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THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Case Number 1164/2018

Reportable: yes/no

Circulate to other Judges: yes/no

Circulate to Magistrates: yes/no

In the matter between:

M[...] F[...] M[...]

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

CORAM:

BERRY, AJ

HEARD ON:

25 JANUARY 2023

DELIVERED ON: This judgment was handed down electronically by email to the parties' representatives and by release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 30 January 2023.

JUDGEMENT BY: BERRY, AJ

JUDGEMENT

[1] Plaintiff was involved in an accident where she was a passenger on the back of a motorcycle on 23 November 2014 and was hospitalised until 03 December 2014.

[2] Plaintiff suffered from a head injury, left elbow injury, right knee injury and a right elbow injury.

[3] The Plaintiff has no recollection of the accident.

[4] The Defendant conceded merits and provided an undertaking in terms of Sec 17(4)(a) of Act 56 of 1996 for future medical expenses.

[5] The Defendant accepted the Plaintiff's medical expert reports and it was agreed that the Plaintiff did not have to testify.

[6] The claim for past medical expenses was abandoned, thus the only issues in dispute are the claims for general damages and loss of earnings.

[7] The Plaintiff claims of R424 320.00 for past and future loss of earnings and R1 000 000.00 for general damages.

[8] The Defendant did not submit any expert reports.

[9] The following expert reports for the Plaintiff were admitted.

Dr DK Mutyabu	Neurosurgeon
Dr Mbhele	Neuropsychologist
Ria Van Biljon	Occupational Therapist
Dr JP Marin	Orthopaedic Surgeon
DR AC Strydom	Industrial Psychologist

J Sauer

Actuary

[10] Counsel for the Plaintiff submitted that the physical injuries formed a minor part of the claim for general damages and focused more on the brain injuries suffered by the Plaintiff.

[11] Dr Mutyaba states that the Plaintiff was admitted to hospital with a traumatic head injury and bleeding and her Glasgow Coma Scale was 12/15. This injury is confirmed by the radiological picture and the alteration in her level of consciousness at admission.

[12] The Plaintiff suffers from a change in personality, headaches, poor memory and lower back pain.

[13] The Plaintiff suffers neurocognitive and neuropsychological deficits.

[14] The Plaintiff has a 10% risk of developing post traumatic epilepsy and twice the risk of developing Alzheimer's disease or dementia, compared to normal controls.

[15] Dr Mbhele states that the brain injury causes poor memory, poor concentration and inattentiveness, as well as mood swings and anxiety in the Plaintiff. This resulted in the Plaintiff being dismissed from her employment.

[16] Dr Mbhele conducted a mental status examination and found that the Plaintiff suffers from attention and concentration deficiencies and the test had to be abandoned because the Plaintiff became too tired and could not cope with the test.

[17] The Plaintiff was given a three-hour break but could not complete the test.

[18] Dr Mbhele conducted the following Neurological Tests:

- Complex Attentional Ability.

- Executive functioning.
- Memory and Learning.

[19] The neuropsychological findings revealed the following neurocognitive deficits:

- Poor auditory memory and learning problems.
- Attentional problems.
- Poor working memory.

[20] Dr Mbhele is of the opinion that the Plaintiff had average intelligence prior to the accident.

[21] Dr Mbhele diagnosed the patient to suffer from:

- Mild Neurocognitive Disorder due to the traumatic brain injury.
- Post traumatic stress disorder.
- Major depressive disorder.

[22] Dr Mbhele is of the opinion that the Plaintiff's condition will not improve.

[23] Van Biljon administered several neurocognitive tests and refers to the Mail Sort Subtest of the Therapists Portable Assessment Laboratory, which closely resembles the cognitive requirements of working as an assistant librarian - a position for which the Plaintiff has applied.

[24] The Plaintiff had to file mail in pigeonholes according to numbers. She had to remind the Plaintiff several times to file the mail below and not above the corresponding number. She had to help the Plaintiff identify errors that during the initial stages of the test, despite assistance. The Plaintiff made 8 errors versus 1 allowable and her working speed fell at 42%. Test results indicate that she works slowly and inaccurately.

[25] The Valpar 6 – independent problem-solving work sample test was administered. This work sample is composed of one exercise that assesses the ability to perform work

task, requiring the visual comparison and proper selection of a number of extract colour designs. Specifically, the work sample requires significant motor co-ordination, reasoning, form, perception, clerical perception, colour discrimination, manual dexterity, finger dexterity and intelligence. These abilities are basic to success in many jobs.

[26] The Plaintiff made 13 errors versus an allowable 3 in this test.

[27] The Plaintiff attended a library assistant learnership programme from June 2019 to March 2020 where her duties included dusting shelves, packing away books, locating books using the library software, stamping books with due dates for books to be returned, assisting people in preparing curriculum vitae's, make photocopies for clients, and assist students with gathering information for projects. She was however unable to secure full time employment.

[28] Van Biljon is of the opinion that the Plaintiff would not have been able to retain her employment considering her current neurocognitive profile.

[29] Dr Strydom states that considering the Plaintiff's education and employment history, plus in absence of proof of earnings, that the Plaintiff's earnings would range between the median of an unskilled workers' earnings and the median of semi- skilled workers' earnings in her mid-forties, where after normal inflationary increases should be applied.

[29] No proof of income could be provided as the Plaintiff's former employer did not want to co-operate.

[31] Both parties referred to case law as precedent for the amount general damages that should be awarded. I do not repeat the injuries listed in every case, save to state that the injuries are similar to those suffered by the Plaintiff.

[32] The Plaintiff referred me to the following cases and the value of the damages awarded, after adjustment for inflation to 2023.

Sterris v RAF 12167/07 QOD VOL V1 B4-26	R500 000.00
Makapula v RAF 1635/2007 QOD VOL V1 B4-26	R575 000.00
Donough v RAF 8962/2010 QOD VOL V1 B4-56	R623 000.00
Modan v RAF 14435/2009 QOD VOL V1 A4-123	R638 000.00
Van Der Mescht v RAF 12182/2008 QOD VOL V1 J2-42	R765 000.00
Tobias v RAF 4934/2009 QOD VOL V1 B4-65	R860 000.00

[33] The Defendant referred me to the following cases and the value of the damages awarded, after adjustment for inflation to 2023.

Zibi v RAF 2010 (6B4) QOD (ECG)	R224 100.00
Fries v RAF 2002 (5B4) QOD 88 (C)	R259 100.00
M v RAF 2019 ZAGPPHC 588 (GP)	R420 100.00

[34] This brings me to contingencies.

[35] The Plaintiff submitted an actuarial report which used R2 500.00 per month as the basic income the Plaintiff earned prior to the accident. This figure is based on the recommendation of Dr Strydom.

[36] The Defendant disputed that any past loss of earnings was proven as no evidence of the Plaintiff's income could be provided.

[37] I am satisfied that the e-mail provided from the previous employer, which states that she does not want to be involved in this matter in any manner whatsoever, proves that the Plaintiff was indeed employed prior to the accident.

[38] Seeing that the Plaintiff was employed as a shop assistant, I am willing to accept that she earned R2 500.00 per month, prior to the accident.

[39] The actuarial calculations applied a 5% contingency to pre- and post- morbid to past loss of earnings and calculate the Plaintiffs loss to be R166 543.00.

[40] A 15% contingency was applied to pre-morbid future earnings and a 35% contingency to post morbid, bringing the loss to R257 777.00.

[41] Counsel for the Plaintiff argued that an even higher contingency should be applied to post-morbid future loss as it was proven that the Plaintiff have failed her learnership as an assistant librarian.

[42] Counsel for the Defendant argued that a 30% contingency should be applied to post-morbid future loss as it was illustrated that the Plaintiff attended training and thus the risk of her remaining unemployed is lower. This would bring the Plaintiff's future loss of earnings to R185 550.00.

[43] I can see no reason why the calculations used by the actuary should not be accepted.

[44] The following order is made:

1. The Defendant is liable to pay 100% of the Plaintiff's damages.

2. The Defendant shall pay the Plaintiff the sum of R994 320.00 in respect of loss of earnings and earning capacity and general damages made up as follows:

Loss of earnings and earning capacity	R424 320.00
General Damages	<u>R570 000.00</u>
TOTAL	R994 320.00

3. The Defendant shall pay the abovementioned amount into the account of the Plaintiff's attorney.

Account holder:	VZLR Inc
Branch:	ABSA Business Bank Hillcrest
Branch Code:	6[...]
Type of account:	Trust Account
Account Number:	3[...]
Reference:	M[...]

4. The Defendant shall furnish the Plaintiff with an undertaking in terms of Sec 17(4)(a) of Act 56 of 1996, in respect of future accommodation of the Plaintiff in a hospital, nursing home, or treatment of, or the rendering of a service, or supplying of goods of a medical and non- medical nature to the Plaintiff, after the costs have been incurred and on submission of proof thereof, arising out of the injuries sustained in the collision which occurred on 23 November 2014.

5. If the Defendant does not make payment within 180 days from the date of this order the Defendant will be liable to pay interest on the capital amount at the moratory rate, compounded and calculated 14 days from the date of this order.

6. The Defendant shall pay the Plaintiff's taxed, or agreed cost on party and party scale, up to and including the date off this order, including the cost of counsel.

7. The Defendant shall pay the qualifying fees of the following expert witnesses:

Dr DK Mutyabu	Neurosurgeon
Dr Mbhele	Neuropsychologist
Ria Van Biljon	Occupational Therapist
Dr JP Marin	Orthopaedic Surgeon
DR AC Strydom	Industrial Psychologist

J Sauer

Actuary

AP BERRY, AJ

APPEARANCES:

For the Plaintiff:

Adv. M Steenkamp

Instructed by:

VZLR Incorporated, Pretoria

c/o Du Plooy Attorneys, Bloemfontein

For the Defendant:

M Booyesen

Instructed by:

The Road Accident Fund

Bloemfontein