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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2012/29620

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

In the matter between:

LETTA MARIA OOSTHUIZEN
and

Plaintiff

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

KATHREE-SETILOANE, J:

[1] The plaintiff, Letta Maria Oosthuizen claims damages from the defendant arising out of bodily injuries sustained in a motor vehicle collision which occurred, on 18 May 2009, in Vereeniging, between the insured motor vehicle and the motor vehicle in which the Plaintiff was a passenger.

[2] The issues of negligence and liability have been agreed and settled on the basis that the defendant admits 100% liability for the proven damages that plaintiff has suffered as a result of this collision. The defendant has undertaken to furnish the plaintiff with an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act, 56 of 1996 for the costs of the future accommodation 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 upon proof thereof. The defendant has also agreed to pay the plaintiff the amount of R16887.00 in respect of her claim for past medical and hospital expenses.

[3] The matter comes before me for the determination of the quantum of damages in relation to the plaintiff's past and future loss of income, and past medical expenses. The issue of general damages was referred to the Health Professional Council of South Africa prior to the trial.

[4] The plaintiff testified, as did Dr Oelofse (Orthopaedic Surgeon), Ms E Kruger (Occupational Therapist) and Mr F.P Möller (Industrial Psychologist) on her behalf. The following expert witnesses testified for the defendant: Mr B Moodie (Industrial Psychologist) and Ms S Harrison (Occupational Therapist). The defendant produced the expert report of its Orthopaedic Surgeon, Professor Schepers, but did not call him to testify. Joint minutes were prepared by the Orthopaedic Surgeons (Oelofse and Schepers), the Industrial Psychologists (Möller and Moodie), and the Occupational Therapists (Kruger and Harrison).

[5] It is common cause that the plaintiff suffered a severe injury to her cervical spine, resulting in a cervical condition which is causing severe pain, requiring conservative treatment and probable surgical intervention in the future. The

conclusions drawn from the MRI results is that the plaintiff sustained a serious long term impairment and loss of body function in terms of the narrative test. Having regard to the injuries sustained by the plaintiff, the Orthopaedic Surgeons concluded as follows in their joint minute:

“38.1 Having regard to the patient’s physical pre-morbid employment duties, the patient’s complaints and clinical presentation, as well as the radiological findings, it is agreed that the patient is physically unsuitable to perform her pre-morbid duties.

38.2 It is agreed that the patient will have to undergo the recommended medical treatment

38.3 It is agreed that the injuries sustained in the collision and the *sequelae* thereof constitutes serious long term impairment and loss of body function in terms of the narrative test.”

[6] At the time of the collision the plaintiff was [.....] years old and unemployed. She was in possession of a grade 10 certificate and had between 7 to 8 years’ experience as a child-minder working in the children’s nursery industry. She had resigned from her last job as a child-minder at Telly Tubbies Nursery School in Vereeniging in 2008, where she worked fulltime for eight months of the year, and two months part time. Telly Tubbies is owned by her sister, Ms Ina Albrecht. The plaintiff resigned from this job in order to take care of her youngest daughter who became depressed after the death of her father, and developed a medical condition requiring surgical intervention. She intended to return to work in 2010, due to financial constraints and because her daughter’s condition had improved, but was prevented from doing so due to the injuries which she sustained in the accident. As a result of the injuries sustained in the accident, the plaintiff experiences severe and chronic neck pain, which is aggravated when walking, reaching, handling heaving objects, rotating her neck, looking up and down etc. She also experiences severe headaches and muscle spasms in her neck, and struggles to sleep at night due to the pain. She struggles to carry children, and has difficulty lifting them up, or bending down to tend to them. She uses analgesics to treat her pain.

[7] The plaintiff's duties as a child-minder included lifting children, feeding, cleaning and dressing them as well as playing with them. In late 2010, she assisted her sister at Telly Tubbies for a day. She was unable to perform her duties fully as she was incapable of lifting and carrying the children. When she informed her sister of this, she was told that if she was unable to physically handle the children, then she could not return to work. Although the plaintiff never returned to work at Telly Tubbies, she sought employment at two crèches in the area. When she disclosed her medical condition, and that she was only capable of working with children in a supervisory capacity (monitoring the children), she was advised that she could not be employed unless she was able to lift and carry children, and cope with the other physical demands of child-minding.

[8] Although initially agreeing that post-accident the plaintiff is suited to sedentary work, on consideration of the joint minute of the Orthopaedic Surgeons, the Occupational Therapists for both the defendant and the plaintiff, are in agreement that the plaintiff is unable to perform her pre-morbid work duties and is totally unemployable post-accident.

Pre-Accident Scenario

[9] Mr Möller, the Industrial Psychologist for the plaintiff, is of the opinion that the plaintiff would have been successful in securing a similar position as a child-minder in the nursery school industry during 2011, and that her career would have progressed as follows:

- (a) The plaintiff would have remained unemployable for a period of six months, during which time a suitable position would have been sought.
- (b) By age 45 the plaintiff would have been employed as a child-minder earning R2000, 00 per month (between the median and upper quartile as an unskilled worker).
- (c) By age 50, the plaintiff would have earned R3000, 00 per month (closer to the upper quartile of an unskilled worker)
- (d) By age 55 the plaintiff would have reached her career ceiling, earning R4000,00 per month (upper quartile of an unskilled worker).

(e) Thereafter the plaintiff would have received annual inflationary increases until normal retirement age of 65.

[10] Mr Moodie, the Industrial Psychologist for the defendant agrees in general with Mr Möller, but deviates from Moller's view on the following two issues: the period within which the plaintiff would have been able to secure employment and her age of retirement. In this regard, he is of the view that plaintiff would have secured employment within a period of six months from first starting to look for employment in 2010, and she would have worked to retirement age 60-65 as opposed to 65 as opined by Mr Möller. He is of the opinion that she would have worked to retirement age 60-65 because she would have found herself at a distinct disadvantage when competing for posts against more suitably qualified younger child-minders, and that because plaintiff relied on her physical strength to perform her job, she would have opted to retire at the younger age of 62.5 years. To the contrary, I am of the view that plaintiff would have elected to work to age 65 because she is a widow, a single mother of five children, and is in financial need. Having regard to her experience of 7 to 8 years as a child-minder, I am of the view that she would have faced little difficulty securing employment in a similar role at a crèche, nursery school, private home, or an institution for special needs children at age 65. The objective evidence demonstrates that in the Vereeniging area alone, where the plaintiff previously worked, there is a demand for child-minders. Her experience as a child-minder would, therefore, have made her a more attractive employee than younger, less experienced child-minders. Furthermore, due to plaintiff's financial constraints, she would have opted for an extended work life, as opposed to the lower state pension. Accordingly, I find that the plaintiff would, post- accident, have retired at age 65. Also, having regard to the high demand for child-minders in the Vereeniging area alone, I find that plaintiff would have been unemployed for a period of six months and would have found employment in 2010 as opposed to 2011 as opined by Mr Möller.

Post- Accident Scenario

[11] Having regard to the joint minute of the Orthopaedic Surgeons, the Industrial Psychologists agree that post-accident, the plaintiff is unable to compete in the open labour market as a child-minder or for any job, which she would have been pre-morbidly qualified, because of the plaintiff's physical condition, her lack of trainability,

and that she will be required to compete with an oversupply of newly matriculated younger and healthier job applicants. Accordingly, they agree that, post-accident, the plaintiff is totally unemployable.

[12] On consideration of the expert views I consider the plaintiff to be unemployable for the next fifteen years until age 65. She will undoubtedly suffer loss of earnings as a result of the injuries sustained in the accident. The plaintiff has prepared a calculation of the plaintiff's past and future loss of income based on the assumption that from June 2010, the plaintiff would have earned R2000,00 a month (in 2014 terms as agreed by the Industrial Psychologists), that her income would have increased in line with inflation (5.4%) until her retirement at age 65, and that since the date of the accident, plaintiff has earned no income, and will not earn any income in the future. Although there was some discrepancy between the evidence of the plaintiff and the experts as to the amount that she earned at Telly Tubbies between 2005 and 2008, this is irrelevant to the calculation of the plaintiff's past and future loss of earnings, as the Industrial Psychologists agree that R2000,00 is a fair estimate of what the plaintiff would have earned when she resumed employment in 2010. Importantly, in this regard, Mr Moodie stated that the plaintiff's sister currently (in 2014) pays child-minders employed at Telly Tubbies R2400.00 a month.

[13] The plaintiff's income but for the accident is calculated to be R85 900, 00. to which is applied a 2.5% contingency deduction, resulting in a net past loss of R83 752.50. I consider the application of a 2.5% contingency deduction to plaintiff's income, but for the accident to be fair and reasonable, since the evidence reveals that but for the accident the plaintiff would have secured employment at Telly Tubbies, which belonged to her sister.

[14] The plaintiff's future loss of income, but for the accident is calculated to be R277 700,00, to which is applied a 7.5% contingency deduction resulting in a net future loss of R256 872.50. I am of the view that the application of a 7.5% contingency deduction to plaintiff's future loss of income, but for the accident is fair and reasonable since the evidence reveals that, but for the accident, plaintiff would have been employed to age 65, as she is highly experienced, and there is a high

demand for child-minders in Vereeniging. Accordingly, I award the plaintiff an amount of R340 625.00 for past and future loss of earnings.

[15] In the result I grant judgment for plaintiff against the defendant as follows:

1. The defendant shall pay the plaintiff a capital amount of R357512.00 in respect of plaintiff's claim for past and future loss of earnings and past medical and hospital expenses.
2. The capital amount is payable by means of direct fund transfer before or on 30 June 2014 into the trust bank account of the plaintiff's attorney; Mills & Groenewald Trust Cheque Account, Absa Bank Vereeniging, Account number:[.....], Branch code: [.....], reference [.....].
3. No interest will be payable except in the event of default of payment before/ on the above mentioned date in which case interest will be payable at the rate of 15,5% calculated on the capital amount from 30 June 2014.
4. The defendant will furnish the plaintiff with an undertaking in terms of s 17 (4)(a) of the Road Accident Fund Act, 56 of 1996, for 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 to the plaintiff or supplying of goods due to injuries sustained by the plaintiff in the motor vehicle collision which occurred on 18 May 2009 and the *sequelae* thereof, after such costs have been incurred and upon proof thereof.
5. The defendant shall pay the plaintiff's taxed or agreed party to party costs up to date on the High Court scale, which party and party costs shall include, but not be limited to:
 - 5.1 The reasonable costs in respect of the preparation of the medico legal reports, the addendum medico legal report, the radiological reports, the RAF1 Third Party Claim form, and the RAF4 Serious Injury Assessment Reports;

5.2 Consultations when detailed instructions were given due to the complexities of the matter;

5.3 Costs of counsel from 12 May 2014 up and until 21 May 2014;

5.4 Drafting of heads of argument as per the direction of the court (plaintiff's leading senior, Piet Uys);

5.5 Costs pertaining to 16 May 2014 and 20 May 2014 as well as all costs pertaining to qualifying/ and or preparation and/ or reservation fees and/ or travelling fees of Dr Oelofse and Enid Kruger.

5.6 Qualifying and/ or preparation and/ or reservation fees, if any, for trial on 12 May 2014 up to 16 May 2014 to be proven to the taxing master in respect of the following experts:

5.6.1 Dr Oelofse (Orthopaedic Surgeon);

5.6.2 Dr M Wilson (Radiologist);

5.6.3 Dr J.H.S Van Zyl (Physician);

5.6.4 Ms E Kruger (Occupational Therapist);

5.6.5 Mr F. P Möller (Industrial Psychologist);

5.6.6 Munro Consulting Actuaries (Actuaries);

5.6.7 As well as the preparation fees of Dr Oelofse (Orthopaedic Surgeon) in respect of the joint meeting discussions and preparation of the joint minute with Professor Schepers (Orthopaedic Surgeon);

5.6.8 As well as the preparation fees of Ms E Kruger (Occupational Therapist) in respect of the joint meeting discussions and preparation of the joint minute with Ms S Harrison (Occupational Therapist);

5.6.9 As well as the preparation fees of Mr F. P Möller (Industrial Psychologist) in respect of the joint meeting discussions and

preparation of the joint minute with Mr B Moodie (Industrial Psychologist).

6. Subject to the following conditions:

- 6.1 The plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the defendant's attorney of record, and
- 6.2 The plaintiff shall allow the defendant 7 (seven) court days to make payment of the taxed costs.

F KATHREE- SETILOANE
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA, GAUTENG LOCAL
DIVISION, JOHANNESBURG

Counsel for the Plaintiff: P Uys and H Schouten

Attorneys for the Plaintiff: Mills and Groenwald

Counsel for the Defendant: A Nondwana

Attorneys for the Defendant: Hogan Lovells Attorneys (previously known as Routledge Modise Attorneys)

Date of Hearing: 21 May 2014

Date of Judgment:

3 June 2014