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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 1970/2020

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

DATE: SEPTEMBER 2024

SUTHERLAND DJP

NOMPUMELELO FLORENCE NDLOVU

PLAINTIFF

v

THE ROAD ACCIDENT FUND

DEFENDANT

This Judgment has been delivered by uploading to the digital data case of the High Court of South Africa, Gauteng Division, Johannesburg on 19 September 2024 at 14h00 and by email to the parties.

THE ORDER

1. The Defendant shall pay to the Plaintiff the sum of R847,000 as compensation for delictual damages sustained in a motor vehicle collision that occurred on the 15th of October 2016, in settlement of the Plaintiff's claims in respect of past medical expenses and loss of earnings.

2. The Plaintiff's claim in respect of general damages is postponed *sine die*.

3. The capital amount referred to in paragraph 1 above, shall be paid by the Defendant directly into the trust account of Andrew Meldrum Attorneys Incorporated, the attorney of record of the Plaintiff as specified hereunder:-

A[...] M[...] A[...] I[...] T[...] A[...]

First National Bank

W[...] P[...] Branch

Account number: 6[...]

Branch code: 2[...]

4. The Defendant shall pay interest on the amount referred to in paragraph 1 (one) above at the rate of 11.75% *per annum* as from 14 (fourteen) days from the date of the final Court order to date of final payment.

5. The Defendant is ordered in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, to reimburse the Plaintiff for the costs of any future accommodation of the Plaintiff in a hospital or nursing home, or treatment or rendering of service to her or supplying goods to her arising out of injuries sustained by Plaintiff in the motor vehicle accident which occurred on the 15 October 2016, after such costs have been incurred and upon proof thereof.

6. The Defendant shall pay the Plaintiff's taxed or agreed costs to date of action on the party and party High Court Scale B, such costs to include the following:

6.1 the costs of obtaining the following expert medico-legal reports and/or addendum reports and/or serious injury assessment forms:

- 6.1.1 Dr Colin Barlin – Orthopaedic Surgeon;
- 6.1.2 Anne Reynolds – Occupational Therapist;
- 6.1.3 Kim Kaveburg – Occupational Therapist;
- 6.1.4 Elna Roussouw – Industrial Psychologist;
- 6.1.5 Prof. John Ouma – Neurosurgeon;
- 6.1.6 Arch Actuarial Consultants – Actuary.

6.2 The reservation fees and preparation of the costs (including the preparation of joint minutes) if any, and as allowed by the Taxing Master, of the Plaintiff's expert witnesses as set out above.

6.3 The cost of Counsel.

7. In the event that costs are not agreed the Plaintiff shall serve the notice of taxation on the Defendant or its attorneys of record and the Defendant shall be allowed a period of 14 (fourteen) court days to make payment of the taxed costs.

JUDGMENT

SUTHERLAND DJP:

[1] The Plaintiff, Nompelelo Florance Ndlovu, seeks damages from the Defendant, the Road Accident Fund (RAF). She was a passenger in a vehicle when on 16 October 2016 she sustained the injuries upon which her claim is based. She was then 45 years of age.

[2] The RAF acknowledges liability for 100% of the proven damages. An undertaking in terms of section 17(11) of the Road Accident Fund Act 56 of 1996 has been given in respect of future medical expenses. The claim for general damages was referred for a serious injury assessment which was declared to not be serious. This Judgment does not address the question of general damages.

[3] In dispute remain the computation of the quantum of:

- 3.1. Past medical expenses
- 3.2. Past loss of income
- 3.3. Future loss of earning capacity.

[4] All of the evidence was adduced on affidavit pursuant Rule 38(2) of the Uniform rules of Court. These affidavits included the plaintiff, her employer Ms Casey Sparks and the several medical practitioners and an industrial psychologist, as listed in the order. The RAF adduced no evidence. The body of evidence on affidavit stands unrebutted.

[5] The injuries were severe enough for the plaintiff to be hospitalised for a fortnight. Her cervical neck and her lower back suffered flexion extension injuries. Her right arm and shoulder and right leg were also injured. There was no evidence of a head injury. The long-term sequelae relate to the neck and back injuries. Subsequently she was treated by physiotherapy and returned to work as a domestic servant.

[6] The claim for past medical expenses is founded on series of vouchers to a physiotherapist and confirmed by Ms Sparks. The sum claimed is R 5424.00. The documentation was submitted to the RAF in July 2023, 14 months before this hearing. The attorney for the RAF informed me that he is still awaiting the RAF to confirm an acceptance. As there is no rebuttal to offer and the basis for the claim is proven, this head of damages is proven in the sum of R5464.

[7] The further claims have been articulated as being for past and future loss of earnings.

[8] The claim for what is called 'past' earnings is in truth a segment of the claim for future loss as initially computed as at 2020, four years ago but which because of the delay in coming before a court was overtaken by such delay. An amount of R23,253 is claimed. This sum is capable of exact computation by reference to pay slips and UIF payments being the obvious sources of information. Some recent

payslips from 2022 onwards are adduced but proof of UIF payments, which in any event ought, strictly speaking, to have been reflected on the pay slips. Because the loss is related to periods of indisposition during which, allegedly, the plaintiff suffered reduced earnings, the sum proposed to the court is properly explained. I am satisfied some loss could probably occur, based on the unrebutted affidavit evidence, but the computation is unsatisfactory. The computation appears to be based mostly on extrapolations from remarks made to the various expert witnesses. That is not good enough. Moreover, despite the claim that her rate of pay has been reduced this is not apparent from such objective evidence as is available eg, she earned R5000 per month in 2016 and R7000 in 2024 a trajectory which is in keeping with the general rate of inflation. For these reasons, in my view, it is inappropriate to accept this figure as reliable. The head of damages is unproven in the sum claimed but it is appropriate to make some award. Had the RAF fulfilled its function the uncertainty would not exist. On the premise of being even handed between the parties I propose an arbitrary sum of R10,000.

[9] As to the future loss of earning capacity, the basic facts, as set out in the several expert reports from the practitioners, show that the plaintiff has indeed suffered a diminution of her capacity to work as a domestic servant in a private residence. Domestic work is generally regarded as medium grade work as distinct from light or heavy work. Reference is appropriately made to the need for her, from time to time, to lift heavy objects, and do much bending, stopping, stretching up and down and so forth. These movements are essential to activities in such species of work. The plaintiff's arthritic cervical neck and back are directly implicated in these manoeuvres. She suffers from chronic pain. The visits to a physiotherapist attest to that. She has become depressed, in part from her physical condition and in part from the anxiety derived from a fear of losing her job because she can perform only sub-optimally. Ms Sparks has been a sympathetic employer who has made generous accommodation for the plaintiff's limitations for the past 8 years, including, the routine days of work being reduced from 5 to 3 per week since February 2024. This arrangement is not sustainable indefinitely.

[10] The initial medical view was that the plaintiff would sacrifice 5 years of a working life and retire early at age 60. In 2024, at the time of the hearing, she is 53

years of age. This view emanates essentially from Dr Barlin, the orthopod. His report is dated 2 March 2020 – four years after the accident. A year earlier he had – unmotivated – expressed the view that she could sensibly retire at age 58. Her condition in 2020 was such that she had chronic pain and tenderness in the affected areas. The prognosis was treatment by physiotherapy and pain killers. Dr Barlin thought her productivity was reduced by 10%.

[11] A neurosurgeon Prof Ouma examined her on 22 April 2021 – 5 years after the accident. Prof Ouma noted the report of a supposed stroke in 2018 with some incredulity. He did nonetheless note a loss of power and sensation on the rightside of her body. He opined that the HIV positive status might explain the ostensible stroke-like symptoms. His major findings for present purposes is related to headaches linked to a possible concussion during the accident, based on her report of such an event. As alluded to, no record of a head injury at the time of the accident exists. As a result, the headaches cannot be attributed to the accident. Unhappily, the medical evidence does not address the possibility that the headaches are a form of referred pain from her chronic arthritic neck.

[12] The latest view expressed is that of Ms E A Rossouw an Industrial Phycologist whose report is dated 9 September 2024. Ms Rossouw contends that the plaintiff is at present in such a condition of discomfort that she is ‘unemployable’ and should cease work now. This is supported in general terms by an occupational therapist Ms Kim Kaveburg.

[13] These views suffer from a lack of support from the orthopaedic expert Dr Barlin. Moreover, the fact that for the past eight years the plaintiff has worked, and continues to do, would require more substantiation to establish convincingly, on the eve of a hearing, that her condition has so radically deteriorated. I express my scepticism about these conclusions, which I regard as exaggerated when compared with the objective evidence available.

[14] The plaintiff’s present overall condition cannot plausibly be attributed exclusively to the persistent neck shoulder and back pain. In particular, in 2018 she experienced what is opined to be a mild stroke but was probably something less

hazardous. Regrettably, no serious attempt has been made to disaggregate her present condition to link it or unlink it from that occurrence. I am left to make do with that lacuna. On behalf the plaintiff, I am invited to allow a 25 % contingency to accommodate the overall uncertainties including her conditions as influenced by that supposed stroke, and no less by her HIV positive status. This approach takes the exercise in the rough and ready zone.

[15] The contribution on behalf the RAF was to take up the stance that the court should assume a reduced work life of 5 years and multiply the plaintiffs present annual earnings of R90,000 by 5 and deduct a 15 % contingency. This yields a sum of about R450,000. I took this submission as being seriously made. It warrants no further comment nor attention.

[16] The actuary has presented two computations. The rate of income both in 2016 and at present are correctly noted. The methodology of computation is not challenged. He allows a 15% contingency, rather than the 25% now proposed on behalf of the plaintiff. The difference in the two computations of the actuary is dictated by the unemployability contended for as described above as distinct from the loss of 5 years of working life.

[17] In the former computation, given in 2021 and later revised, the sum is presented as R696,054. On the latest approach, ie, immediate unemployability, the sum being sought by the plaintiff, excluding the other two heads of damages, is R806,817. In my view, the former computation stands on firmer objective grounds; ie the premise is that articulated by Dr Barlin.

[18] Nevertheless, the factor which warrants considerable weight is the plaintiffs market credibility. It is manifest that she is seriously uncompetitive were her present employer to dispense with her services. This prognostication posits that she could work at the same performance levels but that nobody is likely to want to employ her. On these grounds the unemployability thesis is on firmer ground than the exaggerations alluded to above. Moreover, again, were there to be some doubt, the abject dereliction by the RAF to perform its function offers no alternative concrete scenario to pit against the thesis.

[19] The R5464 for past medicals should be added to the sum payable. The 'past' component of lost earnings in a sum of R10,000 must be added to the sum payable.

[20] This calculation leads me to propose an overall sum, rounded up:- R830,817 plus R5464 plus R10,000 = R 846281 > R 847,000.

[21] As regards costs, having regard to the issues I am of the view that scale B is appropriate. It was contended that the rigours of cajoling the RAF into doing its job warranted a higher scale but, despite my despair at the unprofessional conduct of the RAF, this is not an always an appropriate way to address its shortcomings.

[22] The contingency fee agreement of 20 July 2024 is declared applicable.

[23] Accordingly, the order set out above is hereby made.

**ROLAND SUTHERLAND
DEPUTY JUDGE PRESIDENT
GAUTENG, JOHANNESBURG**

APPEARANCES

Date of hearing: 18 September 2024

Date of Judgment: 19 September 2024

For the Plaintiff: Adv. J.L. Khan instructed by Andrew Meldrum Attorneys Inc.

For the Defendant: Mr. E.M. Mdlovu instructed by State Attorney