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**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)**

CASE NUMBER: 4762/2021

In the matter between:-

MASHABA: SUZAN SIZAKELE

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT

GREYLING-COETZER AJ

INTRODUCTION

[1] The plaintiff instituted this delictual claim against the defendant for personal injuries sustained during a motor vehicle collision that took place on 16 October 2020.

[2] According to the plaintiff the collision occurred along the Mariti Road, Bushbuckridge, Mpumalanga Province, when a motor vehicle bearing registration numbers and letters [...] and another motor vehicle bearing registration numbers and letters [...] collided. The plaintiff was a front seat passenger in the latter motor vehicle.

[3] Summons was duly served but the defendant did not enter an appearance to defend.

[4] The plaintiff sustained the following injuries:-

- (a) soft tissue injury of the neck;
- (b) bruising of the occiput with concussion;
- (c) laceration of the right ear;
- (d) per-orbital bruising of the left eye;
- (e) soft tissue injury of the right shoulder; and
- (f) transverse laceration over the right-hand metacarpals.

[5] The plaintiff was admitted to the Rob Ferreira Hospital and was discharged twelve days after admission.

[6] When the matter came before court on 25 July 2022, the merits had been settled 100% in favour of the plaintiff in terms of a written offer which was accepted by the plaintiff. The claim for general damages as per the RAF4 had been rejected, thereby ousting the court's jurisdiction to deal with general damages.

[7] The defendant also made an offer in respect of the loss of earning capacity, which was not accepted by the plaintiff. No offer was made in respect of an undertaking for future medical expenses as contemplated in Section 17(4) of the Road Accident Fund 56 of 1996 ("the Act").

[8] Two heads of damages remained to be determined by this court:-

- (a) The plaintiff's entitlement to an undertaking in terms of Section 17(4) of the Road Accident Fund Act 56 of 1996 in respect of future medical expenses.
- (b) The plaintiff's entitlement to past and future loss of earnings.

[9] The plaintiff testified in support of her claim, together with an independent witness and various expert witnesses. In the circumstances of this default judgment, it is not necessary to extensively record each witness evidence as such only a brief summation of that most relevant follows.

[10] The plaintiff testified that she sustained a head injury, various lacerations, a neck injury, injury to her shoulders and her back. She further testified that since the accident she is more forgetful, suffers from headaches, experiences daily pain, she is unable to lift heavy items, she finds it difficult to walk or stand for long durations and she is unable to bend forward. She testified that she needs assistance to go to the toilet and to walk in general.

[11] The plaintiff's highest level of education is Grade 7. For the majority of her working life, the plaintiff was employed as a seasonal farm worker, picking and sorting nuts. In addition, and for six months of each year that she was not employed as a seasonal farm worker, the plaintiff was an informal vendor, selling mainly vegetables from her house.

[12] For six months of a year, the plaintiff earned R26 390.00 at 2020 value in respect of her employment as a seasonal farm worker, and R27 300.00 per year at 2020 value in respect of her income as an informal vendor. This equates to a total income of R53 690.00 per annum or R4 474.00 per month.

[13] The plaintiff testified that since the collision she could not return to her employment as a seasonal farm worker due to her injuries, and similarly had not worked as an informal vendor. The reason for the latter is however not truly accident related as she explained that no funds have been available to purchase stock to sell, and should the plaintiff be able to gather the required funds, she will again resume her work as informal vendor.

[14] The plaintiff introduced her available bank statements and salary advices as partial documentary proof of the oral evidence given.

[15] The plaintiff called Mr Phumlani Mokoena, who testified that he assisted the

plaintiff (who is his aunt) with her street vendor business, and should it be required, will do so in the future.

[16] Dr Geldenhuys is an Orthopedic Surgeon, and testified that he examined the plaintiff twice, first during June 2021 and again during January 2022. He testified that there were very limited medical records available to provide a proper picture of the plaintiff's pre-accident health and that no health issues were reported to have existed prior to the accident.

[17] He further testified that from his clinical assessment she displayed a broad-based, slightly antalgic gait, and her knees are in slight flexion. The plaintiff displayed a transverse scar over the metacarpal joints of her right hand and has a 3cm scar over her right ear. The plaintiff suffered tenderness over the occiput and complains of occasional vision changes. The plaintiff was tender over her cervical spine, occiput, thoracic spine and lumbar spine.

[18] From the specialist investigations through X-rays, it was noted that the plaintiff has marked disc space narrowing at C5/6, which could be long-standing, but was not mentioned in any of the hospital notes, and the plaintiff indicated that she had no issues in this respect prior to the accident. Further, the plaintiff's lumbar spine has marked changes at L3 and L4, and slightly transitional changes in L5/S1 with mild retro-listhesis at L4/5. He explained that this too could be long-standing, but no notes were made that this was radiologically examined or found abnormal at the time of the accident.

[19] He confirmed that having regard to the January 2022 special investigation through X-rays, the position has essentially remained unchanged since the previous examination. The plaintiff still presented with disc space narrowing at C5 to 6, slight calcification of the right shoulder, a marked narrowing of L4/5 and a mild degenerative change of L3/4/5 and S1.

[20] Dr Geldenhuys' two reports were received into evidence and regarded as if it was specifically read into the record.

[21] Dr Smuts, a Neurologist's report was similarly received into evidence. Dr Smuts testified that in his opinion, the plaintiff sustained a blow to the head, which resulted in a mild to moderate concussive head injury with associated brain injury. He confirmed the presence of Fibromyalgia, which he explained has a tendency to be of genetic onset, but considering that no history was available, it is most likely in the present instance that same was caused by the accident. This would also in the main contribute to the emotional and cognitive problems experienced by the plaintiff.

[22] Ms Leslie Taylor, an Occupational Therapist, report was received into evidence. She testified that the plaintiff is capable of light to medium work. She explained that the picking of the nuts fell into the medium category and the sorting into the light category. In her opinion, and ideally, the plaintiff although capable of doing light to medium work, ought not to do so and should be restricted to sedentary to light work due to the injuries sustained, and to avoid the need for early retirement. The plaintiff had no training in respect of sedentary work and from the test result she displayed limited to no potential of being trainings in such work.

[23] She testified that although the plaintiff walked with a slight limp, she walked unassisted. From the test results as set out in her report, the plaintiff demonstrated no limitation in her mobility, as she was able to perform the tested functions for 2/3 of a working day. Difficulty was notice when repetition came in to play.

[24] From her psychological evaluation it was noted that the plaintiff's reasoning was concrete and poor problem-solving skills were apparent. So too her mental processing was slow, with insight and judgment lacking to the same extent as motivation and initiative.

[25] The medico-legal reports by Dr Sevenster (Obstetrician and Gynecologist), Ronel Nel (Clinical Psychologist), Melissa du Plessis (Industrial Psychologist) and Johan Sauer (Actuary) were received into evidence in terms of Uniform Rule 38(2) as these reports contained no evidence on which I required clarity or sought engagement. The report had also been confirmed under oath.

[26] From these reports the following bears brief mention:-

(a) In respect of Dr Sevenster, the complaint of frequency of the plaintiff's menstrual cycle is unrelated to the accident.

(b) Ronel Nel indicated that the plaintiff's depression and anxiety seem to find expression in phycho-somatic systems, including constant muscle pain and tension, headaches, disrupted menstrual cycle and urinary urgency, and would support the diagnosis of Fibromyalgia suggested by Dr Smuts. The plaintiff's subjective experience of pain could therefore be negatively influencing her mood, whilst her compromised emotional functioning could add to a decreased tolerance of pain and influence her capacity to successfully manage her pain.

(c) Melissa du Plessis confirmed the future aspirations of the plaintiff to be pre-accident and to continue working in dual capacity as a seasonal farm worker and self-employed informal vendor for the remainder of her adult working life. Post-accident the plaintiff indicated that she now plans to continue working in the informal sector as a street vendor on a fulltime basis for as long as her health permits, and that she would likely in addition to remaining self-employed, continue to train new farm workers at the outset of the season, as she did since the accident. Further:

- a. She confirmed the employment and income information;
- b. that past loss of earnings stands to be calculated on the available information, more particularly R 6048.80 per annum at 2022 value;
- c. in respect of future loss of earnings, she held that when considering the plaintiff's work and educational history, her age at the time, her indicated career aspirations, her reported and varied earnings just prior to the accident under review, it can reasonably be concluded that the plaintiff had already reached her earning pinnacle when the accident occurred;

d. the plaintiff would likely have continued working in her pre-accident capacity as a seasonal farm worker and self-employed street vendor, and could in this regard have expected inflation-related annual increases only, up until the retirement age of 65.

(d) Mr Johan Sauer calculated the plaintiff's past loss of earnings pre-morbid to amount to R90 599.00 and post-morbid to amount to R7060.00. He further calculated the plaintiff's future loss of earnings pre-morbid to amount to R840 923.00 and post-morbid to R78 125.00.

[27] Founded on the evidence presented by the plaintiff, this court is required to decide:-

- (1) the award to be made to the plaintiff in respect of past loss of earnings;
- (2) the award to be made to the plaintiff in respect of future loss of earnings;
- (3) the contingencies to be applied to the aforementioned; and
- (4) whether the plaintiff is entitled to an undertaking for future medical expenses, as envisaged by Section 17(4) of the Act.

[28] This matter is laid before court in terms of Rule 31(2). The former provides that whenever in an action the claim, or if there is more than one claim, any of the claims is not for a debt or liquidated demand, and a defendant is in default of delivering a notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for the default judgment, and the court may after hearing evidence grant judgement against the defendant, or make such order as it deems fit.

[29] In the present circumstances summons was duly served, but the defendant failed to enter an appearance to defend. In line with the applicable practice directive of this Division, the matter was set down on the trial roll for receipt of evidence.

[30] The applicable burden of proof befalling a plaintiff is no different in these circumstances as it would be in an ordinary opposed trial.

[31] Considering the evidence led on behalf of the plaintiff, the plaintiff has indeed proven that her injuries were sustained due to negligence, which negligence was conceded in terms of the accepted offer. The plaintiff has proved that her loss arose from such negligence and that such loss resulted from the bodily injuries sustained by her.

[32] The plaintiff is thus, entitled to an award in respect of both past and future loss of earnings in amount of R97 659.00 and R919 048.00 respectively.

[33] Considering contingencies. The plaintiff contends for a 5% contingency deduction pre- and post-morbid in respect of past loss of earnings, and 5% and 25% deduction in respect of pre- and post-morbid future loss of earnings.

[34] The 5% contingency in respect of the past loss of earnings is justified, considering that the exact income generated by the plaintiff as informal vendor was not documented.

[35] In respect of the contingencies for future loss of earnings, in the circumstances 5% is too low. In my view the principle of $\frac{1}{2}$ a percent per year to retirement as stated in *Goodall v President Insurance* 1978 (1) SA 389 (W) will be more accurate in the present circumstances. This is said acutely aware that this principle is not a one size fits all solution. However, using this as a guideline and infused with the circumstances of the case to my mind 10% would be just.

[36] In respect of the proposed 25% in respect of post-morbid future loss, a higher contingency deduction is reasonable, considering increased employment vulnerability, labour incapacity, uncertainty, possible periods of unemployment and possible early retirement.

[37] Applying 5% contingency to the past loss and 10% and 25% respectively to the pre- and post-morbid future loss, the total award comes to R777 599.00.

[38] The remaining aspect for consideration is whether the defendant should be ordered to provide the plaintiff with a Section 17(4) undertaking. Considering the proven injuries, as well as the extent of the proposed medical intervention, there is no basis for me to conclude that the plaintiff would not be entitled to such an undertaking.

[39] In the circumstances, I make the following order:-

1. The defendant is ordered to pay the plaintiff an amount of **R777 599.00** [SEVEN HUNDRED SEVENTY-SEVEN THOUSAND, FIVE HUNDRED-AND NINETY-NIGHT RAND, ZERO CENT];
2. Interest on the aforesaid amount of R 777 599.00 at the prescribed rate of interest if the amount remains unpaid after 60(sixty) days of date of this order.
3. The defendant is ordered to provide the plaintiff with a written undertaking as contemplated in Section 17(4) of the Road Accident Fund Act within 30(thirty) days of service of this order upon the defendant.
4. The defendant is ordered to pay the costs of suit.

GREYLING-COETZER AJ

DATE OF HEARING: 25 AND 26 JULY 2022

DATE OF JUDGMENT: 27 JULY 2022

FOR THE PLAINTIFF: Adv Herman Percival
Instructed By Philip Meyer Attorneys
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FOR DEFENDANT: NO APPEARENCE ENTERED (Default Judgment)

Mr C Mkansi – Court Monitor

