



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

Not reportable

Case no: 5664/2021

In the matter between

KAREN LYNETTE SMITH

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

Neutral citation: *Karen Lynette Smith v Road Accident Fund*

Coram: Nemavhidi AJ

Heard: 31 January 2025

Delivered: 29 April 2025

Summary: Claim for future loss of income – whether plaintiff proved loss of income arising from a loss of earnings or earning capacity – whether plaintiff lost income or future income due to damage-causing event allowing claim for future loss of income.

ORDER

- (a) The plaintiff's claim for future loss of earnings/earning capacity is dismissed.
- (b) The defendant is liable for payment of 100% (one hundred percent) of the plaintiff's proven or agreed damages resulting from a motor vehicle accident that occurred on 2 November 2019.
- (c) The defendant shall provide an undertaking in terms of s17(4)(a) of the Road Accident Fund Act 56 of 1996 to compensate the plaintiff for the costs relating to the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the plaintiff, after the costs have been incurred and on proof thereof and rising from the collision which occurred on 2 November 2019.
- (d) The defendant shall pay to the plaintiff the amount of R450 000.00 which is for general damages.
- Total: R450 000
- Should payment not be made within 180 (one hundred and eighty) days from the date of the court order, the defendant shall be liable for payment of interest on the amount of R450 000 calculated at the prescribed rate, from 15 (fifteen) days after the date of the court order, till date of payment.
- (e) The defendant shall pay the plaintiff's taxed or agreed party and party costs, on a high court scale to date of this order, which shall include the reasonable qualifying fees (where applicable) of plaintiff's experts, as well as plaintiff's counsel fees on Scale B.
- (f) The plaintiff shall allow the defendant 180 (one hundred and eighty) calendar days to make payment of the taxed or agreed high court costs.
- (g) Should payment as aforesaid costs not be made within 180 (one hundred and eighty) calendar days from the date of settlement/taxation, the defendant shall be liable for payment of interest calculated at the prescribed rate, from 15 (fifteen) days after the date of settlement/stamped allocatur, to date of payment.
- (h) The plaintiff's claim for past medical expenses stands over for later adjudication.
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JUDGMENT

Nemavhidi AJ

[1] This matter is before the court to determine the loss of earnings/earning capacity after the injury sustained by the plaintiff who was involved in a motor vehicle collision on 2 November 2019.

[2] The plaintiff was born on 12 May 1961 and was 58 years old on the day of the accident. She was employed by Bigen Africa Services (Pty) Ltd (Bigen Africa) as a senior engineer draughtsman.

[3] Following the accident, the plaintiff was on sick leave and was fully compensated during this period. Upon her recovery, she returned to her workplace, where she remained employed up to August 2020. She was retrenched by her employer for reasons unrelated to the accident. The main cause of the retrenchment was the outbreak of the Covid-19 pandemic.

[4] She was offered a redundancy package which she invested. She earns approximately R9 500 per month from this investment. Between September 2020 and February 2021, the plaintiff continued to work on a project which she started pre-retrenchment and was compensated for such work.

[5] In March 2021, the plaintiff was re-employed by Bigen Africa on annual contract basis as an independent consultant doing the same work she did pre-retrenchment. When this annual contract ends on 31 March 2025, it will be renewed until 31 March 2026. Upon renewal of each yearly contract, the plaintiff negotiates an hourly rate with Bigen Africa and bills the company on a monthly basis. The plaintiff is no longer involved IT support, which required her to carry items around. She works from her home

[6] The plaintiff's average monthly income for the period between April 2024 to December was R27 700. The new contract will run from April 2025 to March 2026. The plaintiff will be 65 years of age on 12 May 2026. Until then, the plaintiff would

not have suffered any loss of earnings because of the accident and subsequent injuries she sustained.

[7] The plaintiff would have wished to work for Bigen Africa up to the age of 75 years, if her health permitted, as she and her husband have financial constraints. She testified that, having regard to the accident and the pain, she will only work until the age of 65 years as moving her arm or her hand between the mouse and the keyboard strains her shoulder, which causes her pain. The plaintiff stated that, even if she wished to work beyond 65 years of age, she is not certain that Bigen Africa will extend her contract, and how frequently the work would be outsourced to her. The plaintiff does not know any consultants above the age of 65 currently working on a contract basis for Bigen Africa, even though she does not know all the staff members. She testified that if Bigen Africa extends her contract after 1 April 2026, when she would have turned 65, she would likely decline the offer.

[8] Mr Llewellyn Biggs is a professional engineering technologist, principal at the company and a Project Operations Manager at Bigen Africa. He determines whether work is to be done in-house or outsourced. Work will be outsourced when the workload requires it, or it is a skilled resource which Bigen Africa does not necessarily keep in-house.

[9] He stated that there may be periods in between contracts during which the awarding of consultancy contracts may stop due to the consultant's age, or if the vacant positions are filled. He will offer a yearly contract to the plaintiff for as long as she can fulfil the duties awarded or until such a point where the human resources department (HRD) no longer permits it. He does not know of anyone beyond the age of 65 years working for Bigen Africa.

[10] He stated that Bigen Africa is continuously sourcing permanent draughtsman. By implication, such permanent employees would lessen the need to outsource work to consultants.

The expert reports:

The plaintiff's orthopaedic surgeon

[11] The surgeon opined that the plaintiff's right shoulder and upper arm has a profound impact on her productivity and working ability. With successful treatment, her productivity will improve. Even with successful management, she will most probably always have a weakness in her right shoulder. She should be accommodated in a permanent light duty and back-friendly working environment as determined by the occupational therapist (OT).

The occupational therapist

[12] This occupational therapist found the plaintiff to have a residual working capacity and her capacity was found to fall within the sedentary to low and light ranges. Her work as a draughtsman fell in the sedentary range. She does not foresee that the plaintiff will be able to work past the age of 65 years.

The industrial psychologist

[13] She conceded that her reports did not contain any information as to which percentage of the population work between 65 and 70 years. She could not say that the plaintiff will be offered a contract after the age of 65 years.

Conclusion

[14] It is clear that the plaintiff has a residual working capacity, and that the employer stated that the quality of her work did not decrease and remained of high quality. However, there is uncertainty about whether Bigen Africa will continue awarding contracts to the plaintiff between her ages of 65 - 70 years. This may include possible periods of unemployment between contracts and uncertainty as to new contracts once vacancies are filled by permanent staff.

[15] In *Minister van Veiligheid en Sekuriteit v Geldenhuys*,¹ the Supreme Court of Appeal held that the question is not what the claimant could have earned but what

¹ *Minister van Veiligheid en Sekuriteit v Geldenhuys* [2003] ZASCA 90; [2003] 4 All SA 330 (SCA); 2004 (1) SA 515 (SCA) para 42.

he probably would have earned. In *Deyssel v Road Accident Fund*,² the basis of the award was set out as follows:

'Loss of income arises primarily from a loss of earning capacity, in other words, if the plaintiff loses a certain degree of earning capacity', this will show in that they will lose actual income in future. This is also true in that when a person loses income due to a damage-causing event, such loss is due to a lowered earning capacity arising from the same cause of action.'

[16] In *Scheepers v Road Accident Fund*,³ Naidoo J held as follows:

'It is trite that the Plaintiff bears the onus to prove on a balance of probabilities that the injuries he sustained have reduced his earning capacity which will result in the actual loss.'

[17] The evidence shows that, having regard to the accident, the plaintiff, will after normal retirement age, still be recommended by Mr Biggs as a consultant for work which needs to be outsourced. Mr Biggs stated that, even if Bigen Africa does not have employees who are over the age of 65 years, he will still offer a contract to the plaintiff as and when her skills will be needed as a consultant, depending on her ability and health to perform the work. It is common cause that the plaintiff was not retrenched because of the accident-related incapacity but because of the Covid-19 pandemic. The plaintiff did not lose any earning capacity as her employer committed that he would continue to award annual consultancy contract to the plaintiff beyond her normal age of retirement.

[18] In the result, the following order is made:

- (a) The plaintiff's claim for future loss of earnings/earning capacity is dismissed.
- (b) The defendant is liable for payment of 100% (one hundred percent) of the plaintiff's proven or agreed damages resulting from a motor vehicle accident that occurred on 2 November 2019.
- (c) The defendant shall provide an undertaking in terms of s17(4)(a) of the Road Accident Fund Act 56 of 1996 to compensate the plaintiff for the costs relating to the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the plaintiff, after the costs have

² *Deyssel v Road Accident Fund* [2011] ZAGPJHC 242 paras 15.

³ *Scheepers v Road Accident Fund* [2023] ZAFSHC 248 para 14; see also *Rudman v Road Accident Fund* [2002] ZASCA 129; [2002] 4 All SA 422 (SCA); 2003 (2) SA 234 (SCA) and *Road Accident Fund v C K* [2018] ZASCA 151; [2019] 1 All SA 92 (SCA); 2019 (2) SA 233 (SCA).

been incurred and on proof thereof and rising from the collision which occurred on 2 November 2019.

(d) The defendant shall pay to the plaintiff the amount of R450 000.00 which is for general damages.

Total: R450 000

Should payment not be made within 180 (one hundred and eighty) days from the date of the court order, the defendant shall be liable for payment of interest on the amount of R450 000 calculated at the prescribed rate, from 15 (fifteen) days after the date of the court order, till date of payment.

(e) The defendant shall pay the plaintiff's taxed or agreed party and party costs, on a high court scale to date of this order, which shall include the reasonable qualifying fees (where applicable) of plaintiff's experts, as well as plaintiff's counsel fees on Scale B.

(f) The plaintiff shall allow the defendant 180 (one hundred and eighty) calendar days to make payment of the taxed or agreed high court costs.

(g) Should payment as aforesaid costs not be made within 180 (one hundred and eighty) calendar days from the date of settlement/taxation, the defendant shall be liable for payment of interest calculated at the prescribed rate, from 15 (fifteen) days after the date of settlement/stamped allocatur, to date of payment.

(h) The plaintiff's claim for past medical expenses stands over for later adjudication.


Nemavhidi AJ

Appearances

For the plaintiff: Adv DJ Marx
Instructed by: VZLR Attorneys, Bloemfontein

For the defendant: MsJ Gouws
Instructed by: State Attorney, Bloemfontein.