**IN THE HIGH COURT OF SOUTH AFRICA**

**(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

**CASE NO.: 3748/14**

**Date heard: 15 August 2016**
**Date delivered:20 September 2016**

In the matter between:

**BRYONI SHANICE KETTLEDAS** **PLAINTIFF**

**and**

**ROAD ACCIDENT FUND** **DEFENDANT**

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**JUDGMENT**

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**MALUSI AJ**

[1] This is an action for damages arising out of collision between two motor vehicles in Kamesh Road, Uitenhage on 24 June 2011. The plaintiff was a passenger in one of the motor vehicles. She sustained serious injuries as a result of the collision. She suffered head, neck, back, tooth, facial and knee injuries.

[2] A substantial portion of the plaintiff's claim has been resolved by way of a settlement agreement between the parties which was made an order of Court by Revelas J. General damages were agreed in the sum of R600 000,00. The defendant tendered to provide a statutory undertaking to compensate plaintiff for future medical expenses in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996. The only head of damages that remains in dispute is the claim for past and future loss of earnings. Various issues were agreed except for the contingencies to be applied to the loss of earnings.

[3] At the start of the trial the parties submitted a list of issues on which agreement had been reached between them. It was agreed that five reports by experts who had examined the plaintiff at various times were to be handed in as evidence without the necessity for the experts to testify. The actuarial report was also handed in as evidence save for the aspect of contingencies in the report. Dr Peter Whitehead, an industrial psychologist, was called as an expert witness by the plaintiff.

[4] The sole issue to be determined in this matter are the contingency factors applicable to the plaintiff's past and future loss of earnings.

[5] According to orthopaedic surgeon, Dr Oelofse, the plaintiff experiences moderately severe pain over the knee joint. The pain is felt when sitting, standing, walking, crouching, handling heavy objects, climbing and sleeping. He diagnosed the plaintiff as having severe traumatic chondromolacia of the knee joint. He noted that the plaintiff has difficulty with some routine everyday activity. Dr Oelofse' opinion was that the plaintiff has become an unfair competitor in the open labour

market. Furthermore, he stated that her working abilities have been affected by the injuries sustained in the collision.

[6] The maxillofacial and oral surgeon, Dr Kassan noted that the plaintiff has a laceration on the left forehead extending to the upper eyelid. She has severe myospasm related to her bilateral facial muscles. She had a fractured canine tooth and a missing premolar on the lower jaw. His opinion was that her facial muscle pain is debilitating which affects her concentration and execution of daily chores. This contributes to her persistent headaches. The scarring and the pain were due to a nerve in the wound. The cosmetic effect of scarring has affected her confidence. All these have affected her ability to work to a certain degree though they are not a severe disability.

[7] According to the occupational therapist, Van Zyl, who examined the plaintiff she suffered from headaches daily with blurred vision. She also experiences lower backache which affects her endurance when sitting and standing. This also affects her ability to lift and carry heavy objects. She was of the view that the plaintiff has a borderline clinical depression. Based on plaintiff's work experience after the collision, Van Zyl was of the opinion that she will be limited to work with sedentary physical demands until surgery is performed. She will be able to perform work with medium to sedentary physical demands following surgery and successful rehabilitation.

[8] The plastic surgeon, Dr Apostolis, held the view that plaintiff's work capacity was reduced due to the scar on her forehead. It impacted negatively her chances of obtaining work in any occupation that involves any personal face to face encounters. His opinion was that though plastic

surgery may improve the appearance of the scar, she will have permanent disfigurement.

[9] The clinical psychologist, Wessels assessed the plaintiff to be suffering from an adjustment disorder with depressed mood. The disfiguring scarring on her face caused her to develop significant emotional problems. The chronic pain and mobility problems after the collision also adversely affected her mood. She further diagnosed the plaintiff as having a pain disorder associated with her general medical condition. He also diagnosed her to be suffering from a post-traumatic stress disorder which significantly interferes with her general functioning currently. She also has socio-emotional stresses in the form of unemployment and financial pressures. She was measured on the global assessment functioning scale to be 51 to 60 which means moderate difficulty in personal, social and occupational functioning. The prognosis for her recovery is guarded and related to her chronic pain probably continuing to negatively affect her mood despite psychological treatment. Wessels' opinion is that the sequalae of the collision has reduced plaintiff's career prospects to sedentary type of work.

[10] Dr Whitehead, the industrial psychologist, testified that the headaches suffered by plaintiff were detrimental to her future employment. Her painful knee will not enable her to do physical work. He stated that the diagnosis by Wessels will negatively impact on plaintiff's ability to work. The plaintiff has not been able to retain employment and holds a position for a short period of time. She is compromised when competing for work.

[11] Dr Whitehead opined that plaintiff would likely have obtained only a grade eleven qualification considering her poor performance in lower grades. In the uninjured stated she would have probably found work in a more physical capacity. He was pessimistic that post-collision the plaintiff is in a position to have a career path.

[12] Under cross examination, Dr Whitehead conceded that his pre-morbid scenario was based on the corporate sector of the economy. He conceded that post-collision the plaintiff has residual earning capacity doing sedentary work if one overlooks her compromised state.

[13] Arch Actuarial Consulting prepared a report to quantify the value of plaintiff's loss of earnings. Arch's calculations were based on Dr Whitehead's predicted pre-morbid and post-morbid scenarios. The relevant portion of Arch's report reflects the following:

> "*2.2 <u>Earnings had the accident not occurred (Pre-morbid earnings)</u>*
>
> *At the time of the accident the Claimant was a scholar. Were it not for the accident, it is assumed she would have entered the open labour market in 2015. The following figures have been used in this part of the calculation:*

| *Pre-morbid earnings* | | |
|---|---|---|
| *Date* | *Salary p.a.(2016 terms)* | *Benefits* |
| *01/2015* | *R35,000* | Annual bonus equivalent to a 13th cheque |
| *01/2016* | *R82,000* | |
| *01/2022* | *R94,000* | |
| *01/2028* | *R108,000* | |
| *01/2034* | *R120,000* | |
| *01/2040* | *R132,000* | |

*Earnings levels were assumed to increase in the past and future in line with Consumer Price Index (CPI) iinflation+1.5% per annum compound. As instructed, we have allowed for the Claimant to experience increases each earnings level and after 01/2040 until retirement age at Consumer Price Index (CPI) inflation+1.5% per annum compound.*

*2.3 <u>Earnings given that the accident has occurred (Post-morbid earnings:</u>*

*Following the accident, the Claimant has earned as follows:*

- *A total of R300 in 2012;*
- *An average of R565 per week in October and December 2014;*
- *R250 per week from the end of January to March 2016.*

*The Claimant is expected to experience the following earnings path in the future:*

| *Post-morbid future earnings* | |
|---|---|
| *Date* | *Earnings p.a. (2016 terms* |
| *01/2017* | *R19,500* |
| *07/2029* | *R56,00* |

*We have allowed for even compound increases between earning levels. Earnings levels were assumed to increase in the past and future in line with Consumer Price Index (CPI) inflation+1.5% per annum compound.*

*2.4 Retirement age: Pre-morbid 65 years*

*Post-morbid 60 years*

[14] Mr *Schubart*, on behalf of the plaintiff, submitted that the usual contingencies of 5% to past loss of earnings ought to be applied. He pointed out that plaintiff was claiming from 2015 to the present which is a period of one and half year.

[15] Mr *Paterson,* on behalf of the defendant, submitted that Dr Whitehead's evidence had erroneously been based on plaintiff being employed in the corporate sector. He argued a more reasonable contingency was 10% in the circumstances of this case.

[16] Past loss of earnings can be assessed with greater certainty particularly with regard to the facts than future income. I accept Dr Whitehead's reasons for using the corporate sector as the plaintiff was employed at Spar after the collision. I accept Dr Whitehead's evidence as it was not contradicted and cogent reasons were given for his opinion. I am of the view that on the facts of this case and having regard to *Koch: Quantum Yearbook 2016,* at page 124 that the normal contingencies are 5%, they must be applied to past loss of earnings.

[17] Mr *Paterson* submitted that a contingency deduction of 25% should be applied to plaintiff's pre-morbid future loss of earnings. He based this on plaintiff not likely to have achieved grade 12. He argues that she would have competed with a high percentage of unemployed school leavers, some with matric. This would have placed plaintiff in unfavourable competition with people who have matric.

[18] I agree with Mr *Schubart* that the submissions regarding unemployment are speculative as there was no evidence tendered about levels of unemployment. Furthermore, the learned author *Koch supra* states that it has become customary for the court to apply a sliding scale to contingencies "*that is 25% for a child, 20% for a youth and 10% in middle age".* Contingency factors applied in other cases involving youths and/or children range from 15% to 40%. I am of the view that taking

into account all the circumstances in this case and plaintiff's youthful age, contingency deductions of 15% should be applied.

[19] Mr *Parterson* contended that having regard to the physical and psychological impact of plaintiff's injuries she still has a residual earning capacity. He submitted that the evidence of Dr Whitehead that half the period plaintiff would be unemployed is not supported by historical factors. He submitted a contingency deduction of 35% is appropriate.

[20] Mr *Shubart* submitted that the post-morbid career history of the plaintiff to date gives an indication of the future. I find that on the uncontested evidence of Dr Whitehead a higher than normal contingency ought to be applied in the plaintiff's injured state. Due to her current compromised state her future career is indeed at risk. I accept Dr Whitehead's evidence that she will probably spend significant periods being unemployed and would not work beyond the age of 60 years. This is less than the 65 years he predicted she would have worked in her uninjured state. I am of the view that a 50% contingency deduction on plaintiff's future loss of earnings is appropriate.

[21] The parties had agreed on the amounts to which the contingencies are to be applied. I relied heavily on the calculations provided by Counsel in reaching the final sum in the order.

[22] In the circumstances and for the above reasons, it is ordered:

**22.1 The defendant shall pay to plaintiff, in respect of her claims for past and future loss of earnings, the sum of R1 646 156,00;**

**22.2 Interest shall accrue on the said amount at the legal rate of 10.5% per annum payable as from 14 days from date of this order until date of payment;**

**22.3 The defendant shall pay the plaintiff's costs of suit, as taxed or agreed, together with VAT thereon, on the party and party scale. Such costs shall include the qualifying expenses, if any, of the following:**

**22.3.1 Dr Oelofse;**

**22.3.2 Dr Apostolis;**

**22.3.3 Dr Kassan;**

**22.3.4 Ilonka Wessels;**

**22.3.5 Dr Whitehead;**

**22.3.6 Ansie Van Zyl;**

**22.3.7 Arch Actuarial Consulting.**

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**T. MALUSI**

**ACTING JUDGE OF THE HIGH COURT**

**APPEARANCES:**

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|---|---|---|
| **For the Plaintiff** | **:** | **Mr Schubart** |
| **Instructed by** | **:** | **Heine Ungerer Attorneys** |
| | | **PORT ELIZABETH** |
| **For the Defendant** | **:** | **Mr Paterson** |
| **Instructed by** | **:** | **Friedman Schekter** |
| | | **PORT ELIZABETH** |