



**IN THE HIGH COURT OF SOUTH AFRICA, MPUMALANGA DIVISION,
(MIDDELBURG LOCAL SEAT)**

CASE NUMBER: 3257/23

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

2 February 2026
DATE

H.F. FOURIE
SIGNATURE

In the application between:

NHLAPO NTOMBIFUTHI MARTHA (SKOSANA)

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

FOURIE AJ

INTRODUCTION:

- [1] Although, in broad terms, the matter before this Court deals with a damages claim by the Plaintiff against the Defendant, the Road Accident Fund, emanating from a motor vehicle accident in which the Plaintiff was a passenger on the 2nd of September 2018, the central issues in this Judgment relate to the merits of the action and whether the Defendant is liable towards the Plaintiff and whether the Plaintiff has been able to prove a diminishment in earning capacity with the necessary proof to convince this Court that the Plaintiff has suffered a loss of earnings for such to be awarded to the Plaintiff.
- [2] Both merits and quantum remain in dispute, and the issue pertaining to general damages, on the request of both parties, stands over to be adjudicated at a later stage.

BACKGROUND:

- [3] It is largely accepted that the Plaintiff, a major female, was involved in a motor vehicle accident on 2 September 2018. In the collision at hand, the vehicle in which the Plaintiff was a passenger overturned while attempting to avoid a head-on collision, during which manoeuvre the Plaintiff became injured.

EVIDENCE ON MERITS:

- [4] As is the case ever so often in similar matters, the Plaintiff, at the commencement of the trial, made an application under Rule 38(2) of the Uniform Rules of Court to adduce the relevant evidence by way of affidavit. Although the Court was satisfied that the evidence of the relevant experts may be adduced by way of affidavit, the Court found it necessary for the Plaintiff to appear and to lead evidence.
- [5] Although each matter has its own facts, I believe it is good practice for a Plaintiff to be present in Court when their case is ultimately presented and to adduce evidence of what transpired and of the injuries and sequelae thereof. Not only

does the presence of a Plaintiff afford the Court the possibility to pose any questions it might have to such a Plaintiff, but it also safeguards against abuse of Court process and corruption, for instance, in the case of non-existent Plaintiffs. Although the aforesaid is not specifically aimed at the current matter, it is, according to this Court, a practice that ought generally to be observed.

- [6] In respect of the merits, the Plaintiff was accordingly called to testify and as is ever so often the case in matters of this nature, the Defendant elected to cross-examine the Plaintiff without leading any evidence themselves.
- [7] In the Plaintiff's testimony, she stated travelling in the front passenger seat of the vehicle concerned when an oncoming vehicle travelling in the line of travel of the vehicle in which the Plaintiff was a passenger, entered their lane of travel causing the driver of the vehicle in which she was a passenger to swerve in order to avoid a collision causing such vehicle to turn over.
- [8] In the process of the vehicle in which the Plaintiff was a passenger turning over, the Plaintiff was ejected from the vehicle, during which action she sustained the injuries at hand. In the Defendant's Plea as well as during cross-examination, it was put to the Plaintiff that the Plaintiff was not, at the time of the collision, wearing a seatbelt. This is a submission the Plaintiff vehemently denied, stating that she was indeed wearing a safety belt, which broke during the overturn and the force of her ejection.
- [9] The Defendant led no evidence, either from eyewitnesses or from experts who examined the vehicle in which the Plaintiff was travelling, to rebut the Plaintiff's evidence, as stated, that she was indeed wearing a seat belt.
- [10] In the absence of any contradicting evidence, this Court is bound to accept the version as advanced to the Court under circumstances where the Court has no other contradicting facts with which the facts presented by the Plaintiff are to be measured against.

[11] In this regard, I find the matter to be distinguishable from matters such as **Phahlane v Road Accident Fund [1]** and several other similar matters in which contributory negligence was claimed, as in those matters there was either proof of the Plaintiff not wearing a seat belt or, during evidence the Plaintiff conceded not wearing a seat belt which in this case did not occur. As such, contributory negligence has no part to play in the matter at hand, and no other factor moves this Court to make any other finding than the Defendant being liable, 100%, towards the Plaintiff for the Plaintiff's proven or agreed damages.

EVIDENCE ON QUANTUM:

[12] In advancing the Plaintiff's case on quantum, the Plaintiff testified, and the evidence of the experts, as adduced in terms of Rule 38(2) of the Uniform Rules of Court, was relied upon by the Plaintiff. The Defendant led no evidence of their own and merely argued on the basis of the irregularities that the Defendant pointed out in the Plaintiff's expert reports and case.

[13] The Plaintiff, during her testimony, testified that she sustained a fracture of her left femur, a fracture of three ribs on her left side, and a soft-tissue injury on her left knee.

[14] To a great degree, these sentiments were echoed in the experts' reports filed on behalf of the Plaintiff, specifically by the orthopaedic surgeon, who mentioned both the fractures to the left femur and the left ribs.

[15] It having been established that the Plaintiff has indeed been injured in the motor vehicle accident, it remains to be determined whether the injuries sustained led to a diminishment in the earning capacity of the Plaintiff.

[16] It is on this score that the central issue of this Judgment turns.

[17] Save to query and criticize the experts' reports filed by the Plaintiff, the Defendant absconded from the litigious process.

[18] This Court can but only echo the sentiments by the Supreme Court of Appeal in the matter of **MMK[2]**, where Goosen JA expressed the following sentiment:

“When the RAF does not participate in the process of adjudicating matters to finality, the Courts seize with the case are placed in an invidious position, they are required to bring special care to the bear, lest an order is made which compels the RAF to pay damages not proved. It is simply not in the interest of justice that this should occur. It is to be hoped that the RAF, as an Organ of State, managing public funds, will take reasonable steps to avoid recurrences of what occurred here.”

[19] Proper participation by the Defendant in the matter would have aided the Court significantly in coming to a just conclusion, specifically insofar as it challenged the position of the Plaintiff that was advanced.

[20] The Plaintiff relied on the expert evidence of:

- a. Tshepo Kalanko – Industrial psychologist
- b. Dr AC Erasmus – Radiologist
- c. Dr Andy Buarte – Orthopaedic surgeon
- d. Solly Mphofela – Occupational Therapist

[21] If regard is had to the experts' reports filed on the Plaintiff's behalf, it is unfortunate to state that such reports are of a very poor quality, and a mere glance at the respective reports indicates significant inconsistencies in the reports and the fact that the reports are unsubstantiated with certain crucial underlying evidence.

[22] To embark upon a full scrutiny of each and every inconsistency in the respective reports would overburden this Judgment, but the relevant portions of the reports,

which are noteworthy to be highlighted, are nonetheless addressed as they appear in these reports:

[22.1] INDUSTRIAL PSYCHOLOGIST - TSHEPO KALANKO

[22.1.1] The claimant noted that she repeated Grade 12 twice and, after completing Grade 11, dropped out of school due to illness.

[22.1.2] The report indicates that the Plaintiff is able to read, write, speak, and understand English.

[22.1.3] Where the medical and HIV status of the Plaintiff is discussed, the Plaintiff is referred to as a male and not a female.

[22.1.4] The injuries sustained by the Plaintiff reflect a hip fracture, upper back injury, and right leg laceration.

[22.1.5] Although after just dealing with the report in specific paragraphs with the previous sentiments of other expert reports, the expert includes the following paragraph:

“21. The writer notes that there were no medical legal experts made available at the time of completion of this report. The writer reserves the right to amend the comments once receipt of documentation is made”.

“The Plaintiff reports her salary to be R 7500.00 per month. The reason for leaving her employment was stated as discontinued business due to accident-related injuries.”

[22.1.6] In the notes of the expert, it was stated that:

“28. The claimant was unable to prove via proof of earnings her pre-accident employment.”

- [22.1.7] When the expert wanted to contact the Plaintiff to ascertain her employment status, the Plaintiff could not be reached.

[22.2] RADIOLOGIST – DR AC ERASMUS

- [22.2.1] The Radiologist commented that radiographically, the Plaintiff's chest is clear and normal.
- [22.2.2] No other parts of the Plaintiff were part of the Radiologist's report, and it would seem as if the same was not evaluated by the expert.

[22.3] ORTHOPAEDIC SURGEON – DR ANDY BUARTE

- [22.3.1] The Orthopaedic Surgeon's report only mentions the left femur and the left fractured ribs.
- [22.3.2] On the occupational elements, the expert stated that the Plaintiff was self-employed, but her employment ended due to the economic impact of COVID-19. In this regard, it is important to note that no mention is made of the effect of the accident on the employment of the Plaintiff.
- [22.3.3] Pertaining to sports/recreational events, it is stated that the Plaintiff enjoyed school netball events, which she no longer enjoys after the injuries. In this regard, it is necessary to state that at the time of the assessment, the Plaintiff was already 37 years of age and accordingly well beyond the stage where the Plaintiff could partake in school netball.

- [22.3.4] Regarding education, the expert stated that the Plaintiff completed matriculation in 2000, when she went into self-employment. In this regard, it is necessary to state that the Plaintiff never completed matriculation, and her school education ended in 2002 at the end of Grade 11.
- [22.3.5] The statement pertaining to the matriculation of the Plaintiff in 2000 cannot refer to the current Plaintiff.
- [22.3.6] The social/marital status of the Plaintiff is indicated as married and blessed with three children. This stands in contrast to the marital status in the expert report by the industrial psychologist, indicating the Plaintiff to be a widow. The expert states that the Plaintiff is fluent in English.
- [22.3.7] The report was stated to be valid for 2 years from 25 March 2021, and it is noteworthy that the matter was ultimately brought to Court nearly five years after the report.

[22.4] OCCUPATIONAL THERAPIST – SOLLY MPHOFELA

- [22.4.1] The Plaintiff was the owner of a Mini Cooper Vehicle, an aspect which becomes important later in this judgment.
- [22.4.2] According to the occupational therapist, the Plaintiff obtained a Grade 11 in the year 2000. This is again at odds with both previous reports.
- [22.4.3] The expert states that the Plaintiff was generating about R 6 000.00 – R 7 000.00 per month and that this was her only source of income.

[22.4.4] Her pre-accident occupational duties as a self-employed vendor were as follows:

[22.4.4.1] Selling clothes and accessories.

[22.4.4.2] Purchasing stock

[22.4.4.3] Delivering goods to customers.

[22.4.4.4] Banking.

[22.4.5] The injuries sustained, according to the expert was:

[22.4.5.1] Left femur fracture

[22.4.5.2] Chest injuries

[22.4.5.3] Rib fractures

[22.4.5.4] Soft tissue injury on the right side of her back.

[22.4.5.5] Neck injury.

[22.4.6] Pertaining to post-accident transport, the expert states the Plaintiff still drives her own car, a Mini Cooper Manual.

[22.4.7] According to the occupational therapist, the Plaintiff has no post-Grade 11 qualifications, although, according to the previous experts, she holds a two-year engineering diploma.

[22.4.8] Similarly, the occupational therapist indicated that the report will remain valid until March 2024 and that it is outdated on all accounts.

[23] During testimony, the Plaintiff conceded that the amounts provided, so far as they related to her income generated, were not substantiated, nor did she provide any proof of such amounts. The Plaintiff conceded that she had a bank account and that at least certain of the transactions for her economic endeavour emanated from or utilised the bank account. The Plaintiff did not provide any reason for her decision not to make her bank account available to the Court or the Defendant for

evaluation. It was noteworthy that the Plaintiff utilised the services of an interpreter when the matter was called and whilst the Court accepts, that a party might wish to testify in Court due to the stressful nature of litigious process in a different language, the degree of excellence which was portrayed to exist with the Plaintiff's mastering of the English language in her expert reports was simply not present when the Plaintiff appeared in Court.

- [24] Crucial personal information about the Plaintiff was not accurately reflected in the experts' reports, including her education, schooling, and the years in which it was obtained.
- [25] The inconsistencies in the reports regarding the injuries sustained and how they were conveyed to the experts are also noteworthy.
- [26] It is further evident that the experts did not evaluate the Plaintiff's income at all and accepted it on her mere say-so, leading to an unfortunate situation in which all the experts' reports were premised on an unsubstantiated basis. All the calculations made by the Plaintiff's experts pertaining to a potential loss were premised on unproven and unsubstantiated financials and a position which was not even correctly and consistently conveyed by the Plaintiff to her respective experts.
- [27] If the Court considers the information in the respective reports, the Court has but to accept one of two alternatives which are either that the reports were drawn without diligence, as is unfortunately often the case, copied and pasted from previous reports, alternatively if the experts are not to blame, it is the Plaintiff who gave the respective experts the incorrect information which they correctly stated in their reports. Both of these scenarios are totally unacceptable and unfortunate.
- [28] The fact that the Plaintiff had evidence available that could assist the Court in adjudicating the matter and bringing it to a just conclusion, and that the Plaintiff consciously elected not to do so, cannot be overlooked. The Plaintiff elected not to provide any substantiating evidence to corroborate what was stated in her own experts' reports.

- [29] The Plaintiff's testimony pertaining to her finances under oath also differs from her own experts' reports insofar as it relates to her education, the fact that she is not able to drive her own vehicle, and her injuries sustained.
- [30] If no evidence was available to assist the Plaintiff, and the Plaintiff's version throughout all the experts' reports and her testimony at trial remained consistent, it would at least lend some credibility to what the Plaintiff is advancing to the Court.
- [31] In the current matter, the Court cannot accept that the evidence of the Plaintiff, evaluated together with the evidence of the Plaintiff's experts, is correct and should be accepted.

APPLICABLE LEGAL PRINCIPLES:

- [32] The absence of any evidentiary material to confirm the experts' reports and to establish the facts upon which the claims might be adjudicated is fatal to the Plaintiff's case[3].
- [33] The Plaintiff is required to prove its case, which includes the claim for loss of earnings. The absence of factual proof of income means the postulations lack merit in a claim for loss of income [4].
- [34] Courts have held on several occasions that expert evidence must be based on facts established through admissible evidence during trial, unless admitted or proven by competent witnesses [5].
- [35] It is trite that the onus to prove her case on the balance of probabilities was on the Plaintiff [6], and is it therefore necessary for the Plaintiff to adduce evidence indicating that she has suffered a loss of income.

[36] The Plaintiff, in my view, could have at the very least adduced the following documents and information to substantiate her claims:

[36.1] Any proof of income

[36.2] Bank statements

[36.3] Tax returns of IRP5's

[36.4] Invoices issued to her or by her.

[36.5] Affidavits or evidence at trial by clients or suppliers of the Plaintiff

[37] During the argument, the Plaintiff urged the Court to nonetheless accept the position set out by the Plaintiff and to apply higher-than-normal contingencies to the calculations. This, however, is a position the Court cannot accept. The application of contingencies is a discretionary measure imposed by the Courts to address unforeseen eventualities of life. The contingencies are applied to an established factual position. If a Plaintiff satisfies the Court of a factual position, that factual position is utilised as a starting point for the Court's investigation, and to that factual position, certain contingencies are applied in order for the Court to eventually come to a just outcome in a matter. Contingencies are not designed or implemented by the Court to account for a Plaintiff who has not satisfied his or her evidential burden by proving his or her claim beyond a reasonable doubt.

[38] It can never be that the Court allows a Plaintiff who has not proven her claim to nonetheless succeed with such a claim by such Plaintiff's mere say-so of their financials and then to strike a balance by the application of higher contingencies. Either the Plaintiff has proven her case on a balance of probabilities, or she has not. It is only after she has proven her case on a balance of probabilities that the discretionary measures, such as contingencies, are applied by the Court.

[39] As early as 1950, the Court developed what has become known as the Galante Principle [7].

- [40] The Galante Principle, although dealing with motor vehicle collisions, deals with the negative inference that a Court is allowed to draw if a party that has evidence available as to how a motor vehicle collision occurred elects not to adduce such evidence at trial.
- [41] This Court has extensively evaluated how the Galante Principle has been applied and developed over the years, and I find it appropriate to state that the Court finds no reason why the same negative inference ought not to be drawn by a Court dealing with personal injury claims, especially concerning Defendants such as the Road Accident Fund.
- [42] Not only is it the ethical obligation of a litigant to present all the information and documentation relevant to the facts to his opponent and to the Court in order for the Court to come to a just conclusion, the basic litigious principle of a party needing to prove each and every aspect of their claim dictates that, if a party is in possession of information or documentation that substantiates the relief such a party is seeking, that information and documentation should necessarily be made available to his litigious opponent and the Court. If a party indeed has documentation or information available pertaining to a litigious matter, concedes that such information is indeed available, and elects for whatever reason not to take the Court into its confidence by proving such information and/or documentation, a Court will be justified in drawing a negative inference from such an omission.
- [43] The fact that a party has information and documentation relevant to a matter in their possession which they ultimately do not present to the Court can justifiably be inferred to mean that the information would have a negative impact on the relief sought by such a party and that the omission of the information was thus a strategic manoeuvre to avoid such an adverse outcome.
- [44] Unfortunately, much can be said of the quality of the pleadings filed in the matter at hand, and not in a positive light. As in several similar matters, the pleadings

filed by both the Plaintiff and the Defendant are at best general and broad, lacking any significant particularity.

[45] Rule 18(4) of the Uniform Rules of Court makes it clear that a pleading must contain all material facts relied upon by the pleader.

[46] This Court in the matter of **Shabangu v Minister of Police**, Case Number 178/2023, Mpumalanga Division, Mbombela Main Seat, delivered 19 November 2025, stated, in dealing with the matter from the view of the Defendant, that:

“It might be in certain circumstances that a party genuinely does not hold any knowledge of an incident, which would make it impossible for such a party to be expected to plead positively or to make a positive statement on the defence it wishes to raise. Where a party is, however, in possession of specific crucial facts or ultimately a defence on which they want to rely, and they consciously elect not to incorporate the same in their pleadings, and not to make their opponent aware of the defence they want to rely on ultimately, they do so at their own peril.”

[47] I find no reason not to make the same principles applicable to a Plaintiff. A party decides its course and defines the issues in a certain way when it approaches the Court. A party cannot, at a later stage, without proper amendment, deviate from such a course.

THE EVOLUTION OF THE PLAINTIFF’S CLAIM IN ARGUMENT:

[48] A pleading would have sufficient particularity if it identifies and defines issues in such a way that it allows the other party to comprehend what they are [8]. It is trite that the parties to an action are bound by the pleadings. A party cannot be allowed at trial to raise a different case from that pleaded without due amendment to the pleadings properly being sought, granted, and effected. The Court itself no less is

also bound by the pleadings. The Court does not determine the issues or the terms of reference to be utilised to resolve those issues: this the parties do in their respective pleadings [9].

[49] The norm of a fair trial means each side being given an unambiguous warning of the case they are to meet, moreover, these requirements are not mere subtleties as between advisories; the Court too, is dependent upon the fruits of clarity and certainty to know what question is to be decided and to be presented only with admissible evidence that is relevant to that question. Making up your case as you go along is an anathema to orderly litigation and cannot be tolerated by a Court. Counsel's duty of diligence demands an approach to litigation which best assists a Court to decide the question, and no compromise is appropriate [10].

[50] A party cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvas another [11].

[51] In the current matter, the Plaintiff claims to have suffered a loss of income. The Plaintiff does not in her pleadings set out any supporting facts or averments relating to such a claim. The pleadings being silent on the premise of the Plaintiff's claim, the Court was necessitated to evaluate the ancillary documentation on which the Plaintiff relies. From all the documents filed, it is evident that the Plaintiff wishes the Court to believe that, immediately prior to the accident, she had an income of approximately R 7 500.00 per month and that, as a result of the accident, she is no longer able to earn that amount or any amount for that matter.

[52] All the submissions made by the Plaintiff's experts' reports, as well as the Plaintiff in her testimony, were founded on this submission.

[53] During the argument, however and after counsel appearing on the part of the Plaintiff conceded that there was no proof to substantiate the averments pertaining to the previous income as alleged by the Plaintiff, the Plaintiff's case evolved to a case which the Court was to consider similar to an unemployed individual with future diminished prospects of working in the informal sector.

- [54] Although there are many cases in which unemployed individuals experience a decrease in earning capacity, a case is made out on that principle, and the Court ultimately finds in favour of such a Plaintiff, this is not such a case.
- [55] The facts, the pleaded case and the experts' reports in those matters, however, all need to speak the proverbial same language.
- [56] It cannot be accepted that a litigant who has pursued her case for several years in Court is allowed only in argument and having been found wanting on the evidence or lack thereof to be permitted to change the underlying premises of her claim as a so-called fallback position to the case presented to Court.

CONCLUSION:

- [57] In order to satisfy the Court that the Plaintiff has suffered a loss of income, there are several factors which the Plaintiff needs to prove, and in the absence of the Plaintiff satisfying the Court on a balance of probabilities, the Plaintiff cannot succeed with her claim. The Plaintiff needed to provide the Court with some sort of confirmatory proof that she previously derived an income and that she no longer derives that income. Even if the Plaintiff was unable to provide exact confirmatory documentation, as is often the case with informal employment, the Plaintiff should have provided the best available information and documentation to support her claim and to enable the Court to at least gain some insight into her claims.
- [58] As was conceded by the Plaintiff's counsel in argument, the information provided by the Plaintiff is not of a bad quality; it is of a non-existent nature.
- [59] As such, the Court cannot be expected to come to the aid of the Plaintiff by applying contingencies of any nature to the matter to rescue the Plaintiff's case, as the financial basis to which such contingencies are to be applied has not been proven by the Plaintiff.

[60] As such, the Plaintiff's claim for loss of earnings cannot succeed.

COSTS:

[61] The Plaintiff was partially successful in the relief claimed in that the merits were found in her favour. The Plaintiff's claim for general damages is also yet to be decided, and that portion of the Plaintiff's claim will determine ultimate success insofar as it relates at least partially to the Plaintiff's quantum.

[62] If the Plaintiff is, however, not successful in her claim for general damages, irrespective of this Court's finding on the merits, the Plaintiff would not be successful in her claim. As such, the Court shall merely order that costs be costs in the cause.

ORDER:

[63] As a result, the following Order is made:

[63.1] The Defendant is 100% liable to the Plaintiff in respect of all of the Plaintiff's proven or agreed damages sustained in the motor vehicle collision on 2 September 2018.

[63.2] The Plaintiff's claim for loss of income is dismissed.

[63.3] Costs shall be costs in the cause.

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**H F FOURIE AJ
ACTING JUDGE OF HIGH COURT, MIDDELBURG**

Counsel for the Plaintiff: Adv Mabilela
Instructed by: Ntshosa Madiba Incorporated

Counsel for the Defendant: Me. A Nefolopvhodwe
Instructed by: State Attorney

Judgment reserved on: 27 January 2026
Date of delivery: 2 February 2026

[1] Phahlane v Road Accident Fund (21973/20230 [2025] ZAGPJHC 706 (21 July 2025)

[2] MMK obo MK (Case Number 497/2024) [2025] ZASCA 136 (25 September 2025) at paragraph 34

[3] MMK *supra* at paragraph 15

[4] Mkala v RAF (16158/2018) [2025] ZAGPJHC (10 March 2025) at paragraph 5

[5] Mathebula v RAF [2006] ZAGPJHC 261

See also Mlotshwa v RAF (926/2014) [2017] ZAGPPHC 109 (29 March 2017)

[6] Pillay v Krishna 1946 SA 964

- [7]** Galante v Dickenson 1950 (2) SA 460 (A)

- [8]** Nasionale Aartappel Kooperasie Bpk v Price Waterhouse Coopers Ing en Andere 2001 (2) SA 790 (T) at 798F – 799J

- [9]** VDN Carriers and Logistics CC v Gennao Logistics CC and Others Case (AR 13/22) [2022] ZAKZPHC 73 (18 November 2022) at paragraph 36.

- [10]** South African Breweries (Pty) Ltd v Louw [2017] ZALAC 63; [2018] 39 ILJ (189) LLC at paragraph 4

- [11]** Minister of Agricultural and Land Affairs and Another v De Klerk and Other 2014 (1) SA 212 SCA