association Limited v Bailey N.O.**,⁸ it was said;

"Even where method of actuarial calculations is adopted the trial Judge still has a discretion to award what he considers right ...can make a discount for contingencies...nature of contingencies that can be taken into account...such contingencies not always have to be adverse"

ANALYSIS.

32. The Actuary's calculation is on the basis that she will suffer a true patrimonial loss because of employment vulnerability as explained in the Mvundle case.

33. In this regard, there is a significant difference in contingency deductions between the pre-morbid and post-morbid scenarios. The higher future contingency deduction is meant to account for potential risks and uncertainties, such as: Employment vulnerability, Reduced labour capacity, Uncertainty Possible periods of unemployment. It is trite that the percentage of the contingency deduction depends upon several factors however it ranges between 5% and 100%

34. As established in relevant legal precedents, the percentage of contingency

⁸ **1884 (1) SA 98** (A) 98E-F

deduction is informed by a multiple assessment of several key factors, including:

- The claimant's occupation and industry
- The severity of the injury and its impact on earning capacity
- The likelihood of future employment disruptions
- The presence of any pre-existing medical conditions

35. In accordance with established guidelines, the contingency deduction percentage can range from 5% to 100%, contingent upon the specific circumstances of the case. In this instance, the assessment of damages took into account the aforementioned factors.

36. Contrary to the assumptions underlying the calculations, the following factors emerged from the expert reports:

36.1. Unchanged work capacity: The Industrial Psychologist's report confirms that the plaintiff can continue working in an administrative role until retirement, despite potential pain and discomfort. Notably, the plaintiff's work hours remain unchanged, and she received a salary increase thirteen months post-accident.

36.2 The Occupational Therapist's and Orthopaedic Surgeon's reports corroborate that, while the plaintiff requires ongoing treatment, her condition has not impacted her ability to work and that she will remain sedentary.

36.3. Inconsistencies in the plaintiff's claims: The plaintiff alleges she did not receive her salary while absent from work, which is contradicted by the Industrial Psychologist's report. The report states that the plaintiff received her full salary while recuperating at home and only lost overtime, which she never worked in the past. This inconsistency raises concerns about the reliability of the plaintiff's claims and suggests potential exaggeration.

37. Furthermore, it is essential to consider that the plaintiff had a pre-existing condition resulting from a previous accident. The presence of a pre-existing condition can affect the plaintiff's baseline health and earning capacity, which in turn influences the

calculation of damages. Failure to consider the pre-existing condition may result in an overstatement of the damages, which would be unfair to the defendant.

38. The above aspects suggest that the plaintiff's earning capacity has not been significantly impacted by the accident, and therefore, a lower contingency deduction would be more appropriate. *"Even where method of actuarial calculations is adopted the trial Judge still has a discretion to award what he considers right"* The calculation is as follows:

- Pre-morbid and post-morbid future earnings are the same: R2,593,294
- Contingency deduction: 10% (pre-morbid) vs. 40% (post-morbid)
- Pre-morbid contingency: R259,329
- Post-morbid contingency: R1037 317.60
- Total loss: R777 988.60

CONCLUSION

39. I find no reason why a higher contingency should be applied in the present scenario. . In my view, a 40 % contingency deduction of pre-morbid is fair and caters for risks.

40. The Order

Consequently, I make the following order:

1. Merit is granted 100% in favour of the plaintiff
2. Loss of earnings: R777 988.60
3. General damages and Future medical claims are postponed sine dies
4. Defendant to pay the plaintiff's costs on party and party scale

A black rectangular box redacting a signature.

Malatsi-Teffo AJ

Judgement Delivered: 03/02/2025

Plaintiff's counsel: Adv Pieter Venter
pieterventer@lawcircle.co.za

Instructed by: VZLR Attorneys
Contact details: (012) 435 9460

Defendant's counsel: No Representation