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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 01163/2015

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

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DATE

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SIGNATURE

In the matter between:

B S

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

MAHALELO, AJ:

INTRODUCTION

[1] The plaintiff is a 30 year old lady. She instituted an action for damages against the defendant arising from bodily injuries she sustained in a motor vehicle collision where she was a passenger on 8 February 2006. The defendant has conceded liability for 100% of such damages that the plaintiff proves.

[2] The parties have agreed that the plaintiff is entitled to general damages for pain and suffering in the amount of R600 000,00. The remaining issue in dispute concerns the plaintiff's past and future loss of earnings/earning capacity and the contingencies to be applied.

[3] The plaintiff's case on loss of earnings or earning capacity was that her injuries are such that she could not remain in her employment up to the ordinary retirement age of 65 and that in all probability she stands to lose her employment in the near future.

THE COMMON CAUSE FACTS

[4] The plaintiff's highest level of education is matric. Her work history included working as an administrative assistant at a bakery for a year and a manager at Something Fishy for about two years. Prior to the accident she was unemployed, however she had applied for a receptionist position at Seal Cool. She had attended an interview and was awaiting the outcome when the accident occurred. After the accident she was employed by Atlantic Component for about three months in July 2006 and thereafter by Kids World

for about eight months. She also worked at an old age home for eight months. In 2010 she was employed by Vereeniging Meat Packers as a receptionist. She has been so employed until the present time.

[5] The parties have agreed that the plaintiff sustained the following injuries as a result of the accident:

- 5.1 Brain injury;
- 5.2 Compound fracture of the right humerus;
- 5.3 Fracture of the right radius and ulna;
- 5.4 Fracture of the pubic rami;
- 5.5 Radial nerve palsy;
- 5.6 Scarring of the back, right arm and abdomen.

[6] They further agreed that as a result of the injuries the plaintiff suffers from:

- 6.1 Occasional headaches;
- 6.2 Right wrist drop;

- 6.3 Poor self-esteem;
- 6.4 Neurogenic bladder secondary to head injury;
- 6.5 Poor memory;
- 6.6 Concentration difficulties;
- 6.7 Irritability and anger;
- 6.8 Fatigues easily;
- 6.9 Depression;
- 6.10 Diminished comprehension of task instruction;
- 6.11 Severely diminished complex mental tracking;
- 6.12 Very poor visual analysis and planning;
- 6.13 Poor recognition of errors especially in the visual modalities;
- 6.14 Confabulatory inclusions;

6.15 Very poor visual memory, in both immediate and delayed time scales;

6.16 Post-traumatic stress disorder;

6.17 Moderate communication difficulties.

[7] The parties furthermore agreed that but for the accident the plaintiff would have been employed in the same position she was, earning a salary of R4 500,00 per month and would have progressed to Paterson B3/4-median level reaching her career ceiling at around 45 years, with inflationary increases from there until retirement age of 65. Having regard to the accident, the injuries she sustained and the *sequelae* thereof as well as her track record and work ethics at her current employer, the parties are agreed that the situation is not in her favour.

[8] The following medico-legal reports of the plaintiff were admitted into the record as evidence:

8.1 Dr Shevel, the Psychiatrist;

8.2 Dr Miller, the Neurosurgeon;

8.3 Dr Bruce White, the Plastic and Reconstructive Surgeon;

8.4 Dr Van Heerden, the Neurologist;

8.5 Mr Reynolds, the Clinical Psychologist;

8.6 Ms Ida Marie Hattingh, the Speech Language Pathologist and Audiologist;

8.7 Dr Giampaolo, the Neurologist.

[9] The following witnesses testified in support of the plaintiff' case: Ms Jonck, Senior Payroll Manager at the plaintiff's current employment, Zander Booysen, the plaintiff's brother and Ms Vermaak, the Industrial Psychologist. Their evidence was not largely challenged. The defendant called one expert witness, Ms MacGoldrick who is an Industrial Psychologist.

[10] The joint minutes of the Orthopaedic Surgeons, Occupational Therapists and Industrial Psychologists were admitted into the record as evidence.

[11] The injuries sustained by the plaintiff in the accident are common cause. The physical injuries have all healed. What remains to be considered is the physical and psychological *sequelae* of her injuries. In his uncontested report Dr Miller, the neurosurgeon, noted that the plaintiff sustained a significant head injury. According to him the head and resultant brain injury has resulted in moderate cognitive and neuropsychological changes. Further,

the plaintiff appears to have sustained a complete damage to the radial nerves rendering her fingers, wrist and hand functionless. She also sustained ulnar nerve damage.

[12] Dr Reynolds, the Clinical Psychologist, opined that the plaintiff manifests behavioural excesses and neurocognitive impairments. According to Dr Shevel, the Psychiatrist, the plaintiff presents with psychological difficulties.

[13] The crucial issue in quantifying the plaintiff's damages for loss of income is to consider the effects of her physical as well as psychological deficits on her employability and therefore earning capacity.

[14] The plaintiff's pre-accident work history has been described in the joint minute of the Occupational Therapists. She worked in an administrative capacity for a bakery and for Something Fishy as a manager. Prior to the accident she was job seeking. She had applied for a position as a receptionist and was awaiting the results of an interview she had attended.

[15] Post-accident the plaintiff was employed in different capacities by at least three companies. She was employed as a receptionist by her current employer since 2010. She has been so employed until the present time. After the accident she was admitted in hospital for about four months. Her capabilities dwindled after the accident, resulting from her neuropsychological profile. She could no longer cope with the demands of her employment.

According to Ms Jonck the plaintiff often becomes emotional and irritable, cannot effectively perform her responsibilities without making mistakes, is not a neat worker, cannot perform basic administrative duties without support or supervision, and is forgetful. Ms Jonck testified that the plaintiff received various warnings in the past and has recently been served with a final written warning for failure to follow standard work procedure. Her poor work performance has resulted in some financial loss to her employer. Dr Reynolds was of the opinion that the plaintiff's behavioural excesses and neurocognitive impairments directly diminish her ability to gain and maintain employment. While it would appear that her current employer is sympathetic to her circumstances, it is clear that tolerance for her impairments is not assured and if she gets an alternative employment it will mostly be in a sympathetic environment. Dr Reynolds was of the further view that it is improbable that the plaintiff will be able to successfully undergo the requisite training to allow her to enter the labour market in an alternative career or vocation.

[16] A contentious issue arising concerns the fact whether the plaintiff is likely to be dismissed from her employment due to the various warnings she previously received which led to a final written warning and a disciplinary hearing which was to be held against her. According to Ms Jonck and Ms Vermaak, the probability exists that the plaintiff would be dismissed at the disciplinary hearing when regard is had to her poor work performance and her track record. Ms Vermaak testified that should the plaintiff be dismissed from her current employment she will be without employment in the open labour

market. Regarding the plaintiff's ability to obtain new employment she opined that because the plaintiff will have to go out in the labour market and compete with people who are not in the same position as hers, taking into account her history with her current employer, her chances of obtaining later or future employment are not rosy. She postulates that the plaintiff will find herself unemployed or without employment in the next five years. This is because the plaintiff is in a sympathetic employment and she is being accommodated only for a period of time as she is not contributing to the bottom line of the company.

[17] From the evidence at hand it is quite apparent that the plaintiff's future tenure in her present employment is precarious. The plaintiff reported to the experts during assessments that she is unable to cope in her present work environment.

[18] As regards the plaintiff's employability now that the accident has occurred Ms Vermaak was of the opinion that the plaintiff would, as a receptionist, likely be remunerated at the B3/4 Paterson grading until she reached her ceiling level around the age of 45. The plaintiff is currently receiving a basic salary of R5 200,00 per month and her income is documented as R56 880,00 per annum on the employee income tax certificate for the period March 2014 until 28 February 2015.

[19] This brings me to the evidence of Ms MacGoldrick, the defendant's Industrial Psychologist. She disagreed with the views expressed by Ms

Vermaak. She was of the view that the plaintiff would likely be remunerated at B3/1 basic scale until she reached her ceiling level at the retirement age of 65. According to her there is certainty regarding the stability of the plaintiff's employment while she is still employed because nothing concrete has come up regarding termination of her employment. Ms MacGoldrick was of the view that the plaintiff is re-employable in the open labour market. I am inclined to accept the evidence of Ms Vermaak in preference to that of Ms MacGoldrick, as it is in all respects in accordance with the evidence and the views expressed by other experts. Ms MacGoldrick conceded that she had not considered other expert reports. This is so despite the plaintiff's expert reports having been furnished to the defendant long before trial.

[20] The actuarial reports were handed in by agreement. Only the basis upon which the calculations were made in both reports was placed in dispute. Counsel for the defendant submitted that the plaintiff's actuarial report should not be accepted as it is not based on the joint minute of Ms Vermaak and Ms MacGoldrick. I accept the basis of the plaintiff's actuarial calculations. From the evidence at hand it is clear that at the time of compiling her report Ms Vermaak had considered all the relevant expert reports and medical reports whereas Ms MacGoldrick had not.

[21] In respect of the plaintiff's uninjured earnings the actuary accepted that she was unemployed at the time of the accident. She was between jobs. Were it not for the accident she would have been able to secure a similar position to the one she held prior to the accident. Her salary in the position

she held pre-accident was R4 500,00 per month (in 2006), which would have increased in line with inflationary rates to R54 000,00 per annum. As for the injured earnings the actuary accepted that the plaintiff is presently earning R5 200,00 per month which would have increased in line with inflationary rates to R62 400,00 per annum. Having accounted for certain assumptions the final figures he arrived at are R3 422 083,00 (but for the accident) and R293 747,00 (having regard to the accident) resulting in a gross loss of R3 128 291,00.

[22] Turning to the question of contingency allowances to be made in respect of both scenarios, both parties have agreed that a 5% contingency deduction for the past loss uninjured income and 15% contingency deduction for the past loss injured income should be made. Having had due regard to the authorities, the applicable principles and in particular the facts peculiar to the case I accept the proposal as it is reasonable in the circumstances.

[23] On the future loss of earnings or earning capacity I have taken into account the usual factors to be taken into consideration. The following factors peculiar to the case have also been considered: the fact that the plaintiff's employer although aware of her condition has kept her on and increased her salary at least once in five years time, the fact that the plaintiff has no formal qualifications, limited prospects of finding employment, the plaintiff had a pre-existing hip condition and the possibility of early retirement. In assessing all these factors a contingency deduction of 20% is deemed appropriate. Accepting the plaintiff's calculations, the plaintiff's total claim for loss of

earning capacity/loss of income is an amount of R2 502 632, 80 plus R262 916,00.

[24] In the result I grant judgment in favour of the plaintiff as follows:

1. Payment of the amount of R2 765 548, 80 in respect of the plaintiff's loss of earning capacity/loss of income.
2. Payment of the amount of R600 000, 00 in respect of general damages.
3. The capital amount is payable by means of direct fund transfer within 14 (fourteen) days from date hereof into the trust bank account of the plaintiff's attorneys; YVONNE KRUGER INC TRUST ACCOUNT, RMB PRIVATE BANK trust account, Sandton Branch code: 261 251, Account number: [...], reference B15/KS/MVA, and which amount shall be retained in an interest-bearing account in terms of Section 78(2)A of the Attorneys Act, for the benefit of the patient, pending the creation of the trust referred to in paragraph 4 infra and the issuing of letters of authority.
4. The plaintiff's attorneys are ordered therefore:
 - 4.1 To cause a trust(herein after referred to as 'the Trust') to be established in accordance with the provisions of the Trust

Property Control Act 57 of 1988, within a period of two (2) months from the date of this order to administer the estate of the patient; and

4.2 To pay the full amount invested in such trust account, including the accrued interest, to the trust within one (1) week of the establishment thereof and the opening by the trustees of a bank account.

5. The trust instrument contemplated in paragraph 4.1 above shall make provision for the following:

5.1 That the patient is the sole beneficiary of the trust;

5.2 That the first trustee(s) shall be Constant Wilsnach of Pretorius & Wilsnach (herein after referred to as “Wilsnach”) or failing him, such other employees of Wilsnach as they may nominate;

5.3 That the trustee(s) is to provide security to the satisfaction of the master;

5.4 That the ownership of the trust property vests in the trustee(s) of the trust in their capacity as trustees;

5.5 Procedures to resolve any potential disputes, subject to the review of any decision made in accordance therewith by this Court;

5.6 That the amendment of the trust instrument be subject to the leave of this Court;

5.7 The termination of the trust upon the death of the patient, in which event the trust assets shall pass to the estate of the patient; and

5.8 That the trust property and the administration thereof be subject to an annual audit.

6. In the event of the trust not being created within two months from date of this order, the plaintiff and her attorneys are directed to approach this court within one month after the expiry of the first period of two months, to obtain further directions with regard to the manner in which the capital amount should be further administered on behalf of the patient.

7. The defendant shall pay interest on the amounts at the rate of 9% per annum 30(thirty) days from date of judgement to date of final payment.

8. The defendant shall furnish plaintiff with an unlimited undertaking in terms of section 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 services to her or supplying of goods to her arising out of the injuries sustained by her in the motor vehicle collision on 8th February 2006 after such costs have been incurred and upon proof thereof;

9. The defendant shall pay the plaintiff's costs on the High court scale either taxed or agreed, to date hereof, such costs to include qualifying and or reservation fees, attendance fees and preparation of joint minutes as well as addendums if any of the following experts:

- 9.1.1 Dr. Volkersz

- 9.1.2 Dr. P Wilson Sunninghill.

- 9.1.3 Dr. Miller.

- 9.1.4 Dr. Shevel.

- 9.1.5 Dr. B White..

- 9.1.6 Mr Trevor Reynolds .

- 9.1.7 Ms Suzette Murcott.

- 9.1.8 Ms T Vermaak.

- 9.1.9 Ms Izak Van Heererden.

- 9.1.10 Ms Ida Marie Hattingh.

- 9.1.11 Dr. D Giampaolo.

- 9.1.12 Arch actuarial consulting (Actuary)

- 9.2 Cost of Senior- Junior counsel;

- 10 Subject to the following conditions:

- 10.1 The plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the defendant's attorney of record; and

10.2 The plaintiff shall allow the defendant 7 (seven) court days to make payment of the taxed costs.

B MAHALELO
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARENCES

COUNSEL FOR THE PLAINTIFF : ADV DJ COMBRINK

COUNSEL FOR THE DEFENDANT: ADV S MPAKANE

DATE OF HEARING: 1 SEPTEMBER 2015

DATE OF JUDGMENT: 30 NOVEMBER 2015