

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: 25393/18

**NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED
09/06.23**

In the matter between:

LAVERNE MARGERY CLOETE

Plaintiff

v

THE ROAD ACCIDENT FUND

Defendant

t

JUDGMENT

MOSOPAJ

1. The plaintiff in this matter was a passenger in a motor vehicle which was involved in a collision which occurred on 8 April 2017. The only issue for determination in this matter relates to the plaintiff's claim of damages, specifically in respect of past and estimated future loss of income.
2. Liability has been determined, and the defendant was held liable for 100% of the plaintiff's proven damages. The defendant was also ordered to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Act. Damages were settled in the amount of R500 000.00 in favour of the plaintiff. The issue pertaining to past hospital and medical expenses is postponed *sine die*.
3. The plaintiff avers in her particulars of claim that she suffered the following

injuries:

- 3.1 Fractured right shoulder;
 - 3.2 Multiple fractured ribs;
 - 3.3 A lung contusion;
 - 3.4 Injury to the left knee;
 - 3.5 Soft tissue injuries to the neck and lumbar spine;
 - 3.6 A head injury, and;
 - 3.7 Psychological and psychiatric sequelae.
4. The plaintiff further averred that, as a result of the injuries sustained, she was unable to resume income earning capacity activities, thus resulting in a loss of income.
 5. The plaintiff was initially admitted and treated for her injuries at the Worcester Provincial Hospital, on 8 April 2017 (the date of the collision), where she was stabilised and subsequently transferred to Tygerberg Hospital on the same night. She remained at Tygerberg Hospital for several hours, before being transferred again to Mediclinic Louis Leipoldt. Thereafter, she was transferred to Intercare rehabilitation facility where she spent a month after her admission, and she was finally discharged two months later.
 6. She underwent physiotherapy over a period of approximately two to three months. She was readmitted to Mediclinic Louis Leipoldt on 9 November 2017, to remove the plates and screws from her right scapula. She was discharged the following day and she wore a sling for three weeks.
 7. The defendant's attorneys have since withdrawn from the matter and on the date of hearing of this matter, there was no appearance on behalf of the defendant.
 8. At the time of the collision, the plaintiff was employed as an administrative controller at Neopak and she was also enrolled for a management diploma. Her highest qualification at the time of the collision was Grade 12.

9. The plaintiff was examined by a total of nine experts, all of whom filed their reports, along with confirmatory affidavits, confirming the contents of their reports and opinions. The plaintiff sought that same be admitted into evidence and it is on this basis, that the matter was heard on the papers (***Havenga v Parker 1993 (3) SA 724 (T)***).
10. The plaintiff effected an amendment to the particulars of claim dated 26 March 2018, to indicate the following:

10.1 Past loss of earnings: R 182 329.00

10.2 Estimated future loss of earnings and interference with earning capacity: R4 384 653.00

Total: R4 567 045.00

This amendment was effected before the plaintiff could obtain the actuarial report compiled by Ivan Kramer, dated 28 February 2023 (the "Addendum Actuarial report"), and it appears that the plaintiff did not effect further amendments to the particulars of claim after receipt of the actuarial report dated 28 February 2023. The plaintiff seeks to hold the defendant liable for the amounts and calculations as indicated in that report. The first actuarial report was dated 13 April 2021, which will become clearer later in the judgment when the reports are analysed.

11. In the matter of ***Bee v The Road Accident Fund (093/2017) [2018] ZASCA 52 (25 March 2018)***, the Supreme Court of Appeal set out the approach the court must adopt when dealing with expert testimony and provided that:

"[22] It is trite that an expert witness is required to assist the court and not to usurp the function of the court. Expert witnesses are required to lay a factual basis for their conclusions and explain their reasoning to the court. The court must satisfy itself as to the correctness of the expert's

reasoning."

12. The personal circumstances of the plaintiff, as gleaned from the various reports submitted, are as follows:

12.1 She was born on 13 November 1982 and she is currently 40 years old and was 34 years old at the time of the collision;

12.2 The plaintiff's injuries are as indicated in the plaintiff's particulars of claim and confirmed by medico-legal reports. The plaintiff suffered a concussive head injury, with diffuse brain injury and resultant neurocognitive, neuropsychological and neuropsychiatric sequelae. She also suffered a fractured right scapula, multiple fractured ribs with lung contusions, injury to the left ankle and knee, as well as injuries to the lumbar and cervical spine.

12.3 She is a mother of two children and was employed at the time of the collision. Her academic qualifications have been stated earlier in this judgment. The plaintiff earned a basic salary of R16 500.00 per month, including benefits amounting to R8000.00 per month, thus amounting to a total annual salary of R294 000.00.

13. Dr Colin Barlin, an orthopaedic surgeon, confirmed the injuries sustained by the plaintiff. He further stated that the plaintiff did not work for a period of three months and received her full salary and resumed her normal duties upon her return. The plaintiff complains of pain and moderate stiffness in her right shoulder and there is a 2 to 3% chance that the plaintiff will require a total shoulder replacement. The doctor is of the view that with adequate treatment, the plaintiff should be able to continue working in her current capacity until retirement age.

14. Dr Coceka Mfundisi, a specialist neurosurgeon, stated that the plaintiff has difficulty remembering instructions at work and frequently has to write things down. She was enrolled for a course which she had to abandon after the

collision. The doctor found that the plaintiff's history that she was unconscious until she was transferred to Tygerberg Hospital, is contradicted by the hospital records which reflect her GCS as 15/15 at the time of the transfer. The doctor noted soft tissue injuries to the spine. Dr Mfundisi postulates that the plaintiff suffered a diffuse traumatic brain injury in the form of a moderate concussion and she had post-traumatic amnesia. She also has post-traumatic headaches.

15. Dr Mayaven Naidoo, a psychiatrist, postulates that the plaintiff suffered a mild traumatic brain injury following the collision and as such, neuropsychiatric sequelae are not usually expected. There are other physical injuries the plaintiff suffered, but it is difficult to determine which has a greater contribution to the pathogenesis of the cognitive deficits and changes in affective function. The psychiatrist's working diagnosis is that of neuropsychiatric sequelae due to multiple aetiologies, which refers to injuries sustained in the collision. The plaintiff has depressive disorder due to the injuries sustained in the collision (including the traumatic brain injury) with travel-related anxiety symptoms.
16. Dr Brian Wolfowitz, an otolaryngology head and neck surgeon, noted that the plaintiff has normal hearing and has no peripheral vestibular dysfunction.
17. The clinical psychologist, Rolene Hovsha, found that the plaintiff's ability to focus attention was below average. The plaintiff suffered an initial dense period of post-traumatic amnesia/confusion, which lasted until she awoke in Tygerberg Hospital. The plaintiff suffers from neurocognitive, neuropsychological and physical deficits in keeping with those seen in individuals with a traumatic brain injury. The deficits found are likely to be stable and of a permanent nature and are unlikely to improve over time.
18. Speech therapist and audiologist, Michelle Gaspar, found that the plaintiff suffers with moderate to severe receptive and expressive language impairments.
19. Educational psychologist, Kevin Trollip, found that the plaintiff was an average to above-average learner pre-accident. She could not manage with her studies

towards a diploma in management post-accident, as she had difficulty with headaches, concentration and memory after the collision.

20. Occupational therapist, Maria Georgiou, found that the plaintiff demonstrated the ability to meet the physical demand characteristics of work at a low-range medium physical demand level, and she is able to meet the physical demand level of light work and low-range medium work occasionally. The plaintiff retains the capacity to cope with sitting, walking, repetitive squatting, dynamic standing, elevated work, stooping and stair climbing on frequent basis, based on the plaintiff's upper limb injuries and resultant symptomatic presentations and the plaintiff is not precluded from partaking in this work. This is especially true since she holds the same capacity at present.
21. Ms. Georgiou further opined that, considering the plaintiff's orthopaedic diagnosis and prognosis that there is a 2 to 3% chance that the plaintiff will require a shoulder replacement, there is a rare chance that the plaintiff will develop osteoarthritis, and she will thus be able to participate in her occupation with no limitations. Taking into account the expert opinions from a cognitive/psychological perspective, the plaintiff may continue to have difficulty with her work and her ability to perform her duties in the workplace may be compromised in light of her neuropsychological limitations.
22. Dr Riaan Bothma, an industrial psychologist, found that after being employed at Neopak CEC from 2016, the plaintiff was retrenched on 31 May 2019 and she is currently unemployed. She worked mostly in an administrative environment. She earned a monthly income of R16 714.51 after the collision, which amounted to R200 574.12 annually and R250 438.32 annually including benefits. Bonus payments and back pay are not included in the calculations. Before the collision she earned R238 681.92, including benefits, annually.
23. The plaintiff returned to work on 4 June 2017, after the collision. The plaintiff was retrenched on 31 May 2019, for operational requirements of the company, and not for personal or accident-related reasons. She has applied for various employment positions, but she has been unsuccessful. There is no indication that the plaintiff's earning growth had deteriorated significantly since the

collision.

24. Further, taking into account the fact that the plaintiff's pre-accident workplace feedback indicated that her work performance was average and that she has reached her career ceiling, it is likely that she would continue working in the administrative field. She has grown to Paterson B4 medium to upper quartile.
25. The expert finds that it would be very difficult for the plaintiff to secure work post-retrenchment, and it is unlikely that she will reach her pre-accident potential. She is not considered to be suited to working in a self-employed capacity. She would require an employer that is accommodating and sympathetic.
26. The actuary, Ivan Kramer, calculated loss of income from July 2020. The principle he used was to place the plaintiff in the same financial position as she would have been but for the accident. This is done by calculating the value of her income, having regard to the accident and the difference is the loss of income suffered. He applied contingencies of 15% to both accrued loss and prospective loss. The total loss is estimated to be R5 210 185.00.
27. When assessing damages for loss of earnings, it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation (see *The Quantum Yearbook*, Robert J Koch). General contingencies cover a wide range of considerations which vary from case to case and may include; taxation, early death, saved travel costs, loss of employment, promotion prospects, divorce and so forth. There are no fixed rules in respect of general contingencies.
28. The plaintiff was 34 years old at the time of the collision and employed at Neopak as an administrative clerk. She resumed her employment three months after the collision and assumed the same position she held before the collision. The collision had an impact on her work activity, as she is right-handed and she had to use her left hand to type, which slowed her work progress and resulted in her having to work overtime and on Saturdays to keep up with her work. She was retrenched on 31 May 2019, not for accident-related reasons, but

rather because of the company's operational requirements. She could not secure employment after she was retrenched, despite applying for 52 different positions at various companies.

29. The court has a wide discretion to allow contingencies, but such discretion ought to be exercised based on a consideration of all relevant facts and circumstances, and must be applied to the particular proven facts of the case (see **AA Mutual Insurance Association Ltd v Maqula 1978 (1) SA 805 (A)**).

30. The plaintiff reached her career ceiling while she employed at Neopak. Her earning capacity did not deteriorate after the collision and she was paid her salary in full, once she returned to work after her discharge from the hospital. The plaintiff should have remained in her employment until the retirement age of 65 years, but for the accident, as she was a healthy person pre-accident.

31. Robert J Koch, in his book *The Quantum Year Book 2023*, provides the helpful guidelines which can be used in the determination of the contingencies to be applied, as follows:

"Sliding scale: ½% per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in middle age (see Goodall v President Insurance 1978 (1) SA 389 (W); for child claims see Bailey v Southern Insurance 1984 (1) SA 98 (A)).

Normal scale: The RAF usually agrees to deductions of 5% for past loss and 15% for future loss, the so-called 'normal contingencies'.

Saved travel costs: A victim who can no longer attend at work is spared the costs of travelling to and from work."

32. According to Dr Barlin, with adequate treatment for the orthopaedic injuries sustained by the plaintiff, she will be able to continue working in her current capacity until retirement. Her employment is classified as a sedentary physical demand level. Based on the work demands, the occupational therapist is of the view that the plaintiff will be able to undertake her occupation with no

limitations. From the psychological point of view, the plaintiff is considered a vulnerable employee and if she were to lose her current employment, she will likely have difficulty in securing employment of a similar nature in the open market again.

33. If it was not for her retrenchment, the plaintiff could still have been employed, despite her cognitive deficits. This means that she would have worked until she reached her career ceiling at the age of 45 or until her retirement at the age of 65, having regard to the fact that the plaintiff was 35 years old at the time of the accident, which is considered middle aged. The plaintiff applied for many positions at various companies, including to the Government of the Western Cape as an administrative clerk, all of which were rejected. The plaintiff was paid her full salary post-accident, including time when she did not go to work.

34. No mention is made in the rejection letters that such rejections are based on the collision and sequelae suffered by the plaintiff. The fact that the plaintiff remains unemployed at this stage, means that she is spared the costs of travelling to and from work. It is therefore my considered view, based on the above, that it will be fair and reasonable to allow the contingency deductions as follows:

Contingency %

Accrued:	20%
Prospective:	30%
Gross accrued value of income:	R 751 840.00
less contingency:	R 150 368.00
Net accrued value of income:	R 601 472.00
Gross prospective value of income:	R5 382 157.00
less contingency:	R1 614 647.10
Net prospective value of income:	R3 767 509.90
Net prospective value of income:	R4 368 981.90

ORDER

35. The draft order marked "X" is made an order of court.

MJ MOSOPA
JUDGE OF THE HIGH COURT,
PRETORIA

Appearances:

For the plaintiff:

Adv. I Zidel SC

Instructed by:

De Broglio Attorneys Inc.

Defendant's claims handler:

Mr. Sibusiso Ngqekem

The Road Accident Fund

Date of hearing:

9 March 2023

Date of judgment:

Electronically transmitted