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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE

SIGNATURE

Case Number: 30909/2015

27/3/2019

In the matter between:

SOPHIA GABATSHWANE SEGODI

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

POTTERILL J

- [1] The plaintiff, S.G. Segodi (“Segodi”) was injured on 15 August 2013 in a collision along the Mooi-nooi/Brits Road, North West. Segodi was a passenger in a vehicle driven by one, Reggie Moitsheke. The vehicle wherein Segodi was overturned and she was flung out of the vehicle. Her then boyfriend died in the collision.
- [2] She is claiming patrimonial loss from the Road Accident Fund (RAF). The only issue the Court had to decide was whether the plaintiff will as a result of the collision suffer a future loss of income. Although much of the cross-examination related to loss of earning capacity, the plaintiff did not proceed with such claim.
- [3] As a result of the collision Segodi suffered the following injuries:
- (a) a head injury;
 - (b) fractured left collarbone; and
 - (c) a left pelvic fracture.
- [4] On 26 February 2019 a third and final pre-trial was held (two weeks before the trial) wherein neither the merits nor the quantum was admitted by RAF. RAF stated that no assessor would be appointed, but RAF would appoint an orthopaedic surgeon, an occupational therapist and an industrial psychologist. RAF had set out no defence to the merits of the matter. It is worthy to note that as a passenger in

the insured vehicle Segodi only had a duty to prove 1 % negligence on the part of the insured driver, but despite this trite principle RAF did not try and settle the matter.

[5] At the commencement of the trial the defendant had not appointed any experts and chose to proceed without any expert reports. The Fund unsurprisingly had no defence to the merits. Between roll call and being allocated a Judge the merits was however settled, with the RAF accepting 100 % liability for the claim. In this Court this is the RAF's normal practice; either due to a lack of investigation, or the RAF not giving proper instructions.

[6] In chambers, prior to commencement of the trial, counsel for the plaintiff submitted that the trial was allocated to me to run for 2-3 days. Counsel for RAF was however adamant that it would take 2-3 hours. Puzzled as to this substantial difference in opinion I enquired what the defence of RAF is, especially since they had no expert reports pertaining to quantum. Counsel for RAF stayed quiet for a long time and upon me asking him what his defence is, he retorted that he needed time to think. I then enquired if he did not know their defence to the quantum claim upon which he retorted that he needed his file that is outside my chambers. I afforded him the opportunity to fetch his file. He shouted at me that I should not raise my voice and that he would walk out. I said he was welcome to do so. He later apologised for his unacceptable conduct. The defence simply was the following: the industrial psychologist stated in her report that proof of registration, academic results and the diploma certificate were not received. Only upon receipt of

qualification would she be able to positively state that the diploma is equivalent to a NQF level 5. The matter stood down for the industrial psychologist to be called.

- [7] The industrial psychologist took the stand and RAF accepted her expertise and experience. She testified that she for the first time had sight of the matric certificate and the diploma before she started testifying. The National Diploma in ABET practice is in fact a NQF 5 qualification and endorsed by SAQA. Counsel for RAF was not collegially informed by counsel for Segodi that the industrial psychologist was now in possession of the certificate and diploma. Upon being afforded an opportunity to inspect the diploma and certificate counsel for RAF argued that the certificates were not discovered and could not be used. It was ruled that it would be provisionally accepted until Segodi confirmed the contents thereof, and in any event counsel for RAF had asked for these certificates.
- [8] The industrial psychologist, Ms. Mathabela, testified that she assessed Segodi on 28 January 2019. At the time of the assessment she had a copy of the orthopaedic surgeon's report, a copy of the neuro-surgeon's report, a copy of the clinical psychologist's report as well as a copy of the occupational therapist's report. She also had a copy of the hospital records, the RAF1 and RAF 4 forms as well as a copy of Segodi's identity document.
- [9] She concluded that pre-morbid Segodi was in good health. She did however notice that the clinical psychologist reported that Segodi had HIV and was taking ARV treatment. Post-morbid Segodi informed her that she experienced pain in the left shoulder when carrying or lifting heavy objects and she is unable to stand or walk for long periods.

- [10] Pre-morbid Segodi completed Grade 12 after failing it twice. She had also once failed Grade 2. At the time of the accident she was enrolled for a human resource diploma at Mankwe FET College as a N4 Human Resource first year student. Post-morbid Segodi reported that upon her return to the College she could not stand for prolonged periods as her left clavicle became painful especially in inclement weather conditions and she could not walk for long periods. Although passing two of the four modules she discontinued with the course as she was no longer interested and she had secured a learnership opportunity.
- [11] In 2016 she completed a national diploma in ABET training through the Department of Education. As expressed previously she could now confirm that a national diploma in ABET practice is at a NQF level 5. With this qualification Segodi commenced employment at the Department of Education at Ponelepele Adult Centre North West as a facilitator employed on a part time basis. Her duties included teaching adult learners to read and write, marking tests and examination papers and giving lessons. She received training on the job, but there were no career progression opportunities within this line of work. This employment in any event ceased in June 2016 when her contract expired. She received R2 800 per month.
- [12] In July 2018 she secured alternative employment at Galaxy Bingo in the capacity of a general worker employed on a permanent basis. For this she received remuneration of R4 400 per month. She indicated that she also herein received training on the job, but the difference is that herein there is career progression opportunities. Segodi stated that she is unable to carry heavy objects and still cannot stand for prolonged periods. From the 11th of February 2019 she had been

moved to a position of a chef and her duties included cooking though her salary remained the same. The witness contacted the employer of Segodi at Galaxy Bingo and he informed her that Segodi never told him of the accident. He confirmed her salary of R4 400 per month and submitted that Segodi's performance was good, however, there were no promotional opportunities within the company. He confirmed that the retirement age is 60. Segodi had never complained of any pain or problems with executing her job.

[13] In determining the employability and future earning capacity of Segodi the witness assessed her against criteria impacting on individual work performance such as cognitive, emotional and physical variables. The witness testified that but for the accident, Segodi would in any event likely would not have completed her N4 studies in Human Resource Management. This was not contested by RAF.

[14] In terms of her National Diploma in ABET Training in 2016 she was appointed on a contract part-time basis as a facilitator and earned R2 800 per month. She did so as she had acquired a National Diploma in ABET Training which was equivalent to NQF level 5. She did attempt to phone the Ponelepele Adult Centre but had no response. However she testified that in any event it would depend from contract to contract and at what institution she was giving adult lessons what her income would be. The earnings in this sector are not regulated and would be dependent on the place of employment. She therefore used the PE Corporate Prediction of Entrance and Career Progression in the formal sector for individuals with a NQF level 5. As she would have entered the corporate labour market with a semi-skilled capacity she would earn at Patterson level B3. She anticipated that she may have been capable

of dealing with job complexity at the Patterson job grade C1/2 by career ceiling 45-50 years. Thereafter there would only be the annual inflationary increases until she reached the retirement age of 65.

- [15] Post-accident the witness took cognisance of the fact that according to the orthopaedic surgeon Segodi suffers discomfort and chronic pain from the injured area. She has never been pain-free since the accident. The occupational therapist opined that Segodi has a 5 % whole person impairment. In fact the conclusion arrived at was that she is unemployable and that the injuries sustained would make it difficult for her to compete fairly in the open labour market in that she would have difficulty doing jobs that requires physical exertion. The neuro-surgeon confirmed that Segodi is suffering from chronic pain since the accident has occurred. According to the clinical psychologist it was unlikely that the possible head injury sustained by Segodi post-accident has led to any significant cognitive decline. Her physical injuries however had impacted on her occupational capacity and functioning. According to the occupational therapist Segodi is ideally suited for sedentary to light work where she can alternate positions for most of the time. However, her low level of education and lack of office administrative work experience would make it difficult for her to secure pure sedentary work. Segodi has difficulties participating in strenuous physical activities as it causes pain and discomfort to her lower spinal cord and left upper limb. She had difficulties to perform heavy manual tasks due to painful upper limb and lower spinal cord pains on repetitive movement. The occupational therapist concluded that Segodi's marketability and ability to compete fairly in the open labour market has been

reduced as a result of the injuries she suffered in the accident. Her physical deficits would negatively impact on her ability to function and her presenting pain symptoms would place her at a disadvantage when competing for better work in the workplace.

[16] Based on these reports the industrial psychologist then assessed the employability and earning capacity on cognitive, emotional and the physical variables as set out by the experts. Pre-accident employment would be that of teaching with her national diploma in ABET training. This is however adult education rendering it a semi-skilled capacity earning at Patterson level B3. Post-accident she left the career path of facilitating at an Adult Centre because her contract expired and she obtained no further contract. She did however secure employment at Galaxy Bingo as a general worker and as a chef. It would seem that there is also no upward progression in this employment as with the ABET training, training adults. She concluded that due to the impact of the collision on her physical ability she would be disadvantaged in the open labour market. As she is suffering from chronic pain sustained to a pelvis fracture, a left clavicle fracture and lumber spine soft tissue injury it would affect her work performance.

[17] She did not make much of the cognitive capacity of Segodi post-collision as it was not severely affected. Although the occupational therapist did comment on suitability as an ABET facilitator the industrial psychologist was of the opinion that the position of a facilitator and educator implicated prolonged standing which may compromise her work productivity. It is also mostly done on a contract basis and in the open labour market where Segodi would be competing for employment the official unemployment rate is 27,5 %. Thus, a saturated highly competitive open labour

market where it could be expected that Segodi may experience longer periods of unemployment versus uninjured counterparts. She therefore opined that in accounting for post-accident injuries as well as documented limitations Segodi would be operating in a diminished capacity. She may continue working as a kitchen assistant, receiving inflationary increases until retirement age of 65.

[18] In cross-examination it was put to her that Dr. S.K. Mafeelane, the orthopaedic surgeon, noted that Segodi had no gait and her shoulder had a normal range of motion. She was confronted why this was not reflected in her report. She answered that she based her information from Dr. Mafeelane as to the impact of the injury and the pain and suffering set out for future loss of income. She specifically relies on any chronic pain, as chronic pain is one of the indicators to utilise whether employment is impaired or not. Dr. Mafeelane noted the impact of the injury as Segodi having difficulty in carrying and lifting heavy objects. She has difficulty in doing household chores and bending. She suffered severe pain after the accident. She continued to suffer the inconvenience and discomfort of chronic pain from the injured areas. She has never been pain free since the accident. No criticism can be levelled at the industrial psychologist for taking these factors into account.

[19] She was also in cross-examination criticised for not obtaining precise salaries with an ABET diploma and easily could have done so by phoning around. Once again her answer was probable and logical; she had tried to phone the Pamelopele Adult Centre where Segodi was employed on a part-time basis but had no luck in obtaining the information. She did not pursue this, but used as indicator the PE Corporate Prediction of Entrance and Career Progression, especially since the

earnings in this sector are not regulated and would be dependent on the specific place of employment. It was also put to her that the actuary should not have utilised the income she had received at Galaxy Bingo, but he should have utilised the ABET qualification from which to calculate the figures. Her answer thereto was that he could have, but it was her opinion that in the position of a facilitator or educator the prolonged standing may compromise her work productivity whereas a kitchen assistant is a better scenario.

[20] Much was also made of the fact that the witness' interview with her present employer reflected that Segodi had not mentioned the accident and accordingly it must be accepted that in fact there is no impairment. I find this argument to be nonsensical, because one would not inform a new employer of any impairment especially in a job market with a 27,5 % unemployment rate, as its likely effect would be that you would not be appointed or would be retrenched.

[21] It was also put to her that the actuary should not have included the furtherance to C1/C2 MED package because this was a baseless assumption. Her current employer noted that there was no promotional opportunities within the current employment. Although the witness testified that Segodi may later perhaps become a supervisor, I doubt that through promotion she would be qualified as skilled as provided for with C1/C2. Nothing in the report indicated prospects of further educational training as a possibility to increase career progression. I thus agree that the actuary should not have included a skilled level at the Patterson job grade C1/C2 by career ceiling 45-50 years old. The calculations should thus stay at the Patterson job grade B3.

- [22] Much was made of the fact that Segodi post-accident switched career and is now utilising this new career as basis for the calculations. Segodi effectively lost her job as the contract for adult education with her ABET diploma expired. She made a plan and obtained work as a cleaner, now a chef in a kitchen. No court is going to punish such a plaintiff for taking initiative, the position she now holds is not a meteoric rise in employment; in fact from teaching to cleaning seems to me to be a downward trend. She has however with this move secured permanent employment versus contract employment with a minimal increase to her salary of R1 600 per month; an amount not exactly taking one's breath away. I am satisfied that working on this scenario is fair and reasonable to Segodi and no abuse of the taxpayer's money. But in any event, there was simply no evidence to the contrary for the RAF.
- [23] The actuary did not adjust the values for general contingencies. On behalf of Segodi a 5 to 15 % contingency for the uninjured income was argued and a 15 % contingency for the now injured income. The counsel for RAF declined to make any argument pertaining to contingencies. I am satisfied that a 15 % contingency for uninjured income as well as a 15 % contingency for now injured income should be applied.
- [24] I accordingly make the draft order marked "X" an order of court.

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 30909/2015

HEARD ON: 6-7 March 2019

FOR THE PLAINTIFF: ADV. J.H.P. HATTINGH

INSTRUCTED BY: Chueu Incorporated

FOR THE DEFENDANT: ADV. H.J. STRAUSS

INSTRUCTED BY: TM Chauke Attorneys

DATE OF JUDGMENT: 27 March 2019

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: 30909/2015

In court _____

Before the Honourable Judge Potterill

On 27 March 2019

In the matter between:

SEGODI, SOPHIA GABATSHWANE

Plaintiff

and

ROAD

ACCIDENT

FUND

Defendant

DRAFT ORDER

1. The Defendant concedes the merits and shall compensate the Plaintiff 100 % of the Plaintiff's proven or agreed damages.
2. The amount pertaining to the loss of income as set out in the actuary report dated 20 February 2019 must be adjusted as follows:
 - 2.1 Income uninjured must exclude any calculations on the C1/C2 Med package;
 - 2.2 15 % contingencies must be applied to income uninjured an 15 % to income injured.

The defendant is to pay the plaintiff the amount taking into account paragraphs 2.1 and 2.2 above in settlement of the Plaintiff's claim.

3. The Defendant will not be liable for any interest on this payment if made timeously.
In the event of default on the above payment, interest shall accrue on such outstanding amount at the rate of 10,25 % per annum calculated from due date until date of payment.

4. The Plaintiff nominates as the account into which the above payments must be paid:

Name of Accountholder	CHUEU ATTORNEYS
Bank	ABSA
Branch	LEPHALALE
Branch Code	334547
Account Number	[....]
Type of Account	CHEQUE ACCOUNT

5. The Defendant shall furnish Plaintiff with an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, No 56 of 1996, to compensate the Plaintiff for 100 % of the costs of the future accommodation of the Minor in a hospital or nursing home, or treatment of or rendering of any services or supplying of any goods, resulting from the injuries sustained by the Minor as a result of the accident which occurred on 15 AUGUST 2013, after such costs have been incurred and upon proof thereof.

6. The Defendant shall pay the Plaintiff's party and party costs on the High Court scale either as taxed or agreed to date hereof which costs will inter alia include, up to and including the appearance for trial on 6 and 7 MARCH 2019, subject to the following condition:
 - 6.1 The Plaintiff shall, in the event that costs are not agreed, serve the Notice of Taxation on the Defendant's attorney of record;
 - 6.2 The Plaintiff shall allow the Defendant 14 court days to make payment of the taxed costs.

7. Such party and party costs will include:
 - 7.1 The cost of senior-junior counsel;
 - 7.2 The reasonable taxable costs of obtaining all expert and medico-legal reports and follow-up reports from the Plaintiff's experts which were furnished to the Defendant, as well as preparation and reservation fees, if any,, as the Taxing Master may on taxation determine, of the following experts:

7.2.1 Dr MAFEELANE – Orthopaedic Surgeon

7.2.2 Dr SEGWAPA – Neuro Surgeon

7.2.3 MEC KALANE – Clinical Psychologist

7.2.4 G MATHALA – Occupational Therapist

7.2.5 MAGETHI – Industrial Psychologist

7.2.6 J KOCH – Actuary

8. It is recorded that no contingency agreement applies to the matter.

BY ORDER OF COURT

THE REGISTRAR

Counsel for Plaintiff: Adv JHP HATTINGH (cell: 0825755695)

Counsel for Defendant: Adv. H STRAUSS (cell: 0828704850)