

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 7869/2018P

In the matter between:

NDUMISO WINLOVE SITHOLE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

PLOOS VAN AMSTEL J

[1] The plaintiff in this matter is Nondumiso Winlove Sithole, a 32-year-old

female. The defendant is the Road Accident Fund.

[2] The plaintiff was injured on 14 December 2014 when a motor vehicle in which she was a passenger overturned. She filed a claim with the RAF, after a doctor had certified that her injuries were such that she had suffered a 68% 'Whole Person Impairment'. The RAF did not contest this. The plaintiff instituted an action for compensation in July 2018, after which the merits were settled and the RAF accepted liability to compensate her for her loss. The matter came before me today for the quantification of the claim. The plaintiff was represented by counsel, but the RAF was unrepresented, in spite of having been notified of the hearing, and the service of a notice of set-down on it.

[3] Two heads of damages were claimed. The first was for general damages and the second for loss of earnings. I was furnished with affidavits from a number of medical specialists, dealing with her injuries and their sequelae. I was also furnished with a report and affidavit by an actuary, dealing with loss of income. I deal firstly with the claim for general damages.

[4] The plaintiff was 23 years old at the time of the incident. She was described in the particulars of claim as a dressmaker. She suffered serious injuries, in the form of a traumatic brain injury, scarring of the face and soft tissue injuries to the right knee and leg. The report by Dr Bhanjan, a neurologist, states that when he examined the plaintiff in August 2019 she presented with features of a post-traumatic mood and behavioural disorder with chronic neurocognitive impairment, post traumatic headaches, post traumatic epilepsy and chronic pain syndrome. These features were in keeping with a moderate - severe traumatic brain injury. An EEG performed by him demonstrated features of a multifocal seizure disorder.

[5] An occupational therapist, Ms Jane Van den Merwe, states in her report that the accident has impacted on the plaintiff's physical abilities and caused ongoing pain in her lower back, right knee, right arm, headaches and changes to her

cognition, behaviour and personality, which prevented her from returning to work and also affected her home, personal and family life. She often felt moody and irritable, got angry easily and relied on support from her extended family. She was also often forgetful and disorganized.

[6] A clinical psychologist, Dr Bosch, states in her report that the clinical and psychometric picture is consistent with the diagnosis of a mood disorder (depression); a somatic symptom disorder with predominant pain; and subtle, mild neurocognitive disorder; emotional personality and behavioural changes; mild self and body image disturbances; reduced social/leisure/sexual functioning; and fatigability. In addition, she suffered mental anguish and the awareness of poor function and of injury.

[7] The plaintiff was employed at the time of the incident, although her contract was due to expire in two weeks' time. The contract was not renewed, apparently because of the accident. In March 2016 she obtained a code 10 driver's licence. She completed a one- year Higher Computer Literacy course at Avuxeni Computer Academy in Newcastle in 2017 (She says it was in 2012. The certificate says 27 June 2017.) From February to October 2021, she was employed as a hairdresser, on a commission basis. She says she resigned in October due to persistent pain and the low income. She remained unemployed after that, and intended to attend hospitality studies with a view to pursue a career in cooking and catering. She says she has not done so due to a lack of funds.

[8] An Industrial Psychologist, Mr De Kock, expressed the view in his report that, but for the accident, the plaintiff was likely to have continued competing for unskilled to low semi-skilled positions in the open labour market with prospects of progression to higher levels through further education, training, job changes and experience, working until normal retirement age of 65 years. At the time of the accident, she was working for Bayport Financial Services, selling funeral policies on a commission basis. She told Mr De Kock that if the accident had not happened, she would have

resigned in 2015 in order to complete the matric and then study for a teaching diploma. Mr De Kock says that, given her academic record, is uncertain if she would have been successful at the diploma level.

[9] In Mr. De Keck's report two different scenarios are dealt with -the first on the basis that she would have completed grade 12; and the second on the basis that she would have enrolled for tertiary studies and ended up with an N6 level diploma at a TVET College. I regard the second scenario as unlikely.

[10] The first scenario states that the plaintiff would likely have obtained grade 12 in 2015; would then have re-entered the open labour market and found temporary/contract work in the formal sector for three years; during this period would have attended additional vocational certificate courses, such as higher computer literacy, driving license, administrative, secretarial, receptionist, etcetera, to enhance her skill set and employability. Thereafter, at the age of 28 years, she probably would have procured permanent work at the lower quartile of Paterson A2; and through further training, job changes and experience she would likely have progressed to a career ceiling at the lower quartile of Paterson B2 at age 45 years. She probably would have remained on this level and received only inflation related annual increases until normal retirement at age 65 years.

[11] Mr De Kock sketches the following position, since the accident had happened. The plaintiff was unable to return to her former employment. She has remained unemployed to date. She obtained a code 10 driver's license in March 2016. She completed a one- year higher computer literacy course. The certificate indicates that she completed the course on 27 June 2017. She however claimed that she did the course in 2012. She still wants to pursue a career in teaching and, if not, wants to find a clerical position. Mr. Kock says it is likely that the plaintiff will pass grade 12; and will find temporary/contract work in the formal sector for three years. Thereafter, at the age of 33 years she will probably find permanent work and is likely to progress to a career ceiling at age 45, and thereafter receive only inflation related increases until

early retirement at age 60 years. However, given the high unemployment rate, the current level of education, epileptic condition, physical limitations, uncertainty regarding the success of future medical and psychological interventions and rehabilitation, impairment of neuropsychological functioning, chronic pain, and persisting psychopathology, her employment prospects are significantly narrowed and she will be vulnerable to performance, high absenteeism, disciplinary issues and possible dismissals or redundancy. Thus, a much higher than normal contingency for unemployment should be applied in the injured state.

[12] The plaintiffs loss of income was actuarially calculated on the facts and assumptions in Mr. De Kock's report. The past loss of earnings was calculated in a sum of R564 621, being the difference between what the plaintiff would have earned and what she in fact earned, with a contingency deduction of 5%. The future loss of income (scenario one) was calculated in an amount of R2 857 049, with a contingency deduction of 20% in respect of the 'but for' earnings, and 50% in respect of the future earnings.

[13] That brings me back to the general damages. It is relevant in this context to determine whether or not the plaintiff was rendered unemployable. I do not think the probabilities, as they appear from the medical reports, establish that she is unemployable. Nevertheless, her working life will be more frustrating and uncertain than it would have been, and losing a job will be traumatic and frustrating.

[14] I have had regard to the reported cases to which counsel referred me. They are guidelines only, but helpful in the sense that they illustrate the range of awards in comparable cases, and sometimes the correct application of principles and contingencies. The cases are listed in counsel's written heads of argument, and I do not intend to list them all. The awards range between R500 000 and R1,4m, as the facts are not truly comparable.

[15] I must determine an award for general damages that I regard as fair to

both parties. Unfortunately, the defendant has not found it necessary to make submissions in this regard. Having regard to the plaintiff's physical injuries and the consequences thereof, including the chronic pain, psychological trauma, chronic neurocognitive impairment and her significant loss of the enjoyment of the amenities of life, including a satisfying and fulfilling work life, I think an award of R900 000 will be appropriate.

[16] The award will therefore be a total amount of R4 321 670 (R564 621 + R2 857 049 + R900 000). Counsel provided me with a draft order in the usual form, which order I make, with the amount in para one to be the sum of R4 321 670. The order is attached to. this judgment, and initialled by me.

PLOOS VAN AMSTEL J

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 7869/2018

On the 2nd day of August 2022 before the Honourable Justice Ploos Van Amstel

In the matter between:

SITHOLE: NONDUMISO WINLOVE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER

Having perused the pleadings and the documents filed and having heard counsel it is ordered that:-

1. The Defendant is ordered to make payment to the Plaintiff in an amount of **R4 321 670 (four million three hundred and twenty-one thousand and six hundred and seventy rand** ("the capital amount") in full and final settlement of the Plaintiff's claim against the Defendant for damages suffered as a result of the

injuries sustained in a motor vehicle collision that occurred on 14 December 2014.

2. The Defendant is to furnish the Plaintiff with an Undertaking in terms of Section 17(4) of the Road Accident Fund Act, Act No 56 of 1996, covering 100% of the Plaintiff's reasonable and necessary future medical expenses which will include, but not be limited to, accommodation in a hospital or nursing home, or treatment or rendering of a service, or supplying of goods or related expenses as *inter alia* set out in the Plaintiffs medico-legal reports as set out in 5.1 hereunder, in respect of injuries sustained by the Plaintiff in the motor vehicle accident referred to herein *supra*.

3. Payment of the capital amount is to be made into the following account, being the trust account of the Plaintiffs appointed attorneys of record, EVN Legal Practitioners Incorporated:-

4.1	Account Name	EVN Legal Practitioners Inc.
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4.2	Bank	Standard Bank
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4.3	Branch	Gateway
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4.4	Account number	[...]
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4.5	Branch code	[...]
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4. Payment of the aforesaid amount shall be paid on or before 31 January 2023 failing which interest a *tempora morae* is payable on the capital amount at a rate of 7.5% per annum from 14 days from date of this order to date of payment.

5. The Defendant is to pay the Plaintiffs taxed or agreed upon party-and-party costs on a High Court Scale, which costs will *inter a/ia* include the following:

5.1 All costs incurred in attending and travelling to the following medico-legal examinations as well as all costs incurred in obtaining all medico-legal reports and actuarial calculation, including qualifying fees if applicable, in respect of the following experts appointed by the Plaintiff:

5.1.1 Dr Bhanjan (Neurologist);

5.1.2 Dr De Kock (Industrial Psychologist);

5.1.3 *BA Bosch (Clinical Psychologist);*

5.1.4 Jane Van Der Merwe (Occupational Therapist);

5.1.5 Mr. Whittaker (*Actuary*);

5.1.6 Dr. Arvin M. Lalbahadur (*Plastic/Reconstructive Surgeon*).

5.2 Costs of Counsel;

5.3 The costs of Attorney which includes:-

5.3.1 reasonable travelling costs for actual attendance to Pre-trial conferences, irrespective of time elapsed between Pre-trial conferences;

5.3.2 costs in preparing for Pre-trial Conferences, judicial case management and trial, including the costs consequent to compiling all Pre-trial agendas, Pre-trial minutes, heads of argument/submissions and summaries in terms of directive 38A;

5.3.3 All costs previously reserved, the reasonable cost of consulting with the Plaintiff.

5.4 Costs of Correspondent Attorney;

5.5 The Plaintiff shall serve a notice of taxation on the Defendant and shall afford the Defendant 14 (Fourteen) court days to make payment of the taxed or agreed costs:

BY ORDER OF COURT

REGISTRAR

Case Information

Date of Hearing : 1 August 2022

Date of Judgment : 4 August 2022

Appearances

Counsel for the Plaintiff Ms B De Beer

Instructed by
Plaintiffs Attorneys
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Counsel for the Defendant : No Appearance