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IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

Case Number: 5465/2021

In the matter between

NOLUVUYO SIMAYILE-SIGIJIMI **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

Date of hearing: 12 March 2025
Date of judgment: 31 March 2025

BHOOPCHAND AJ:

1. The Plaintiff is a 36-year-old female. She was involved in an accident on 25 September 2019 when a motor vehicle collided with her. She was a pedestrian. The Defendant is the statutory body established under the Road Accident Fund Act, 56 of

1996 (‘the RAF Act’) to pay compensation for loss or damages wrongfully caused by driving motor vehicles.

2. The unresolved issues included the issue of liability and the Plaintiff’s claim for damages. The parties agreed to a truncated trial under Rule 39(20). The Court would hear testimony on the issue of liability. If Defendant were found liable, it would determine the Plaintiff’s claim for general damages based on the papers and the written arguments submitted by the legal representatives. The expert reports relied upon would be supported by the Rule 38(2) affidavits in place of the experts testifying.

LIABILITY

3. The Plaintiff’s testimony was brief. She remembered crossing the R300 in Mitchell’s Plain and nothing else. She broke down in the witness box, and any attempt to elicit any further information came to nought. Ms Yanga Koyo (‘Koyo’) was then called on behalf of the Plaintiff. She testified that she and two companions, one of which was the Plaintiff, were walking to Westgate Mall from Samora Machel. It was shortly after midday. The three reached the dual-lane Vanguard Expressway. They were walking on the pavement. The third member of the trio was Nosipo, who had since passed away. They were familiar with the road and had walked it many times.

4. A minibus taxi heading northwards, i.e. away from Mitchells Plain, turned against the red light, intending to proceed southwards in the direction it had traversed. The trio were walking a short distance away from the robot. Koyo heard the sound of tyres squealing, and the taxi knocked the Plaintiff. The Plaintiff was on the pavement. The two others escaped the collision. The taxi sped off. The Plaintiff did not lose consciousness. She phoned the emergency services for assistance. The owner of the vehicle arrived. She accompanied the plaintiff to the police station in Samora Machel. They refused to assist. They then went to Mitchell’s Plain Hospital. The Plaintiff received attention. Koyo left the hospital at about 6 pm. The Plaintiff spent six days in hospital.

5. Koyo underwent cross-examination. She testified that the Vanguard Expressway is a busy road in the mornings and evenings but not busy during the day. The trio were walking with their backs to the traffic. They could not see the traffic behind them. They were walking to the left of the yellow line. The Plaintiff was hit on her right shoulder and suffered a ‘hole’ in the head on the left side. Blood oozed from the head and leg injuries. The taxi owner met them at the police station. None of the trio were walking on the road surface. The pavement she referred to was not made of concrete blocks but had a concrete pathway. Nosipho and the Plaintiff walked on the concrete path, while she walked on the gravel, away from the pathway. The gap between the concrete and the yellow line was tarred.

6. The Court attempted to establish the layout of the pavement relative to the road surface. The walking area alongside the road was slightly elevated, and the yellow line was less than a metre away from where the trio were walking.

7. The Plaintiff raised the usual grounds of negligence encountered in road accident claims, such as failing to keep a proper lookout and driving at an excessive speed, etc. She also pleaded that the driver of the insured vehicle made a U-turn when it was dangerous and/or inopportune to do so. The evidence supported the latter ground, but it was not a ground of negligence on which the Plaintiff could rely. The driver changing direction against a red robot did not lead to the accident. The Plaintiff led evidence that the cause of the accident was the driver mounting the pavement and colliding with her off the tarred surface of the roadway. That would constitute evidence of negligence unless controverted by the Defendant. The problem is that Plaintiff did not plead this material fact.

8. The pleadings are intended to outline the material facts on which the plaintiff relies for their claim. Courts often emphasise the importance of consistency between the pleaded case and the evidence presented during the trial. Suppose a plaintiff's testimony introduces a fact not explicitly stated in the particulars of claim, such as the driver mounting the pavement and striking her. In that case, the court may consider this evidence if it aligns with the broader allegations of negligence. The grounds of negligence, cast generally, which include the driver's failure to take adequate measures to avoid the accident, may rescue the plaintiff’s case in this

instance. This omission could have resulted in Plaintiff being non-suited unless she applied to amend her particulars without prejudice to Defendant.

9. It emphasises the need for the legal representatives to ensure that the case they intend to lead is properly reflected in the pleadings. The onus was always on the Plaintiff to prove her case. The purpose of pleadings is to inform the opposing party of the case they must meet and to assist the court in clearly and precisely determining the factual and legal issues in dispute. However, deviations may be permitted if they do not result in procedural unfairness.[1] The Defendant appreciated the evidence, and no objections were raised. The Defendant interrogated the Plaintiff's witness about her testimony that placed the trio off the road when the collision occurred. In the circumstances, the Court accepts the evidence as there is no discernible prejudice to the Defendant.

10. Defendant pleaded, among other things, that Plaintiff had positioned herself on a 'trafficable surface' of a public road at a time when it was unsafe, inopportune, and/or dangerous to do so. Defendant pleaded that the insured driver was in the process of reversing when Plaintiff crossed the road in the path of the (behind?) vehicle. The Defendant also pleaded for an apportionment of liability.

11. The Defendant argued that Koyo was uncertain about how far the yellow line was from the edge of the pavement and that she could not confirm whether Plaintiff was walking on the road surface or within the emergency lane. The latter does not accord with the evidence. Although Koyo was insecure about the distance from the concrete pathway to the yellow line, her evidence consistently placed Plaintiff off the road surface. The defendant did not seriously raise their defence that the Plaintiff was hit by a reversing vehicle or make out a case for apportionment of liability. The Defendant did not call any witnesses.

12. The Plaintiff argued that a driver is required to exercise reasonable care towards pedestrians. A motorist is *prima facie* negligent when they strike a

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1 Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168

pedestrian on a sidewalk.[2] A pedestrian on a sidewalk, which is allocated for their use, is not obliged to look and see whether a vehicle is approaching that may collide with them.[3] A motorist who permits any part of their vehicle to protrude onto the sidewalk would be *prima facie* negligent. The vehicle colliding with a pedestrian on a sidewalk is in a position where it has no right to be.

13. In the circumstances, the Defendant is liable for the Plaintiff's damages.

GENERAL DAMAGES

14. The Plaintiff sustained injuries to her head, right lower limb, and left shoulder. She suffered a fracture of her right supra-orbital wall and an injury to the trigeminal cranial nerve causing neuralgia [4]. The Plaintiff sought R1 250 000 under this head of damages but submitted that an award of R800 000 would be suitable. The Defendant contended for an award of R400 000.

15. The Plaintiff filed seven expert reports in support of this claim. They included a Neurologist, Orthopaedic Surgeon, Ophthalmologist, Clinical Psychologist with an interest in neuropsychology, Occupational Therapist, and Speech Therapist. The Defendant did not file any expert reports.

16. The Plaintiff's appointed neurologist assessed the Plaintiff in October 2020. She reviewed the hospital notes, which indicated that the Plaintiff was conscious on admission. A computerised tomography scan (CT scan) suggested a supraorbital fracture. She was diagnosed on discharge, five days after admission, with a diffuse brain injury.[5] The Neurologist described the Plaintiff's emotional state during the assessment. She broke down and cried at least twice during that consultation. Some

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2 Mosaval v Minister of Posta and Telecom 1978 (1) SA 369 (C).

3 Mashigo v Santam Insuransie Maatskappy Bpk. 1973 (1) SA 156 (A)

4 rigeminal neuralgia causes sudden, intense facial pain like an electric shock or stabbing sensation. The pain typically affects one side of the face and can be triggered by everyday activities, such as brushing one's teeth, eating, or even a gentle breeze. The trigeminal nerve is one of 12 cranial nerves that connect the brain to the head and neck.

5 A diffuse brain injury affects multiple areas of the brain rather than a single specific spot. It can occur when the brain is shaken or jolted inside the skull, such as during a car accident or a fall. This movement can stretch or tear the brain's nerve fibres, called axons, which are responsible for sending signals between different parts of the brain. As a result, communication within the brain can be disrupted, leading to a wide range of symptoms

of the other experts noted a similar reaction. The same situation repeated itself in Court four years later, and proceedings had to be adjourned. The reaction is inexplicable. The Neurologist suspected that the majority of the Plaintiff's symptoms are related to depression and anxiety rather than true cognitive fallout, given the Plaintiff's 'essentially normal' CT brain scan. The expert documented chronic headaches and backache, right eye tiredness, and multiple somatic complaints[6], for which the Plaintiff resisted medication. She had symptoms related to her right knee. The Plaintiff had a mildly disfiguring scar on her forehead. The Neurologist elicited hypersensitivity over the distribution of the fifth cranial nerve in its branches and stated, rather profoundly, that she believed it to be a genuine finding.[7] The expert concluded that the Plaintiff can perform her daily activities of living adequately. The Plaintiff has reached maximum medical improvement and should benefit from psychological intervention.

17. The Clinical Psychologist found, through testing, that the plaintiff's attention and concentration results were variable. Her motor dexterity was impaired, and she had difficulties initiating speech. Her verbal memory was influenced by distraction and delay, but her visual memory was intact. Her visuospatial and perceptual abilities were intact. On testing executive functioning, the Psychologist noted that the Plaintiff was distracted by pain. The expert found that the executive testing was predominantly impaired. Although drawing a correlation between the severity of the brain injury and anticipated neuropsychological fallout, the expert suggested that the fracture to the Plaintiff's orbit may well indicate damage and some shearing to the brain neurons. She accepts that the Plaintiff's symptoms may well be a result of some mood disorder but that the sequelae of the perceived brain injury co-exist. She goes on to say that the genesis of the behavioural, cognitive and emotional changes is academic and must be accepted as a result of the accident. She then diagnosed the Plaintiff with Major Depressive Disorder and recommended both psychiatric

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6 When a doctor mentions "multiple somatic symptoms," they are referring to physical symptoms that a person experiences, such as pain, fatigue, or shortness of breath, which may not always have a clear medical explanation. These symptoms can occur in different parts of the body and might be linked to a condition like somatic symptom disorder. In such cases, the focus is often on how the person reacts to these symptoms—such as excessive worry, distress, or difficulty functioning—rather than the symptoms themselves.

7 The fifth cranial nerve is the trigeminal nerve. It is responsible for both sensory and motor functions. It provides sensation to the face, including areas like the forehead, cheeks, and jaw. It also helps control the muscles involved in chewing.

assessment and psychological interventions. She concluded by stating that significant improvement from a neuropsychological perspective was not expected. The Psychologist's assessment was performed in May 2021.

18. The Occupational Therapist was more forthright. She referred to the Plaintiff's decreased resilience to pain and suspected a psychological component to the Plaintiff's reaction. The expert qualified the statement by saying that it was not attributed to malingering or a conscious attempt to magnify her symptoms, but rather part and parcel of her symptomatology.

19. In her second report, following an assessment on 25 June 2024, the expert noted that the Plaintiff was more composed than previously, able to provide a clear account of her current situation, and more concise in her responses. The Plaintiff received treatment at her local clinic and a general practitioner. She received analgesia, which she took daily and used anti-inflammatories occasionally. She began a gentle exercise regimen at her local gymnasium. She has received counselling from her pastor since her divorce. She has lost weight, and her self-esteem has improved. She accepted her facial disfigurement and wanted to encourage others to do the same. The birth of her third child had given meaning to her life, helped her remain positive, and stabilised her mood. The Plaintiff's self-report included a myriad of somatic and functional symptoms.

20. The Plastic Surgeon provided a schematic drawing of a face, illustrating the distribution of the right supraorbital and supratrochlear nerves and depicted the area of anaesthesia to the left of the midline. He initialled the drawing. It is unclear as to why this drawing was included in the report. The area of anaesthesia is on the opposite side of the face to where the injury to the orbit occurred. The Plastic Surgeon identified the scar from the laceration to the forehead and the slight asymmetry of the Plaintiff's face that could be surgically revised. He did not recommend any surgical intervention for the knee, leg, or shoulder. He drew a correlation between facial injuries and psychological symptoms.

21. The Ophthalmologist found no visual disability from the right orbital wall fracture.

22. The Speech Therapist found word retrieval deficit, poor cognitive lexical search strategies and executive dysfunction, disturbances of complex attention, mental tracking difficulties and poor verbal working memory, preserved ability to think abstractly, poor verbal selective attention and difficulties in sustaining auditory attention, compromised complex listening comprehension skills, the latter forming part of the Plaintiff's receptive communication difficulties, central auditory dysfunction and impaired conversational skills. The Speech Therapist considered it highly probable that the Plaintiff's expressive and receptive communication impairments are attributable to traumatic brain injury sustained in the accident. The expert, like the Psychologist, acknowledged the Plaintiff's depressive symptoms but believed that the Plaintiff's communication difficulties likely and understandably contributed to her disturbances of mood, her irritability, and her social withdrawal. The Speech Therapist assessed the Plaintiff in May 2021.

23. The Speech Therapist provided an addendum report based on a follow-up assessment on 26 September 2024. She elicited the history that the Plaintiff's husband had deserted her, and she was filing for a divorce. She gave birth to another child two years after the Speech Therapists initial assessment. The Plaintiff obtained work for one and a half months in 2022. The Plaintiff had enrolled for a sewing course, which she aimed to complete in October 2024. The Therapist concluded after her second assessment that the Plaintiff's accident-related sequelae about speech had remained the same. The expert does not refer to whether the Plaintiff sought psychiatric or psychological treatment.

24. Two Orthopaedic Surgeons assessed the Plaintiff. The Plaintiff does not seem to rely on the first expert who assessed her in November 2021. She provided a more recent report from another Orthopaedic Surgeon dated 16 September 2024. The second expert agreed with the findings made by the first expert, who diagnosed soft tissue injuries to the lumbar spine, right shoulder, and right knee, all of which would be amenable to medication. The first expert assessed the Plaintiff's whole-person

impairment relating to her soft tissue injuries to be 6%.[8] The second Orthopod found the examination of the spine, knees and shoulder to be normal.

25. The Defendant submitted three cases for the Court's consideration. None of the victims in those cases suffered a brain injury or psychological symptoms. The Plaintiff could not source any comparable awards.

EVALUATION

26. The evidentiary base supporting the claim for general damages is confounding. As a starting point, the Court observed the Plaintiff's emotional reaction when asked questions relating to the accident. The hospital notes confirm a head injury with bruising of the right forehead that required suturing and a fracture of the right orbital wall. The Neurologist did not grade the brain injury except for recording that the hospital diagnosed a diffuse injury without an open intracranial wound. She referred to the CT scan, which was normal except for the fracture of the orbit wall. The Ophthalmologist's examination indicated normal visual functioning.

27. The Neurologist suspected the majority of the Plaintiff's symptoms to be related to anxiety and depression rather than true cognitive fallout. The expert conducted an examination of the Plaintiff's gait. She described it as follows: "There was extremely exaggerated impairment whilst doing tandem gait, unable to keep her balance, wobbling dramatically all over the place. This is likely functional."[9]

28. The test results of the Clinical Psychologist and Speech Therapist suggest florid neuropsychology deficits and communication problems. They acknowledged the Neurologist's opinion but attributed the deficits elicited to the sequelae of organic

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[8] Whole Person Impairment (WPI) is a way to measure how much an injury or condition has permanently affected a person's ability to function in daily life. It's expressed as a percentage, with higher percentages indicating more severe impairments. There are specific guidelines to assess WPI e.g the type of injury, its impact on different parts of the body, and whether the condition has stabilised. This measurement is often used in legal or insurance contexts to determine compensation for injuries. It forms part of the initial assessment in road accident compensation to determine whether an accident victim's should receive compensation for general damages.

[9] The description of a response as being 'functional' means that it is not due to a structural or organic problem. In this case, the nervous system is not working properly, but there is no detectable damage or disease causing the symptoms.

brain injury. Neither of them considered whether a mood disorder could influence their test results, although they noted pain and distraction whilst testing. Neither suggested re-testing after psychiatric or psychological intervention. The Defendant did not appoint any experts. The only suggestion that the Plaintiff may have residual symptoms is her reaction in the witness box. She let out a loud wail and began crying once the topic of the accident was broached. There is no indication that she has sought psychological or psychiatric interventions over the years or that she is on any psychotropic medication.

29. In at least two of the three updated reports, there has been documented improvement in the Plaintiff's social and mental functioning. The Orthopaedic report excludes sequelae from the accident-related injuries to the right shoulder, knee, and lumbosacral spine. A thread of optimism regarding the Plaintiff's general functioning runs through the Occupational Therapist's second report, although the conclusions are guarded. There is no recent neuropsychology report.

30. The Court accepts as proven that the Plaintiff suffered a brain injury that should not have caused cognitive fallout, disfigurement from her facial scarring and mild asymmetry of her face, and loss of amenities of life from her inadequately explained or updated reactions to references to the accident. The Plaintiff suffered acute pain and psychological distress. The chronic or ongoing sequelae have improved to the extent that the Plaintiff enrolled for a sewing course and seeks medical attention occasionally. After considering all these factors, the Court awards the Plaintiff R500,000 in general damages.

31. The Plaintiff provided a draft order, which has been adjusted in the order that follows. The order covers the standard undertaking statutorily provided to accident victims, which includes coverage for future medical expenses and payment provisions for the Plaintiff's and experts' costs, as well as the costs incurred in obtaining payment thereof. The Plaintiff sought her party and party costs, as well as counsel's costs on the C scale. The order also makes provision for the further conduct of the remaining head of damages relating to loss of earnings. The dates provided by the Plaintiff for the further conduct of this matter have been adjusted to accommodate the date of this order.

ORDER

1. The Defendant is liable for the Plaintiff's proven damages arising from her injuries and their sequelae of a motor vehicle accident that occurred on 25 September 2019,

2. The Defendant shall provide the Plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 ('the undertaking') to compensate the Plaintiff for her future medical expenses and costs arising from her accident-related injuries on 25 September 2019 and their sequelae. The undertaking shall cover the Plaintiff's costs of future accommodation in a hospital or nursing home or the treatment or rendering of services for the supply of goods after the costs have been incurred and upon proof thereof.

3. The Defendant shall pay the Plaintiff's attorneys the sum of R500 000 (Five hundred thousand rand) ('the capital') by way of an electronic transfer into the attorney's trust account, the details of which are set out below.

4. The Defendant shall pay the Plaintiff's taxed or agreed-upon party and party costs, including the taxed or agreed fees of Counsel on scale C.

5. The Defendant shall pay the taxed or agreed costs of the reports and qualifying expenses (where relevant and incurred) of the following medico-legal experts:

    6.1 Dr A Richardson,
    6.2 Dr K Cronwright,
    6.3 Dr P A Olivier,
    6.4 Dr A Perrot
    6.5 Dr D Ogilvy,
    6.6 Ms E Burke,

6.7 Ms E Carey

6. The Defendant shall be liable for interest on the capital from 14 (fourteen) days of this order, and from 14 (fourteen) days of the finalisation of the taxed or agreed costs at the prescribed rate of interest.

7. The Defendant shall pay the costs involved in obtaining payment of the capital and other costs referred to in the preceding paragraph,

8. The banking details of the Plaintiff's attorney's trust account are:

Account:	A Batchelor & Associates
Bank:	ABSA Bank
Branch:	Heerengracht, Cape Town
Branch Code:	632756
Account number:	4[…]

9. The Defendant shall have the Plaintiff assessed by an Industrial Psychologist and Occupational Therapist at an agreed date.

10. The Defendant shall file the respective medico-legal reports by 16 May 2025.

11. The parties shall file a joint minute of the corresponding experts by 9 June 2025.

12. The matter is postponed for the determination of the Plaintiff's claim for loss of earnings to the judicial case management roll by 12 June 2025.

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Bhoopchand AJ

Acting Judge

High Court

Western Cape Division

Judgment was handed down and delivered to the parties by e-mail on 31 March 2025