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**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: 2887/2018

Heard: 21/02/2021

Date delivered: 28/10/2022

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

GIFT DUIKER

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

EILLERT, AJ

[1] This is a judgment in respect of the quantum of the Plaintiff's claim against the Defendant, the Road Accident Fund. The parties had previously settled the merits of the Plaintiff's claim on the basis that the Defendant would be liable for 100% of such damages as the Plaintiff may prove.

[2] There was no appearance at the hearing of this matter by or on behalf of the Defendant. On the Plaintiff's side, Mr Jankowitz appeared and made application that the Plaintiff be allowed to adduce the evidence of the Plaintiff's expert witnesses by way of affidavit in terms of Uniform Rule 38(2). This application was granted and the affidavit evidence of the Plaintiff's expert witnesses was duly placed before the court. Additionally, the Plaintiff herself also briefly testified.

[3] The Plaintiff is employed by the South African National Defence Force ("the SANDF"). She was a member of the SANDF Women's Football team and on 28 July 2018 the Northern Cape contingent were travelling by bus to Saldanha Bay to participate in the SANDF National Football Championship. She was 27 years old at the time. At approximately 11h00 on that day, and on the N12 national road between Britstown and Victoria-West, disaster struck when the driver of the bus allegedly fell asleep at the wheel and lost control of the bus, causing the bus to overturn. She lost consciousness. The plaintiff sustained extensive injuries in the accident, to wit: a fracture, or in other words an extensor tendon injury of the right hand, soft tissue injury to the right arm, a head injury, soft tissue injuries to both knees, various bruises, abrasions and cuts and emotional shock and trauma.

[5] She slipped in and out of consciousness in the bus after the accident due to shock. The Plaintiff was transported to the Victoria-West Hospital, and thereafter to the De Aar Hospital where she spent a night. The following day she was transferred to 3 Military Hospital in Bloemfontein, where she received extensor tendon repair surgery. She was discharged from hospital on 10 August 2017. The Plaintiff had follow-up treatment on four subsequent occasions, being 21 to 24 August 2017, 30 to 31 August 2017 and 29 to 31 October 2017, and an occasion when she received surgery on her right knee.

[6] The Plaintiff has been left with the following physical sequelae following the accident: she has permanent diminished finger flexion and extension of the third to fifth fingers of her right hand, leaving her with a fixed flexion contracture or what is

known as a claw hand. The accident and operations performed on her right hand has left her with significant scarring. The Plaintiff initially suffered from daily headaches, but the expert witnesses reported that this has improved. However, the Plaintiff testified that the headaches have again become an almost daily occurrence. The Plaintiff also experiences pain when bending her right knee and when walking long distances. She is unable to run. She suffers from fatigue at times, especially in the afternoons, from sleep disturbance, and from neck pain which radiates from the right side of her neck into her right arm.

[7] In her summons, the Plaintiff initially claimed compensation for past hospital and medical costs, future medical costs, loss of earnings or earning capacity and general damages. I will proceed to deal with each claim in turn.

Past hospital and medical expenses

[8] The Plaintiff did not persist with this claim, presumably because all the Plaintiff's costs in this regard were covered by the SANDF. No award will therefore be made in respect hereof.

Future medical costs

[9] The orthopaedic surgeon, Dr J F Greyling stated that no further surgery was indicated or possible for the Plaintiff. In his view though, the Plaintiff would need physiotherapy for the pain she experiences in her right knee and for the strengthening of her right upper limb. This therapy would include consultations, as well as ultrasound treatment, interferential treatment, myofascial mobilization, shortwave therapy and rehabilitation. The Plaintiff would further need anti-inflammatory medication and analgesics. The total monetary amount for conservative treatment of the Plaintiff in 2018 was estimated at R65,000.00. According to Ms S Maree, the occupational therapist, the Plaintiff will further benefit from treatment by a biokineticist, from occupational therapy and psychotherapy.

[10] In the circumstances I am satisfied that a directive in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, should be made for the Defendant to issue an undertaking to the Plaintiff in respect of her future medical treatment and related costs.

Loss of earnings or earning capacity

[11] The Plaintiff completed Grade 12 at school. In 2010 she started her career with the SANDF, and eventually obtained the rank of Private, being a rifleman in the infantry battalion. Part of the Plaintiff's duties before the accident were to operate a rifle and a multi-grenade launcher, and to drive a Ratel combat vehicle. The Plaintiff regularly qualified for deployment, serving in two international deployments and one national deployment before the accident.

[12] Following the accident, the Plaintiff is still employed with the SANDF, but as an administrative clerk in the sports section. As a result of her injuries, the Plaintiff can no longer drive a combat vehicle or perform any of the functions required from a rifleman. Her current work is of a sedentary to light nature and is confined to administrative tasks such as the obtaining of sick notes, medical records and sport orders, the handing out of sport equipment and the organising of sporting events. The Plaintiff is no longer a candidate for deployment.

[13] According to the industrial psychologist, Dr Jacobs, the Plaintiff would be able to continue in her employment with the SANDF until the age of 60. In terms of career progressions, the Plaintiff could have completed all the courses to qualify for promotions, and being still very young at the time of the accident, had a career span of 32 years ahead of her to improve herself. In Dr Jacobs' opinion, it was highly likely that the Plaintiff would have been promoted to a sergeant or staff sergeant, and was likely to be promoted to the position of a warrant officer. The issue of the Plaintiff not being able to be deployed has a big impact on her suggested loss of earning capacity, as the earnings on deployment are significantly higher than what the Plaintiff's normal monthly earnings would have amounted to.

The Plaintiff would likely have been deployed ten times from the date of the accident until her retirement.

[14] Dr Jacobs stressed that an appropriate post-morbid contingency deduction would need to be applied, as the Plaintiff faces significant challenges, making it uncertain how her career will unfold. The Plaintiff has been left emotionally impaired, and it is not foreseen that she will excel in a sedentary career. She might still progress in a sedentary capacity, but will have fewer opportunities for promotion compared to being fully operational. It is impossible that the Plaintiff might retire early or leave her employment with the SANDF due to frustrations of not being fully fit to compete in the SANDF. Should she leave the SANDF, she will not be an equal competitor in the open labour market because of her physical impairments and having no other skills.

[15] Mr Jankowitz urged the Court to accept the likely career path of the Plaintiff. This is not disputed by the Defendant on any grounds, and I do concur with this approach. According to the actuary, Mr Whittaker, the Plaintiff's nett loss of income, applying a contingency deduction of 15% to her uninjured scenario and 25% to her injured scenario, amounts to R3,301,719.00. No past loss of income is applicable as the Plaintiff was remunerated by the SANDF throughout.

General damages

[16] The accident has exacted a significant toll on the Plaintiff. It is not hard to imagine the pain and suffering the Plaintiff has gone through, and which she continues to go through. Where the Plaintiff was previously a very active young woman, she is no longer able to exercise or compete in sports. This has negatively affected her emotional well-being and her enjoyment of life. Functional limitations have been placed on her activities of daily living: her personal care is done with adapted methods, she eats with a set-up, and needs assistance with grooming. Her personal relationships are negatively affected. The Plaintiff's home management tasks have been limited, because she has problems with meal

preparation, cleaning, washing, laundry, and shopping. The Plaintiff testified that she was recently admitted again for post traumatic stress disorder, which confirms the clinical psychologist, Mr Etzebeth's diagnosis, that the Plaintiff exhibited symptoms of mild depression, anxiety, and PTSD.

[17] In quantifying the Plaintiff's general damages, Mr Jankowitz quoted and relied on the following decisions: *Dikeni v Road Accident Fund, C & H*¹, Volume V, p. B4-147; *Krugel v Shield Versekeringsmaatskappy Beperk, C & B*², Volume III, p. 287; *Bester v AA Mutual Assuransie Maatskappy Bpk en 'n Ander, C & B*, Volume II, p. 279; *Wills v Nasson, C & B*, Volume II, p. 722; *Mosia v Federated Employers Insurance Co. Ltd, C & B*, Volume II, p. 15 and *Marais v Rondalia Versekeringskorporasie van S.A. Beperk, C & B*, Volume II, p. 130. I furthermore consulted the following decisions: *Vukeya v The Road Accident Fund, C & H*, Volume VII, p. B4-1; *Vermaak v The Road Accident Fund, C & H*, Volume VII, p. B4 – 86 and *Newhouse v The Road Accident Fund, C & H*, Volume V, p. D5 – 1.

[18] It is trite law that "*each case must be adjudicated upon its own merits and no one case is factually the same as another ... Previous awards only offer guidance in the assessment of general damages.*"³ Bearing this in mind, and after updating the amount of the previous awards for increases in the Consumer Price Index, I agree that an appropriate award for general damages *in casu* will be the amount of R700,000.00.

[19] In the premise the following order is made:

19.1 The Defendant shall pay an amount of R4,001,719.00 (Four Million and One Thousand Seven Hundred and Nineteen Rand) to the Plaintiff in settlement

¹ Corbett and Honey, *The Quantum of Damages in Bodily and Fatal Injury Cases*

² Corbett and Buchanan, *The Quantum of Damages in Bodily and Fatal Injury Cases*

³ See: *Brumage v SA Eagle Insurance Company Ltd (C)*, C & H, Volume IV, E2 – 33 & E2 - 50

of the Plaintiff's claim.

19.2 The aforesaid total amount shall be payable by direct transfer into the trust account of the Plaintiff's attorneys, details of which are as follows:

Nedbank

Account Number: [...]

Branch Number: 198765

Pretoria

Ref: JPR/MTKMP3731

19.3 The Plaintiff shall allow the Defendant 180 (One Hundred and Eighty) court days to make payment of the capital from date of this court order, failing which the Plaintiff will be entitled to recover interest at the applicable interest rate.

19.4 The Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) in respect of 100% of the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to her, after the costs have been incurred and on proof thereof, resulting from the accident that occurred on 28 July 2017.

19.5 The Defendant must make payment of the Plaintiff's taxed or agreed party and party costs on the High Court scale which costs shall include, but not be limited to the following, the quantum of which is subject to the taxing master's discretion: -

19.5.1 The fees of Counsel on the High Court scale.

19.5.2 The reasonable taxable costs of obtaining all expert/medico-legal, addendum, RAF4 Serious Injury Assessment and actuarial reports from the Plaintiff's experts which were furnished to the Defendant.

19.5.3 The reasonable taxable preparation, reservation and qualification fees in respect of all the Plaintiff's experts in respect of which the reports were served on the Defendant.

19.5.4 The costs of a consultation between the Plaintiff and her legal representatives to discuss the terms of this order.

19.5.5 The reasonable taxable accommodation and transportation costs (including Toll and E-Toll charges) incurred by or on behalf of the Plaintiff in attending medico-legal consultations with the parties' experts, and consultations with the Plaintiff's legal representatives, the quantum of which is subject to the discretion of the taxing master.

19.5.6 The above costs will also be paid into the aforementioned trust account.

19.5.7 It is recorded that the Plaintiff's instructing attorneys do not act on a contingency fee basis.

19.6 The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:-

19.6.1 The Plaintiff shall serve the notice of taxation on the Defendant's attorney of record.

19.6.2 The Plaintiff shall allow the Defendant 180 (One Hundred and Eighty) court days to make payment of the taxed costs from date of settlement or taxation thereof.

19.6.3 Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the applicable interest rate on the taxed or agreed costs

from date of allocator to date of final payment.

19.6.4 The Plaintiff shall not issue a writ prior to the expiry of the 180-day period.

**EILLERT, A
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION
KIMBERLEY**

For the Plaintiff: Adv. D. Jankowitz
Instructed by: Stefan Greyling Incorporated
SG/DUI1/SM

For the Defendant: No appearance
Link: 4447033; REF: 560/12695618/1060/0
(Claims handler Mpho Given Rathipa)