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

Case No: 68138/2017

1. REPORTABLE: NO
 2. OF INTEREST TO OTHER JUDGES: NO
 3. REVISED.
- DATE: 24/10/2023

In the matter between:

AFIKILE MDIBI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 24 October 2023.

JUDGMENT

PHOOKO AJ

INTRODUCTION

[1] This is a claim by the plaintiff against the defendant for damages arising from injuries sustained in a motor vehicle accident that occurred on 16 October 2012. Issues relating to the merits, undertaking for future medical expenses, and general damages were finalized on 10 August 2022. Consequently, this judgment deals only with the aspect of loss of earnings.

[2] On 10 August 2022, the trial in respect of loss of earnings was postponed *sine die* by agreement between the parties to enable the defendant to obtain medico-legal reports.

[3] The matter was re-enrolled for 18 April 2023. However, the trial did not proceed because the defendant asked for a postponement to obtain its medico-legal reports and/or all other relevant reports, which was granted. The matter was enrolled for 6 June 2023.

[4] On 6 June 2023, the defendant had still not obtained its actuary reports to support its industrial psychologist medico-legal report. Upon request of this Court post the hearing, the defendant submitted its actuary reports on 4 September 2023.

PARTIES

[5] The plaintiff is Afikile Mdibi, an adult female person born on 30 June 1996 and residing at [...], in the Eastern Cape Province.

[6] The defendant is the Road Accident Fund, a statutory body created in terms of the provisions of section 2(1) of the Road Accident Fund Act, 56 of 1996 whose main place of business is at 38 Ida Road, Menlo Park, Pretoria, Gauteng Province.

THE ISSUE

[7] The issue to be determined by this Court is the plaintiff's loss of past and future earnings.

FACTUAL BACKGROUND

[8] On 16 October 2012 at approximately 11:30 am at or near the R61 Road, two motor vehicles collided between Prot Edward and Bizana in the Eastern Cape Province.

[9] The accident occurred because of the negligence of either of the insured drivers.

[10] As a result of the accident, the plaintiff who was a pedestrian at the time, sustained injuries ranging from moderate head injury, spinal injury, and headaches. In addition, it is said that the plaintiff suffered a loss of past and future earnings in the amount of R 8 192 100.00.

[11] The defendant is of the view that the plaintiff is not entitled to the full amount claimed.

APPLICABLE LAW

[12] It is now settled in our law that in a claim of loss of earnings or earning capacity, the plaintiff must prove the physical disabilities resulting in the loss of earnings or earning capacity and actual patrimonial loss.¹

[13] There must be proof that the disability gives rise to a patrimonial loss. This depends on the occupation or nature of the work which the plaintiff did before the accident, or would probably have done if she had not been injured.²

[14] Once a loss of earning capacity has been established on a balance of

¹ *Rudman v Road Accident Fund* 2003(SA 234) (SCA) at para 16.

² *Union and National Insurance Co Limited v Coetzee* 1970(1) SA295 (A) at 300A.

probabilities, that loss is generally quantified by actuarial calculation.³ This is done through a three-step process as eloquently put by Wilson J in *Monnakhotle v Road Accident Fund* as follows:

‘...The claimant’s notional future income is first established... Once a notional future income is established, a “contingency” is subtracted.⁴ A “contingency” is a value that represents the vicissitudes of life. Even though we may all hope that our productive capacity will proceed unhindered to retirement, this seldom happens. We get sick. We face unemployment. There are lean years. Sometimes these years outnumber the plentiful ones. The contingency deduction is meant to account for that. The third step is to incorporate the claimant’s injury into the contingency deduction... The final step is to subtract the claimant’s probable future income calculated with the increased contingency deduction from the probable future income calculated without it. The difference is the quantum of the claimant’s likely loss’.⁵

[15] It is evident that an inquiry into damages for loss of earnings is a speculative exercise that needs to be supported by expert evidence and actuarial calculations. Nicholas J in *Southern Insurance Association Limited v Bailey NO*, correctly held that:

‘Any enquiry into damages for loss of earning capacity is in its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of present value of the loss. It has open to it two possibilities approaches. One is for the Judge to make a round estimate of an amount which seem to him to be fair and reasonable. That is entirely a matter of 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

³ *Monnakhotle v Road Accident Fund* (33365/2018) [2021] ZAGPJHC 78 at para 27.

⁴ *Ibid.*

⁵ At paras 27-30.

may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. But the court cannot for this reason adopt a nonpossumus attitude and make no award...'.⁶

[16]A court has wide discretion “*when it assesses the quantum of damages due to loss of earning capacity*” and will award what it considers right.⁷ Even though the actuarial calculations are useful in guiding the court, the court “*is certainly not tied down by exorable actuarial calculations*”.⁸ The percentage of the contingency deduction depends upon a number of factors and ranges between 5% and 50%, depending on the facts of the case.⁹

[17]In light of the above, I now turn to consider the circumstances of this case taking into consideration the written and oral submissions of the parties, actuarial calculations, and expert reports to ascertain whether the plaintiff has made out a case for the relief sought.

EXPERTS REPORTS

[18]I do not intend to refer in detail to the expert reports submitted on behalf of the plaintiff and the defendant but shall merely refer to certain salient features thereof.

[19]I need to indicate from the onset that the counsel for the plaintiff correctly highlighted that the parties did not disagree on the post-accident postulations of the plaintiff's industrial psychologist. Therefore, this limits the legal issue only to pre-accident postulations.

Educational Psychologists

Dr. Halse (defendant)

PRE-MORBID

⁶ 1984 SA 98 (A) at 113F - 114A.

⁷ *Road Accident Fund v Guedes* 2006 (5) SA (SCA) at 586 para 8.

⁸ *Southern Insurance Association LTD v Baily* NO 1984(1) SA 98 at 113 G-114 E.

⁹ See for example, *AA Mutual Association Ltd v Maqula* 1978(1) SA 805 (A) 812; *De Jongh v Gunther* 1975(4) SA 78 (W) 81, 83, 84D; *Goodall v President* 1978(1) SA 389 (W).

[20]The expert *inter alia* noted that the plaintiff was healthy and did well at school until the accident occurred.

[21]Furthermore, the expert stated that the claimant would have achieved matric certification and progressed to possibly a diploma level as her marks suggested that she would have experienced some difficulty studying for a degree.

[22]The expert stated that the plaintiff's pregnancy would have probably prevented her from pursuing further studies.

Dr. Laauwen (plaintiff)

[23]The expert *inter alia* indicated that the plaintiff performed well throughout her foundation phase, intermediate, and senior primary phases including her two years at high school.

[24]Even though she fell pregnant while in Grade 9, she passed that grade. She was involved in an accident in 2012 when she commenced high school, and she was unable to write exams.

[25]According to the expert, when the plaintiff returned to school in 2013, she struggled because of her injuries and was condoned in most of her subjects. The plaintiff passed Grade 11 but struggled to complete matric because of *inter alia* poor concentration and forgetfulness.

[26]The expert concluded that the plaintiff had an estimated average IQ and that she would have progressed well at school by matriculating and obtaining a bachelor's degree or a diploma. The basis for this was that recent studies show that children achieve better qualifications than their parents.

[27]The expert concluded that post the plaintiff's three-year degree or NQF 7 studies, the plaintiff would have entered the open labour market and taken about 3 to 6 months to secure permanent employment where she would have earned in the region of R4 000.00 to R5000.00 monthly.

[28]According to the expert, the plaintiff would have *inter alia* experienced growth in the workplace and entered post earning on par with that of the lower Quartile of Paterson level C1/C2 Annual Guaranteed Packages.

[29]Furthermore, she would have progressed and reached her career ceiling at about the age of 45 earning on par with the median of Paterson Level D1/D2 Annual Guaranteed Packages depending on the degree that she would have completed.

[30]Ultimately, the expert also found that the plaintiff would have received only annual inflationary increases until she reached retirement at the age of 65.

POST MORBID

[31]The defendant's educational psychologist indicated that the claimant has reached her limit academically and that it is highly unlikely that she will be able to complete her schooling or enrol in any further post-school training. The basis for this was that her school performance deteriorated after the accident which occurred whilst she was in Grade 10.

[32]The plaintiff contended that her school performance declined due to her injuries and therefore would not reach her pre-accident potential.

[33]It was further submitted that the fact that the plaintiff has Grade 11, she qualifies for entrance into a TVET College where she could take subjects that are more suited to her abilities such as teaching.

[34]It was further submitted that even if the plaintiff were to be assisted *via* therapeutic services and complete her Grade 12, she would "*in all likelihood find herself entering into the open labour market at a distinct disadvantage against more cognitively able peers*" because employers tend to choose top candidates when selecting and recruiting applicants.

[35]Consequently, it was contended by counsel that the continued cognitive and

psychological difficulties that the plaintiff would experience as compared to her peers when competing for posts, it is unlikely that she will be able to secure employment earning on par with Paterson Level salaries.

[36]The plaintiff would work in a semi-skilled capacity because of her physical impairments and would need to be selective when choosing posts that she desires to pursue. She would find herself in a disadvantaged position compared to her more physically able peers when competing for jobs.

[37]Counsel submitted that the plaintiff in all likelihood would still be able to progress occupationally and would have earned in the region of R 37 200 – R88 000 – R193 000 per annum after reaching her career ceiling at the age of 45.

[38]Based on the above factors, counsel contended that the plaintiff's additional probable loss of income that she will experience should be catered to by applying a significantly higher than average post-accident contingency deduction.

LOSS OF EARNINGS

[39]There were joint minutes of the overlapping experts that were filed namely:

[39.1] Ms Zakia Omarjee and Ms Nompumelelo Shabangu (Occupational Therapists)

[39.2] Mr D Day and Mr H Tomu (Industrial Psychologists)

Occupational Therapists

[40]Both Experts agreed that the plaintiff suffers mild to moderate post-head injury sequelae and cannot pursue a matric pass or tertiary-level studies. However, they contended that she is still trainable. Consequently, this precludes her from highly skilled or professional work.

[41]Both Experts further concluded that the plaintiff has some limitations and will

require some work interventions as she will be unable to do heavy-duty related work but could work as, a cashier, for example.

[42]They further agreed that she would struggle to find work as her narrowed vocational options are limited as compared to uninjured competitors in the open labour market. They further agreed that higher-than-normal contingencies are applicable.

[43]Furthermore, Mr. D Day disagreed with Mr. H Tomu that a Matric Certificate would have *inter alia* equipped the plaintiff with the skills set to secure employment of a skilled nature.

[44]Mr D Day further disagreed with Mr H Tomu that the plaintiff would have *inter alia* reached her career ceiling at the age of 27 years.

Defendant's educational psychologists

[45]On one hand, the defendant's educational psychologist concluded that the plaintiff would have had the cognitive potential to complete a Grade 12 level of education and possibly a diploma. He felt that she would have experienced some difficulty studying for a degree.

[46]On the other, the plaintiff's expert concluded that prior to the accident, the plaintiff would have had the cognitive potential to complete a Grade 12 level of education and a Diploma or a Degree.

[47]There was no consensus between the experts regarding the level of education that the plaintiff would have reached.

PRE-ACCIDENT

[48]According to the plaintiff's expert Mr M Day, had it not been for the accident, the plaintiff would have completed a degree level of education, and it would have taken her 3 to 6 months to secure permanent employment. It was recorded that the

probabilities are that she would have found temporary employment earning in the region of R 4000.000 to R 5000.00 per month. After securing employment, it was indicated that she would have entered a post earning on par with the lower Quartile of Paterson level C1/C2 annual Guaranteed Packages and move on to level D1/D2 annual Guaranteed Packages at around the age of 45 earning as per the degree obtained. On reaching the latter level, the expert stated that she would have received only annual inflationary increases.

[49]The defendant's expert concluded that the claimant would have completed a higher certificate (NQF 5) at the end of 2015 and would have worked in a semi-skilled capacity. It further concluded that she would then have secured an internship during 2017, earning approximately R36 800.00 per annum (lower quartile of salaries for semi-skilled works as per Robert Kock 2023) for 1 year, and then progressing onto R78 000.00 per annum (median of salaries for semi-skilled works) for 3 years. Thereafter, the defendant's expert concluded that the plaintiff would have progressed and reached career earning of R 206 000 per annum (upper quartile of salaries for semi-skilled works). On reaching this level, she would have received only annual inflationary increases.

[50]Both experts agreed that the plaintiff would have retired at the age of 65.

POST-ACCIDENT

[51]The Defendant's industrial psychologist concluded that the plaintiff would be restricted to obtaining work of an unskilled nature and would enter the open market in 2026 earning R 26 000 per annum (lower quartile of salaries for unskilled worker as per Robert Koch 2023) for 3 years. She would then progress on to earn R 47 0000 per month as a median of salaries for unskilled workers based on Robert Koch 2023 after which she will receive only inflationary-based increases.

CONTINGENCIES

[52]Relying upon *AA Mutual Insurance Association LTD V Maqula*¹⁰, the defendant rightly observed that the allowance for contingencies is a process of subjective impression or estimation rather than an objective calculation that is positioned in the sole discretion of the court.

[53]The defendant contended that the plaintiff's results show that the claimant was not a brilliant student before the accident and that her performance had dropped in Grade 9. Notwithstanding her performance's deterioration, she passed Grade 9.

[54]Regarding the past loss of income, the defendant recommended a contingency of 10%. In so far as the uninjured future contingency deduction, the defendant submitted that a more than reasonable contingency deduction of 20% and future injured earning a contingency of 35% to 50% taking into consideration the early retirement of 5-10 years as per the plaintiff's orthopaedic surgeon.

[55]To this end, the defendant contended that the 80% contingencies as proposed by the plaintiff were too high because the plaintiff could still work as per the joint minutes of the occupational therapist.

[56]Therefore, the defendant argued that the amount proposed by the plaintiff was not fair and reasonable.

EVALUATION OF EVIDENCE AND SUBMISSIONS

[57] On the one hand, the plaintiff's industrial psychologist is of the view that the plaintiff would have progressed with her studies until she obtained a degree or its equivalent. In addition, counsel for the plaintiff stood her ground that despite the plaintiff having conceived two children whilst at school, she would have nonetheless continued with her studies. The basis for this is that the plaintiff is a resilient individual who was determined to empower herself with education.

[58]On the other hand, the defendant's industrial psychologist postulated that the

¹⁰ 1978 (1) SA 805 (A).

plaintiff would have obtained Grade 12 and only obtained a year's certificate post-matric. To persuade this court, counsel for the defendant was of the view that the plaintiff's pregnancy on two occasions would have to a certain extent affected her progress with her studies.

[59]I am unable to agree with the defendant's submissions that the plaintiff would have studied up to the level of a one-year certificate. The defendant's submissions seemed to be largely relying on the plaintiff's pregnancy in that she would have struggled to do well in tertiary education. Pregnancy is not a disability. I fail to understand how it could be attributed to someone's ability and/or inability to progress with their studies. The defendant's educational psychologist Mr. Graham Halse also found that the plaintiff would have completed matric and proceeded to obtain a tertiary qualification such as a diploma. This alone defeats the defendant's suggestion that the plaintiff would have studied up to a one-year certificate.

[60]I am persuaded by the plaintiff's educational psychologist that the plaintiff had the required intellectual capacity and intelligence to study. This is something that was admitted by the defendant's educational psychologist. In my view, the evidence before this Court shows that the plaintiff, despite experiencing some challenges in her early life, she had always been determined to be educated. However, post the accident, she largely struggled but still tried to pursue her ambition, of obtaining an education. This is something that is confirmed by the joint minutes of the occupational therapists who *inter alia* stated that the plaintiff's head injury left her with mild to moderate sequelae. Consequently, she is no longer considered eligible to study beyond matric or embark on tertiary education. Furthermore, her cervical and lumbar spine injuries have left her disadvantaged because she can no longer cope with certain forms of physical work.

[61]The plaintiff's industrial psychologist differs with the defendant's industrial psychologist's findings that the plaintiff would have only completed matric and entered the labour market in a semi-skilled capacity. The plaintiff's industrial psychologist was of the view that the possession of a matric certificate is an indication that the plaintiff has a skill that could assist her to enter the labour market. Accordingly, the suggestion that she would have entered the labour market in a

semi-skilled capacity cannot be true.

[62] Additionally, the suggestions by the defendant's industrial psychologist that the plaintiff would have reached her career ceiling at the age of 27 was rejected by the plaintiff's industrial psychologist on the basis that it is generally accepted by industrial psychologists that individuals reach their career ceiling at around the age of 45. This Court is persuaded by the plaintiff's industrial psychologist in so far as the suggestions that individuals reach their career ceiling around the age of 45 is concerned.¹¹ In other words, the defendant's industrial psychologist report falls to be rejected on this aspect. This also negatively affects the options provided for in the actuarial calculations provided by the defendant.

[63] Regarding the counsel for the plaintiff's submission that a significantly higher-than-average post-accident contingency should be applied, the court in *Mashaba v Road Accident Fund*¹² held amongst others that:

“...where sufficient career and income details are available, the actuarial calculation approach may be more appropriate in the present case...”.

[64] This Court is of the view that the plaintiff was able to prove that she is likely to be disadvantaged in the job market in the future because of the injuries she sustained from the accident. What remains to be determined is whether the amount claimed by the plaintiff is fair and reasonable. In my view, this aspect is interconnected with the aspect of career progression and other factors.

[65] My difficulty is that the plaintiff's postulated career progression by her industrial psychologist is in all aspects based on the presumption that the plaintiff's future would have thrived against all the odds. It disregards the current realities such as the astronomic rate of employment and the difficulties faced by countless graduates to secure employment. There is no mention of the effect of the COVID-19 virus on employment possibilities. In my view, Opperman J correctly observed in *I.G.M v*

¹¹ See for example, *Vosloo v Road Accident Fund* (11400/2016) [2022] ZAGPPHC 574 at paras 21 and 37; *Cassiem v Road Accident Fund* (83986/2016) [2022] ZAGPPHC at para 11.

¹² *Mashaba v Road Accident Fund* [2006] 4 All SA 384 (T) at para 56.

*Road Accident Fund*¹³ that:

“The COVID-virus alone, is a reminder that wholly unpredictable events can supervene, causing delays in career progression”.

[66] Indeed, counsel for the plaintiff also rightly observed through reference to legal authority that this Court has wide discretion when it assesses the quantum of damages due to loss of earnings and it is up to the court to award what it considers right.¹⁴ This in one way or the other involves guesswork that needs one to consider actuarial calculations in light of the totality of evidence presented before this Court.

[67] I have carefully considered the actuarial calculations provided by both parties. I am not bound by these calculations because a loss of earning capacity does not easily translate into a precise figure that reflects the actual reduction in income a claimant can in future expect. Furthermore, I do not think that the amount of R 8 192 100.00 claimed by the plaintiff is fair and reasonable. I highlight the reason for my findings below.

[68] This Court has the discretion to award what it deems as fair and reasonable after considering all the circumstances of this case. The circumstances of this case lead me to one conclusion, a fair and reasonable amount would be an amount of R6 192 100.00. The plaintiff's injuries have not completely rendered her unemployable in the future. She is still employable as per the expert's reports.

[69] Ultimately, even though I have not granted the original amount claimed, I accept that the evidence by led by the plaintiff is clear, satisfactory and reliable in every material respect.

ORDER

[70] I, therefore, make the following order:

¹³ [2022] ZAFSHC 251; 2023 (1) SA 573 (FB) at para 14.

¹⁴ *Road Accident Fund v Guedes* 2006 (5) 583 (SCA) at para 8.

(a) The Defendant shall pay the Plaintiff the sum of R6 192 100. 00 (Six Million One Hundred Rand Ninety-Two Thousand One Hundred) in respect of Loss of Earnings.

Sub – Total R6 192 100.00

Less Interim Payment (R2 500 000.00)

(b) TOTAL AMOUNT PAYABLE R3 692 100.00

(The Defendant shall pay the total Judgment amount within 14 days from the Date of Judgment).

(c) The above amount shall be payable into the Attorney's Trust Account as follows:

Name of Bank: Standard Bank

Account Holder: Godi Attorneys

Account Number: [...]

Branch Number: 010145

Type of Account: Trust Account

Branch Name: Van Der Walt Street (Pretoria)

(d) The Defendant shall pay the Plaintiff's agreed or taxed High Court costs as between party-and-party subject to the discretion of the Taxing Master, such costs to include, but not limited to the following:

(i) the costs incurred in respect of the compilation of the Plaintiff's expert reports, and the compilation of the expert affidavits and court attendance fees, on the 18th April 2023 up to and including the 06th June 2023.

(ii) Costs of Counsel including attending court on the 18th April 2023 up to and including the 06th June 2023.

(iii) the Plaintiff's reasonable travel and accommodation costs for attending expert appointments.

(e) The Plaintiff shall, in the event that the costs are not agreed, serve the Notice of Taxation on the Defendant's attorney of record, and shall allow the Defendant 14 (fourteen) court days to make payment of the taxed costs, after service of the taxed bill of costs.

(f) There is no contingency fee agreement signed between the Plaintiff and her Attorney.

(g) The net proceeds of the payment referred in paragraph (b) above, after deduction of the Plaintiff's attorney legal fees ("the capital amount"), shall be payable to the Plaintiff's established and registered Trust Account.

M R PHOOKO

ACTING JUDGE OF THE HIGH COURT,
DIVISION, PRETORIA

APPEARANCES:

Counsel for the Plaintiff: Adv L Haskins

Instructed by: Godi Attorneys

Counsel for the Defendant: Adv L Lebakeng

Instructed by: State Attorney

Date of Hearing: 6 June 2023

Date of Judgment: 24 October 2023