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

**CASE NO: 34680/2020**

**REPORTABLE: NO  
OF INTEREST TO OTHER JUDGES: NO  
REVISED.  
21 October 2022**

**In the matter between:**

**LYDLA MOEPENG MOUMAKOE**

**Plaintiff**

**and**

**ROAD ACCIDENT FUND**

**Defendant**

**DATE OF JUDGMENT:** This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 10h00 on **21 October 2022**.

## JUDGMENT

**KHASHANE MANAMELA, AJ**

### *Introduction*

[1] On 29 May 2019 and at or around Rosslyn, Pretoria North in the Gauteng Province, the plaintiff was injured in a motor vehicle accident. She was at the time a passenger in one of the motor vehicles involved in the accident. The plaintiff sustained injuries to her head, back, chest, left and right legs, and her right arm. She suffered damages caused by the injuries sustained from the accident or their *sequelae* including future loss of earnings, initially estimated to be in the amount of R1 210 000.

[2] On 30 July 2020, the plaintiff caused summons to be issued in this Court against the defendant. According to the plaintiff the accident was caused by the negligent driving of the driver of the other vehicle ("the insured vehicle") and she seeks that the defendant be held liable for the damages she suffered in terms of the provisions of the Road Accident Fund Act 56 of 1996 ("the Act").

[3] Although it is not clear from the papers whether the defendant had delivered anything beyond a notice signalling its intention to defend the plaintiff's action, the defendant's defence was struck out by an order of this Court granted on 16 May 2022, *per* Kubushi J. The effect of the order is that the matter thenceforth proceeded on an unopposed basis and, therefore, for purposes of obtaining default judgment.

[4] On 03 October 2022 the matter came before me by video-link for purposes of determining whether default judgment ought to be granted.

Mr JF Grabler SC, appeared on behalf of the plaintiff. Naturally, there was no appearance on behalf of the defendant, due to what is stated above. I reserved this judgment after listening to oral submissions by counsel.

The judgment, gratefully, also benefited from the written submissions filed by counsel on behalf of the plaintiff.

### ***Evidence and submissions on behalf of the plaintiff***

#### **General**

[5] The hearing was for the determination of both issues relating to merits or liability and *quantum* in the matter. The evidence in the hearing was exclusively procured or adduced by way of affidavit without oral evidence or physical appearance by any of the witnesses, including the plaintiff. Both the plaintiff and the medical experts who furnished reports after assessing the plaintiff for her injuries and/or their *sequelae* filed affidavits confirming the contents of their reports. But as this relates to a hearing on default judgment basis, I consider it unnecessary to traverse all material in the evidence. save in as far as it is necessary to explain the orders ultimately made in this matter.

[6] The plaintiff was born on 13 July 1973. She was therefore 45 years old at the time of the accident on 29 May 2019. She was 49 years old at the time of the hearing. She has a Grade 12 certificate and an NQF level II certificate. She has been employed as a merchandiser since August 2009. She was therefore in the same position for almost 10 years at the time of the accident. She returned to this position after being absent for approximately three or four days or a week following the accident. She has remained in the same position since including at the time of the hearing. Her activities as a merchandiser involve standing; handling light and heavy objects, and boarding and disembarking from a vehicle. The relevant experts classify her job or work level as medium. I will return to the latter issue below.

### Merits or liability

[7] In the affidavit filed for purposes of the establishing liability for her damages on the part of the defendant, the plaintiff explained how the accident occurred. The accident occurred in the afternoon (i.e. 17h15) on 29 May 2019. She was a passenger in one of the vehicles involved in the accident. The scene of the accident was in Rosslyn, Pretoria North at some intersection controlled by traffic light. At the material moment leading to the contact between the two vehicles, the traffic light was green in favour of the vehicle in which the plaintiff was been ferried. The driver of the other vehicle made a right turn in front of the vehicle the plaintiff was in, when it was not that driver/vehicle's opportunity or turn to do so, which led to collision or accident between the two vehicles. She sustained injuries as a result and was taken by ambulance to the nearby hospital.

[8] As the plaintiff was only a passenger in one of the vehicles involved in the accident and, therefore, required to prove or establish only 1% negligence to be successful in her claim, I find that the liability of the defendant has accordingly been established. The evidence contained in the plaintiff's affidavit suffices for the making of the necessary ruling. I will therefore hold the defendant fully (i.e. 100%) liable for any damages proven on behalf of the plaintiff.

### Quantum

[9] As already indicated, the plaintiff sustained soft tissue injuries to her upper and lower parts of her body. She was ferried by an ambulance from the scene of the accident to the hospital. Her Glasgow Coma Scale or GCS reading was recorded as 15/15, meaning that she was fully conscious upon her arrival at the hospital. She was treated conservatively and discharged from the hospital on the same day, but had to return a few days later complaining about severe headache and swollen eyes. After a scan was taken (which revealed soft tissue injury of the scalp) and issued a

prescription note for analgesics, the plaintiff was discharged on the same day.

[10] The plaintiff, as already stated, was subsequently examined by various medical practitioners or experts. The experts compiled and furnished medico-legal reports dated between 11 September 2020 and 19 October 2021. They subsequently were allowed by the Court in terms of the prevailing directives to file affidavits confirming the contents of their reports, as envisaged by Rule 38(2)<sup>1</sup> of the Uniform Rules of this Court. The plaintiff also obtained an actuarial report for the calculation of the relevant figures relating to her claim for loss of earning capacity. The latter report is dated 22 October 2021.

[11] The plaintiff complains of general body pain, including headaches and pain on both legs. She also experiences pain on her shoulders and lower back following the accident. The pain also makes it difficult for her to enjoy a peaceful sleep. The pain and discomfort have gradually increased over time, despite treatment or medication given. Inclement weather and increased activity exacerbate the pain, it is contended. Some of the pain still persists whilst there has been some dissipation of pain in other respects.

[12] She is struggling with bodily movement such as standing, walking and handling of heavy objects. All of these activities are required or necessary for her job as a merchandiser. Due to painful shoulders, the plaintiff also finds it difficult to reach up to higher shelves for purposes of packing merchandise, which is part of her job. She experiences pain when lifting heavy objects or stooping or bending over to pick up heavy objects and, therefore, find these activities difficult to perform. She also finds it painful to attend to daily chores, such as cooking, cleaning, carrying groceries, bathing, dressing her lower

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<sup>1</sup> Uniform Rule 38(2) reads as follows: "The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit."

body, washing and ironing clothes.

[13] Radiological examination revealed no pain on palpation and no abnormalities detected in respect of the shoulders. With regard to the lumbar spine injury, examination revealed that the plaintiff experiences pain with extension and pain with 90 degrees flexion. Further, the radiological examination indicated osteo-degenerative change. The experts recommended conservative treatment including physiotherapy. Also, it is stated that the plaintiff had sustained a mild traumatic brain injury, not usually associated with significant neuropsychological *sequelae*.

[14] Regarding the effect of the injuries and/or their *sequelae* on the plaintiff's prospects of employment, the experts have the following to say. The injuries had an impact on the plaintiff's productivity and working ability and would continue to do so in the future. Although, the plaintiff returned to her pre-accident occupation she struggles to fulfil all of the duties expected of her due to ongoing pain. The injuries will affect her promotion and career advancement prospects.

[15] Regarding the plaintiff's residual work capacity, the opinions of the experts include the following. The plaintiff is capable of sedentary and light physical work. She is also suited for engagement in a range of medium work, the limitations of which are with regard to prolonged standing, stooping and elevated work. She is limited in heavy load-handling and unsuited to engage in full-spectrum medium, heavy and very heavy occupations. It is concluded that the plaintiff does not fully meet the physical job demands of her current job as a merchandiser. She is therefore not working at the same level as before the accident, due to limitations arising from the accident such as lower back pain. It is also stated that the osteo-degenerative changes as recorded by the orthopaedic surgeon had a bearing on her medium work demands. She is best employable in sedentary and light related occupations. She would rely on sympathetic employer to accommodate her and also make use of assistive devices and rest breaks.

[16] Upon telephonic consultation between the industrial psychologist and the plaintiff's manager, the manager confirmed that although the plaintiff does not report directly to her on a daily basis, he was satisfied with her pre-accident and post-accident work performance. She remains a good worker, although she complains of back pain. Her promotional capacity would depend on her qualifying for the position of field marketer. The latter position requires a Grade 12 qualification, which the applicant possesses, as well as sufficient experience as a merchandiser. However, no such positions were available at the time of the aforementioned consultation on 14 October 2021.

[17] The industrial psychologist concludes that post-accident the plaintiff would probably only continue in her current position, for as long as she could endure, keeping in mind that she is not fully suited for same. She would continue to be remunerated at her current earnings plus annual inflationary increases. It is also speculated that the plaintiff would retire early, due to her injuries or limitations. She has no prospects of promotion in the future, which should be addressed by a much higher post-accident contingency deduction, it is submitted.

[18] The table below reflects an actuarial certificate informed by the findings and conclusions of the expert witnesses. In terms of the calculations the plaintiff's total loss of past and future earnings is in the amount of R440 782.00

Past earnings

Less contingency deductions (5% / 5%)

**Total loss of past earnings**

Future earnings

Less contingency deductions (5% / 25%)

**Total loss of future earnings    Total loss of earnings**

<b>Had the accident not happened</b>	<b>Now that the accident has happened</b>	<b>Difference loss</b>
<b>192 137</b>	<b>191 337</b>	
<b>9 607</b>	<b>9 567</b>	
<b>182 530</b>	<b>181 771</b>	<b>759</b>
<b>1 364 607</b>	<b>1 141 805</b>	
<b>68 230</b>	<b>285 451</b>	
<b>1296376</b>	<b>856 353</b>	<b>440 023</b>
		<b>440 782</b>

[19] Notably, the actuary had applied 5% contingency deduction to past earnings both pre- morbid and post morbid, resulting in a past loss of R759.00. For the future loss of earnings a 25% contingency deduction had been applied to the earnings now that the accident had happened which resulted in a spread of 20% due to the 5% applied to the earnings had the accident not happened. It is submitted by counsel that the latter contingencies are to allow for increased employment vulnerability, labouring capacity, uncertainty, possible lump years of unemployment and in retirement.

### ***Conclusion***

[20] The plaintiff was injured in May 2019. Although the experts opine that her current limitations - arising from the injuries from the accident and/or their *sequelae* - affect her work capacity and future employment prospects, the plaintiff had remained in the same position she occupied pre-morbid for a



period of over three years. Her employer had reportedly not found anything untoward with her performance, although she complains about back pain. While one is mindful of the fact that her condition may degenerate or worsen in future, [ find that the contingency deduction of 25% applied to her future earnings now that the accident had happened (resulting in a spread of 20%) to be slightly higher and therefore not appropriate.

Therefore, I will apply a contingency deduction of 20% resulting in a spread of 15%. This would result in a total loss of earnings in the amount of R383 691.00.

[21] Therefore, I will make an award in the amount of R383 691.00 in respect of the estimated loss of income or earning capacity of the plaintiff. However, to the extent that the re- calculation or the application of the contingencies, either in form or substance, for whatever reason, do not seem conventional, scientific or arithmetically accurate. I point out that I consider the amount of R383 691.00, in and of itself, a fair and adequate compensation for the loss of income or earning capacity suffered by the plaintiff considering the circumstances of this matter. Therefore, the defendant will be held 100% liable for the aforementioned proven damages suffered by the plaintiff. I will also order the defendant to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Act in respect of 100% of the defendant's future medical, hospital or similar expenses. Costs will also follow the outcome in this matter.

### ***Order***

[22) In the premises, I make the order, that:

- a) the Defendant is liable 100% in respect of the Plaintiff's proven or agreed damages;
- b) the Defendant shall pay an amount of **R383 691.00 (three hundred**

**and eighty three thousand six hundred and ninety one rand)** in settlement of the Plaintiff's claim;

c) the Defendant shall be liable for interest at the prevailing interest rate from a date 15 days after the date of this order as envisaged in section 17(3)a of Act;

d) the amount in b) hereof shall be paid to the Plaintiff's Attorneys, Wehmeyers Attorneys, in settlement of the Plaintiff's claim, by direct transfer into their trust account, details of which are as follows:

<b>Bank</b>	<b>First National Bank</b>
<b>Branch code</b>	<b>252345</b>
<b>Account holder</b>	<b>Wehmeyers Attorneys</b>
<b>Account number</b>	<b>[....]</b>
<b>Reference</b>	<b>J WEHMEYER/WM) 109</b>

e) the Defendant must furnish the Plaintiff with an undertaking in terms of section 17(4)(a) of the Act in respect 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 supplying of goods to her after the costs have been incurred and on proof thereof, resulting from the accident that occurred on 29 May 2019;

(f) the Defendant shall make payment of the Plaintiffs taxed or agreed party and party costs on the High Court scale of the action, which costs shall include the following and be subject to the discretion of the Taxing Master:-

- I. the costs of Senior Counsel on the High Court Scale, inclusive of but not limited to Counsel's preparation, full day fees, fees for preparation of heads of argument for 3 October 2022;
2. the reasonable taxable preparation, assessment and expert report fees, of the following experts of whom notice have been given, being:
  - 2.1 medico legal report by Dr Marin (Orthopaedic surgeon);
  - 2.2 medico legal report by Dr Berger (Ophthalmologist);
  - 2.3 medico legal report by Dr Wynand-Ndlovu (Neurologist);
  - 2.4 medico legal report by A Ndabambi (Occupational therapist);
  - 2.5 medico legal report by N Kotze (Industrial psychologist), and
  - 2.6 medico legal report by J Sauer (Actuary).
3. the reasonable taxable costs of obtaining affidavits in support of the evidence to prove the Plaintiff's claim;
4. the reasonable taxable accommodation and transportation costs (including Toll and E-Toll charges) incurred on behalf of the Plaintiff in attending medico-legal consultations with the parties' experts, consultations with the legal representatives and the court proceedings, subject to the discretion of the Taxing Master;
5. the reasonable, taxable costs of all consultations between the Plaintiff, and/or her attorneys and/or the Plaintiff's witnesses/ experts in preparation for hearing of the action;
6. the costs of complying with the practice directive dated 1 June 2021;

7. the above costs will also be paid into the aforementioned trust account.

g) the following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:

1 the Plaintiff shall serve the notice of taxation on the Defendant's attorney of record;

2. the Plaintiff shall allow the Defendant 7 (seven) court days to make payment of the taxed costs from date of settlement or taxation thereof;

3. should payment not be effected timeously, Plaintiff will be entitled to recover interest at the prevailing mora interest rate on the taxed or agreed costs from date of *allocatur* to date of final payment.

h) it is recorded that there is no contingency fee agreement.

**Khashane La M. Manamela**  
**Acting Judge of the High Court**

**Date of Hearing:** 03 October 2022

**Date of Judgment:** 21 October 2022

**Appearances:**

For the Plaintiff	Mr JF Grabler SC
Instructed by	Wehmeyers Attorneys, Pretoria
For the Defendant	No appearance