

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

CASE NO: 60042/2019

- REPORTABLE: NO
- OF INTEREST TO OTHER JUDGES: NO
- REVISED: NO

4 March 2024

In the matter between:

RJ M[...]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

K. STRYDOM AJ

1. On the 6th of May 2018, the plaintiff's life changed irreparably. Up until then she had been a relatively carefree 17-year-old who was busy with her grade 11 year. In a devastating motor vehicle collision, she sustained severe injuries which have had the effect of drastically changing the trajectory of her life, in general, and her earning potential, specifically.
2. In her claim against the defendant stemming from losses due to the sequelae of her injuries, the question of liability and future medical expenses have already been settled

100% in her favour. Additionally, despite a whole person impairment of 38%, the defendant has not conceded to the seriousness of her injuries. As such this Court does not have jurisdiction to decide the issue of general damages. I am accordingly called upon to assess her loss of earnings only.

3. There was no appearance for the Defendant on the day of hearing and the matter proceeded on a default basis. I also admitted the Plaintiff to lead her expert evidence on affidavit in terms of Rule 38(2).

Background to claim for loss of earnings

Injuries and sequelae

4. Her injuries are polytraumatic of nature: she sustained a traumatic brain injury, which was described as a “subarachnoid haemorrhage with multiple contusions” (her initial Glasgow coma scale was 8/15), a left mandible fracture, bilateral humerus fractures and lacerations to her forehead. She underwent various surgical procedures and spent approximately four months in hospital, before being discharged.
5. Despite a fair prognosis insofar as her orthopaedic injuries are concerned, she still has complaints of bilateral shoulder, pain pelvic pain and pains to her knees and jaw. Crucially, the accident has resulted in not only cognitive deficits but also psychological deficits stemming from the brain injury, her severe facial scarring and her involvement in the accident itself.
6. Unsurprisingly she failed grade 11 in 2018. However, she passed it in 2019 and in 2020 completed her grade 12 with admission to a bachelor’s degree. She obtained a foundational literacy certificate as well as a basic computer literacy certificate in 2021. In that year she applied for studies towards a degree in law but did not meet the minimum requirements for entry to that course. In 2022 she registered for degree in Communications but could not study due to lack of finances. She has since then worked for short stints as a waitress call centre agent or casual work in sales. In all these she

experienced not only physical problems including headaches and shoulder pain but also anxiety attacks and light headedness.

7. Testing performed by the educational psychologist revealed that, whilst her verbal comprehension and perceptual reasoning fell within the average range, her working memory and processing speed were borderline. Overall, she presented with average intellectual functioning post-accident. On testing specifically pertaining to education, she similarly performed average in terms of inter alia her reading mathematics and spelling. Testing did however reveal that she had some difficulty in terms of recollection. Emotionally, the educational psychologist test showed a moderate depressive mood level. The clinical psychologist also reported deficits especially in concentration and memory, as well as severe depression and anxiety.

Earnings postulations by experts

8. The educational psychologist is of the view that, had the accident, not occurred the plaintiff would have completed a degree (NQF 7) level qualification.
9. According to the industrial psychologist upon completion of the degree by 2022/2023 it would have taken about 12 months to do learn ship in which she could have earned the median quartile of Patterson level B1. Thereafter it would have taken her six months to secure employment in line with the qualification at which stage she would have started earning at the median quartile of Patterson level B5/C1. Upon reaching her career ceiling at the age of 45 she would have earned at the upper quartile of Patterson level D2 where after should have earned in line with the applicable inflationary increases until retirement at 65
10. Post morbidly, according to the educational psychologist, as a result of the sequelae of the accident, she will remain with only a grade 12 (NQF 4) qualification.
11. The industrial psychologist explains that as a result of the combination of her cognitive deficits, especially in the areas of memory and concentration, as well as her emotional

deficits she will not be able to obtain further qualifications and will have difficulty sustaining employment. She will be limited to semiskilled employment and, even then, will experience slower career progression should she be fortunate enough to obtain such employment. She will experience periods of unemployment in between works as a result. Given her qualification post morbidly (grade 12) she will be limited to low semiskilled categories of employment.

Applicable legal principles

12. In *Southern Insurance Association Ltd v Bailey* NO¹ the following is stated:

“Any enquiry 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, augers 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 a loss.

One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is a matter guesswork, a blind plunge into the unknown,

The other is to try to 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

In the case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an "informed guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial judge's "gut feeling....as to what is fair and reasonable is nothing more than a blind guess."

¹ 1984(1) SA 98 AD at 113F- 114A

13. Factually based calculations should be preferred over a Court blind guess, the Court still has at its disposal a 'levelling' instrument to ensure that the calculations are reasonably in line with the probabilities of each plaintiff's factual circumstances. This instrument is referred to as "contingencies". Matters which cannot otherwise be provided for or cannot be calculated exactly, but which may impact upon the damages claimed, are considered to be contingencies. They include any possible relevant future event which might cause damage or a part thereof or which may otherwise influence the extent of the plaintiff's damage. ²

14. In terms of the calculation, contingencies are usually taken into account over a particular period of time, generally until the retirement age of the plaintiff ³ and are usually provided for by deducting a stated percentage of the amount or specific claims. ⁴ The deduction so done represents the risk that the calculated earnings will not in fact realise in the future.

15. Contingencies are subjective; however, the learned author Koch has suggested the following well-followed approach to determine what the 'normal' contingency (i.e the risks that can affect the earnings of people in general) would be:

"...what is described as a "sliding scale" is used, under which it is allocated a "1/2% for year to retirement age, i.e 25% for a child, 20% for a youth and 10% in middle age". ⁵

16. Using this 'rule of thumb' as a baseline, it is up to the Court to then, on the facts before it, adjust the percentage to be deducted accordingly. In some instances, this would involve a downward adjustment, whilst in other higher deductions may be warranted. Naturally the rule of thumb is just that: a useful, but not obligatory, guide to calculation of the norm.

² *Erdmann v SANTAM Insurance Co Ltd* 1985 3 SA 402 (C) 404-405; *Burns v National Employers General Insurance Co Ltd* 1988 3 SA 355 (C) 365

³ *Goodal v President Insurance Co Ltd* 1978 1 SA 389 (W) 393; *Rij NO v Employers' Liability Assurance* 1964 (4) SA 737 (W); *Sigournay v Gillbanks* 1960 2 SA 552 (A) 569; *Smith v SA Eagle Insurance Co Ltd* 1986 2 SA 314 (SE) 319

⁴ *De Jongh v Gunter* 1975(4) SA 78 (W) 80F

⁵ *Goodall v President Insurance Company Limited* 1978(1) SA 398(W) and *Road Accident Fund v Guedes* 2006(5) SA 583(A) 588D-C. Likewise, see *Nonwali v Road Accident Fund* (771/2004) [2009] ZAECHMHC 5 (21 May 2009) para 23

Finding

Pre morbid earnings

17. On the day of hearing, I queried Counsel for the plaintiff on the pre morbid career ceiling of Patterson D2, as postulated by the industrial psychologist. Noting that the determination of what a young person's potential would have been had she not been involved in an accident is highly speculative, I queried from counsel whether the relatively high career ceiling, under the circumstances was not overly optimistic. Pursuant to this discussion and argument by counsel, I requested that the plaintiff prepare calculations based on a lower career ceiling of Patterson C5. These calculations have been supplied and will be discussed forthwith.
18. The remaining issue for determination, is that of the applicable premorbid contingency to be deducted. Whilst the actuary has applied a 15% deduction to the future premorbid earnings, it is trite that the determination of contingency deductions falls within the discretion of the Court.
19. The Plaintiff is 22 years old. Assuming retirement age 65, she has a work life span of 43 years left. Applying the rule of thumb per Koch, the normal contingency applicable to the period would be 21,5%.
20. In considering the adjustment to this baseline contingency, I have had regard to her specific circumstances. In the first place, it should be noted that the determination of employment potential of a person who had yet to complete schooling at the time of the accident, is by its nature extremely speculative. In this specific instance, the Plaintiff has proven (even post-accident) that she could meet the educational requirements for admission to bachelor's degree qualification. However, different degrees come with different levels of earnings.
21. Additionally, as shown post morbidly, obtaining a matric with admission to a bachelor's degree does not automatically translate to admission to a specific course or, for that fact,

admission to university itself. In *casu*, for instance, she did not meet the requirements for an LLB degree but did meet those for a degree in Communications.

22. A further bar to her earning as per the calculated premorbid scenario, is naturally that of finances. Factually it has been demonstrated that she does not possess the finances to study at a university and would be reliant on a bursary or NSFAS. The calculation is based on the assumption that she would have studied full time and would have started earning by the latest in 20223. Given her lack of finances, this timeline would not have been guaranteed pre morbidly. Any delay in her obtaining her degree qualification, would have resulted in an exponential reduction of her earnings.
23. In view hereof, a premorbid deduction of 30%, in my view, would be reasonable to account for these additional risks.

Post morbid earnings

24. As a result of the accident, there can be no dispute that her earning potential has then severely negatively affected. In this regard I have taken into account that even after the accident she managed to obtain matric with admission to a bachelor's degree as well as some certificate level qualifications. However, as per the educational psychologist, she will not be able to, even if she gains admission to degree level studies, complete such a degree.
25. Per the industrial psychologist she would therefore be reliant on only her grade 12 to obtain employment. Where she has obtained employment, she has been unable to sustain same due to the accident-related sequelae. As a result, the expert is of the opinion she will be limited to low semiskilled types of employment. In calculating this, the actuary has assumed that she will obtain employment at this level which will be assumed to be her career ceiling. She would therefore receive only inflationary increases over the remainder of her life.

26. I am of the view that this is an overly pessimistic approach given the fact that a large portion of the inability to work post morbidly relates to her orthopaedic injuries, which have a reasonably fair prognosis and can therefore improve. She has also managed to complete her matric fairly well and to obtain certificates post morbidly. I accept that she will not be able to obtain a degree level qualification, however given her prowess in her academic performance post morbidly the possibility of her obtaining further training and thereby being able to move to a higher band within the semiskilled scales cannot be discounted.
27. I have noted the additional risks as outlined by the industrial psychologist *supra*, however in balancing the relative risks discussed, I am of the view that the normal contingency of 21,5% (see above) stands to be reduced somewhat to account for the possibility that the post morbid earnings are undervalued. As such a contingency deduction of 15% in the post morbid scenario would be fair and reasonable.

Finding

28. In the premorbid scenario, the actuary has calculated that the plaintiff would have earned an amount of R12 146 413-00 until date of retirement. Deducting the 30% contingency, as discussed above, from this amount results in total future premorbid earnings of R8 502 489,10.
29. Post-morbidly earnings in the amount of R928 557-00 have been calculated. After deduction of the 15% contingency, the total post morbid earnings would be R789 273,45..
30. The comparison between the postulated earnings had the accident not occurred, with those having regard to the accident, therefore reveals an estimated total future loss of earnings suffered by the Plaintiff of R7 713 215,65.
31. I have noted that the so-called statutory “cap” is applicable in this instance. However, per the calculations done by the actuary, the effect of the cap on the overall claim is negligible (and amount of between approximately R40,000 to R50,000 is deducted on the basis as used by the actuary.) Given the discretionary and speculative nature of determinations of

future loss of earnings, I am satisfied that a recalculation, using the contingencies discussed in this judgment, is unnecessary.

32. As a result, the following order is made:

Order

1. The Plaintiff's application to lead expert evidence on affidavit per Rule 38(2) is granted.
2. The Defendant is ordered to pay an amount of R7 713 215,65 to the Plaintiff, which amount represents the Plaintiff's claim in respect of loss of earning.
3. The Plaintiff's claim for general damages is postponed sine dies.
4. The amount referred to hereinabove and interest on the said amount is due within 14 days as prescribed by the Act, and will be paid within 180 days into the trust account of Plaintiff's attorney of record with the following detail:

Name: H MAMBA INC

Bank: First National Bank

Account Number: 6[...]

Branch Code: 2[...]

Reference: H M[...]

5. The Defendant is ordered to pay the Plaintiff's attorney's taxed or agreed party and party costs on a High Court scale, to date hereof.

6. The costs referred to herein above, are subject to the discretion of the Taxing Master, including the following:
 - a. Fees of counsel, including preparation and drafting of heads of argument.
 - b. The reasonable costs of Plaintiff to scan and upload additional documents and bundles on the electronic Caselines;
 - c. The reasonable costs relating to obtaining of all the expert medico-legal reports, actuarial calculations, radiological reports, addendum reports and affidavits obtained in terms of Rule 38(2).
7. In the event that the costs are not agreed the Plaintiff shall serve a notice of taxation on the Defendant's attorney of record and shall allow the Defendant 14 days from date of allocator to make payment of the taxed costs.
8. Should payment not be affected timeously, the Plaintiff will be entitled to recover interest at the prescribed rate as announced and published from time to time as at 14 days from date of allocator to date of final payment (8.25%)
9. It is noted that there is no contingency fee agreement applicable.

K STRYDOM
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA GAUTENG
DIVISION, PRETORIA

Heard on: 20 November 2023

(Further calculations filed 21 November 2023)

Judgment delivered: 4 March 2024

Appearances:

For the Plaintiff: Adv A Frosch

Instructed by: Mamba H Incorporated

For the Defendant: No appearance