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REPUBLIC OF SOUTH AFRICA



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

Case Number: 16311/2019

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED: YES/NO

DATE: 05 February 2025

SIGNATURE:

In the matter between:

Mashaba Lerato Pearl

Plaintiff

and

Road Accident Fund

Defendant

JUDGMENT

NTLAMA-MAKHANYA AJ:

Introduction

[1] This application was heard before me as an unopposed matter in the civil roll despite its normal scheduling for 2-3 days to complete as a fully-fledged trial that had to be conducted. In this instance, the Defendant (Road Accident Fund, RAF) did not appear although the proper notice was served on time. It then proceeded as uncontested and default judgment was therefore sought in this regard.

[2] At the beginning of the trial Counsel to the Plaintiff moved an application in terms of Rule 38(2) of the Uniform Rules of the Court to hear the expert's evidence on affidavit without their physical appearance. This Rule provides that:

'The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit'.

[3] The Rule allows a judicial discretion for the courts to accept evidence to be given on affidavit in certain exceptional cases as opposed to oral examination of witnesses. In the context of this case, the rationale for such an application was that the affidavits were supplemented by the Plaintiff's medical records. This application was not contested because the Defendant was not before the Court which meant an opportunity for the Plaintiff's Counsel to lead the expert's evidence on affidavits without a dispute if it could have been necessary. Having considered the application which was justifiable by the supplementation with the availability of the medical records, I exercised the judicial discretion to grant the application to have the evidence presented on oath. I reserved the judgment after the presentation of the various reports. For a proper context of this judgment, it is also imperative that I give a brief synopsis of the background facts of this case.

Brief facts

[4] This matter involves a claim that was lodged by the Plaintiff against RAF in terms of the Road Accident Fund Act 56 of 1996 (RAF Act). The objects of the RAF Act is to pay compensation for loss of damage wrongfully caused by the driving of a motor vehicle as envisaged in section 3 of the said Act. In this case, the Plaintiff suffered injuries that she sustained in a motor vehicle accident that happened on 21 April 2017 whilst she was also the driver. At the time of the accident, the Plaintiff was 30 years of age and working at Nedbank as a Branch Administrator from the years 2013 until 2017 at Elukwatini, Nhlazatze in the Mpumalanga Province. She is currently 38 years of age and has been unemployed 8 years after the accident.

[5] The Plaintiff states in her statutory affidavit that '[she] was a driver of a motor vehicle... ..., travelling along Takhomi main road and ... [as she] was turning [on the right curve], a motor vehicle [...] came speeding from the opposite direction and was turning left on the curve. This said motor vehicle swerved into [her] lane of travel and collided with [her] motor vehicle on the driver's side. [She] sustained injuries and [...] was [therefore] admitted at Embhuleni hospital for treatment'.

[6] Of further relevance is the sketch of the scene of the accident, which forms part of the Plaintiff's merits bundle, and which is indicative and illustrates the way in which the accident happened. It demonstrates that 'driver A was about to take the right curve and driver B already turning to the left. Both drivers were avoiding potholes when driver B drove into driver A. The latter driver alleges she was about to turn right when she saw driver B coming straight to her and tried to avoid but failed'. What is not evident from the sketch was the flow of traffic at the time of the accident except the indication of the dry weather conditions and the potholed road. I view the quality of the road surface (potholed) as a contributory factor to the accident as both drivers were trying to avoid them.

[7] The accident was confirmed by the medical records of the Embhuleni Hospital that the Plaintiff was brought in a stretcher by paramedics. The Plaintiff was thereafter also seen at Van Elden and Ethaba Hospitals for various complaints that emanated from the accident. The RAF 1 form was also included to confirm the accident date with the receipt stamp dated 29 January 2019.

[8] In the Particulars of Claim (POC) the Plaintiff, recorded the following injuries that she suffered because of the accident:

[8.1] fracture of the right arm;

[8.2] rights ear injury;

[8.3] whiplash injury of the neck;

[8.4] back injury.

[9] The consequent result of the above injuries as stated in the amended POC, the Plaintiff:

9.1 received medical and hospital treatment and incurred medical expenses in connection therewith;

9.2 will require future medical and hospital treatment which will necessitate the incurring of further medical expenses;

9.3 suffered a loss of earnings and/or earning capacity and will in future suffer a loss of earnings and /or earning capacity;

9.4 experienced pain, suffering, disfigurement, and discomfort, and will in future continue to experience pain, suffering, disfigurement, and discomfort;

9.5 suffered a loss of the amenities of life, and will in future continue to suffer a loss of amenities of life; and

9.6 experienced emotional shock and psychological trauma.

[10] The issue of the loss of earnings was to be determined by this Court and an offer of apportionment of the merits of the contributory negligence which was at 90%

for the insured driver and 10% of the injured driver was accepted by the Plaintiff. The said offer was made and accepted on 01 August 2023. The experts' reports, although not contested and also not a final determinant of the outcome of this matter, provide an insight against which to attribute the Defendant's liability.

Analysis

(11) Having granted the Rule 38(2) application, before the Plaintiff's Counsel could address this Court on various experts' reports, indicated that a merits settlement of 90%/10% was offered in favour of the Plaintiff by the Defendant. The outstanding disputes between the parties relate to the issue of general damages and the loss of future earnings, and the Defendant has not made an offer in respect of the latter issues. I will therefore, for purposes of this judgment, focus on the loss of future earnings because the issue of general damages was in this instance not before the court for consideration.

[12] The above purpose is motivated by the interests of justice which is viewed as the 'hallmark of a just legal system', (*Hlongwane v Road Accident Fund* (44993/2021) [2024] ZAGPHC 1973, *para* 17). In this case the Defendant's non-appearance defeats the overall scheme of the constitutionalised system of judicial reasoning which in this instance considers the effect of Rule 38(2). The purpose was to weigh the principle of the independence of the judiciary as envisaged in section 165(2) of the Constitution of the Republic of South Africa, 1996 (Constitution). This is meant to further the quality of access to justice as envisaged in section 34 of the Constitution which in turn, endorse the impartiality of the courts in the application of the law, (Govindjee J in *Namlela v S* (CA&R 16/2024) [2024] ZAECHC 25 (*para* 14)).

[13] It is also worth to mention that the granting of the Rule 38(2) application was to limit the prejudice likely to be suffered by the Plaintiff who was trial ready being scheduled to run over 2-3 days and the Defendant did not appear, (*Hlongwane para* 3). As explicitly stated in *Hlongwane* the substance of Rule 38(2) is to 'endorse the functioning of the courts in the resolve of the disputes between litigating parties. Secondly, to consider the interests of justice and constitutional values that must be applied in any matter before the court. However, the court on the other hand to

exercise caution and guard against sacrificing the right to cross examine for sake of convenience', (*Hlongwane para 10*, all footnotes omitted). It is against the quest to infuse constitutional values in the exercise of the judicial discretion relating to the allowance for leading of evidence on affidavit that became of fundamental importance in granting the application.

[14] Let me reiterate, the Rule (38(2) application serves as a cornerstone against which to limit any potential that will undermine the core content of the right of access to courts as envisaged in section 34 of the Constitution. The non-appearance of the Defendant in litigation despite being served timeously with the papers relating to the claim is a regress of the progress made since the adoption of the Constitution. In essence, the Defendant, as a state entity, has caused an irk to the framework of bringing meaning and substance in the development of the principles of the new dispensation through the lens of judicial processes. Davis J in *Nathram v Road Accident Fund* (GP) Case no 46876/2020, 26-4-2024) went further and even classified RAF (Defendant) as a '*delinquent litigant*' that undermines the quality of access to the interests of justice, (*paras 1-2*). I am also of the considered view that the Defendant's 'delinquency' limits the potential of this court of equal evaluation and assessment of the evidence for the determination of a 'just outcome'. This Court is now faced with the consideration of the presentation of the Plaintiff's evidence on affidavits without any contestation if it was necessary.

[15] In giving substance to the claim for loss of earnings, Counsel for the Plaintiff presented the experts' assessment reports regarding the determination of quantum concerning the said claim. The experts included:

- (i) 2 x Orthopaedic Surgeons;
- (ii) Speech therapist and Audiologist;
- (iii) Ear, Nose and Throat Specialist;
- (iv) Clinical Psychologist;
- (v) Occupational Therapist;
- (vi) Industrial Psychologist and the
- (vii) Actuary.

[16] I will limit the consideration of the experts reports only to their findings and opinions and not to reproduce their reports. The purpose is to identify the key issues that were the subject of assessment which would enable the understanding of the basis of the said reports. Of particular significance is the integrity that is brought by the experts to the integrity of the judicial process in the application of the law within a particular set of facts. In this instance, Davis J in *Scheneider v Aspeling* 2010 (5) SA 203 WCC gave meaning on the role of experts in judicial processes and held:

‘An expert comes to Court to give the Court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the Court with as objective and unbiased opinion, based on his or her expertise, as is possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor give evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possesses’, (p 15).

[17] I am not to further espouse the significance of expert’s evidence except an affirmation of the guide they provide to the court. The rationality of the opinion provided by the experts and its contribution to judicial reasoning is a cornerstone of furthering the interests of justice. It also allows for flexibility in infusing the interdisciplinary nature of judicial reasoning in giving substance to the content of the law. This means that law alone does not exist independently of other areas and fields that are essential in resolving disputes that come before the courts.

[18] Following the assessment of the specialist Neurosurgeon having concluded that the Plaintiff suffered orthopaedic injuries in the form of injury to the cervical spine, right shoulder and right wrist, the final view was deferred to the Orthopaedic surgeon for an opinion. The Orthopaedic expert also observed the injuries resulted in a serious long-term impairment due to the neck and right shoulder contusion. It also deferred to the Ear, Nose and Throat specialist for an opinion as the Plaintiff has tinnitus and pain in the right ear. This was followed by another deferral to the Clinical

Psychologist and Neuropsychologist as the Plaintiff experienced forgetfulness since the accident.

[19] The observations and opinion of the Speech Therapist and Audiologist found that the speech audiometry established that in both ears, the Plaintiff requires louder communication which do not correlate with 20/30 dBHL. This meant the Plaintiff's hearing impairment in both ears would require the reservation of R45 000.00 every two years and bi-annual consultation fee of R2000. In totality, the expert is of the view that an estimate of R200 000 should be reserved for audiological treatment and treatment for a period of 6 years. Therefore, the Plaintiff is a candidate for hearing aid as she lost the amenities of life due to the accident.

[20] Similarly, the Ear; Nose and Throat Specialist observed the sensorineural loss of hearing in both ears because of the damage to inner structures that are associated with the accident. The Plaintiff also suffers from Tinnitus which is commonly described as a ringing sound and is incurable and may be considered chronic. In this regard, the Plaintiff would require a Tinnitus Hearing aid device and an annual audiology test. The future expenses may be between R40 000-R45 000 with R2000 annual audiology testing.

[21] The Clinical Psychologist found and is of the opinion that the Plaintiff suffered mild head injuries that affected her neurocognitive abilities such as short-term memory that meets the criteria for a Post-Traumatic Disorder (PTSD) which indicate:

- (i) cognitive deficit in cognitive flexibility;
- (ii) experience of severe symptoms of PTSD which is not uncommon in parties with the history of traffic accidents which may either remain stable or worsen without psychotherapeutic intervention.

The expert is of the view that the Plaintiff's quality of life was severely affected by the accident and will be imperative that the other expert's assessment reports be given due regard.

[22] The Occupational Therapist observed and recommended that the Plaintiff's functional work capacity evaluation and speed as per Valpar 201 and Vona de Toit level presents functional dysfunctions due to painful right arm when lifting heavy objects. This means that the Plaintiff does not meet the physical tolerance requirements for 8-hours day norms standards which fall within Sedentary activities. She may endure the frequent dynamic usage of the right shoulder due to the chronic pain of the shoulder. She is not suited to partake in frequent and dynamic usage of the right shoulder and in this instance, she would benefit from optimum pain management as well as training in energy conservation and joint care principles. Her future aspirations in Church Ministry will also be hindered because of the residual right shoulder that might affect her ability to lift and maintain prolonged tolerance above head level when praying for congregants. Her cognitive screening scores as well fell below to that of her age group. She would therefore benefit from 20 hours of occupational therapy intervention and other supplementary health services of referral to Orthopaedic Surgeon; Physiotherapy and Industrial Psychologist. Individual assistance will also be of benefit with domestic household responsibility and an amount of R4000-R5000 per annum for the household maintenance.

[23] According to the Industrial Psychologist report having drawn lessons from the Occupational Therapist indicates that the Plaintiff is unemployable following the accident. Particularly in South Africa with high levels of unemployment, she would need an accommodative workplace environment. Her loss of hearings curtailed her employment opportunities and will remain unemployed post-accident. Even on rehabilitation, she will never be restored to her pre-accident functionality. It is postulated in the Plaintiff's Heads of Argument which are drawn from the Industrial Psychology assessment, that the Plaintiff, with a monthly salary of R12 909.75 pre-accident amounting to a yearly income of R154 917 917.00 falling between Paterson A3 (R121 556-R146 842 – 174 952 per year, she could have reached earnings between the median and upper quartile of Paterson B3 (R211 361 to R250 938 guaranteed package of 15 years' experience by age 45.

[24] The Actuary considered the Industrial Psychologist assessment to determine the future loss of earnings of the Plaintiff. The expert considered the pre- and post-

accident expected value of the calculated loss which is based on the information, instructions and assumptions relied upon in determining the value of the loss. The calculated loss in consideration of the past and future losses amounted to R5 865 264 as endorsed in the updated assessment report.

[25] At the risk of repetition, the experts' reports were not refuted due to the Defendant's non-appearance, it is now left to this Court to evaluate the substance of the reports in determining the quantum of the loss of the Plaintiff's future earning capacity.

[26] With an intense eye on the Industrial Psychologist Report which also drew the assessment benefits from other expert reports, it notes that the Plaintiff was employed from August 2013 until April 2021 and returned to work only one month after the accident. She then resigned due to the associated pains and difficulties that were linked to the accident. I acknowledge that the Plaintiff was able to return to work post-accident, thus, such return was limited not only by the social standing but a professional standing in a workplace environment. It was reported that she completely changed from the person she was pre-accident, and observations were made by her Branch Manager relating to the difficulty on being on time at work, leaving early; give her password to other Colleagues and the worst part was her commission of an error in an investment of R500 000. This shows the change of social and professional attitude because of the accident which drastically changed her prospects for accelerated career pathway in her area of specialty.

[27] I am of the considered opinion the uncontested evidence presented before this Court carries the legitimacy of the claim for the Plaintiff's future loss of earnings. I must state that with the background knowledge of each case being considered based on its own merits, I am persuaded by Mayat AJA in *Terblanche v Minister of Safety and Security* 2016 (2) SA 109 (SCA). In that case, it was held that [the evidence carries the core content in the determination and the resolve of the dispute before the court], (*para 14*). It is in this instance that the Plaintiff's evidence on affidavits provided an insight on the impact the accident had on her future in both her social and professional lives. It was shown that the Plaintiff is unlikely or to be unable to attain the pre-accident accident earning capacity which could have improved her

future life in all areas of her human living. I do not doubt, her level of qualifications (Grade 12 and Financial Management Certificate), the 4 years' experience that she had since attained in the banking industry and the envisaged aspirations in Church Ministry, her physical incapacity would make it difficult for her to be in the original position if it was not for the accident. The future loss is key as opposed to past loss.

[28] On conspectus of factors before this Court, I am satisfied that the evidence presented is indicative of the 'thorn in the flesh' that the Plaintiff would find it difficult to be competitive in the labour market. The situation is worsened in South Africa today by the lack of employment opportunities even to those who are not physically challenged. Without repetition, the injuries sustained by the Plaintiff have the great potential to harm string any prospects of her regaining her pre-accident active role. The evidence before me indicates of the needed further treatment and a quest for future hospital and medical treatment for associated injuries with the accident. Section 17 of the RAF Act requires such provision as endorsed in the draft court order presented by the Plaintiff's Counsel in this Court.

[29] Another fundamental aspect is the exercise of the judicial discretion in the consideration of the award of the quantum itself against the Defendant. The parties have settled merits on 90%/10% in favour of the Plaintiff. The Plaintiff did not have any pre-existing conditions before the accident.

[30] For these reasons, I accept the Plaintiff's postulation of her pre-morbid and post-morbid projected career paths and income and the resultant actuarial calculations. Those calculations, based on a projected career, disregarding the accident, from the date of the accident to the Plaintiff's retirement in the banking sector, comes to R1 481 355 in respect of the past pre-morbid income and R5 278 618 for the future pre-morbid income, before the application of contingencies. As regards the post-morbid postulation, the Plaintiff's case is that she has been rendered completely unemployable because of the injuries sustained by her in the accident in question. I have some reservations about this aspect of the Plaintiff's claim. Especially if regard is had to the so-called 'whole person impairment' ('WPI') assessment done by the Plaintiff's orthopaedic surgeon, who indicated that, in his view, Plaintiff's WPI, from an orthopaedic point of view, is 4%. Plaintiff's

neurosurgeon, Dr N A Dube, assessed the WPI – from a neurosurgical point of view – at 10% and the audiologist, Mr Tshifhiwa Rabakali, assessed the WPI AT 2%. His ear, nose and throat specialist, Dr M J Sekole, also assessed the WPI at 2%. This then means that, on Plaintiff's own version, the total whole person impairment suffered by her was 18%.

[31] This concern can, however, in my view, adequately be addressed by the application of appropriate contingencies. In fact, I believe that the application of a so-called 'contingency differential' may very well be a fair, just and equitable way of compensating the plaintiff for her loss of income.

[32] The contingency differential to be applied in this case is 25%. That means that the Plaintiff's past loss of income amounts to $R1\,481\,355 \times 25\% = R370\,338.75$. And her future loss of income amounts to $R5\,278\,618 \times 25\% = R1\,319\,654.50$. The total sum to be awarded to the plaintiff for loss of earnings / loss of income earning capacity / loss of employability is R1 689 993.12. These are the amounts I intend awarding to the Plaintiff under these heads of argument, and which are, in my view, appropriate and just all things considered.

[33] The Plaintiff, as a driver of the motor-vehicle, I will not deviate from the offered settlement (90%/10%) as I am of the view that the parties have come to an agreement that makes the living nature of the dispute come to an end. Mhlantla J in *Mafisa v Road Accident Fund* 2024 (6) BCLR 805 (CC) gave credence to the non-deviation in this case and held 'contractual agreements concluded freely and voluntarily by the parties ought to be respected and enforced ... [which] is in accordance with the principle that agreements must be honoured' (*para* 36). In that case, Mhlantla J cited with approval Ngcobo J in *Barkhuisen v Napier* 2007 (7) BCLR 691 (CC) and concretised the contention herein that 'self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity', (*para* 57). It is therefore not for this Court to doubt the validity of the settlement agreement when either of the parties will not be prejudiced by the agreement.

[34] Regarding the costs of this application, this Court has raised the difficulty about what seems to be trend in the Defendant's (RAF) non-appearance in a matter that was long settled to be heard and with papers being served timeously and did not appear in court. Lessons have also been drawn on the character of the Defendant who has since been characterised as a '*delinquent litigant*' that compromises the foundations of the constitutionalised system of the judicial processes. I am of the view that the Defendant should pay the costs of this application. The Plaintiff's Counsel further submitted that the costs on Scale B for a Counsel in this matter to be paid by the Defendant.

[35] Accordingly, the following order is granted:

- (1) The Defendant is ordered to pay the Plaintiff 90% of the proven or agreed damages.
- (2) The Defendant shall pay to the Plaintiff a Capital Amount of **R1 319 654.50** for the Plaintiff's claim in respect of loss of earnings, which amount shall be paid electronically into the following trust account:

NAME OF THE BANK	STANDARD BANK
NAME OF ACCOUNT HOLDER	NKUNA ROSE ATTORNEYS
ACCOUNT NUMBER	0[...]
BRANCH CODE	051001
REFERENCE NUMBER	RAF20/2023

- (3) The defendant shall provide the Plaintiff with an undertaking in terms of section 17(4)(a) limited to 90%, in respect of future accommodation of the Plaintiff in a hospital or nursing home for treatment of or rendering of a service or supplying of goods to him to compensate the Plaintiff in respect of the said costs after costs have been incurred and on tendering of proof thereof.
- (4) The following heads of damages are to be postponed *sine die*:

4.1 General damages;

4.2 Past Medical Expenses.

- (5) The capital amount shall be paid into the above-mentioned trust account within 180 days (One hundred and eighty days) from date of this order.
- (6) Should the Defendant fail to make payment of the capital amount within 180 days from date hereof, the defendant will be liable for interest on the amount due to the plaintiff at a prescribed rate per annum, calculated from the date the payment was due until the date of final payment.
- (7) The Defendant is ordered to pay the Plaintiff's costs of suit in respect of the determination of the issue of quantum on the High Court scale, which costs include but are not limited to:

- 7.1 Dr N.A Dube, Neurosurgeon;
- 7.2 Dr P.T Kumbaria, Orthopaedic Surgeon;
- 7.3 Dr B.N Nhlapo, Orthopaedic Surgeon, updated report
- 7.4 Dr K Maite, Clinical Psychologist;
- 7.5 Dr T Rabakali, Audio & Speech Therapist;
- 7.6 Dr MJ Sekole, Specialist Ear, Nose & Throat;
- 7.7 Dr Zanele Ishmael Chauke, Occupational Therapist;
- 7.8 Dr M.M Temane, Occupational Therapist, updated report;
- 7.9 Nwamlambya Medical Legal Consultant, Industrial Psychologist;
- 7.10 Abundant Human Capital, Industrial Psychologist Report, updated report;
- 7.11 Wim Loots, Actuary.
- 7.12 Counsel

- (8) The reasonable costs of transporting the Plaintiff to the various medico-legal examinations;

- (9) All preparation and attendance costs of Counsel on scale B;
- (10) The reasonable costs of the Attorneys, which includes reasonable travelling costs, preparation, reservation and qualifying fees of various medical experts; costs for preparing for trial, pre-trial conferences and costs for actual attendance to pre-trial conferences;
- (11) The reasonable costs occasioned in respect of travelling, travelling time and accommodation, if applicable, occasioned by the Plaintiff as he is declared a necessary witness;
- (12) Should the Defendant fail to pay the party and party costs as taxed or agreed within 180 (one hundred and eighty) days from the date of taxation, alternatively date of settlement of such costs, the Defendant shall be liable to pay interest at a prescribed rate per annum, such costs as from and including the date of taxation, alternatively, the date of settlement of such costs up to and including the date of final payment thereof;
- (13) The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:
 - 13.1 The Plaintiff shall serve the notice of taxation of Plaintiff's party and party bill of costs on Defendant's attorneys of record;
 - 13.2 The Defendant shall pay the Plaintiffs' taxed and/or agreed party and party costs within 180 days from the date upon which the accounts are taxed by the Taxing Master and/or agreed between the parties; and
 - 13.3 Should the payment of the taxed or agreed costs not be effected timeously, the Plaintiff will be entitled to interest at the applicable rate from the date of the allocator to the date of payment.
- (14) There is a valid contingency agreement.

**N NTLAMA-MAKHANYA
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

This judgment is issued by the Judge whose name appears herein and is submitted electronically to the parties /legal representatives by email. It is also uploaded on CaseLines and its date of delivery is deemed 05 February 2025.

Appearances:

Applicant's Counsel:

Advocate D Mogagabe

Instructing Attorneys:

Nkuna Rose Attorneys
95 CNR Kruis & Albertina Sisulu
Johannesburg

For the Defendant:

The Road Accident Fund
10 Junction Avenue
Parktown, Johannesburg

Date of Hearing:

21 January 2025

Date Delivered:

05 February 2025