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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.

8 October 2021

DATE

SIGNATURE

CASE NO: 40240/2020

In the matter of:

PN MOKHOMONG

Applicant/Plaintiff

and

ROAD ACCIDENT FUND

Respondent/Defendant

JUDGMENT

KHWINANA AJ

Introduction

- [1] The plaintiff has instituted an action against the defendant pursuant to a motor collision.

- [2] The plaintiff issued combined summons on 19 August 2020 and same was served on the defendant on 24 August 2020. The *dies* for the defendant to file notice of intention to defend expired.

- [3] The plaintiff claims for future loss of income and general damages as per the amended particulars of claim plus the quantified future loss of earnings in a total of R1,265,680-00, an undertaking to pay future medical costs in terms of Section 17(4)(a) of Act 56 of 1996 and costs of suit

- [4] The plaintiff applied for default judgment on the 22nd of September 2020. The matter was removed from the roll and has now been set-down again for the 08th of June 2021. I am seized to consider both merits and quantum.

- [5] The plaintiff is Patricia Ntombizodwa Mokhomong, an adult female person born [....].

- [6] The defendant is the Road Accident Fund a schedule 3A public entity, established in terms of section 2(1) of the Road Accident Fund Act 56 of 1996 with its service office situated at 38 Ida Street, Menlo Park, Pretoria, Gauteng Province.

Merits

- [7] The plaintiff was a passenger in a minibus taxi while driving from Orange Farm to Soweto on the R550 on the 02nd day of March 2018. The driver of the insured vehicle (Taxi) lost control of the vehicle and collided with a tree next to the road at approximately 01:00.

- [8] There is no Accident Report available as the plaintiff was a passenger. The only version before me is that of the plaintiff. The plaintiff submits that the plaintiff, being a passenger, should be awarded 100 % of her proven damages.
- [9] It is trite that the plaintiff, as a passenger claimant, need to prove only 1 % negligence on the part of the insured driver in order to succeed with her claim against the defendant.¹

Injuries and sequelae

- [10] Dr. T. Enslin compiled the RAF4 and recorded that the plaintiff sustained the following injuries: head injury; compression fracture of T8 with 40 % loss of body height; compression fracture of T7 with 43 % loss of body height; compression fracture of T6 with 28 % loss of body height; chronic pain syndrome; Costochondritis of the chest; whiplash injury to the neck and Mechanical backpain in the spine. He assessed the plaintiff to qualify for general damages award on a Whole Person Impairment of 27 % and also under the narrative test for two categories namely: Serious long-term impairment or loss of bodily function and severe long-term mental or behavioural disturbance or disorder.
- [11] The Clinical Psychologist with special interest in Neuropsychology, Me. T. da Costa, examined the plaintiff and concluded that there is evidence of a brain injury and that she probably suffered a mild to moderate brain injury. She referred the plaintiff to a Neurologist for an opinion on the severity of the brain injury.
- [12] The plaintiff is a 25-year-old female who is right-handed and grew up with her parents and siblings. At the moment she resides with her brother, sister and

¹ *Groenewald v Road Accident Fund* (74920/2014) [2017] ZAGPPHC 879 (5 October 2017)

her two children in a 2-bedroom RDP house. Her brother is the only breadwinner since she lost her job and is currently unemployed. The only employment she had prior to the accident after she left school was as an unskilled and unqualified hairdresser. The plaintiff passed Grade 10 and left school because she became pregnant. She later completed Grade 10 through ABET. She completed a 2-week Microsoft Office course through her church. Her father passed Grade 10, her mother Grade 8, her brother Grade 12 and her sister Grade 11. Her brother has employment in the formal sector, he is working for SAPS as an inspector.

Future medical expenses

- [13] It is trite law that the defendant shall furnish the Plaintiff with an undertaking in terms of Section 7(4)(a) of Act 56 of 1996, in respect of future accommodation of the plaintiff in a hospital or nursing home or treatment of or treatment of or the rendering of a service or supplying of goods to the Plaintiff (and after the costs have been incurred and upon submission of proof thereof) arising out of the injuries sustained in the collusion which occurred on the 02nd of March 2018.

Medico-legal reports

- [14] Mrs. M. Beytell, the Industrial Psychologist, reported the following current problems experienced by the plaintiff as a result of the accident: She cannot drive long distances due to severe back ache; she cannot stand, sit or walk for long periods of time; she sits for a bit, then she needs to stand up to stretch; she is no longer able to run/jog; she cannot sit on her knees, or squat; she cannot sleep on her back; she struggles to walk uphill, and even steep downhill is difficult; she sometimes just falls down when she walks, and this is a big problem for her; she fell inside the house and once in the street; her legs would just give way, and she would fall; she cannot jump; she can no longer work with her arms above shoulder height; she is no longer able to cook due to the back pain she experiences; she prefers to lie down most of the time as

it is more comfortable. She has become very forgetful; she has become very short-tempered and is easily irritated; she angers easily; she cries a lot she is no longer the person she used to be; she has become withdrawn, and feels like people just do not want to leave her alone; she is very anxious as a passenger in a car; she suffers from headaches three to four times a week, especially in hot weather; she sometimes becomes dizzy in hot weather; she constantly suffers from neck and back pain; she suffers from muscle spasms in her back; and her eyes have become less efficient.

She has not reached the 30 % whole person impairment, but qualifies under the Narrative Test, which warrant an award for general damages output will remain limited, and her pain and suffering will continue to affect her in future. She will benefit from future conservative and probably surgical treatment (own emphasis). The Orthopaedic Surgeon, Dr. H.B. Enslin, reported as follows regarding the injuries suffered by the plaintiff and the sequelae thereof on her general quality of life and ability to work:

“She has not returned to work as she was unable to stand. She is unemployed at present. She is twenty-five years old and will not be able to work as a hairdresser. She could work as a salon receptionist. She has not passed matric and she will have to be trained to perform administrative work. Finding suitable work will remain a challenging mission. She is unlikely to be appointed permanently. Writer believes that her income will remain limited for the rest of her working life. With the combination of physical and emotional impairment, it is unlikely that she will remain employed past the age of sixty. Radiological examination confirms compression fractures of T8 with 40% loss of body height, T7 with 43% loss of body height and T6 with 28% loss of body height.”

“She also has mechanical back pain in the lumbar spine, symptoms of a whiplash injury to her neck and costochondritis of the chest. She has severe depression, due to the fact that she is no longer able to look after her children and the fact that her boyfriend has left her. Ms Mokhomong has been left with serious long-term musculoskeletal impairment. She will benefit from future conservative and probably surgical treatment. Ms Mokhomong’s life has been affected by symptoms that have been present since 02.March 2018.”

- [15] Ms K. Havenga, the Counselling Psychologist, examined the plaintiff and came to the conclusion that she suffers from a severe long-term mental or behavioural disturbance or disorder. She concluded that the plaintiff has a 15 % WPI due to the mental disturbance or disorder. Me. C. Fourie under the guidance of Me. Ingrid Kleynhans, the Occupational Therapist, examined and tested the plaintiff and concluded the following outcomes of this assessment show that Ms. Mokhomong in her current capacity demonstrates the maximum ability to cope with work of light physical nature, but not all, of the described overall demands of her pre-accident job as Hairstylist. From her description, her job is graded to have required input of predominantly light physical nature, with occasional aspects of medium nature (material handling, e.g., stock or water containers).
- [16] She will benefit from implementing spinal hygiene principles with immediate effect to reduce strain on her spine. When pain is present or in case of increased symptomatology, she will require rest breaks to manage pain and fatigue. This could impact negatively on future work productivity. She will not, however, regain her pre-accident capacity in the event of spinal surgery. Her task engagement should be coupled with the necessary postural and pain management strategies in place. In terms of future employment options, she would benefit from successful rehabilitation, the implementation of reasonable accommodations, ergonomic setup and the use of assistive devices to optimize work functioning. From a psycho-emotional perspective, she reports

e.g., depression, mood swings, anxiety, a short temper and that she easily gets angry.

- [17] She presents with low motivation during this assessment. Her scores on the self-report questionnaire Hospital Anxiety and Depression Scale (HADs) indicate severe levels of anxiety (15) and mild levels of depression (11). Scores above 10 are significantly high and require referral to a psychologist. Her reported emotional changes may likely have a negative work-related impact in terms of work performance due to poor work habits. It could also impact negatively on her interpersonal relationships with co-workers and clients in a future job. Her poor motivation could affect her mental endurance to sustain physical activity. It may also have an adverse effect on her ability to cope under pressure and stress. Reduced temper control may result in potential problems to keep and sustain employment.

- [18] Her perceived abilities of her pain and ability to perform tasks, could also limit her participation in activities. She will therefore benefit from psychological intervention to address any underlying psycho-emotional difficulties that could hamper her work performance. From a cognitive point of view, she reports cognitive difficulties, e.g., reduced concentration and memory. From a cognitive point of view, ideally, her work in future should always be simple in a structured environment, to retain important information and complete an activity in a given timeframe.

- [19] She is expected to have trouble in handling and adjusting to new and challenging situations as a result of presenting cognitive problems. This could affect the efficiency and accuracy of her work. She also suffers from headaches which are expected to have a negative effect on activity participation. It should be considered that emotional difficulties (and the chronic experience of pain) may contribute to or manifest in terms of changes in cognitive abilities. She reportedly has a Grade 10 level of education, no

formal vocational qualifications apart from a basic computer course certificate and has limited vocational exposure which she obtained in her only job to date (Hairstylist).

- [20] Ms Mokhomong would have remained employed in the informal labour market as an Unqualified Hairdresser, either at her pre-accident employer, another employer, or eventually became self-employed in the capacity as mentioned. For the remainder of her employment career and considering that she would have remained in the informal labour market, normal inflationary increases would have sufficed until the normal age of 65 years. Ms Mokhomong mentioned that she had not received any remuneration during her period of recuperation. She did not return to her pre-accident employment as a Hairdresser (Unqualified) and has remained unemployed to date.
- [21] Youth aged 15 to 34 years were the most vulnerable in the South African labour market, as the unemployment rate among this age group was 59,0 % in the 1st quarter of 2020. Among graduates in this age group, the unemployment rate was 33,1 % during this period compared to 24,6 % in the 4th quarter of 2019. The more educated people are, the more likely their chances for employment and jobs with good working conditions. Although the youth in the labour market are more vulnerable, those with a tertiary level of education have better chances of being employed.
- [22] Mrs. Beytell opines that the plaintiff's residual work, earning capacity and considering the available medical expert opinions, Ms Mokhomong would not be able to return to her pre-accident position as an unqualified Hairdresser, or any other position where she would have to work long hours standing or be on her feet a lot. Ms Mokhomong will be more often unemployed than employed for the remainder of her employment career. Furthermore, considering, as well as her emotional and behavioural disorder, she will have to continuously compete against other younger, healthier and far more qualified individuals

than herself, either in the informal or the formal labour market. Ms Mokhomong should be regarded as far less competitive and severely compromised in the open labour market as a direct result from the accident in question and the sequelae thereof. Furthermore, in view of the available expert opinions with regards to the sequelae of the accident in question, as well as her young age (currently 25 years), level of education and her very limited employment history, the writer is of the opinion that Ms Mokhomong would in all likelihood struggle to secure a permanent position at this stage in her life, and most likely for the remainder of her employment career.

- [23] Dr H.B. Enslin opines that Ms Mokhomong will not be able to work past 60 years of age, thus the writer is of the opinion that even though she is already deemed as compromised until the normal retirement age of 65 years, she will suffer a partial future loss of earnings from date to age 60 years and a total loss of earnings until age 65 years. Ms Mokhomong would struggle to secure meaningful employment and would most likely have to rely on sympathetic employment, which is very difficult to find considering the high unemployment rate, specifically in her age range. The writer is of the opinion that Ms Mokhomong would most likely be more unemployed than employed, even if she should receive the suggested treatment as per the expert opinions.

- [24] It should be noted that even with treatment, Ms Kleynhans is of the opinion that reported emotional changes may likely have a negative work-related impact in terms of work performance due to poor work habits, that it could also impact negatively on her interpersonal relationships with co-workers and clients in a future job and that from a cognitive point of view, ideally, her work in future should always be simple in a structured environment, to retain important information and complete an activity in a given timeframe.

- [25] Taking into consideration the mentioned whole person impairment rating = 27 %, as per Dr T.J. Enslin, the cognitive and emotional difficulties as per Ms

Kleynhans, Ms T. Da Costa, and the body of the report, the writer opines that Ms Mokhomong will most likely be unemployed for about 75 % of the remainder of her employment career, and it is suggested that she be compensated in this regard. The writer is further of the opinion, whilst taking into consideration the expert opinions on hand, that should Ms Mokhomong be able to obtain any form of meaningful employment, most likely in the informal markets of the open labour market, these will be temporary positions, as sympathetic employment is very hard to find, and because she will struggle with any form of employment, except sedentary light work, which is also very hard to find, as mentioned previously.

Legal principle on loss of earnings

- [26] The issue *supra* was set out succinctly in ***Southern Insurance Association Ltd v Bailey NO²*** by Nicholas JA who said:

“In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an ‘informed guess’, it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge’s ‘gut feeling’ (to use the words of appellant’s counsel) as to what is fair and reasonable is nothing more than a blind guess. (cf Goldie v City Council of Johannesburg 1948 (2) SA 913 (W) at 920.)”

- [27] It is imperative to consider the circumstances surrounding each case prior finalisation of the damages in the matter: ***Burger v Union National South British Insurance Company [1975] 3 All SA 647 (W)*** at p650:

“A related aspect of the technique of assessing damages is this one; it is recognised as proper in an appropriate case, to have regard to relevant events which may occur, or relevant conditions which may

² 1984 (1) SA 98 (A) at 114C-D

arise in the future. Even when it cannot be said to have been proved, on a preponderance of probability, that they will occur or arise, justice may require that what is called a contingency allowance be made for a possibility of that kind. If, for example, there is acceptable evidence that there is a 30 per cent chance that an injury to a leg will lead to an amputation, that possibility is not ignored because 30 per cent is less than 50 percent and there is therefore no proved preponderance of probability that there will be an amputation. The contingency is allowed for by building in the damages a figure representing a percentage of that which would have been included if amputation had been a certainty. That is not a very satisfactory way of dealing with such difficulties, but no better way exists under our procedure."

- [28] There are no hard and fast rules in so far as contingencies are concerned. Koch in *The Quantum Yearbook* (2011) at 104 said:

*"General contingencies cover a wide range of considerations which may vary from case to case and may include: taxation, early death, saved travel costs, loss of employment, promotion prospects, divorce, etc. There are no fixed rules as regards general contingencies."*³

Pre-accident Earnings

- [29] Ms Mokhomong reported her income at an average of R2,750.00 per month. It has been calculated to an average of R33,000.00 per annum. She reported that she did not receive any extra benefits or earned any commission or tips. The writer was not able to confirm same.

Post-Accident Earnings

- [30] The writer suggests that the average earnings of the self-employed section as per the informal market, between the median (32 800) and upper quartile (76

³ *Gwaxula v Road Accident Fund* (09/41896) [2013] ZAGPJHC 240 (25 September 2013)

100) should suffice for calculation purposes until age 35 years. After reaching age 35 years, Ms Mokhomong would have gained enough experience, and saved enough money to open her own hair salon. Thus, M age 35 years to age 65 years would have ranged between the average of the upper quartiles of self-employed individuals with no employees and self-employed individuals with employees (as she would have eventually hired at least one assistant),

- [31] Ms Mokhomong will suffer partial loss of earnings of approximately 75 % for the remainder of her employment future until age 60 years. Ms Mokhomong should also be compensated for a total loss of earnings from age 60 years to age 65 years. As per Dr H.B. Enslin, even with the suggested treatment to be rendered, Ms Mokhomong will not be able to work past 60 years due to the accident in question, and had the accident not intervened, she would have been able to work until age 65 years, or even longer had her health permitted.

General damages

- [32] The plaintiff's counsel has referred me to caselaw regarding general damages. However, I have considered the as to what has been said in the matter of **Duma**⁴: *"As to what then happens, regulation 3(4) provides that, if the third party disputes the Fund's rejection of the RAF 4 form (under regulation 3(3)(d)(i)) – or if either the third party or the Fund wishes to challenge the assessment by the medical practitioner designated by the Fund (under regulation 3(3)(d)(ii)) – the aggrieved party must formally declare a dispute by lodging a prescribed dispute resolution form (RAF 5) with the registrar of the Health Professions Council within 90 days of being informed of the rejection or the impugned assessment. Regulation 3(5)(a) then goes on to say that if this is not done, the rejection of the RAF 4 form or the assessment by the Fund's designated medical practitioner, as the case may be, shall become final and binding."*

⁴ *Road Accident Fund v Duma, Road Accident Fund v Kubeka, Road Accident Fund v Meyer, Road Accident Fund v Mokoena* (202/2012, 64/2012, 164/2012, 131/2012) [2012] ZASCA 169; [2013] 1 All SA 543 (SCA); 2013 (6) SA 9 (SCA) (27 November 2012)

- [33] The Fund is an organ of State as defined in s 239 of the Constitution and is performing a public function in terms of legislation, its decision in terms of regulations 3(3)(c) and 3(3)(d), whether or not the RAF 4 form correctly assessed the claimant's injury as "*serious*", constitutes "*administrative action*" as contemplated by the Promotion of Administrative Justice Act 3 of 2000 (PAJA). (A "*decision*" is defined in PAJA to include the making of a determination.) The position is therefore governed by the provisions of PAJA. *In casu* it is evident that the plaintiff's attorneys caused the RAF 4 to be completed by the medical practitioner however there is no evidence which depicts that they have followed the procedure outlined *supra*. It is on this basis that I am unable to award the claim for damages.

Counsel's submissions

- [34] Counsel for the plaintiff has referred me to case law regarding similar injuries and awards regarding general damages. I have considered same however the law is clear on how courts are to deal with the issue of general damages. The plaintiff's WPI of 27 % refers. In the matter of ***Duma***⁵ the court reiterated the manner in which the general damages are to be dealt with.
- [35] Counsel for the plaintiff further submitted that the plaintiff has suffered severe and serious injuries that led to a change in her daily livelihood and especially her working ability all of those to the extent that it warrants an amount for general damages and the past and future loss of income. Contingencies for future loss of Income and other factors considered by the Actuary.
- [36] Mr. Johan Sauer, calculated the plaintiff's loss of future earnings and said the following in his summary: According to the report of Marissa Beytell (Industrial Psychologist), no income for Ms. P.N. Mokhomong until 2021/02/01, as she never returned to her pre-morbid employment following the accident and has remained unemployed to date. In the future we assume 75 % of the same

⁵ *Groenewald v Road Accident Fund* (74920/2014) [2017] ZAGPPHC 879 (5 October 2017)

post-morbid earnings as in the pre-morbid scenario until early retirement at age 60, as per Dr. H.B. Enslin (Orthopaedic Surgeon). The Actuary used a future post-morbid contingency related to her income of 35 %. Taking the future pre-morbid contingency of 15 % into account, the 20 % split is based on the WPI of 27 %.

- [37] The effect of the assumptions is fair and reasonable to both parties. The Actuary allowed only for a 25 % reduction in the post-morbid income as against the pre-morbid income of the plaintiff, together with early retirement at age 60 (according to the Orthopaedic Surgeon, Dr. H.B. Enslin). Total current claim as motivated by the experts and case law:

Loss of past earnings: R103,721-00

Loss of future earnings: R761,959-00

Total Loss of earnings: R865,680-00

Plus:

General Damages: R700,000-00 00

Total claim value: R1,565,680-00

- [38] I have considered the evidence *in toto*. The plaintiff, according to the industrial psychologist, can still do sedentary or light work and has been affected to 75 % percentage. She will be forced to retire early at 60 years. I came to the conclusion that in regard to the plaintiff's loss of earnings, taking into account all of the circumstances of the matter, including the medical evidence, it would be fair and just that an amount be paid for loss of earnings.

[39] In the exercise of my discretion, I am of the view that in respect of future loss of earnings, an amount of R600 000. 00 would be fair and reasonable in the circumstances of this case.

[40] The costs must follow the result therefore I am satisfied that the plaintiff be awarded costs at party-and-party scale.

[41] The counsel for the plaintiff has referred me to the draft order filed on CaseLines I have considered same and amended it accordingly.

[42] The following order is made:

The draft order marked "X" is made an order of Court.

E.N.B. KHWINANA

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No.: 40240/2020

**HELD AT PRETORIA ON THIS THE 8TH DAY OF OCTOBER 2021
BEFORE THE HONOURABLE JUSTICE KHWINANA (AJ)**

ORDER GRANTED ELECTRONICALLY IN TERMS OF DIRECTIVES REGARDING
SPECIAL ARRANGEMENTS TO ADDRESS COVID-19 IMPLICATIONS FOR ALL
LITIGATION AND MANAGEMENT OF COURTS DURING THE NATIONAL STATE
OF DISASTER

In the matter of:

PN MOKHOMONG

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER

AFTER READING THE PAPERS AND HEARING COUNSEL THE FOLLOWING
ORDER IS MADE:

1. The Defendant is liable to pay 100 % (HUNDRED PERCENT) of the proven or agreed damages of the Plaintiff with regards to the merits of the matter.

2. The defendant is ordered to pay the plaintiff an amount of R 600 000.00 (SIX HUNDRED THOUSAND) for loss of earnings a full and final settlement on the plaintiff's claim payable within 180 days of this order.

3. The Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of Act 56 of 1996, for the injuries sustained by the Plaintiff in the motor vehicle accident that occurred on 02 March 2018. The aforesaid undertaking is limited to 100 %.

3.1 If the Defendant fails to furnish the undertaking to the Plaintiff within 30 (thirty) days of this order, the Defendant shall be held liable for the payment of the taxable party and party additional costs incurred to obtain the undertaking.

4. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale for 08 June 2021.

4.1 In the event that the costs are not agreed:

4.1.1. The Plaintiff shall serve a notice of taxation on the Defendant's attorneys on record.

4.1.2. The Plaintiff shall allow the Defendant 14 (fourteen) Court days from date of allocatur to make payment of the taxed costs.

4.1.3. Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 7 % per annum on the taxed or agreed costs from date of allocatur to date of final payment.

5. The amounts referred to in paragraphs 2 & 4 above will be paid to the Plaintiff's attorneys, Slabbert & Slabbert Attorneys, by direct transfer into their trust account, the details of which are as follows:

Account holder: SLABBERT ATTORNEYS INC

Bank FNB Branch Code: 250655

Account no: [...]

Ref: TPC/0170

6. General damages are postponed *sine die*.

BY ORDER OF THE COURT:

REGISTRAR

On behalf of Plaintiff: Slabbert & Slabbert Attorneys

Contact Number: [....]

Francois Slabbert Contact Number: [....]

Adv. P. Van Der Schyf Contact Number: [....]

Ref: F SLABBERT/TPC/0170 RAF

Ref: 560/128800759/316/0

Link Number: 4962293

On behalf of Defendant: No appearance

CASE NUMBER: 40240/2020

DATE OF HEARING: 08 June 2021

ON BEHALF OF THE PLAINTIFF: ADV. P. VAN DER SCHYF
INSTRUCTED BY: Slabbert & Slabbert Attorneys

ON BEHALF OF THE DEFENDANT: NO APPEARANCE

DATE OF JUDGMENT: 8 October 2021