IN THE HIGH COURT OF SOUTH AFRICA, MPUMALANGA DIVISION,

(MBOMBELA MAIN SEAT)

CASE NO.: 5089/2023
APPEAL CASE NO.: A58/24

DELETE WHICHEVER IS NOT APPLICABLE

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

[redacted]

29 May 2025
DATE

SIGNATURE

In the application between:

PATRICIA NOMAFA BHEMBE **APPELLANT**

AND

THE ROAD ACCIDENT FUND **RESPONDENT**

JUDGMENT

<u>FOURIE AJ</u>

<u>INTRODUCTION:</u>

[1] This is an appeal against the Judgment and Order by Mazibuko AJ (Court *a quo*) granted on 25 April 2024 whereby the Court *a quo* granted an order as *per* Draft Order. In the draft order, *the Defendant was by agreement held liable for payment of 100% of agreed or proven damages of the Plaintiff. It was further recorded that the issue of General Damages in the amount of R450 000.00 was previously disposed of between the parties as detailed in the offer of settlement as accepted by the Plaintiff, dated 15 April 2024. The Defendant was ordered to furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of Act 58 of 1996. The matter proceeded on trial only in respect of loss of income damages, whereafter the Defendant was ordered to pay the Plaintiff the sum of R927 265.15 in respect thereto, with interests at 11,25% per annum plus costs on party and party Scale A.*

[2] Leave to Appeal to this Court was granted by the Court *a quo* on 23 August 2024. The appeal is aimed against the order made in respect of damages awarded for loss of income.

[3] This Court is satisfied that the preliminary issues, such as the setting of security and the providing of an authority to act, have been properly met.

[4] The Respondent did not oppose the appeal and has filed a Notice to Abide by this Court's decision.

BACKGROUND:

[5] In the current matter, Patricia Nomafa Bhembe (the Appellant), instituted action against the Road Accident Fund (the Respondent) for damages suffered as a result of the personal injuries she sustained in a motor vehicle collision on 19 April 2022.

[6] The underlying facts of the matter are not in dispute and it is further accepted by the respective parties that merits have been settled 100% in favour of the Appellant, general damages have been tendered by the Respondent and accepted by the Appellant in the amount of R 450 000.00 (four hundred and fifty thousand Rand) and in respect of future medical expenses the Respondent has tendered an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1966 (hereinafter the "Act") which tender was also accepted.

[7] At the hearing of the matter in the Court *a quo* the Appellant personally gave evidence and expert evidence was accepted by the Court after accepting a Rule 38(2) application authorising such by agreement between the Appellant and the Respondent whereby the evidence of the orthopaedic surgeon, the occupational therapist, the industrial psychologist, and the actuary was admitted into evidence by virtue of their affidavits being presented and accepted by the Court.

[8] Unfortunately as is the case in too many litigious matters concerning the Road Accident Fund, the Road Accident Fund elected not to appoint any experts that could assist the court in coming to a just conclusion nor did the Respondent advance any evidence which could either contrast or rebut the evidence as was led by the Appellant or aid the Court *a quo* in coming to a just and fair order.

[9] The Appellant experts' reports remaining unchallenged, this Court cannot regard the content thereof in any other light than same being accepted by the Respondent.

[10] Whilst the evidence as presented by the Appellant herself could be open to some criticism, the evidence as led has not been rebutted by the Respondent.

[11] Although this Court has carefully evaluated and scrutinised the evidence of both the experts and the Appellant in her personal capacity and has not summarily accepted same, any opposition to the evidence as presented in the Court *a quo* by the Appellant or her experts ought to be addressed with caution under circumstances where no rebutting evidence was presented to the Court *a quo*.

[12] Although the Appellant states that she is appealing against the whole of the Judgment of Mazibuko AJ, that can never be the case. The majority of the Judgment of Mazibuko AJ was granted pursuant to a settlement being reached between the Appellant and the Respondent. The only aspect with which the Appellant can take any issue is with Order 2.3 of the Order being the amount awarded by Mazibuko AJ to the Appellant in respect of past and future loss of earnings reflecting and amount of R 927 265.15 (Nine hundred and twenty-seven thousand two hundred and sixty-five rand and fifteen cents).

[13] The Appellant is also misguided in the Notice of Appeal, which I have to say reads more like a Notice of Application for Leave to Appeal than it does an appeal, but, irrespective the Appellant states that the Court *a quo* erred in finding or assuming that there was no loss of future earnings. This line of reasoning stands opposite to paragraph 2.3 of the Order of the Court *a quo,* which expressly states the amount awarded by the Court to be an amount for both past and future loss of earnings.

[14] Although I am of the intention of dealing with the requirements for a claim of loss of earnings hereinafter, which I only do to be thorough, it is evident that the Court *a quo* sufficiently evaluated the matter and found that a past and future loss of earning capacity existed and premised upon same the Court *a quo* made a ruling on a specific quantum it believed to be just under the circumstances.

<u>EVALUATION OF THE EVIDENCE IN THE COURT *A QUO:*</u>

[15] This Court places value on the finding of the court in the matter of **Spamer v Road Accident Fund 2018 JDR 0604 (GP)** as *per* Molopa-Sethosa J at paragraphs 23 – 25 held as follows:

"[23] The conclusions by the experts set out in their reports referred to above, are properly motivated expert opinions which were admitted by the Respondent.

[24] It is a matter of logical reasoning that all the factors mentioned by the experts and summarized in paragraph 17 above, will probably result in future in a reduction of the Appellant's patrimony (earnings) having regard to the injuries, in comparison to what he would have earned, for example, due to less incentive remuneration, delays in promotion and/or career progression, lower career ceiling etc, all as a result of lower productivity. The Appellant's loss may not be calculable according to the method proffered in the matter of ***Prinsloo v Road Accident Fund 2009 SA 406 (SE)*** *referred to in the court a quo's judgment, but it can be quantified applying different contingencies (a higher post-accident contingency) which method is applied on a daily basis in the courts over many years.*

[25] Having regard to the facts emanating from the various expert reports referred to above there is a clear nexus between those facts and the conclusions reached."

[16] When confronted with expert reports the Court is to be guided by the reasoning of the Supreme Court of Appeal in the matter of **RAF v Zulu [2011] ZA SCA 223** in which matter the Court reaffirmed the principle of **Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another 2001 (3) SA 1188 (SCA)**:

"[36] That being so, what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on reasoning. That is the thrust of the decision of the house of lords in the medical negligence of ***Bolitho v City and Hackney Health Authority [1997] UKHL 46****".*

[17] While having regard to what the Court held in the matter of **IM v Road Accident Fund 2023 (1) SA 573 (FB)** at paragraph 21 that:

> *"The common thing is that courts must jealously protect their role and powers. Courts are the ultimate arbiters in any court proceedings. The facts that caused the experts' opinions in this case are vital. They were supplied by the Plaintiff and corroborated by experts and surrounding evidence. They are logical and sound."*

This Court further remains guided by a decision of this Court, also sitting as a full bench in the matter of **Zodwa Nono Ngwenya v Road Accident Fund (Case Number: A104/2019 delivered on 10 March 2022)** held that:

> *"The acceptance of reports without their authors giving oral evidence in Court is not unheard of in civil trials."*

[18] A challenge to the content of an expert report under circumstances where no rebutting evidence has been provided should accordingly be dealt with, with caution and not merely at a Defendant's asking, who had the opportunity of leading evidence and elected not to do so.

[19] From the evidence led in the Court *a quo* evaluated together with the transcribed record of appeal and the judgment of the Court *a quo* it is evident that the first portion of the test, whether a diminishment of or reduction of earning capacity existed, the Court already found in favour of the Appellant in that it does and as

such it is not necessary for this Court to rule upon that aspect. Similarly, it was not seriously contested in the Court *a quo* and as is evident from the Notice to Abide the Respondent does not oppose same herein.

[20] As such, all that remains is for this Court to establish whether it ought to interfere with the award for damages awarded by the Court *a quo* in respect of loss of income.

[21] I align myself with what the Appellant Division (as it then was) found in the matter of **Southern Insurance Association v Bailey NO. 1984 (1) SA 98 A,** where it stated that:

> *"It is well settled that this Court does not interfere with awards of damages made by the Trial Court unless there is substantial variation or a striking disparity between the award of the Trial Court and what this Court considers ought to have been awarded; or the Trial Court did not give due effect to all the factors that properly entered into the assessment; Or the Trial Court made an error in principle or misdirected itself in a material respect."*

[22] The object of the Road Accident Fund, shall at all times be repayment of compensation in accordance with the Act for loss or damage wrongfully caused by the driving of a motor vehicle **(See in this regard: Section 3, Road Accident Fund Act, 56 of 1996 as amended)**.

[23] The Plaintiff needs to be compensated sufficiently full, as he/she will not have an opportunity at a later stage to amend their claim once their claim has been finalised **(See in this regard: Jacobs v Cape Town Municipality (1935) CPD 478)**.

[24] The evaluation of the amount to be awarded for the loss, does not involve proof on a balance of probabilities. It is a matter of estimation. Where a Court is dealing with damages which are depending upon uncertain further events, which is generally the case of claims for loss of earning capacity, the Plaintiff does not have to prove

on a balance of probabilities and is it entitled to rely on the Court's assessment of how they should be compensated for their loss **(See in this regard: MS v RAF (10133/2018) [2019] ZAGPJHC at 84).**

[25] The trial judge shall not be tied down by inexorable actuarial calculations. He has a large discretion towards what he considers right. One of the elements in exercising this discretion, is the making of a discount for contingencies, or differently put, the uncertainties of life **(See in this regard: Southern Assurance Association Ltd v Baily N.O 1984 (1) SA 98 (A))**.

[26] In assessing damages for loss of earnings or support, it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is the prerogative of the Court **(See in this regard: RAF v Guedes 2006 (5) SA 583 (SCA))**.

[27] Having found that the earning capacity of the Appellant was reduced and that there was a need for compensation in respect of same to be paid to the Appellant the Court *a quo* needed to evaluate an amount which it found to be just under the circumstances with the evidence presented to it. Whilst the court would have been guided by the expert reports filed by the Appellant and the report specifically by the actuarial accountant, it is by now a settled principle that a court will not be tied down by actuarial calculations when ordering damages that the court believes to be just and justified.

[28] The Appellant's actuarial report and the confusion that arose at the hearing of the matter in the Court *a quo* can be regarded as central to such confusion as the actuarial report and specifically page 360 of the indexed Appeal bundle sets out the loss the Appellant avers to have suffered as an amount of R 5 827 657.00 (Five million eight hundred and twenty-seven thousand six hundred and fifty-seven Rand) but which amount did not have regard to any contingencies being applied. I pause to state this can only be because the Appellant did not instruct the Actuary to apply any contingencies. Actuaries do not decide which contingencies to apply; they make such an application based purely on the instructions provided to them.

[29] Contingencies are a helpful mechanism to account for the eventualities of life, and I am unaware of a legal precedent where no contingencies were applied in matters such as the matter at hand. By approaching the Court *a quo* without a proper actuary report wherein justified contingencies were applied, the approach by the Appellant needs to be frowned upon as it was not at all helpful for the Court to come to a just conclusion in respect of what would be a just order. During argument, the Appellant's counsel agreed that higher-than-normal contingencies ought to be applied and submitted that it would be just if the Court orders, in respect of past and future loss of income that an amount of R 3 183 420.15 (Three million one hundred and eighty-three thousand four hundred and twenty rand and fifteen cents) be awarded to the Plaintiff. The Plaintiff made such a statement in the absence of an updated actuarial report indicating the calculations of the Plaintiff to be correct.

[30] The Defendant, in keeping with the reasoning that higher than usual contingencies ought to be applied requested a contingency of 5% in respect of past loss and 40% in respect of future loss to be applied.

[31] The fact that no proper calculations were at hand when the matter was heard should be indicative to the litigants of the importance of actuarial calculations and the accuracy thereof in order to guide the Court to come to a just conclusion in respect of matters such as this.

[32] From the appeal record, it is noted that the Court *a quo* tried its utmost best to gather as much and as accurate information as possible from the Appellant and the Respondent amidst legal argument, and it is evident that amidst the submissions made, the correct amounts premised on the view of Court had become lost.

[33] Although I am of the opinion that the confusion was in essence created by the incomplete manner in which the Appellant elected to present its case, justice

dictates that an evaluation of the matter as a whole be made to ensure that the amount that is ultimately awarded causes justice to be done.

[34] For the purpose of this judgment and in coming to a just conclusion, the Court is guided by that which the Plaintiff has sought, ultimately being an amount of R 3 183 420.15 and the contingencies which the Respondent sought to be applied by the court.

[35] In respect of the Appellant's past loss of income, the Court is satisfied to apply a contingency of 5% to the actuarial amount of the Appellant as per page 360, which amount stands uncontested and which the Court is bound to accept.

[36] In respect of the past loss, the Appellant is accordingly entitled to compensation in the amount of R 156 593.25.

[37] In respect of future loss of earnings, the Court *a quo* had several reservations in respect of the evidence tendered by the Appellant. The respective parties conceded, rightfully so, that higher-than-normal contingencies need to be applied.

[38] The establishment of contingency percentages and to which portion of the loss they need to be applied falls squarely within the discretion of the Court. Even then, they shall serve merely as a guide in order for the Court to come to a just conclusion.

[39] Having evaluated the evidence presented to the Court *a quo* and having heard the submissions by the respective counsels, this Court is of the intention to apply a 50% contingency to both the pre- and post-morbid future loss of earnings.

[40] As a result of the contingencies being ordered as stated, the future loss of income of the Appellant is established and ordered to be R 2 913 808.50 (Two million nine hundred and thirteen thousand eight hundred and eight rand and fifty cents).

[41] The total loss of income of the Appellant is accordingly ordered to be in the amount of R 3 070 401.75 (Three million seventy thousand four hundred and one rand and seventy-five cents).

[42] Having regard to the facts represented by the Appellant in the Court *a quo* and the fact that the Appellant at the hearing of the matter did not persist with claiming any amount in excess of R 3 183 420.15 (Three million one hundred and eighty-three thousand four hundred and twenty rand and fifteen cents), the application of any other contingencies or the exercise of the court discretion in any other way would lead to the court making an order that would amount to ordering an amount in excess of that which the Appellant claimed when the matter was heard which in itself would be unjust.

[43] The current matter is not one where the Appellant presented an unsurmountable case to a Court *a quo* who came to an incorrect conclusion but rather one where the case the Appellant presented to the Court *a quo* was of such a confusing nature that it was eminent that the confusion would spill over into the judgment provided by the Court *a quo*. Although this Court is willing to come to the assistance of the Appellant in respect of loss of income it would not be in the interest of justice if the Respondent is burdened with a cost order pertaining to this appeal. The facts of the matter, the fact that the Respondent did not oppose the appeal and the interests of justice dictate that no cost order is herein made.

ORDER:

[44] For all the reasons stated herein, the following Order is made:

1. The Appellant's appeal is upheld.

2. Paragraph 2.3 of the Order of the Court *a quo* is replaced with the following Order:

   "2.3. The Defendant is ordered to pay the Plaintiff the sum of R 3 070 401.75 (Three million seventy thousand four hundred and one rand and seventy-five cents) for past and future loss of earnings within a period of 180 days from the date of this Order.

3. No order as to costs.

[redacted]

H F FOURIE AJ
ACTING JUDGE OF HIGH COURT, MBOMBELA

I agree, and it is so ordered: [redacted]

TV RATSHIBVUMO (DJP)

I agree: [redacted]

M MOLELEKI (AJ)

Judgment reserved on: **2 May 2025**
Date of delivery: **29 May 2025**