



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

REPUBLIC OF SOUTH AFRICA

CASE NO: 2008/36388

In the matter between:-

Reportable

O'BRIAN, OLOFF MARIE

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGEMENT

MOKGOATLHENG J

- (1) The plaintiff a female Technical Regulatory Specialist born on 15 March 1970 has instituted a claim for damages against the defendant arising from bodily injuries sustained during a collision on the 6 November 2007 at the intersection of K101 and Old Pretoria Roads.

- (2) The collision occurred between motor vehicle WDM 658 GP driven by E. Van Wyk (the insured driver) and motor vehicle FWY 313 GP driven by the plaintiff. The plaintiff alleges that the insured driver's negligent driving was the sole cause of the collision.
- (3) Various expert medical reports were by consent admitted as evidence. The parties' actuaries did not testify, but their respective actuarial reports were handed in as evidential aids for the assessment of the plaintiff's future loss of earning capacity.

The claim for General Damages

- (4) The parties agreed that the amount of R800, 000.00 constituted the quantum of the general damages sustained by the plaintiff. The parties also agreed that the plaintiff's past hospital and medical expenses amounted to R606 960. 52.
- (5) At the inception of the trial, the defendant conceded that the insured driver was liable for 50% of the plaintiff's general damages due to his contributory negligence, but contended that the plaintiff was also equally liable, through her contributory negligence.

The Evidence of Van Rensburg

- (6) On the 6th November 2007, he was travelling from Kempton Park on the Old Pretoria Road, towards the K101 intersection. He was travelling on the right lane; the plaintiff's vehicle was travelling on the left lane behind two vehicles. The plaintiff's vehicle was in turn followed by two vehicles. He was travelling on the right lane just behind these two vehicles.
- (7) The traffic lights at the intersection were green in the plaintiff's favour. The vehicles entered the intersection in this configuration and were all travelling within the speed limit, when traversing the intersection. A truck travelling from the opposite direction, entered the intersection, and turned right across the plaintiff's vehicle's path of travel, and collided with it.
- (8) The insured driver intended "to take a gap" in front of the plaintiff's vehicle, but could not make it in time, inevitably he collided

with the plaintiff's vehicle. The right front part of the truck collided with the plaintiff's vehicle on its right hand side. There was nothing the plaintiff could have done to avoid the collision, because the insured driver just drove into her whilst talking to his wife.

- (9) He had sufficient time to observe the accident. In his opinion, there was nothing the plaintiff could have done to avoid the collision. The insured driver told him that he did not see the plaintiff's vehicle before the collision because he was talking to his wife. He was sorry and had made a mistake.

The Evidence of Venter

- (10) On 6 November 2007 he was travelling on the K101 Road towards the Old Pretoria Road intersection. The traffic lights were red. He stopped behind a red Uno. He recalls seeing a truck colliding with the plaintiff's vehicle inside the intersection. The insured driver said he did not see the plaintiff's vehicle.

The Evidence of Van Wyk (The Insured Driver)

(11) On the 6 November 2007 he was travelling in a four ton truck, from Pretoria to Johannesburg on the Old Pretoria road. The traffic lights then turned green in his favour, he entered the intersection, an arrow indicated that he could turn right. He proceeded and as he did so, he saw a vehicle in front on his path of travel which collided with his vehicle.

(12) He saw the plaintiff's vehicle when he was basically on top of it, and when he saw it, it was already in the intersection. He conceded that after the accident he told the police that he did not see where the plaintiff's vehicle came from.

The evaluation of evidence

(13) Mr. Van Vuuren on plaintiff's behalf submitted that the insured driver's evidence was unreliable, unacceptable and stood to be rejected. Mr. Erasmus on defendant's behalf argued that the versions were mutually destructive in so far as the colour of the traffic lights was at the intersection, and consequently, who had the right of way. He submitted that the probabilities

did not favour either party and as a result, the plaintiff could not succeed with her claim.

(14) It is trite that the onus reposes on the plaintiff to prove on a preponderance of probabilities that her version is true, accurate and therefore acceptable, and that of the insured driver false or mistaken, and fell to be rejected.

(15) Where the probabilities are evenly balanced, the plaintiff can only succeed in her claim, if the court accepts that her evidence is probable and true, and that of the insured driver false.

**National Employer's General Insurance co Ltd v Jagers 1984
(4) SA 437 (E) at 440 E- G.**

(16) It is trite that a vehicle entering a traffic light controlled intersection has no absolute right of way; there is an obligation on its driver to keep a proper lookout.

**Doorgha and Other v Parity Insurance Co Ltd 1963 (3) SA 365
(DCLD).**

(17) The plaintiff has no recollection how the accident occurred. The defendant did not dispute Van Rensberg's evidence that, when the insured driver was inside the intersection, turning and proceeding to cross the plaintiff's path of travel, he was talking to his common law wife, with his head tilted towards her.

(18) The defendant did not dispute Van Rensberg's evidence that the insured driver told the police he did not see the plaintiff's vehicle before colliding with it. In fact, the insured driver's evidence is that he only saw the plaintiff's vehicle at the moment he collided with it.

(19) On his own version the insured driver, concedes that he did not keep a proper lookout when he turned in the intersection and collided with the plaintiff's vehicle. He also conceded that he did not see any vehicles including the plaintiff's proceeding in the opposite direction through the intersection.

(20) Van Rensberg's evidence that the insured driver appeared to be intent on "taking a gap" in front of the plaintiff's vehicle was not disputed. When the plaintiff entered the intersection her

vehicle was in close proximity with the two vehicles which traversed the intersection in front of her, consequently, this shows that the insured driver by attempting to “take a gap”, crossed the plaintiff’s vehicle’s path of travel when it was unsafe and inopportune to do so.

(21) The insured driver’s evidence is unreliable, unacceptable and is rejected as false. Van Rensberg’s undisputed evidence is the only cogent evidence explaining how the collision occurred. Van Rensberg’s evidence is not tainted by any improbability, and is accordingly accepted as truthful.

(22) Van Rensberg’s assertion that there was nothing the plaintiff could have done to avoid the collision was not challenged; consequently, the defendant has not shown that there was any contributory negligence attributable to the plaintiff.

The Claim for future loss of earning capacity.

(23) The legal position relating to a claim for diminished earning capacity is trite. In **Dippenaar v Shield Insurance CO Ltd 1979 (2) SA**

904 (A), Rumpff CJ articulated the principle in the following terms:

“In our law , under the lex Aquilla, the defendant must make good the difference between the value of the plaintiff’s estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person’s estate and the losses of impairment of that capacity constitute a loss, if such loss diminished the estate”.

See **Union and National Insurance Co Ltd v Coetzee 1970 (1) SA 295**

(A) where damages were claimed and allowed by reason of impairment of loss of earning capacity.

(24) Chetty J in **Prinsloo v Road Accident Fund 2009 (5) SA 406 (SECLD)** at

410 para 5, describes the principle underlying the calculation in respect of the loss of earnings thus:

“A person’s all-round capacity to earn money consists, inter alia, of an individual’s talents, skill, including his/her present position and plans for the future, and, of course, external factors over which a person has no

control... A court has to construct and compare two hypothetical models of the plaintiff's earnings after the date on which he/she sustained the injury... The court must calculate, on the one hand, the total present monetary value of all that the plaintiff would have been capable of bringing into her patrimony had she not been injured, and, on the other, the total present monetary value of all that the plaintiff would have been able to bring into her patrimony whilst handicapped by her injury. When the two hypothetical totals have been compared, the shortfall in value (if any) is the extent of the patrimonial loss".

The Plaintiff's Evidence

- (25) She studied for a degree, an honours degree, and in 1996 obtained her Master's Degree in Mycology at the Rand Afrikaans University. After being a lecturer, in May 1997, she obtained employment at the Agricultural Research Council – Plant

Protection Institute (ARC) as a Senior Research Technician. In August 1999 she was appointed a Researcher.

(26) In January 2006 she joined Villa Crop (Pty) Ltd as a Technical Regulatory Specialist. Her work entails more administrative work than research. Prior to the accident she wanted a change of vocation because she found her job boring and unstimulating. She wanted to leave Villa Crop the main reason being she was not doing research. Her work revolved around the registration of generic agro – chemicals.

(27) Prior to the accident she had an opportunity of moving to the Northern Cape, to take up a research vacancy and simultaneously pursue a love relationship. The relationship ended, consequently, she abandoned the venture.

(28) Pre morbid she enjoyed doing outdoor trial work. Post morbid if she was required to do trial work it would negatively impact on her because of the injuries to her right arm and leg. Post accident, she would not be able to study for an MBA or a PHD degree. It

takes her much longer to study anything, and she has to put in more effort to get basic output.

(29) Post morbid she battles to concentrate, and it takes her longer to memorize information. She forgets information, and usually makes little notes to jog her memory. It takes her a bit longer to go through her work. She makes errors and has to check what she has already completed. She sometimes works extra time to finish her work. Her employers are aware of her present work compared to what it previously was.

(30) Prior to the accident she had put feelers out for another post. Doctor Van der Linde, had connected her with a managing director of a company regarding a vacancy, but the entire process was aborted because the salary was lower than what she was earning.

The Evidence of Donaldson and Vos

(31) Vos' opinion is that irrespective of the accident, the plaintiff would have progressed and reached her ceiling by her mid forties,

achieving a Paterson D3, /D4 level, and would have remained at Villa Crop until retirement.

(32) But for the accident, Donaldson did not see the plaintiff remaining at Villa Crop until retirement. In her opinion the plaintiff would have reached her ceiling in her mid-fifties and would have achieved a Paterson D3 level in a different environment. She and Vos agree that the plaintiff would have reached her ceiling as a senior scientist.

(33) Donaldson's opinion is that the plaintiff was likely to have continued working in a stable and financially secure environment until retirement at age 65, and would probably have elected to work after age 65, for a five year period until the age of 70 as a consultant on projects or assignments or mentoring roles only earning a basic salary. Vos differs and is of the opinion that it is unlikely that the plaintiff would have worked as a consultant past normal retirement age.

(34) Donaldson's view is that, it is slightly difficult for the plaintiff to function as efficiently and effectively as she did prior to the

accident. She believes that it is best that the plaintiff remains at Villa Crop because she is in the most facilitative environment and there is an accommodation for her difficulties. Vos holds a contrary view and states that these cumulative difficulties are not sufficient to prevent the plaintiff from achieving her career ceiling even though it requires more effort to cope with her tasks.

(35) Donaldson accepts that the plaintiff will work until normal retirement age 65 at Villa Crop, but a number of indirectly unquantifiable factors could be expected to exert a negative effect on her employability, these should be given due consideration in the overall quantification of her claim.

(36) Donaldson's view is that at the time of the accident, the plaintiff was looking for a different job. She does not venture to pronounce a date when this could have happened, but says it could have been in the immediate future, and plaintiff would have joined a multi - national corporation.

(37) She did not make any enquiries as to the scarcity of research and development vacancies within the multi national companies the plaintiff would have gravitated towards. She cannot comment on how frequently these vacancies became available, but when they do, the plaintiff would have been an important version to consider, because she was achieving at that very uppermost level. There is a fairly slow progression within the research sciences because, there are salary scales and notches to be gone through before one moves to the next level.

(38) Vos' opinion is that despite her injuries, indications are that the plaintiff was nevertheless still expected to reach the levels considered realistic for her prior to the accident i.e. Paterson D3/4 by her mid-forties and recommends that an appropriate contingency be applied to address the extra effort and energy expended by the plaintiff to reach these levels.

(39) Donaldson's view is that the plaintiff already had nine years at ARC, and two at Villa Crop, and would have moved into a multi – national company in a senior scientist position at the very

least, and would have proceeded to chief scientist at the top of the Paterson D band.

(40) In her opinion the plaintiff falls within the range of a Senior Scientist 2 with 10 years experience, where the basic salary is between R28 000 and R 41 400 per month. As a matter of probability the plaintiff's salary in a multi – national company would be between R35 000 and R40 000 per month bearing in mind that the salary of R41 400 is only at the 75th quartile percentile. She believes that the plaintiff would have reached the 90th upper quartile level at age 55 earning R898 000 per annum by her mid-fifties in the Paterson D3 level.

(41) In her view Villa Crop's structure is completely flat, and does not allow for progression. There is no opportunity to progress through the levels to Paterson D3/D4 as a manager, as the Plaintiff's supervisor is going to be there forever.

(42) Vos states that during her assessment, the plaintiff indicated that she did not really enjoy her current job, she preferred to return to research and development where she is not office bound. Prior

to the accident she had applied for such a position, but had decided not to accept same as the salary was considerably less. The plaintiff had indicated that due to the lower remuneration she had decided to remain at Villa Crop, and eventually work her way up to management level.

(43) Dr Rong, a former superior of the plaintiff at the ARC indicated to her that prior to the accident, the plaintiff certainly had the potential to reach management level. Rong however, noted that in research experience is essential in order to be promoted. Rong believed that the plaintiff would need to work in her specific field for at least 15 years before she would be capable of reaching management level.

(44) Dr Van der Linde, the plaintiff's colleague at Villa Crop stated that there were numerous positions to which the plaintiff could enjoy career progression, and consequent earnings, once promoted. In light of the aforesaid, Vos sees no reason why the plaintiff's career progression would have differed from the norm. She is therefore of the opinion that the plaintiff was likely to reach her ultimate earnings on a Paterson D3/4 scale

in her mid-40's, where she would have remained until the normal retirement age of 65 years.

(45) Vos is of the opinion that physically the plaintiff maintains the ability to continue working in her current or similar occupation, although she does present with subtle neuropsychological difficulties which compel her to make use of adaptive methods, and added effort, consequently, the fairest way of compensating her would be by means of an appropriate contingency.

(46) Vos is of the opinion that in the “unlikely” event that plaintiff desired to work as a consultant past normal retirement age (pre-accident), there is no reason why she would not be able to do the same post-morbid work as she will be working in the same environment, because she is capable of doing her pre-morbid work albeit with extra effort.

The Evaluation of the Expert Evidence

(47) A court's approach to expert testimony was succinctly formulated in

Michael and Another v Linksfeld Park Clinic (Pty) Ltd and

Another 2001(3) SA 1188, [2002] 1 ALL SA 384 where the court stated:

*'[36] ... "(What is required in the evaluation of such evidence is to determine whether and to what extent the opinions advance are founded on logical reasoning. That is the thrust of the decision of the House of Lords in the medical negligence case of Bolitho v City and Hackney Health Authority [1998] AC 232 (HL (E))......This essential difference between the scientific and the judicial measure of proof was aptly highlighted by the House of Lords in the Scottish case of **Dingly v The Chief Constable, Strathclyde Police** 200 SC (HL) 77 and the warning given at 89D-E that*

"(o)ne cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a Judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved – instead of assessing, as a Judge must do,

where the balance of probabilities lies on a review of the whole of the evidence." [Emphasis added].

- (48) The processes to be adopted in assessing damages was pronounced, in **Southern Insurance Association v Bailey NO 1984 (1) SA 98 (A)** by Nicholas AJA, who expressed himself as follows at 113G – 114A:

"An inquiry into damages for loss of earning capacity is of its nature speculative because it involves a prediction as to the future without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other to try and make an assessment by way of mathematical calculations on the basis of assumptions resting on the evidence. The validity of this approach depends of course

upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent, but the court cannot for this reason adopt a non-possumus.

(49) The Court has before it material on which an actuarial calculation can usually be made. It has before it two reports from Mr. Whittaker, and Mr Gilbey consulting actuaries. What is required is to calculate the present value of the future income which the plaintiff would have earned “but for” her injuries and consequent disability. From that must be deducted the present value of the plaintiff’s estimated future income, “having regard to” her disability. The figure thus obtained must be adjusted in the light of all relevant factors and contingencies.

(50) Concerning the method of actuarial computations at 116G-117A: The learned Judge stated:

“Where the method of actuarial computation is adopted, it does not mean that the trial judge is ‘tied down by inexorable actuarial calculations’. He has “a large discretion towards what he considers right”

(51) Holmes AJ, in **Legal Assurance Company v Botes , 1963 (1) SA 608 (A)**

at 614F stated:

*“One of the elements in exercising that discretion is the making of a discount for ‘contingencies’ or the ‘vicissitudes of life’. These include such matters as the possibility that the plaintiff may in the result have less than a ‘normal’ expectation of life, and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labor unrest, or general economic conditions. The amount of any discount may vary depending on the circumstances of the case (see **Van Der Plaats v Southern African Mutual Fire and General Insurance Company, 1980 (3) SA105 (A) 114- 5**. The rate of the discount cannot of course be assessed on any logical basis: The assessment must be*

largely arbitrary and must depend upon the trial judge's impression of the case".

The Plaintiff's Scholarstic and Employment Career

(52) An evaluation of the plaintiff's educational career commencing with her matriculation, shows that she was an above average student. The plaintiff's university record also demonstrates that she was certainly an above average student with a penchant for science subjects.

(53) The plaintiff's employment career shows that she was not despite her qualification aggressively ambitious, to advance her career in the private sector as manifested by the fact that from May 1997 to November 2005 she was employed as a Senior Research Technician at ARC. From January 2006 up to the present, as a Technical Regulatory Specialist at Villa Crop in a position she presently occupies.

(54) According to the tests conducted by Donaldson in order to evaluate the plaintiff's capabilities in comparison with her peers in

competition with her in the open market, the plaintiff was assessed *“as falling within the upper average to above average in comparison with others whose educational circumstances are similar to her own.”*

(55) In my view, it does not seem unreasonable to conclude that the plaintiff’s intellectual capabilities were functional in the average to above average range prior to the accident. It cannot be conclusively stated that she was in the upper echelons or superior range of her profession.

(56) It can be cogently argued that the plaintiff was capable of attaining a PHD in Mycology, but the fact of the matter is that since obtaining her Master’s Degree in 1996, the plaintiff did not prior to the accident study towards a PHD or a MBA degree. In any event as pointed out by her counsel, that is not the basis of her claim to future loss of earning capacity.

(57) At no stage did the plaintiff categorically advert that it was her ultimate career path to join multinational companies to advance her career. Doctor Rong testified that the reason the

plaintiff left ARC *“was because she had a particularly difficult and frustrating work experience and conflict with a colleague.”*

(58) The plaintiff’s motivation in considering relocating to the Northern Cape was in part predicated on a romantic relationship. It was not a purely conscious deliberate career advancement decision. The plaintiff did not specifically name any of her ex colleagues either at ARC or Villa Crop who left such employment, to work for multi - national companies. Donaldson did not specifically mention any such particular persons in her testimony, except to blandly state that such persons naturally end in multi-national companies.

(59) The plaintiff did not apply for a vacancy at any of the multi-national companies at any stage after obtaining her Master’s Degree. The fact of the matter is, the plaintiff was not able to find a suitable research vacancy. Once after applying for a research post, she did not receive a reply, let alone an invitation for an interview.

(60) The plaintiff's employment record clearly demonstrates that she was not a driven go – getter, aspiring to reach the highest echelons of her career in a multi - national company. Multi -national companies according to Donaldson's evidence attract the *crème-de-la-crème* of the science graduates. The plaintiff was definitely not a member of that exclusive superior range of performers who are invariably high achievers head-hunted by multi - national companies.

(61) According to Dr Rong the plaintiff spoke about starting a business enterprise outside the research environment, The plan never materialized, plaintiff left for ARC. The plaintiff did nothing conscious and concrete to actually start such a business.

(62) Donaldson conceded that there were different degrees of achievement pertaining to the average , upper average and superior range in the pursuit of endeavour, and excellence in grading graduates. In my view Donaldson's opinion that the plaintiff by attaining a Masters Degree with an average of 63% falls within the superior range of the *crème-de-la-crème*

superior category of achievers, is not objectively sustainable and is logically flawed.

(63) Donaldson's view that she believes that plaintiff's natural progression was to enter a multi-national corporation as a natural scientist 2 in the Paterson D3 level in the 90th quartile because *"the plaintiff was working on something else at the time of the accident that she would have gone to a big multinational corporation simply because that is the natural home for these people,"* is highly speculative and not based on any logically substantiated evidence.

(64) In my view, Donaldson's opinion is a sweeping generalisation. For instance, Dr Van der Linde and Dr Rong did not end up in big multi - national corporations. Further on being pertinently asked if *"she made any enquiries regarding the scale of research and development within multinationals the plaintiff would gravitate towards"*. Donaldson answered: *"she did not, simply because there is no reported job survey warranting that as a specific progression."*

(65) Donaldson cannot comment how frequently research vacancies become available in multi - national companies all she can say is *“if and when it does occur the plaintiff would be an important person to consider.”* for such vacancies. Fact of the matter is, the undisputed evidence shows that such vacancies are scarce.

(66) Donaldson’s evidence that the structure at Villa Crop was flat and there were no prospects of promotion or opportunities to progress, is not correct because the Plaintiff has seniors at management level at Villa Crop who joined the company before her.

The plaintiff’s Future Employment and Earnings

(67) The Plaintiff’s counsel’s submission that she would have moved out of Villa Crop into a multi - national company within two years after November 2007 is a hypothetical speculative abstraction not based on any substantiated objective evidence. The plaintiff never adverted to that proposition. The objective evidence shows that prior to the accident the plaintiff did not

initiate any conscious decisive action to move out of Villa Crop and join a multi – national company.

(68) There is no guarantee that at 39 years, the Plaintiff would have acquired a vacancy in a multi - national company with an entry in the 90th quartile of the Paterson D3 level earning a salary of R 898 000.00 per annum.

(69) Dr Shevel's findings are that the plaintiff is suffering from only a mild form of organic brain syndrome, she retains work capacity although her occupational functions have been adversely affected to some extent. The plaintiff reported to medical experts that *"she is back at work and is functioning adequately in her job" "and has continued to do the same work as before the accident ..."*

(70) The fact that the plaintiff post morbid is still performing adequately in her job at Villa Crop, logically entails that she would perform the same functions in a multi - national company having regard to expert evidence about her retaining the institutional memory of her job specification functions.

(71) In my view, objectively viewed it is erroneous and fallacious for Donaldson, Dr Guy, Dr Shevel and MR Mallinson to argue that the plaintiff can perform acquired and learnt institutional functions only at Villa Crop until retirement, albeit in an accommodative environment, but cannot perform the same institutionally learnt and acquired functions at a multi - national company. In my view there is no logically sustainable reason why post-morbid, the plaintiff would not be able to perform similar functions at a multi - national company.

(72) The fact of the matter is that after the plaintiff completing her Masters Degree in 1996, she did not seek employment with a multi-national company, instead she took up employment with ARC and eventually Villa Crop. Even up to date, the plaintiff has not sought employment in a multi-national company, consequently, there is no factual evidence that if she had applied for a vacancy at a multi - national company, she would have been disqualified from such a vacancy as a consequent of her post morbid physical and mental condition.

The Applicable Contingency Deduction

(73) *In the case of Road Accident Fund v Guedes 2006 (5) 583 SCA at para 8 it was held: “The calculation of the quantum of a future amount, such a loss of earning capacity, is not, as I have indicated, a matter of exact mathematical calculation. By its nature such a an enquiry is speculative and a court can therefore only make an estimate of the present value of the loss which is often a very rough estimate (see for example Southern Insurance Association Ltd v Bailey NO³. The Court necessarily exercises a wide discretion when it assesses the quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right. Courts have adopted the approach that in order to assist in such a calculation, an actuarial computation is a useful basis for establishing the quantum of damages. Even then, the trial court has a wide discretion to award what it believes is just (see for example the Bailey case⁴ and Van der Plaats v South African Mutual Fire and General Insurance Co Ltd.”*

³ Supra

⁴ Supra at 116G-117A.

(74) There is no conclusive evidence that the plaintiff would have left Villa Crop in the immediate future but for the accident. In my view having regard to the fact that she had left ARC after seven years, it is reasonable to assume that if the plaintiff ever left Villa Crop, she possibly might have left while she was still marketable in the industry consequently, it is not unreasonable to project this would have eventuated at age 42.

(75) Actuary G A Whittaker in projecting the plaintiff's future loss of earnings applied the assumption that she reaches her ceiling at 55 years, plaintiff is presently earning R27 050 00 per month which as at 1st November 2009 increases uniformly up to 1 April 2025 to the average total of R750 000.00 in money terms per annum on the Paterson D4 level should the plaintiff remain in Villa Crop's employment until retirement. In my view, these projected future earnings is reasonable and it is based on logical assumptions and consequently accepted.

(76) Actuary L Gilbey in calculating the plaintiff's prospective loss of future earnings, was instructed to assume that plaintiff would have moved into a larger corporation as a natural scientist

earning R357, 500.00 as from 2009 onwards, reaching her ceiling at age 55 years earning R 898,000.00 and thereafter receiving inflationary increases only until retirement at age 65 years and thereafter from 65 to 70 years earning R41, 400.00 per month.

(77) These assumptions are not based on any reasonable factual logical substantiated evidence consequently, the actuarial projections based on these assumptions are flawed, and unsustainable and are consequently rejected.

(78) Vos' opinion is that pre accident the plaintiff would have reached her ceiling at age 45 is basically not sustainable, having regard to the structure of Villa Crop, and the fact that progression was slow up to management level. In any event, the defendant by instructing its actuary to project the plaintiff's future earnings at a ceiling of age 55 years, inferentially has conceded that the plaintiff would have reached her ceiling at the age of 55, which in my view is a reasonable assumption due to Villa Crop's retirement age policy on attaining 65 years.

(79) It must be borne in mind that the plaintiff would not be moving from one multi-national company to another, but would be moving from a medium sized company to a multi-national company. In all probability given her average educational, intellectual capabilities, experience and expertise limited to medium sized organisations, it is not unreasonable to assume and project that the plaintiff would logically have entered a multi-national company in the 50th quartile of the Peterson D3/D4 scale, as a natural scientist with 5 – 10 years experience.

(80) In my view because of scarcity of research vacancies in multi-national companies, the reality of affirmative action and equity employment considerations, plaintiff's relatively advanced age, average educational qualifications, her lack of multinational company research experience, it is reasonable to apply a 30% contingency against her projected future loss of earning capacity, such perceived future loss commencing as from Nov 2012, with the plaintiff reaching her projected ceiling at age 55, and thereafter only receiving inflationary increases until retirement at age 65 to accommodate the imponderables, uncertainties and the vicissitudes of life.

- (81) Donaldson's evidence that plaintiff would probably have worked as a consultant but for the accident *"that it seems reasonable to accept, like many professionally qualified and experienced persons, plaintiff would have elected to continue for a further 5 years or so working"* is highly hypothetical and speculative and not based on any empirical factual evidence.
- (82) It is speculative to surmise that the plaintiff would have worked as a consultant. There is no factual empirical evidence that the plaintiff would have been employed as a consultant earning a regular monthly salary by a multi - national company after retirement. Donaldson's evidence in this regard is purely hypothetical speculation.
- (83) Generally consultants are independent professional advisers who are independently engaged for their expertise. If the plaintiff desires to set herself up as a consultant after age 65, nothing debars her from so doing, because expert medical evidence is that she retains pre- morbid institutional memory post morbid

to perform her functions even after retirement as her life expectancy has not been affected.

(84) It is logically fallacious to assume that a multi - national company employing the plaintiff would continue to employ her as a consultant after her retirement. In any event it no factual conclusive evidence was tendered in this regard.

(85) The plaintiff never adverted that she intended working as a consultant after her retirement at age 65. In fact although her employment contract stipulated retirement at age 65, she was not even aware what the retirement age at Villa Crop was.

(86) Having considered all the relevant evidence the following order is made:

The defendant is ordered to pay to the plaintiff:

[1.] The agreed damages in the amount of R800, 000.00, deducting amount of R 400, 000.00 already paid;

[2.] The agreed medical and hospital expenses in the amount of R606, 960.52, deducting the amount of R 300 000.00 already paid;

[3.] To issue the plaintiff within an undertaking as envisaged in terms of section 17, (4) (a) of the Road Accident Fund Act 56 of 1996;

[4.] The costs of suit including the cost of the reports of plaintiff's experts

(a) Mr. Mallinson;

(b) Dr Guys;

(c) Dr Reid;

(d) Dr Peirce;

(e) Dr Suevel;

(f) Ms Basson;

(g) Dr Edeling;

(h) Dr Allan;

(i) Mrs. Donaldson;

(j) Mr. Glibly; and

as well as the qualifying fees of Dr Edeling, Dr Guy, Mr. Mallinson and Mrs. Donaldson.

- [5] (a) The plaintiff's assumed projected future loss of earning capacity is to be assessed as from the 7 November 2012, when plaintiff is assumed would be earning R 35 000.00 per month, and progressively receiving uniformly salary increases up to age 55 years when she reaches her ceiling, and thereafter inflationary increases up to retirement age of 65 years.
- (b) A 30% contingency should be applied against this projected future loss of earning capacity to determine the plaintiff's nett projected future loss of earnings.
- (c) To determine the plaintiff's total nett future earnings from the amount determined in (a) and (b) above must be deducted (pre-morbid and post-morbid) the future projected salary the plaintiff would have earned at Villa Crop as a Technical Regulatory Officer reaching her career ceiling at the age of 55 and thereafter receiving only inflationary increases up to the retirement age of 65 years.
- (d) From this amount projected as a 15% contingency deduction should be applied to obtain the plaintiff's actual projected

future loss of earnings at Villa Crop, which amount should be deducted from the amount determined in (a) and (b) above. To determine the plaintiff's actual assumed future loss of earning capacity.

- (e) The parties may approach the Court within 14 days of this order to argue any issue regarding the calculation of plaintiff's projected future loss of earning capacity.

[6] Interest on the aforesaid amounts at the rate of 15.5% annum as calculated from a date 14 days from date of this judgement to date of payment.

Dated this day of 31 August 2010 at Johannesburg

Ratha Mokgoatlheng

Judge of the High Court of South Africa

Date of Trial: 12 December 2009

Date Judgement delivered: 02 September 2010

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