IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No: 3993/2017

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

MAKGAUHELO BETTY MAHLO	**Plaintiff**
and	
ROAD ACCIDENT FUND	**Defendant**

BEFORE:	CHESIWE J
HEARD ON:	22 APRIL 2022
DELIVERED ON:	25 AUGUST 2022

[1] The Plaintiff, a major female and business woman instituted a claim for damages against the Road Accident Fund (RAF) for injuries sustained upon a motor vehicle collision that occurred 26 May 2014. The Plaintiff was a passenger in the vehicle registered [....].

[2] The Defendant accepted liability for 100% (one hundred percent) for the Plaintiff's proven damages. A court order was issued on 21 January 2022 that the Defendant is to pay the Plaintiff an amount of R430 185, 00 (four hundred and thirty thousand one hundred and eighty five rands) as well as an undertaking in terms of section 17 (4) (a) of the **Road Accident Fund Act.**[1]

[3] The Plaintiff's claim for general damages was referred to the Health Professional Council of South Africa (HPCSA), but was denied.

[4] On the day of the hearing, on 22 April 2022, the only issue for argument was future loss of earning capacity.

[5] The Court has to determine the retirement age of the Plaintiff as well as the contingency rate.

[6] The Plaintiff called one witness with respect to the issue of retirement. The Defendant did not call any witnesses.

[7] The Plaintiff testified that, she was a self-employed vendor since 2010 and generating an income of R6 500 (six thousand five hundred rands) per month. She further testified that she was planning to retire at the age of 80 (eighty) years, was it not for the accident and depending on her health.

[8] Under cross-examination the Plaintiff conceded that the law in South Africa states the retirement age is 65 (sixty-five) years of age and the government pension grant for females is capped at 60 (sixty) years and male persons at 65 (sixty-five) years of age. She mentioned that her health will not affect her business, as her thinking and running of the business will not be affected by getting older. She

[1] Act 56 of 1996.

conceded that she is unable to walk at a fast pace as she is no longer young. She mentioned that she applied for the old age pension grant, as her age allowed her to apply for it.

[9] The Plaintiff called Mr Mofosinyana Joseph Ntsala as her witness. He testified that he is 65 (sixty-five) years and he does not belong to a pension fund and receives a government pension grant. He has been a vendor, selling on the streets since the year 2010. He knows the Plaintiff as they have both been vendors since then. Mr Ntsala confirmed that being a vendor is a risky business, as there are criminals and "nyaope boys" (drug addicts) that can rob them and it's even riskier for the Plaintiff as she is a female. Mr Ntsala concluded that depending on his health, he is prepared to work until the age of 80 (eighty) years. That concluded the Plaintiffs case. The Defendant did not call any witnesses and also closed its case.

[10] The legal representatives of both parties were requested to submit written heads of argument on 26 April 2022 and 29 April 2022 respectively.

[11] Counsel on behalf of the Plaintiff, submitted in the written heads of argument that the Plaintiff is strong and healthy enough to retire at the age of 80 (eighty) years, was it not for the accident. He stated that the Plaintiff in her evidence showed that in the 'hawker' (street vendor) industry, it was a norm to retire at 80 (eighty) years, provided she was of sound health and was able to fulfil her duties completely. Counsel submitted that the Court is to apply scenario 4 as calculated in the actuarial report.

[12] Counsel on behalf of the Defendant submitted in the written heads of argument that the Plaintiff has failed to prove that she would have retired at 80 (eighty) years, having regard to her health, personal circumstances, safety/risk factors as well as being an easy target for the criminality on the streets, as 'hawkers'/street vendors sit on the side of the streets when selling their products. Counsel submitted that the court is to consider scenario 1 of the actuarial report.

[13] Counsel for the Plaintiff submitted that scenario 4 should be applicable in this instance. Counsel on behalf of the Defendant disputed that and submitted that

scenario 1 would be more practical since the retirement age in South Africa is 65 (sixty-five) years.

[14] It is common cause that in South Africa, government old age grant is available for females at age 60 (sixty) and for males at age 65 (sixty-five). The Court furthermore takes judicial notice of professionals, government officials, which are considered to retire at age 65 (sixty-five). Government employees in terms of the Government Employees Pension Fund (GEPF), the retirement policy in terms of men and women, varies from 55 (fifty-five), 60 (sixty) & 65 (sixty-five).

[15] However, the Plaintiff in this instance is a vendor, is self-employed and was financially dependent on the income generated from the sale of goods amounting to R6 500 (six thousand five hundred rand) per month. There is currently no case law in respect of the retirement age for a self-employed person as a street vendor. The majority of case law deals with the retirement age of employees in a formal employment setting.

[16] In **Rubin Sportswear v SA Clothing and Textile Workers Union and Others**[2], the Court said:

> "What is the normal retirement age depends upon the meaning accorded the word 'normal' in s 187(2)(b). It, accordingly must be given its ordinary meaning."

[17] In **Bos v Eon Consulting (Pty) Ltd Consulting**[3]**,** the Court accepted the submissions to establish a normal retirement age. The issue of "normal age" was also dealt with in **Hibbert v ARB Electrical Wholesalers (Pty) Ltd.**[4]

[18] Dr. DH Moloto, an orthopaedic surgeon, concluded in his report that the accident has not adversely affected the Plaintiff's life expectancy, nor her ability to work and there is no need for any future orthopaedic treatment.

[2](2004) 25 ILJ 1671 LAC at para 13
[3](JS948/14) [2016] ZALCJHB 305
[4] (2013) 34 ILJ 1190 (LC)

[19] Dr. S Moagi occupational therapist stated in her report as follows:

> "Her competitiveness and productivity will be affected as long as the mechanical pain persists when doing physical work. It was evident that the accident has rendered her less competitive in the open labour market. It is noted that post-accident, Ms Mahlo seemingly suffers loss of productivity.
>
> Following the motor vehicle accident Ms Mahlo stated that she was unable to return to her pre-accident occupation as a vendor due to sequelae of injuries sustained from the accident in question."

[20] Ms Kheswa, the industrial psychologist noted in her report as follow:

> "The accident in question only intervened when she was on the verge of disengagement phase, hence not much could have been expected in terms of career growth and development. Thus, she could have continued with his (sic) pre-accident job till such a time as he (sic) would have retired. She would have continued earning at her pre-accident earnings level until she retired."

[21] The Plaintiff filed an actuarial report by Munro Actuaries and there was no actuarial report filed by the Defendant. The Plaintiff's actuarial report showed four scenarios. Munro Actuaries having calculated four scenarios of the varied retirement ages and concluded that the Plaintiff would have earned R5 500 (five thousand five hundred rand) per month (2014 terms before tax) since the date of the accident and allowed for earnings inflation until retirement ages 65 (sixty-five), 70 (seventy), 75 (seventy-five) and 80 (eighty).[5]

[22] The scenarios are stated as follows in the Munro Actuaries Report:

Scenario 1	Scenario 2	Scenario 3	Scenario 4
Age 65	Age 70	Age 75	Age 80

[5] Munro Actuarial Report, pages 58, 59, 60 and 61 of the Index: Defendant's Expert Reports

Past loss:	R597 300	R597 300	R597 300	R597 300
Future loss:	R80 400	R509 00	R841 400	R1 080 100
Total:	R677 700	R1 106 300	R1 438 700	R1 677 400

[23] Indeed, it is difficult to quantify the loss of earnings of an unskilled, self-employed person such as in this case. The Plaintiff's circumstances are different compared to an employee in the private sector or within government, where calculations are accurate predictions. It is clear that the Plaintiff has suffered loss of earnings and evidently with no case law which can be used or compared with as she is a vendor. The Court can only rely on the mathematical calculations of the actuarial report.

[24] The Plaintiff in her evidence testified that, was is not for the accident, she would have retired at the age of 80 (eighty) years. However, I am inclined to agree with Counsel for the Defendant that during cross-examination, the Plaintiff was evasive on answering certain questions, insisting that she was able to retire at the age of 80 (eighty) years, of which I doubt, as already during trial she did move with some difficulty.

[25] However, it is not unreasonable to accept that she is able to work beyond the age of 65 years (sixty-five). Though there in no case law on the retirement age of a self-employed and unskilled labourer, there are many instances where employees in the formal employment market are allowed to work until the age of 70 (seventy) years and beyond such as is the case for professionals, Attorneys and Ministers, though the Plaintiff's circumstances are not comparable to some of these professionals.

[26] It is clear from the Plaintiff's testimony that depending on her health, she will work beyond the age 65 (sixty-five). I have my doubts that she will be able to work until the age of 80 (eighty) years as on observation during her testimony, she walked with difficulty as she approached the witness stand. The Plaintiff suffers from high

blood pressure pre-accident and is already on the government old age grant, which she has been receiving from the age of 60 (sixty).

[27] The actuarial report on page 57 of the expert bundle, tabulated four scenarios in which the different retirement ages are set out. The Court depends on these calculations as these involve a prediction into the future. In **Southern Insurance Association Ltd v Bailey N.O** [6], Nicholas JA said the following:

> "One is for the Judge to make a round estimate of an amount which seems fair and reasonable. That is entirely a matter of guess work, 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 vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent."

[28] Nicholas JA continued on page 114 C – D as follows:

> "In a case where the Court has before it material on which an actuarial calculations can usefully be made,...while the result of an actuarial computation may be no more than an 'informal guess' it has the advantage of an attempt to ascertain the value of what was lost on a logical basis."

[29] The Plaintiff in this instance is already 65 (sixty-five) years of age and receiving an old age grant from the government. The Plaintiff at this age cannot compete in the labour market as a result of her age. The Court has to therefore accept that as a vendor, she would have worked beyond the age of 65 (sixty-five), had it not been for the accident, but it cannot accept that she would be able to work till the age of 80 (eighty) years.

[30] Having considered the Plaintiff's physical factors, personal circumstances and her general health, it is not completely impossible that she would be able to work

[6] 1984 (1) SA 98 (A)

until the age of 70 (seventy) years. In my view, the second scenario of the actuarial calculations would therefore be more applicable.

[31] Counsel on behalf of the Plaintiff submitted that the Court is to apply 7.5 percent contingency, but not exceed 15 percent taking into consideration that the accident has affected the Plaintiff's competitiveness and productivity as well as the continued pain being experienced when doing physical work. Counsel for the Defendant submitted that a 25 percent contingency be applied for future loss of income.

[32] It is now settled that contingencies, whether positive or negative are an important control mechanism to adjust the loss suffered to the circumstances of the individual case in order to achieve equity and fairness to the parties. There is no hard fast rule regarding contingency allowances.

[33] It is trite that contingency deductions are within the discretion of the Court and depend upon the Court's impression of the case. Contingency is normally calculated at 5 percent for past loss of income and at 15 percent for future loss of income. (See **Southern Insurance Ltd v Bailey N.O**) [7]

[34] Thus an actuarial report merely serves as an aid to the Court (See **Shield Insurance CO Ltd v Hall**) [8]. There are no hard and fast rules for mathematical logic in the determination of contingency discount. Indeed, case law has shown that an older claimant, in this instance, the Plaintiff, the contingency discount rate will be lower than of a younger claimant.

[35] The factors that the Court has to take into consideration when determining contingency are the possibility that the Plaintiff may eventually have a less than normal life expectancy and may experience periods of unemployment by reason of incapacity due to illness or accident or due to labour unrest or general economic conditions. (See **Southern Insurance s*upra***)

[7] 1984 (1) SA 98 (A) at 118 G – H
[8] 1976 (4) SA 431 (A) at 444F

[36] The Plaintiff is already 65 (sixty-five) years and is therefore not a competitor in the labour market. However, reality is that people work into their later years, depending on their health. In **Mogale v Road Accident Fund** [9], the Court confirmed as follows:

> "that people today are healthier and continue to work after the age of 65."

[37] I am thus inclined to accept that the Plaintiff's retirement age would be the age of 70 (seventy) years. Taking into consideration the Munro actuarial report, scenario 2 would be applicable and it is more practical. Bearing in mind what was said in the matter of **Pitt v Economic Insurance Co. Ltd,**[10] Holmes J (as he then was) cautioned

> "…not to pour largesse from the horn of plenty at the defendant's expense."

[38] In the circumstance and in my view, a fair, just and reasonable contingency of 25 percent, be deducted from scenario 2 calculations of R1 106 300,00. Calculated as follows: R1 106 300 – R276 572 = R829 725

[39] Accordingly, the following order is made:

1. The Defendant is ordered to make payment for loss of earnings in the amount of R829 725;
2. Interests on the above sum at the maximum prescribed rate, presently being 15,5 % per annum, 14 days from the date of this judgment to date of final payment;
3. Costs of suit, including costs of 19, 20 and 22 April 2022.

Chesiwe, J

[9] (29208/13) [2014] ZAGPJHC 263 (14 October 2014)
[10] 1957 (3) SA 284 (N) at 287 E-F.

On behalf of the Plaintiff:	Adv. MB Mojaki
Instructed by:	Makubalo Attorneys
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On behalf of the Defendant:	J Gouws
Instructed by:	State Attorney
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