REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2014/37006

(1) REPORTABLE: YES / **NO**
(2) OF INTEREST TO OTHER JUDGES: YES / **NO**
(3) REVISED: YES / **NO**

07 March 2025 [redacted]

DATE SIGNATURE

In the matter between:

SITHEBE: SIFISO Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

MAKGATE AJ:

INTRODUCTION

1. The Plaintiff in this matter is Sithebe Sifiso, a major male of full legal capacity. The Plaintiff has instituted an action against the Road Accident Fund ("RAF"), following a motor vehicle accident in that, on the 14 November 2013 at Tsakane, Brakpan, as a pedestrian on the pavement, he was knocked down by a motor vehicle.

2. As a result of the accident, the Plaintiff sustained bodily injuries which resulted in him being transported by an ambulance to Pholosong hospital, wherein he was stabilised and subsequently transferred to Life Springs Parkland clinic for admission. He was discharged on the 18 November 2013.

3. An offer for general damages was accepted shortly before the commencement of the trial in an amount of R500, 000.00 (five hundred thousand rand). Whereas liability and undertaking in terms of Section 17(4) of the Road Accident Fund Act 56 of 1996 were settled during the 02 August 2016, as per the court order of the then Deputy Judge President Mojapelo.[1]

4. In the circumstances, the only issue for determination relates to the aspect of loss of future earnings.

5. Importantly, at the commencement of the trial, Ms Nziyanziya for the Defendant, raised a point that the aspect of loss of future earnings was settled as per the court order of the 02 August 2016, in that, the Plaintiff was awarded an amount of R224, 297.40 in respect of loss of earnings and this was in full and final. In the circumstances, there is nothing left to adjudicate on.

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[1] Caselines 074-19

6. In reply, Ms Molope-Madondo for the Plaintiff, argued that the aforesaid payment, even though it was in respect of loss of earnings, same was an interim payment. In the result, this court still must adjudicate this head of damages and finalise it.

7. In her argument, Ms Nziyanziya referred me to the RAF memorandum incorporating the Plaintiff's actuary report dated 13 June 2016[2], which was only uploaded on Caselines a day before the trial (04 March 2025), which according to her, tends to support her contention that loss of earnings has been settled in full and final.

8. Though Ms Molope-Madondo did take an issue and objected to Ms Nziyanziya relying on the said memorandum in that it was not a discovered document *nor* was there a proper discovery in so far as the memorandum is concerned, in the interest of justice, I allowed Ms Nziyanziya to advance her argument having regard to the said memorandum.

9. Having heard counsel for both parties and having considered the court order of the 02 August 2016 and the RAF memorandum, I was not persuaded by Ms Nziyanziya and found her argument to be untenable in that:

   9.1 The court order of 02 August 2016 clearly states that the *"The Defendant shall pay the Plaintiff an <u>interim payment</u> of R224 297.40 (Two Hundred and Twenty-Four Thousand Two Hundred and Ninety-Seven Rand Forty Cents), in respect of loss of earnings*."

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[2] Caselines 079

9.2 Further, the memorandum that Ms Nziyanziya seeks to rely on, also states that the amount payable is an interim payment.[3]

10. Based on the aforesaid, I arrived at the conclusion that, absent any proof to the contrary, the payment as previously made in terms of the court order of 02 August 2016, was an interim payment and therefore, the aspect of loss of future earnings still need to be adjudicated to finality. In the event of any ambiguity on the part of the Defendant, it ought to have taken the necessary steps but has failed to do so, despite a considerable lapse of time.

FACTUAL BACKGROUND

11. Though the facts relating to how the accident occurred is not in dispute since the liability aspect has already been settled, the Plaintiff's pleaded case is that on the 14 November 2013, he was knocked down by a motor vehicle. The accident resulted in him suffering bodily injuries and having to be hospitalised. The medico legal report by the relevant expert, records that because of the accident, the Plaintiff has sustained a head injury and a left scapula fracture.

12. At the time of the accident, the Plaintiff was employed as an enrolled nurse at Heidelberg Hospital, working 12 hours day and night shifts, and rotating within the wards where he would check on patients, administer medication and changing bedding. When the accident occurred, he had only been working for approximately two years.

[3] Caselines 079-11

13. For the determination of the loss of future earnings, the Plaintiff has appointed several experts and has also filed medico legal reports of the following:

13.1 Dr T.P Moja – Neurosurgeon;

13.2 Dr P M Dlukulu – Clinical Psychologist;

13.3 Ms Thembisile Mahlangu – Occupational Therapist;

13.4 Ms Zaheerah Fakir; and

13.5 Algorithm Consultants and Actuaries – Actuary.

EVIDENCE

14. The Plaintiff has filed an application in terms of Rule 38(2) of the Uniform Court Rules to adduce evidence by way of affidavits in respect of his experts witnesses and requested that same be recorded and admitted as evidence. The Defendant was not in opposition to the application. In the result, I granted the order.

15. Dr Moja, a specialist Neurosurgeon, assessed the Plaintiff on the 17 February 2025. He reported that the Plaintiff sustained head and facial trauma with multiple lacerations. He sustained a mild concussive head injury. He also

sustained an orthopaedic injury – left scapula fracture. As a result of the accident, he complains of residual headaches and left shoulder pain. He presents with reactive psychological problems. He has reached maximum medical improvement.

16. Dr P M Dlukulu, a Clinical Psychologist, evaluated the Plaintiff on the 3 October 2024. She reported that the Plaintiff has poor control of emotional response, socially withdrawn, minimal or no anxiety, normal ups and downs depression and moderate PTSD levels of emotional distress.

17. She further reported that most assessment scores are within inadequate performance, and varied from low average to average ranges, and showed no deficit functioning of his cognitive domains. His neuropsychological profile is that most of his cognitive functions are well within the inadequate range. During the assessment, he had variable performance on the immediate verbal memory and verbal learning memory.

18. In the circumstances, the evaluation results suggest that the Plaintiff presented with mild to moderate neuropsychological functioning. In the result, though deferring to the relevant experts, he is disadvantaged to compete in the open labour market.

19. Thembisile Mahlangu, an Occupational Therapist, re assessed the Plaintiff on the 26 July 2024. She reported that during the assessment, the Plaintiff complained of pain on the left shoulder and knee when executing activities. He also mentioned that he suffers from headaches post-accident. His pains range from mild to severe. Pressure increases pain in the left shoulder. Depressed left shoulder in standing, static and dynamic balance is adequate.

20. He has physical capacity to cope with light to low range medium types works in the open labour market. He should manage light loads on an occasional basis while he is symptomatic. Elevated work and crouching to be limited to occasional basis. He needs to avoid undue pressure on the left dominant upper limb. Given the symptomatic left upper limb, he should continue to work in the clinic instead of wards where he would be required to assist patients with transfers, bathing and other physical strenuous activities which would increase his pain and result in fatigue.

21. She further opined that: *"As evaluated he presents with cognitive impairments with range from mild to moderate. These impairments are mainly in the area of attention, memory, abstract thinking, sequencing, safety and judgment, with mild impairment of foresight and planning, as well as complex problem solving. Dr Dlukulu notes that the current evaluation results suggest that Mr Sithebe presents with mild to moderate neuropsychological functioning. The accident occurred in November 2013, and he retains residual impairment which affect his work ability. The cognitive impairments have a negative effect on his work, and he has a supervisor, which is recommended in his case as he has responsibility on the lives or health of his patients. It is anticipated that his challenges could be more apparent when his work mental function demands are increased, noting that Dr Dlukulu also notes emotional challenges which affect cognitive skills."*

22. The Plaintiff's pre accident job demanded medium physical strength capacity. He resumed work two months after the accident and was accommodated after four months. He started working 8-hour day shift at the HAST clinic, however, he noted challenges as his left upper limb easily fatigued, concentration is poor, he makes mistakes as he is forgetful and struggles to focus. His modified job demands light physical strength capacity. He is currently on study leave as he is enrolled for a diploma in nursing, but reports that headaches, poor memory and left upper limb pain affects his studies.

23. Zaheerah Fakir, the industrial psychologist, prepared an addendum report that is dated 02 October 2024. The industrial psychologist reported as detailed below.

24. Based on her expert opinion, the Plaintiff has been compromised by the injuries he has sustained. As a result, he is a vulnerable employee. He has however been truly fortunate to have been accommodated in his position at the clinic, but furthermore, he has also been allowed to progress his studies and has been given the opportunity to complete a Diploma in Nursing.

25. Should the Plaintiff complete his Diploma qualification, it would be expected that he takes up a position as a professional nurse. This position would be in a ward setting, dealing with and lifting patients and being able to mobilise most of the day.

26. In the result, she opined that the Plaintiff would struggle to meet the physical duties to perform as a professional nurse. In conclusion, he would have to be accommodated in any position, which he may not achieve in a new position, under a new supervisor, thus leaving him extremely vulnerable.

27. In the circumstances, the industrial psychologist recommends that an applicable post-accident contingency deduction be applied to address his increased vulnerability.

28. Gregory Angus Whittaker on behalf of Algorithm Consultants & Actuaries, a firm of actuaries, prepared a report on the Plaintiff's loss of earnings. The report is informed by the opinion of the industrial psychologist. His assumption is based

on normal life expectancy, in particular, calculations are based on an assumed normal future life expectancy of 32.79 additional years.

29. In terms of the calculations, pre-accident, the Plaintiff was employed as a staff nurse grade 2, having commenced his employment on the 7 January 2008. The payslips provided are for the periods 13 January 2023 with a basic salary of R18, 365.25 per month and 13 December 2024 reflecting a basic salary of R21, 594.50 per month. According to the actuarial calculations, pre accident, the Plaintiff's earnings would have increased as per salary inflation set out in paragraph 3.2.1 of the report, until his retirement age.

30. That being stated, the expert further recorded that the Plaintiff's will in future progress at the same rate he would have progressed had the accident not occurred. An allowance has however been made for the difficulties by applying a higher contingency deduction to the value of his future post-accident earnings. Therefore, in determining a fair compensation, the Plaintiff's future earnings have been taken as the same as his pre-accident earnings.

ANALYSIS

31. The evidence before the court is that the Plaintiff has a reduced earning capacity. Post accident, he struggles with poor memory, poor concentration, lower back pain and headaches, creating tension between him and his colleagues who ended not wanting to work in his shift because of inability to carry heavy objects, frequently taking time off to recover from the strain that he was feeling, chronic headaches and could not write for a long time because of the fractured left scapula. A year later of having resumed his employment, he was moved from the hospital setting to clinical setting. Later, he was then

moved to HIV clinic doing admin without overtime, working Monday to Friday, resulting in a monetary loss.

32. According to the industrial psychologist, the accident has left the Plaintiff *"extremely vulnerable."* I agree with her conclusion.

33. The actuary has provided two bases for future loss of earnings:

33.1 Basis I: uninjured earnings -13% and injured earnings - 23%.

33.2 Basis II: uninjured earnings – 13% and injured earnings 25.5%.

34. The court enjoys a discretion in its determination of the contingency deduction; it must decide what is fair and reasonable.[4] The exercise is not an exact science. To that effect, Trollip JA observed in **Shield Insurance Co Ltd v Booysen**,[5] that the determination of contingencies involves 'a process of subjective impression or estimation rather than objective calculation.' Similarly, in **Goodall v President Insurance Co Ltd**,[6] Margo J remarked:

> **"In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practised by ancient prophets and**

[4] Fulton v Road Accident Fund 2012 (3) SA 255 (GSJ), at paragraphs [95] to [96]; and Nationwide Airlines (Pty) Ltd (in liquidation) v SA Airways (Pty) Ltd [2016] 4 All SA 153 (GJ), at paragraph [147

[5] 1979 (3) SA 953 (A), at 965G.

[6] 1978 (1) SA 389 (W).

soothsayers, and by modern authors of a certain type of almanack, is not numbered among the qualifications for judicial office."

35. Practically, the determination of a contingency deduction has the result that damages are reduced by anything between 5% and 50%.[7] The facts and circumstances of each case dictate how and where the line must be drawn.

36. The Plaintiff is likely to complete his Diploma qualification considering that he is currently doing his second year, *albeit* the limitation as already stated above. In the event he completes, he will assume a position as a professional nurse and would be in a ward setting, dealing with lifting patients and being able to mobilise most of the day. Now that the accident has occurred and he possess a functional capacity of light to low range medium types work, according to the experts, he is likely to remain in the clinic as opposed to working in the wards, since he will struggle to meet the physical duties to perform as a professional nurse.

37. The argument advanced by Ms Molope-Madondo is that a contingency deduction of 25.5% for future loss of earnings is appropriate under the circumstances and opposes 30% deductions as proposed by Ms Nziyanziya. Her reasoning is that the 30% deduction would have been acceptable in the event the Plaintiff did not have any proof of earnings, which is not the case herein.

38. On the other hand, Ms Nziyanziya contended that the Plaintiff has not suffered any future loss of earnings but only experiences difficulties in the execution of his duties. According to her, the interim payment already made, is sufficient to

[7] Van der Plaats v SA Mutual Fire & General Insurance Co Ltd [1980] 2 All SA 129 (A).

cater for the future loss of earnings in the event there is any. Further, should I not find favour in her contention and conclude that the Plaintiff has suffered future loss of earnings, she argued that 30% contingency deductions is appropriate.

39. In the matter of **AM and another v MEC Health, Western Cape**[8], the Court had the following to say about expert testimony:

"[17] Something needs to be said about the role of expert witnesses and the expert evidence in this case. The functions of an expert witness are threefold. First, where they have themselves observed relevant facts that evidence will be evidence of fact and admissible as such. Second, they provide the court with abstract or general knowledge concerning their discipline that is necessary to enable the court to understand the issues arising in the litigation. This includes evidence of the current state of knowledge and generally accepted practice in the field in question. Although such evidence can only be given by an expert qualified in the relevant field, it remains, at the end of the day, essentially evidence of fact on which the court will have to make factual findings. It is necessary to enable the court to assess the validity of opinions that they express. Third, they give evidence concerning their own inferences and opinions on the issues in the case and the grounds for drawing those inferences and expressing those conclusions.

[18] Before an expert witness may be called it is necessary to deliver a summary of the witness's opinions and the reasons therefor in terms of Uniform Rule 36 (9)(b). This court held in Coopers 1976 (3) SA 352 (A) that the summary must at least include:

[8] AM and another v MEC Health, Western Cape (1258/2018) [2020] ZASCA 89 (31 July 2020)

'... the facts or data on which the opinion is based. The facts or data would include those personally or directly known to or ascertained by the expert witness, e.g., from general scientific knowledge, experiments, or investigations conducted by him, or known to or ascertained by others of which he has been informed in order to formulate his opinions, e.g., experiments or investigations by others, or information from text-books, which are to be duly proved at the trial.'

[19] In the same case, Wessels JA said:

'... an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert." ...

[21] The opinions of expert witnesses involve the drawing of inferences from facts. If they are tenuous, or far-fetched, they cannot form the foundation of the court to make any finding of fact. Furthermore, in any process of reasoning the drawing of inferences from the facts must be based on admitted or proven facts and not matters of speculation."

40. I fully support the Court's view as expressed above. The realistic position of the Plaintiff is that he has a reduced earning capacity. This is supported by various experts 'reports. To that effect, the experts have expressed the view that the Plaintiff has a reduced earning capacity with limitations.

41. In the circumstances, 25.5% contingency deductions as per Basis II on future loss of earnings is fair and reasonable. In the result, his net future loss is R1,

699, 695.00 less 25.5% contingency deductions which results in a total net loss of R833, 184.00

42. Having regard to the interim payment of R224, 297.40 already paid to the Plaintiff, a total sum due to the Plaintiff is R608, 886.60.

43. In the result, the following order is made:

Order

[1] The Defendant is ordered to pay the Plaintiff a total sum of **R1, 108, 886.60** calculated as follows:

[1.1] **R608, 886.60** for loss of future income and earning capacity.

[1.2] **R500, 000.00** for general damages.

[2] The Defendant is ordered to pay interest on the above amounts, at the prescribed legal rate, calculated from 180 calendar days after the date of this order until date of payment.

[3] The Defendant is ordered to pay the Plaintiff's costs on High Court Scale B, including counsel's fees and the reasonable qualifying and travelling expenses, if any, for all medico-legal experts of the following experts:

(a) Dr T.P Moja – Neurosurgeon.

(b) Dr P M Dlukulu – Clinical Psychologist.

(c) Ms Thembisile Mahlangu – Occupational Therapist.

(d) Ms Zaheerah Fakir.

(e) Algorithm Consultants and Actuaries – Actuary.

T J MAKGATE
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Plaintiff: Adv L Molope- Madondo instructed by Sepamla Attorneys.

For the Respondent: Ms P Nziyanziya, Road Accident Fund unit in the Office of the State Attorney, Johannesburg

Date of Hearing: 05 March 2025.
Date of Judgment: 07 March 2025.