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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no. 833/2017

In the matter between:

T M

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT BY: **I VAN RHYN AJ**

HEARD ON: **19 AND 20 FEBRUARY 2019**

DELIVERED: **5 APRIL 2019**

INTRODUCTION:

- [1] The plaintiff instituted action against the defendant in terms of the provisions of the Road Accident Fund Act No 56 of 1996 (“the Act”) for the payment of R1,429,135.00 in damages arising from an incident which took place on 17 March 2016. A motor vehicle with registration letters and -number [...] GP, driven by Mr. Hlalele (the insured driver) failed to slow down and stop at the stop sign in Maeli Street Bohlokong, Bethlehem and collided with the plaintiff who was crossing the street. The plaintiff was a pedestrian at the time of the incident. The plaintiff’s action is based on the negligence of the insured driver.
- [2] On the 27th February 2018 Bokwa AJ ordered that the merits and quantum of the plaintiff’s claim are separated in terms of the provisions of Rule 33(4) and the issue of quantum to be adjudicated upon at a later stage. By agreement between the parties it was further ordered that the defendant is liable to pay 80% (eighty percent) of the plaintiff’s proven or agreed damages. The defendant was ordered to furnish the plaintiff with an undertaking in terms of the provisions of s 17(4)(a) of the Act, limited to 80% in respect of future accommodation of the plaintiff in a hospital or the rendering of future medical treatment arising from the injuries sustained in the motor vehicle accident.
- [3] This matter was set down for hearing on 19, 20 and 22 February 2019 to adjudicate upon the remaining issues regarding the quantum of the plaintiff’s claim in relation to:
- a) past medical and hospital expenses;
 - b) past loss of income;
 - c) estimated future loss of income: and
 - d) general damages.
- [4] On 19 February 2019 the matter stood down with the view of a possible settlement of the plaintiff’s claims. However, on the following morning the defendant rejected the plaintiff’s “ Serious Injury Assessment “ and the trial proceeded on the plaintiff’s claim for past loss of income and future loss of earnings or earning capacity. The plaintiff did not adduce any evidence

regarding her claim for past medical and hospital expenses and abandoned her claim in this regard.

THE INJURIES SUSTAINED BY THE PLAINTIFF.

- [5] The plaintiff was 34 years old at the time of the motor vehicle accident. She was transported to the Phekolong Hospital subsequent to the incident. The following morning she was transferred to the Dihlabeng Provincial Hospital for further intervention. She sustained a fracture to her right proximal tibia and fibula and a fracture to her 5th metatarsal in her right foot. She was taken to theatre on 22nd March 2016 for an Open Reduction Internal Fixation of the tibia and the 5th metatarsal. Whilst in hospital she received physiotherapy treatment in the form of strengthening exercises and mobility training with the aid of crutches. She was discharged from hospital on 23 March 2016. She continued to mobilize with two crutches for approximately three months and then started using only one crutch. By November 2016 the plaintiff was mobilizing independently.
- [6] Several expert notices were filed by both parties in terms of the provisions of Rule 36 (9)(a) and (b). Joint minutes in terms of the provisions of Rule 35 (9) were filed by the following medical experts and handed up as Exhibits “A”, “B” and “C” respectively:
- (a) Orthopaedic Surgeons, Dr L F Oelofse and Dr. T S Bogatsu dated 29 August 2018;
 - (b) Occupational Therapists, S Gouws and S Moagi dated 18 January 2019;
 - (c) Industrial Psychologists, Mr. Ben Moodie and Ms M Kheswa dated 13 February 2019.
- [7] The Orthopaedic Surgeons agree that the plaintiff suffered from acute pain during the first two weeks after the accident. During August 2018 she was still

experiencing pain with a profound impact on her amenities of life. Dr Oelofse opines that the plaintiff is an unfair competitor in the open labour market and must be accommodated in a light duty and sedentary working environment. Due to her injuries the plaintiff will not be able to do physical labour. In the event that the plaintiff is able to obtain employment, provision must be made for 5 (five) years early retirement. Dr Bogatsu however disagreed and stated that the plaintiff's productivity and retirement are not affected by the injuries that she sustained. Both Orthopaedic Surgeons agreed to defer to the opinion of an Occupational Therapist and an Industrial Psychologist.

- [8] The Occupational Therapists indicated that the plaintiff gave different versions as to her school education and therefore uncertainty existed whether the plaintiff completed Grade 10 or indeed completed Grade 11. The Industrial Psychologists investigated this aspect and agree that the plaintiff progressed up to Grade 11 but failed this grade and then dropped out of school. She has no further formal or informal qualifications.

- [9] The Occupational Therapists agree that the plaintiff will experience reduced occupational choices in the open labour market compared to able bodied, same age peers and she has therefore become an unequal competitor in the open labour market. The plaintiff will benefit from optimum pain management, rehabilitation of the right lower limb, training and energy conservation techniques. The pre-accident employment information provided further uncertainties as the plaintiff indicated to Mrs Gouws that she was employed as a packer (groceries) at a till point at Shoprite Checkers prior to the accident while she indicated to Mrs Moagi that she worked as a seasonal farm worker. Again the Industrial Psychologists investigated the inconsistency and concluded that the plaintiff initially entered the open labour market as a farm worker and earned a salary of R1000.00 per month. During February 2015 she obtained employment at Shoprite in Bethlehem as a packer and earned an income of R468.99 per week.

POST-ACCIDENT EMPLOYMENT.

- [10] The experts agree that the plaintiff was unable to return to her pre-accident employment due to the physical limitations resulting from the injuries sustained in the accident. The plaintiff has been unemployed since. The Occupational Therapists agree that the plaintiff presented with reduced standing and walking endurance and that she will struggle to meet the demands of excessive or prolonged walking and standing. She is best suited to meet the demands of sedentary work with aspects of light work which does not have excessive mobility demands. She will never be able to do physical labour. Noting the opinions of the experts as well as the plaintiff's level of education and her work experience, the Occupational Therapists concluded that the plaintiff will not qualify for work which is of sedentary in nature and that the plaintiff can thus, for all practical reasons, be regarded as unemployable in the open labour market.
- [11] The plaintiff presented the evidence of Mr Johan Sauer, an actuary practising as such at Brooklyn, Pretoria. The actuary calculated the loss of earnings on the basis of loss according to Mr. Moodie and as well as an alternative calculation on the basis proffered by Ms Kheswa. It is therefore not in dispute that the plaintiff is unable to return to her pre-accident work due to the physical limitations resulting from the injuries she sustained, but the issue in dispute concerns the pre-accident income potential of the plaintiff and the contingencies to be applied. Mr. Moodie opines that if the plaintiff continued working as a farm worker the prescribed minimum wages as set out by the Department of Labour must be taken into consideration when calculating her future loss of earnings. If the plaintiff continued working as a packer her income would have been approximately R4 365.00 per month, slightly more than a farm worker. Ms Kheswa stated that calculating the plaintiff's loss of income on the basis of a full time packer might not be fair as she was a casual employee during the festive season and she was a farm worker from March to September.
- [12] Counsel on behalf of the plaintiff contend that, due to the conflicting opinions of the Industrial Psychologists regarding the pre-accident income potential of the plaintiff, the opinion of Mr Moodie, that the average income between a

farm worker and a packer should be used to calculate the pre-accident income potential of the plaintiff. Ms Kheswa proposed that the pre-accident income potential of the plaintiff should be calculated on the basis of a farm worker. It is not disputed that the plaintiff worked as a packer at Shoprite Checkers in Bethlehem from February 2015 until January 2016, approximately two months prior to the accident occurred in March 2016.

- [13] Counsel on behalf of the defendant agree that the opinion of Mr Moodie is considerate of the fact that the plaintiff submitted proof of her income as a packer and should therefore be the preferred opinion under the circumstances.
- [14] On the basis that the plaintiff's last employment prior to the accident was as a packer in Bethlehem, I am convinced that the opinion of Mr Moodie is more pragmatic under the prevailing circumstances and I therefore agree with the argument that the calculation of the plaintiff's future loss of income should be calculated as proposed by Mr Moodie.

CONTINGENCIES.

- [15] In **Southern Insurance Association v Bailey NO**,¹ Nicholson JA held as follows concerning computation of future loss of earnings as a component of delictual damages: *"Any enquiry into damages for loss of earning capacity is of 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 the present value of the loss."*
- [16] Contingencies are the *"hazards of life that normally beset the lives and circumstances of ordinary people"*² and should therefore, *"by its very nature, be a process of subjective impression or estimation rather than objective*

¹ 1984 (1) SA 98 (AD) at 113G.

² Corbett & Buchanan, *The Quantum of Damages*, Vol II 360 at 367.

calculation”³. Contingencies for which allowance should be made, would usually include the following:

- (a) the possibility of illness which would have occurred in any event;
- (b) inflation or deflation of the value of money in future; and
- (c) other risks of life such as accidents or even death, which would have become a reality, sooner or later, in any event. ⁴

[17] In **Sandler v Wholesale Coal Suppliers Ltd**⁵ Watermeyer JA held as follows: *"The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the Judge's view of what is fair in all the circumstances of the case"*.⁶ In the Quantum Yearbook⁷ the learned author points out that there are no fixed rules as regards general contingencies. However, he suggests the following guidelines:
"Sliding scale: yz% per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in the middle age...
Normal contingencies: The RAF usually agrees to deductions of 5% for past loss and 15% for future loss, the so-called normal contingencies."

[18] Mr Greyling, who appeared for the plaintiff, submitted that contingencies should be applied at the rate of 5% in respect of past loss and 12½% in respect of future loss of earnings, being the average between 10% and 15% as initially calculated by the actuary. Counsel on behalf of the defendant conceded that the average of 12½ % will be fair under the circumstances.

[19] The plaintiff was 34 years of age at the time of the accident. The only work experience she has is as a farm worker and a packer. She suffered from hypertension since 2014. She experiences increased pain in her right leg

³ Shield Ins. Co. Ltd v Booyesen 1979 (3) SA 953 (A) at 965G-H.

⁴ Corbett & Buchanan, The Quantum of Damages, Vol I at 51.

⁵ 1941 AD 194.

⁶ Sandler v Wholesale Coal Suppliers Ltd at 199.

⁷ Robert Koch, 2017 Edition, p 126.

when sleeping and suffers from pain in her leg and foot when standing for prolonged periods and during cold weather. She will suffer a loss of income due to sick leave for future treatment and surgery should she be able to obtain employment. She has three children, the youngest is 3 years old and her two sons are 7 and 16 years of age. She is not married but involved in a long term relationship. The plaintiff still suffers from pain in her right lower leg, ankle joint and foot which caused a profound impact on her productivity and working ability and will continue to do so in future. With the plaintiff's level of education, area of experience as well as the effects of the injuries it will be very difficult for her to gain future employment. I also take note of the unemployment rate of approximately 40% prevailing in South Africa.

Having regard to all the circumstances of this matter I am of the view that a contingency factor of 12½% should be applied.

- [20] The defendant is liable to pay 80% (eighty percent) of the proven or agreed damages. The plaintiff's past loss of earnings is calculated at an amount of R111 482.00 and an amount of R839 807.50 for future loss of earnings. The plaintiff should therefore be compensated in the total amount of R 761 031.60 in respect of her loss of earnings, after apportionment. This amount is reflected in the draft order submitted by the plaintiff's counsel, which I intend to make an order of Court.

[21] **ORDER:**

1. The defendant is ordered to compensate the plaintiff in the amount of R761 031.60 (Seven hundred and sixty One Thousand and Thirty One Rand and sixty Cents).
2. Payment of the amount referred to in paragraph 1 above is to be made in the plaintiff attorney's trust account with the following details:

ACCOUNT HOLDER:	VZLR INC
BRANCH:	ABSA BUSINESS BANK HILLCREST
BRANCH CODE:	632005
TYPE OF ACCOUNT:	TRUST ACCOUNT

ACCOUNT NUMBER: [...]

3. In the event of default on the above payment, interest shall accrue on such outstanding amount at 10.25% (at the mora rate of 3.5% above the repo rate on the date of this order, as per the Prescribed Rate of Interest Act, 55 of 1975, as amended) per annum calculated from due date, as per the Road Accident Fund Act, of payment;
4. The Defendant is+ to pay the Plaintiff's taxed or agreed party and party costs into the above mentioned account up to and including the trial dates of 19 and 20 February 2019, for the instructing and correspondent attorneys, which costs shall include but not be limited to the following:
 - 4.1 All reserved costs to be unreserved, if any;
 - 4.2 The fees of Senior Junior Counsel inclusive of but not limited to counsel's full, reasonable day fee and fees for preparation and the preparation of heads of argument;
 - 4.3 The costs of obtaining all expert medico-legal and any other reports of an expert nature which were furnished to the Defendant and/ or it's experts;
 - 4.4 The costs of obtaining documentation/evidence, scans, considered by the expert(s) to finalise their reports;
 - 4.5 The reasonable taxable qualifying, preparation, reservation, travelling and attendance fees of all experts, including the costs of consultation fees with the legal teams, if any,

- 4.6 The reasonable travelling- and accommodation cost, if any, incurred in transporting the Plaintiff to all medico-legal appointments;
- 4.7 The reasonable costs for an interpreter's attendance at court at the medico legal appointments for translation of information, if any;
- 4.8 The above mentioned payment with regard to costs shall be subjects to the following conditions:
 - 4.8.1 The Plaintiff shall, in the event that the costs are not agreed, serve the notice of taxation on the Defendant's attorneys of record, and
 - 4.8.2 The Plaintiff shall allow the Defendant 14 (Fourteen) calendar days to make payment of the taxed costs;
 - 4.8.3 In the event of default on the above payment, interest shall accrue on such outstanding amount at the prescribed mora rate on the date of taxation/settlement of the bill of cost, as per the Prescribed Rate of Interest, Act, 55 of 1975, as amended, per annum, calculated from due date until the date of payment.

I VAN RHYN AJ

On behalf of the Plaintiff:
Instructed by:

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VZLR Inc. c/o Du Plooy Attorneys

On behalf of the Defendant:
Instructed by:

Adv. K N Peterson
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