

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

Case no: 3673/2018

Date of Hearing: 07/09/2020-10/09/19020

Date of Judgment: 11/09/2020

In the matter between:

BABALWA JULENDA MAFONGOSANA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

NAIDU AJ:-

INTRODUCTION:

[1] This is an action for damages by the Plaintiff, a 26 year old female against the Defendant, arising out of a motor vehicle collision that occurred on the 15th February 2016. The Plaintiff was a pedestrian on the day in question.

- [2] The matter had been set down for hearing on the 3 August 2020 in respect of both merits and *quantum*. The Defendant on such date was afforded a further opportunity to consider settlement proposals to the Plaintiff's attorney. On the 25 August 2020 the only issues which the Defendant had settled on were the merits of the matter and the furnishing of a Certificate in terms of Section 17(4) of the Act, in respect of the Plaintiff's future medical and hospital expenses.
- [3] In light of the Defendant's failure to settle the *quantum* aspects of the Plaintiff's claim as well as the Defendant's supine actions to finalize the matter and refusal to make any admissions in respect of Plaintiff's expert evidence, Deputy Judge President Van Zyl granted an order on the 25th August 2020, *inter alia*, that the trial would commence on 7 September 2020. It is common cause that the Defendant had by this stage failed to submit any expert reports of its own in respect of countenancing the Plaintiff's expert report.
- [4] It is further common cause that on 28 August 2020 the Defendant admitted that the Plaintiff's expert reports are what they purport to be and admitted the correctness of the information therein as well as the opinion therein and that the reports could be admitted into evidence without the necessity of calling the expert witnesses to prove their findings and opinions. Shortly thereafter the Plaintiff's claim for general damages in the amount of R1 000 000.00 became settled between the parties. A draft order in this regard was handed in by *Mr Frost* on

behalf of the Plaintiff on the 07th September 2020. The draft order marked "X" was made an order of court.

[5] The Defendant failed to appear at the hearing of the matter and made no representations regarding the finalization of the matter. The Defendant's conduct in this matter is extremely perturbing and warrants censure.

[5] Thus the only issues for determination by me are the Plaintiff's claim for loss of earnings/earning capacity and the costs, including the costs of two counsel (where so employed).

THE PLAINTIFF'S INJURIES:

[6] The Plaintiff sustained the following severe injuries:

6.1 a brain injury;

6.2 Multiple abrasions to the chest, scalp, both thighs, back, lower leg and right knee;

6.3 left pneumothorax;

6.4 right knee dislocation and ligament injury;

6.5 blow- out fracture of the right supra-orbital bone;

6.6 Multiple rib fractures.

[7] The Plaintiff provided *viva voce* evidence to the Court, and her evidence is summarized as follows:

7.1 The Plaintiff submitted that she had obtained a matric certificate with university entrance in 2013;

7.2 In 2014, she cared for her terminally ill grandmother;

7.3 In 2015 she attended the Dower College and passed her N4 in Human Resources;

7.4 At the time of the collision, she had been studying towards her N5/N6 in Human Resources;

7.5 After her discharge from hospital she returned to her studies at Dower College. She was then readmitted to hospital in May 2016 for a further operation to her knee and then returned to her studies in June/July 2016. The Plaintiff could not cope with her studies and left Dower College in August/September 2016.

7.6 In 2017 Plaintiff re-enrolled at Dower College but did not attend any classes;

7.7 In 2017, and through Ubuntu Pathways (a skills development NGO), Plaintiff was placed at Engen Garage Shop as a cashier. She did not cope

with this employment due to long periods of standing and her inability to perform weight bearing activities and left after two months. Ubuntu thereafter placed her at McDonalds as a cook/hostess. She left McDonalds after five months.

7.8 In 2018 she enrolled at the Nelson Mandela University George Campus for a one year bridging course. She failed this.

7.9 In 2019 she enrolled at the Cape Town Peninsula College of Technology for a marketing diploma. She failed her first year and returned home to Port Elizabeth;

7.10 She has remained unemployed since.

[8] The Plaintiff's evidence was that she was very ambitious prior to the collision and it was her intention to study further and to get a formal qualification. At High School, she was Head of Interact club, Captain of the Debating Team and was the school librarian. She used to enjoy being involved in society and being involved on a social level. Her reasoning for embarking on her N levels was so that she could obtain better points to study for the degrees which appealed to her (such as law or something similar). She wanted to work in a corporate environment upon completion of her studies. She is able to speak fluent English, Afrikaans and Xhosa. Plaintiff testified that her mother always encouraged her to study and further herself in life.

- [9] The Plaintiff testified that she was far more resilient and able to cope with anything life presented to her prior to the accident. After the accident however, any traumatic event brings back all the emotions associated with the collision and she cannot cope like she used to.
- [10] Previously she would experience an epileptic seizure once every 6 to 8 months and they never impacted on her studies. Since the accident however she can experience 5 to 6 fits per month. In addition she has migraines on a daily basis. She has suicidal tendencies (and has already attempted suicide on one prior occasion) stating that she is a failure, has no reason to wake up in the morning and has nothing to live for anymore. She is pre-occupied with her scarring and this affects her well-being and self-confidence. This is in direct contrast to the person she was prior to the collision.
- [11] The Plaintiff submitted that she has realized that she will not be able to complete her tertiary studies as would have been prior to the collision. She also pointed out the difficulties she would face in the labour market as she was of the view that no employer would want to employ an employee who was absent from work due to fits or had to be hospitalized due to migraines. She further submitted that she could not cope with stress, and could not recall and remember as she used to.

- [12] The Plaintiff's mother, Notntsikelelo Mofongosana is currently 50 years old and holds a National Diploma in Supply Chain Management. After obtaining her N4/N5 in 1994/1995 from Technical College she commenced employment with the Department of Education as a Budget Control Assistant. Shortly thereafter she obtained a job at Portnet (now Transnet) as a temporary data capturer. She studied part time whilst working and in 2000 was made a permanent employee at Transnet as a Goods Receiver at the Transnet National Port Terminal. Through experience and skills development she worked herself up through the ranks and is currently operating as a Vendor Master and has been in this position for the last five years. This position attracts an annual basic salary of R 439 000.00.
- [13] The Plaintiff's older sister holds an N4 in Tourism and is currently employed at the municipality in the position of supervisor. Plaintiff's brother is currently attending a Technical High School where he is focusing on Electrical Engineering. Plaintiff's youngest sister is at Lawson Brown High School and upon completion of her high school education, wishes to study accounting.
- [14] The Plaintiff's mother financially assisted all of her children in the furtherance of their studies. She encouraged them to study further as in her opinion education is very important.

THE EVIDENCE OF LAETITIA STRAUSS:

[15] Ms Strauss, Occupational Therapist testified that at the time of preparing her initial opinion she was not in possession of a confirmed diagnosis in respect of the Plaintiff's head injury and acquired cognitive deficits. On testing, it was apparent that Plaintiff's cognitive abilities fell within the extremely low range which then necessitated Ms Strauss advising that the Plaintiff be referred for a neuropsychological assessment by a Clinical Psychologist. From a physical perspective, Ms Strauss initially found the Plaintiff to be suited to completely sedentary work and even then she would have difficulties as she cannot sit for long periods of time and would be deemed a vulnerable employee. Upon receipt of Mr Bilué Moolman's report and diagnosis of a Neurocognitive disorder due to TBI, Severe Depression, mild PTSD and Somatic Symptom Disorder, Ms Strauss opined that the culmination of injuries (physical and psychological) and the *sequelae*, as well as the evidence of the Plaintiff and her mother regarding how quickly the Plaintiff has deteriorated since Ms Strauss last assessed her, had resulted in the Plaintiff being unemployable in any capacity.

THE EVIDENCE OF LANI MARTINY:

[16] Mr Lani Martiny, the Industrial Psychologist testified that based on the evidence provided about her own and the family achievements, especially in regard to her mother, father and older sister's achievements, it is clear that there is a strong

work ethic in Plaintiff's family and that there is a trend to obtain a tertiary qualification. Mr Martiny predicted the following premorbid career progression:

16.1 2016: She probably would have qualified with an N6 qualification in Human Resources. Considering her motivation and her strong orientation to work with other people she was probably well suited to this kind of work.

16.2 2017: She would have been able to apply for work in formal organizations which employ qualified human resource people.

She would have probably started off work as a trainee for 1 – 2 years at the Paterson B2/B3 levels. Thereafter career growth would probably require further development and attendance of courses or of obtaining further qualifications as well as experience.

16.3 2019: She would then have been able to advance from a Paterson B2/B3 level to Paterson C1 level. Thereafter to account for salary increases, changes of jobs and possible promotions a straight line can be drawn up to scenario 1 and scenario 2.

16.4 Her scholastic performance and academic performance prior to the MVA are very important aspects in deciding on using scenario 1 and/or scenario 2.

Scenario 1: By the time she reached the age of 45 years she probably would have been able to advance up to at least Paterson C3 level.

Scenario 2: By the time she reached the age of 45 years, she probably would have been able to advance up to the Paterson C4 level or the Paterson C5 level.

Average annual increments of approximately 7% per annum would then apply up to the normal retirement age of 65 years.

16.5 Her intentions were to work in a large organization such as Transnet, or in a corporate organization. With her background there is a good chance that she could have done so.

- [17] After listening to the oral testimony of the Plaintiff and her mother, Mr Martiny was of the opinion that scenario 2 is the more probable one considering the Plaintiff's achievements at school (Head of Interact, Captain of the Debating Society, opening a Library, tutoring other students), her motivation and dedication towards furthering herself (even in her injured state she continued to make attempts towards qualifying herself), the fact that her family are all educated with her mother already earning on the Paterson C level despite not having a degree, Plaintiff was involved in volunteer work, Plaintiff had the ability to obtain a BTech qualification, she is an African female and thus a candidate for affirmative action; and Plaintiff is trilingual therefore she would be an asset to most corporate companies. Plaintiff was a well-rounded individual with a lot to offer.

- [18] With regards to his initial opinion on Plaintiff's post morbid career progression, Mr Martiny advised that he wished to alter his opinion. After hearing the evidence of the Plaintiff and her mother, as well as the evidence of Ms Strauss regarding the Plaintiff being unemployable and the fact that Plaintiff's condition has deteriorated very quickly, Mr Martiny is of the opinion that the Plaintiff will not find employment in the future.
- [19] Mr Martiny testified that he set out certain salary figures to be used by the actuaries in calculating the Plaintiff's claim. In order to address the difference in salaries across corporations, Mr Martiny suggested the Actuary use the average between the medians of the basic and full package salary survey scales for corporate employment in Koch's Quantum Yearbook.
- [20] Mr Bilué Moolman, a Clinical Psychologist, conducted a psychological assessment of the Plaintiff and found as follows:¹

"The Plaintiff's performance on psychometric testing indicated that the Plaintiff's premorbid level of functioning has been altered. Considering that the Plaintiff would be graded as an average student prior to the MVA her performances on the psychometric testing and her academic record post MVA indicate that there has been acquired cognitive deficits.....it seems that variable processing speed performances make it difficult for her to grasp information quickly with her low mood, PTSD and pain symptoms compounding and affecting her

¹ Pages 73-91 of the Index to Expert Reports

performances.....she struggles to reason out problems therefore making it difficult for her to understand a topic and learn from mistakes.

The following DSM V diagnosis describes Plaintiff's sequelae:

Mild Neurocognitive Disorder due to TBI;

Major depressive disorder, severe with melancholic features;

Post Traumatic Stress Disorder, mild;

Somatic Symptom Disorder with predominant pain (pain disorder).

The examiner is of the opinion that the Plaintiff's current prognosis is poor. She has been unable to complete several courses she has attempted to study and it looks unlikely that she will be able to pass her current course. The examiner is also of the opinion that the combination of her neurocognitive deficits and physical sequelae will result in her struggling to find work.....With all of this considered, the Plaintiff also has to deal with the fact that her seizure episodes have increased.....In all likelihood her employment opportunities in the open labour market have been hampered. "

- [21] In Mr Moolman's supplementary report of 31 July 2020, it was noted that the Plaintiff had suffered a *miscarriage*, *had not passed* the 2019 academic year of studies and *had attempted suicide*.

Now that she no longer has any of her previous protective factors, the Plaintiff is at high risk of self-harming behaviour. In addition, the scarring across her body significantly affects her self-esteem. She is reluctant to form a new intimate relationship as she is afraid of revealing her scars. It also affects what she wears. The Plaintiff noted that in her culture, when scars are on display the community tend to assume that she is a tsotsi and their initial reaction is to treat her like a criminal. Therefore to avoid judgment the Plaintiff purposefully chooses to wear clothes that cover all of her scars.

The examiner is quite confident that the Plaintiff will continue to struggle with tertiary education. She is also at a significant disadvantage in the open labour market from a psychological perspective.

[22] Mr Moolman has in his affidavit handed in to Court dated 8 September 2020 brought to the Court's attention that in light of his diagnosis and the Plaintiff's exacerbated conditions, he is of the opinion that her award should be protected.

[23] I have had due regard to the content of the various medico-legal reports and consequent supplementary reports (where so provided) of the following experts which were admitted by the Defendant:

201. Dr P A Olivier;

20.2 Dr C G Apostolis;

20.3 Laetitia Strauss;

20.4 Bilué Moolman;

20.5 Lani Martiny;

20.6 G Whitaker.

ACTUARIAL CALCULATION:

[24] Plaintiff's claim for loss of earnings/earning capacity has been actuarially calculated by Algorithm Consultants and Actuaries in their report of 7 September 2020. Plaintiff's claim is based on scenario 2 of Mr Martiny's report.

Past loss

Uninjured income	R 768 333.00
Less 5% contingency	<u>(R 38 417.00)</u>
	R 729 916.00
Injured income	R 22 967.00

Less 5% contingency	<u>(R 1 148.00)</u>
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	R 21 819.00
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Net Past Loss	R 708 097.00
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Future Loss

Uninjured Income	R 10 515 563.00
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Less 25% contingency	<u>(R 2 628 891.00)</u>
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Net future loss	R 7 886 672.00
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TOTAL NET LOSS (after application of the loss limit)

Past loss R637 241.00 and Future loss R7 856 382.00 =	<u>R 8 493 623.00</u>
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[25] Mr Frost has inveigled me to apply a 25% contingency as set out in the above calculations. It is trite that the contingencies are a matter that falls within the discretion of the court when a court weighs up what Nicholson JA called “*the vicissitudes of life*”.² He held further “ *the rate of the discount cannot of course*

² *Southern Insurance Association v Bailey* NO 1984 (1) SA 98 (A) at 116-117

be assessed on any logical basis. The assessment must be largely arbitrary and must depend upon the trial Judge's impressions of the case."

[26] In my view having regard to the conspectus of the evidence as a whole and argument proffered by Mr Frost for the Plaintiff I make the following order:

26.1 the order marked "X1" is made an order of court.

V NAIDU

ACTING JUDGE OF THE HIGH COURT