IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No: 5271/2021

In the matter between:

MOTHEPANE ELLEN LEPHATSI **PLAINTIFF**

(ID NO: 8[…])

and

ROAD ACCIDENT FUND **DEFENDANT**

(Link Number: 4321503)

AMENDED ORDER

On 21 June 2025 I delivered my judgment. I have noted that I did not include the amount I awarded for loss of income in my order despite my finding for loss of income. I hereby amend the order granted on 20 June 2025 as follows:

1. The Defendant to pay 100% of the Plaintiff's proven or agreed damages.

2. The Defendant to pay the plaintiff the amount of **R493 376.10 (four hundred ninety-three thousand, three hundred seventy-six rand ten cents)** for loss of future income.

3. General damages are postponed sine die

4. The aforesaid amount is to be paid into the following bank account:

Symington & de Kok Attorneys
First National Bank
Account number: 6[…]
Branch code: 250 655
Reference: TR0706FXL2396

4. The defendant is ordered to furnish the plaintiff within 180 days from date of this order with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 1996, for payment of 100% of the costs of the future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of a service or supply of goods to her arising out of the injuries that she sustained in the motor vehicle collision which occurred on **7 October 2017** and the *sequelae* thereof, after such costs have been incurred and upon proof thereof.

5. The aspect of past medical expenses is abandoned by the Plaintiff.

6. The defendant shall pay the plaintiff's taxed or agreed fees on Scale B as contemplated under Rule 67A of the Uniform Rules if the Court which shall also include the translator fees for the plaintiff and all the accommodation costs and traveling costs for the plaintiff, and AV Theron Swanepoel Attorneys and the reasonable qualifying, preparation fees, reservation fees and appearance fees of Counsel and the following experts (where applicable):

6.1 Dr. Ziervogel (orthopaedic surgeon);
6.2 Lariska van Rooyen (Industrial psychologist);
6.3 Enid Kruger (Occupational therapist);
6.4 Dr. Fischer (orthopaedic surgeon);
6.5 Human & Morris (Actuary).

7. Interest shall accrue at the prescribed statutory rate in respect of:

7.1 the capital amount of the claim, calculated 14 (fourteen) days from date of this order to date of final payment, in the event that payment is not affected within the 180 days from date of this order as per prayer 5.

7.2 the taxed or agreed costs, calculated from 14 (fourteen) days from date of taxation, alternatively date of settlement of such costs to date of final payment.

MPAMA,AJ

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

Not reportable

Case no: 5271/2021

In the matter between

MOTHEPANE ELLEN LEPHATSI **PLAINTIFF**

And

ROAD ACCIDENT FUND **DEFENDANT**

Neutral citation:	*Lephatsi v Road Accident Fund* (5271/2021) (2025] ZAFSHC 186 (20 June 2025)
Coram:	Mpama AJ
Heard:	18,19 & 28 March 2025
Delivered:	This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 12h00 on 20 June 2025
Summary:	motor vehicle accident - liability of the defendant for loss of future income - whether the court can grant a claim for

general damages when the defendant has not reacted to the plaintiff's claim of serious of injuries.

ORDER

1 The defendant is liable for the plaintiff's 100% proven damages of the plaintiff.

2 The plaintiff and the defendant must prepare a draft order and such draft order must make provision for the payment of taxed or agreed fees by the defendant on scale B as contemplated under rule 67A of the Uniform Rules of Court, reasonable and qualifying expenses of the expert witnesses.

3 The draft order must be presented to the office of the Registrar in order to obtain a further order for the payment of the plaintiff by the defendant.

4 The claim for general damages is postponed *sine die.*

JUDGMENT

Mpama AJ

[1] On 7 October 2017, at Kwakwatsi, Koppies the plaintiff was a passenger in a motor vehicle driven by the insured driver (the driver), Mr LZ Motsoane, when the driver lost control of the motor vehicle and collided with an electric pole. She sustained injuries on the head, face, spine, right knee and bruises all over the body. The plaintiff instituted action proceedings against the defendant claiming loss of income, general damages and future medical costs.

[2] The matter was set down for trial on 18 &19 March 2025 for the court to determine the merits and quantum. The defendant has not conceded that the injuries of the plaintiff are serious injuries that meet the threshold requirement for an award of general damages.

[3] On 18 March 2025, the parties requested the matter to stand over until the following day as the defendant's attorney was still waiting for instructions from the

defendant. I conceded.

[4] On 19 March 2025, the parties agreed that no oral evidence was to be led and that the matter was to be adjudicated by the court only on the evidence contained in the plaintiff's affidavit and various experts' reports. The parties further submitted that the court must determine the plaintiff's claim for loss of earnings, general damages and future medical costs. It was further submitted on behalf of the defendant that the defendant has not yet pronounced itself on whether the plaintiff's injuries were serious injuries or not. Subsequently, the plaintiffs and the experts' reports, accompanied by affidavits, were admitted as evidentiary material in these proceedings on behalf of the plaintiff. Dr Phillipus Jeremia Fischer, (orthopedic surgeon), Ms Lariska van Rooyen (industrial psychologist), Ms Enid Margaret Kruger (occupational therapist) and Mr Ian Walsh Morris' (actuary) affidavits were admitted. The defendant adduced no evidence.

[6] The defendant did not admit its liability therefore the court must first determine if the defendant is liable to compensate the plaintiff. The plaintiff bears an onus to prove that the driver's negligence was the sole cause of the accident. The defendant must disprove this and/or show that the plaintiff contributed to the negligence, the driver was not the sole cause of the accident.

[7] The plaintiffs affidavit was handed in. The plaintiff averred that, at the time of the accident, she was a passenger in a car driven by the insured driver when the driver failed to control the car and hit an electric pole. At the time of the accident, the weather was fine and the road was in a good condition. She further stated that the driver was negligent in that he drove at an excessive speed and failed to keep the motor vehicle under proper control. As a result of the accident, she sustained injuries on the head, spine, right knee and abrasions and was hospitalised.

[8] The plaintiff, in the particulars of claim, pleaded that the insured driver was the sole cause of the accident, in that, *inter alia,* he failed to keep a proper lookout, failed to keep the vehicle under his proper control and to avoid the collision, in circumstances where a reasonable person could and should have done so.

[9] Section 17(1) of the Road Accident Fund Act 56 of 1996 (the RAF Act) places a duty on the defendant to compensate a third party for bodily injuries arising from negligent driving of a motor vehicle. The plaintiff was a passenger in the driver's vehicle. It is not in dispute that the plaintiff sustained bodily injuries as a result of a motor vehicle accident. On how the accident occurred, there is no evidence adduced to challenge the plaintiff's evidence.

[10] The plaintiff, since she was a passenger, only needs to prove 1% negligence on the part of the driver. On consideration of the circumstances under which this collision occurred, it is my view that the accident was due solely to the driver's negligent act. Accordingly, the defendant is liable for the plaintiffs 100% proven or agreed damages.

[11] What remains to be determined is whether the plaintiff sustained patrimonial loss and if so, what is the amount of such loss. This concerns loss of income, general damages and future medical costs. In regards to loss of future income *in Rudman v Road Accident Fund* [2002] ZASCA 129; [2002] 4 ALL SA 422 (SCA); 2003 (2) SA 234 (SCA), Jones AJA at para 11 said:

'I believe that this conclusion is correct. The fallacy in Mr *Eksteen's* criticism is that it assumes that Rudman suffers loss once he proves that his physical disabilities bring about a reduction in his earning capacity; thereafter all that remains is to quantify the loss. This assumption cannot be made. A physical disability which impacts upon capacity to earn does not necessarily reduce the estate or patrimony of the person injured. It may in some cases follow quite readily that it does, but not on the facts of this case. There must be proof that the reduction in earning capacity indeed give rise to pecuniary loss.'

[12] The plaintiff handed in some experts' reports as evidentiary material. On 22 March 2024, the plaintiff was examined by Dr Fischer. He reported that, during the examination, the plaintiff produced her hospital records from Boitumelo Hospital. According to the hospital records, the plaintiff sustained a right knee injury, head injury and amnesia, sprain and strain of the cervical spine, sprain and strain of the thoracic spine. The plaintiff reported to him that she struggles with

some daily activities, walking long distances, lifting heavy weights, suffers from insomnia and chronic pain in the leg and back.

[13] Dr Fischer conducted radiological examination which revealed that the plaintiff had a mild congenital scoliosis with the curve to the right, compensation curve thoracic lumbar junction to the left and no signs of a knee injury. The plaintiff also complained of pains on the knee. He opined that the snapping symptoms experienced by the plaintiff on the knee could mean a meniscal injury and required further medical investigations. He concluded that the plaintiff sustained back and right knee injury, the constant pain in her right lower limb leads to severe anxiety and impact her daily living. Furthermore, her back and knee injuries will worsen over the next ten years and her retirement age would probably be decreased by 10-15 years.

[14] On 24 May 2023, the plaintiff was assessed by Ms Lariska Van Rooyen. She compiled a report on 25 January 2024 and an addendum on 5 January 2025. In essence, she reported that on the day of the assessment, she observed that the plaintiff walked with a slight right legged gait. The plaintiff reported to her that she suffered from chronic pain and discomfort on her back, neck and knee. She was experiencing difficulties with lifting heavy objects, sitting and walking for extended periods and bending and kneeling.

[15] According to Ms Van Rooyen, the plaintiff was born in 1984, she completed grade 8 and never received any further training. At the time of the accident and assessment, she was employed as a domestic worker since 2007 when she was 23 years old. She secured employment with the De Bruin family as a domestic worker in 2010. The plaintiff's salary slips revealed that at the time of the assessment she earned R5 240. She also interviewed the plaintiff's employer, Mr De Bruin who informed her that the plaintiff had a longstanding employment relationship with his family, was a good employee, however her work was negatively affected by the accident as she works in slower pace. Mr De Bruin further informed her that should the plaintiff lose this work, she will struggle to find another job as potential employer will not be sympathetic as his family is towards her.

[16] Ms Van Rooyen further reported that considering the *sequelae* of the accident and the resultant reduced physical scope of employment, reduced productivity and that her symptoms will worsen within the next 10-15 years according to Dr Fischer, she is of the view that the plaintiff will retire earlier than normal and most probably at the age of 52.5 years. If it was not for the accident, the plaintiff would have worked for the same employer until the age of 65 years. She concluded that the plaintiff will lose her longstanding employment with the De Bruin family as she needs to retire earlier, cannot be accommodated in another employment due to her level of education and, consequently, needs to be compensated.

[17] On 22 March 2023, Ms Kruger assessed the plaintiff and compiled her report. She reported that the plaintiff was gainfully employed as a domestic worker at the time of the accident and at the time of the assessment. The nature of plaintiff's job required light and possibly medium physical effort and considering her level of education, the plaintiff is best suited for manual labour. The plaintiff reported to her that she experiences difficulty in bending forward when sweeping, vacuuming and mopping floors. She also struggles to carry heavy objects and develops oedema when standing for a long time.

[18] Amongst the tests conducted with the plaintiff by Ms Kruger, was a six-minute walking test. The plaintiff walked at a gradually decreasing pace with an increasing limp and increased weight bearing on the left lower limb. She concluded that the plaintiff's physical abilities no longer meet the demands of her job as a domestic worker and will not be able to meet the average productivity of a domestic worker. This has rendered her a compromised and unequal contender in the open labour market.

[19] Human & Morris Actuaries did the actuarial calculations on 20 February 2025 having taken into consideration the plaintiff's monthly income of R5 389. Based on the experts' opinions, the calculations assumed that the plaintiff will retire at the age of 52.5 years. Without the application of contingencies, the uninjured future earnings were calculated at R1 069 907 and the injured future earnings at R640 069.

[20] The expert evidence demonstrates the plaintiff's injuries and the *sequalae*

thereof. This evidence is uncontroverted. The plaintiff sustained bodily injuries. This is the opinion of Dr Fischer after he conducted physical and radiological examination of the plaintiff. He concluded that the plaintiff's condition will deteriorate and as such she will not be able to work until the normal retirement age.

[21] The work that the plaintiff does as a domestic worker is physical in nature. Generally, this form of work includes but not limited cleaning, laundry and, at times, child supervision. Forward bending, crouching and standing for extended periods are a common occurrence in this line of responsibility. The plaintiff, prior to the accident, had no difficulties in relation to performance of her duties.

[22] At the time of the accident, the plaintiff was 33 years old. She worked for her current employer since 2010 and has been working since 2007 when she was 23 years old. This tends to suggest that she is a reliable, trusted employee and it is reasonable to assume that she would continue working for this employer until her retirement age but for the accident. Post the accident, she faces some difficulties when it comes to her work duties. The occupational therapist and the industrial psychologist agree that the injuries of the plaintiff have affected her productivity at work and she will not be able to reach the normal retirement age of 65 years. The undisputed view of the Dr Fischer and the industrial psychologist is that she will have to retire earlier due to her physical condition that will deteriorate with time - 52.5 years has been indicated as the reasonable probable age of retirement for plaintiff.

[23] In *Mvundle v RAF* [2012] ZAGPPHC 57, an unreported judgment from the Gauteng Division of the High Court, Pretoria, Kubushi AJ, as she then was, held as follows at para **42:**

'It is trite that the damages for loss of income can be granted where a person has in fact suffered or will suffer a true patrimonial loss in that his or her employment situation has manifestly changed. The plaintiff's performance can also influence his or her current job and /or be limited in a number and quality of his or her choices should he or she decides to find other employment.'

[24] The evidence presented shows that the injuries sustained by the plaintiff will

continue to impair her capacity to work and her earning capacity has been diminished by the accident. Due to the plaintiff's level of education, it will be difficult for her to find alternative employment. It is my view that the plaintiff has been negatively impacted by the accident and should be compensated.

[25] There is no application of contingency deductions in the actuarial calculations for loss of income. It is trite that, despite the actuarial calculations, the court has a wide discretion to award what it considers right. Contingency deductions play a critical role in calculating damages, especially for future loss of earnings. The issue of contingencies was dealt with in *Southern Insurance Association Limited v Bailey NO* 1984 (1) SA 98 (A) where Nicholas JA expressed himself as follows at 116G-H:

'Where the method of actuarial computation is adopted in assessing damages for loss of earning capacity, it does not mean that the trial Judge is tied down by "inexorable actuarial calculation". He has a "large discretion to award what he considered right". One of the elements in exercising that discretion is the making of a discount for "contingencies" or differently put the "vicissitudes of life". These includes such matters as the possibility that the plaintiff may in the result have less than a "normal" expectation of life, and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic condition. The amount of any discount may vary depending upon the circumstances of the case.'

[26] This court, in *Ralph v Road Accident Fund* [2023] ZAFSHC 102 as per Molitsoane J, dealt with contingencies comprehensively at para 20 as follows:

'The court in *Oosthuizen v Road Accident Fund* gave a useful summary of case law on contingencies and I refer extensively as follows:

"Matters which cannot otherwise be provided for or cannot be calculated exactly, but which may impact upon the damages claimed, are considered to be contingencies, and are usually provided for by deducting a stated percentage of the amount or specific claim. (De Jongh v Gunter 1975 (4) SA 78(W) 80F).

Contingencies include any possible relevant future event which might cause damage or part thereof or which may otherwise influence the extent of the plaintiff's damage. (Erdmann v Santam Insurance Co Ltd 1985 3SA 402 (C) 404-405; Burns v National Employers General Insurance Co Ltd 1988 3 SA 355 (C) 365).

In the wide sense contingencies are described as the *"hazards that normally beset the lives and circumstances of ordinary people".* (AA Mutual Insurance Association Ltd v Van Jaarsveld 1974 4 SA 729 (A); Van der Plaats v SA Mutual Fire & General Insurance Co Ltd 1980 3 SA 105 (A) 812; Southern Insurance Association Ltd v Bailey 1984 1 SA 98 (A)117. Contingencies have also been described as *'unforeseen circumstances of life'* (De Jongh v Gunther 1975 (4) SA 78(W) 80F).

The percentage of the contingency deduction depends upon a number of factors and ranges between 5% and 50% depending upon the facts of the case. (AA Mutual Association Ltd v Maqula 1978(1) SA 805 (a) 812; De Jongh v Gunther 1975 (4) SA 78(W) 81,83,84D; Goodall v President 1978(1) SA 389 (W) 393; Van der Plaats v SA Mutual Fire & General Insurance Co Ltd 1980 3 SA 105 (A) 114-114A-D).

Contingencies are usually taken into account over a particular period of time, generally until the retirement age of the plaintiff (Goodall v President 1978(1) SA 389 (W) 393; Rij NO v Employers' Liability Assurance 1964 (4) SA 737(W); Sigourmay v Gillbanks 1960(2) SA 552 (A) 569; Smith v SA Eagle Insurance co Ltd 1986 2 SA 314(SE) 319).'

The plaintiff has advocated for a considerably higher post-accident percentage contingency deduction to the future earnings and a higher post-accident of 35%. There is no contrary submission.

[27] The actuarial calculations are not binding to this court as the court has a wide discretion to award what it considers to be fair and reasonable compensation. The court needs to take into consideration other factors like the plaintiff's age, the nature of injuries sustained, qualifications and prospects of finding alternative employment. It is my opinion that the actuarial calculations with the contingency deductions, as advocated by the plaintiff, represent a reasonable, fair and adequate compensation

for the plaintiff. Resultantly, an amount of R493 376.10 is a reasonable amount for loss of earnings in the circumstances of the plaintiff.

[28] I now deal with the claim general damages. Section 17(1) of RAF Act provides that the general damages are payable only if the injury is deemed 'serious'. In terms of regulation *3(c)* and *(d)* of the RAF Act, the defendant may accept the injury as serious, reject it as serious or direct the plaintiff to undergo serious injury assessment. Once the defendant has made its election, the plaintiff, if dissatisfied with the serious injury finding can refer the matter to the Registrar of the Health Professions Council of South Africa.

[29] The court does not have jurisdiction to determine whether the injuries are serious or not. It is common cause that *in casu,* the defendant has not reacted to the plaintiff's serious injury claim. It has not accepted or rejected same. In the absence of an election by the defendant, the court is precluded from adjudicating the payment of general damages. Therefore, the determination of general damages is postponed *sine die* until a proper assessment is made by the defendant.

[30] On future medical costs, there is no reason why, in the light of Dr Fischer's opinion, the plaintiff cannot obtain an undertaking from the RAF for future medical costs. It is my finding that, for future medical costs, an undertaking should be furnished to the plaintiff by the defendant in terms of s 17(4) of the RAF Act.

[31] Lastly, the general rule is that costs follow suit unless the court determines otherwise. There is no reason to deviate from the norm. The defendant is to pay costs.

[32] In the circumstances, I order as follows:

1 The defendant is liable for the plaintiff's 100% proven damages of the plaintiff.

2 The plaintiff and the defendant must prepare a draft order and such draft order must make provision for the payment of taxed or agreed fees by

the defendant on scale B as contemplated under rule 67A of the Uniform Rules of Court, reasonable and qualifying expenses of the expert witnesses.

3 The draft order must be presented to the office of the Registrar in order to obtain a further order for the payment of the plaintiff by the defendant.

4 The claim for general damages is postponed *sine die.*

Mpama AJ

Appearances

For the plaintiff: M D J Steenkamp
Instructed by: Symington & De Kok Attorneys, Bloemfontein

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