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

|                              |     |
|------------------------------|-----|
| Reportable:                  | /NO |
| Of Interest to other Judges: | /NO |
| Circulate to Magistrates:    | /NO |

Case number: 3507/2015

In the matter between:

**MARATSWANENG MARIA MOTLHALE**

**PLAINTIFF**

**And**

**ROAD ACCIDENT FUND**

**DEFENDANT**

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**HEARD ON:** 19 JUNE 2019

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**JUDGMENT BY:** MOLITSOANE, J

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**DELIVERED ON:** 20 SEPTEMBER 2019

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- [1] This claim is for damages arising out of a motor vehicle collision which occurred on the 6th May 2011. The plaintiff was a passenger. The merits were settled on the basis that the defendant was liable for 100% of the Plaintiff's proven or agreed damages. On the 29<sup>th</sup> March 2019 the defendant agreed to pay an amount of R350 000 to the plaintiff being in respect of general damages. The defendant also furnished the plaintiff with an undertaking in terms of s17 (4) (a) of the Road Accident Fund Act, 56 of 1996.
- [2] In the sequel to this claim for damages, this court is called upon to adjudicate plaintiff's claim for past and future loss of earnings.
- [3] The defendant admitted into evidence the reports of the occupational therapist, Letittia Delport, the orthopaedic surgeon, Dr JF Ziervogel and the serious injury assessment practitioner Dr Motlhamme. The industrial psychologist, Susan Van Jaarsveld and Johan Saure, an actuary also presented reports and both these experts gave oral evidence.
- [4] The plaintiff testified that she passed grade 11 at school. After leaving school she sold fruit and vegetables. She obtained a Grade C security qualification and completed an NQF 3 Diploma Grade C in the security industry in 2010. She was employed at various security companies as a security guard. Her work at the time of the accident, *inter alia*, entailed performing access control at the main gate of Metro Fruit and Vegetable market. This work was of a physical nature requiring the use of both hands and involved the opening of boom gates. At the time of the accident

her earnings were in the region of R2 500.00 per month. She also received overtime payment. She also did hair for customers and earned in the region of R900.00 to R1 250.00 per month in this private venture.

[5] The plaintiff testified further, that after the accident she returned to her job but was transferred to another position at the Department of Education as she was unable to manage her duties. A week later she was transferred to Mmabana Cultural Centre in Thaba Nchu where she performed light duties. She was retrenched in 2013.

[6] The plaintiff testified that she applied for numerous jobs in the Security industry but was unsuccessful due to her disability as a result of an amputated left thumb. She testified that she had considered selling fruit and vegetables but faced the challenge of lack of funds and the possibility of not being able to lift and carry her stock.

[7] Ms Susan Van Jaarsveld evaluated the plaintiff on the 15<sup>th</sup> April 2014. In the said report she says:

*“5.1.3.2....Mrs Motlhale also indicated that she received her full salary during her recuperation period and was placed on light duties on her return to work. In May 2013 Mrs Motlhale was retrenched after the contract of her employer was ended at the venue where she was employed.*

*6.6 With regard to Mrs Motlhale’s post-accident income potential she returned to her work as a security guard on the 1<sup>st</sup> of June*

**2011. According to Mrs Motlhale she performed light duty for 6 months and then continued with her normal duties in respect of access control (my emphasis). Mrs Motlhale earned a basic salary of R2 304.00 per month.**

### 6.13

- *The possibility exist that Mrs Motlhale will be able to secure employment in the informal sector with earnings equivalent to the median of an unskilled labourer in the informal sector. It must, however be kept in mind that Mrs Motlhale's career options are narrowed down and that she will suffer from longer stints of unemployment and that she will have to be accommodated by a sympathetic employer. A contingency deduction must thus be made for the fact that Mrs Motlhale will be able to secure alternative employment, although her chances are very limited. The suggested earnings of an unskilled labourer is as follows:*

| Lower quartile | Median   | Upper quartile |
|----------------|----------|----------------|
| R 6 800        | R 17 400 | R50 000        |

(the Quantum Yearbook,2014, R.J. Koch)"

- [8] In her testimony, Ms Van Jaarsveld testified that the plaintiff was not a competitive employee in the open labour market, and that it was unlikely that the plaintiff would ever find employment again in the said market. She conceded in cross examination that she implied in the information given to the actuary that the plaintiff was unemployable.
- [9] Mr. Sauer, an actuary testified that he noted that the Industrial Psychologist, Ms Susan Van Jaarsveld stressed that it was highly

unlikely that the plaintiff would secure an employment in the future. The actuary also testified about paid sick leave in the loss of income. He included same in his calculations. He testified that in his view the plaintiff would not be able to take that paid sick leave at a later stage and would thus suffer the loss when taking future unpaid sick leave. Plaintiff, however, chose not to persist with its inclusion in the calculation of past loss of income.

[10] The actuary was further requested by the parties to prepare calculations based on the scale of a security Officer who is on Grade C and each party gave his specific instructions on which to base the calculations.

[11] In the assessment of the Plaintiff's future loss of earnings a comparison is usually made between what the plaintiff earned pre-morbid and what he is likely to earn post-morbid. In the seminal judgment, **Southern Insurance Association Ltd v Bailey** 1984(1) SA 98(A) Nicholas JA said the following:

“An 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 rough estimate, of the present value of loss. It has open to it two possible approaches: one is for the judge to make a round estimate which seems to him to be 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 calculation, on the basis of assumptions resting on evidence. The validity of this approach depends of course upon soundness of the assumptions, and these vary from the strongly probable to the speculative....”

- [12] The courts frequently rely on the opinions of experts in arriving at certain decisions. The courts are, however, not bound by the opinions of the experts. It is necessary to indicate that the actuary in this case relied heavily on the opinion of Ms Van Jaarsveld in the assessment of loss of earnings. Ms Van Jaarsveld reports that the plaintiff returned to her work and performed light duties for 6 months where after she '*continued with her normal duties in respect of access control.*' It is submitted in the heads of argument that there had been 'miscommunication' between the plaintiff and Ms Van Jaarsveld which led to the latter believing that the plaintiff returned to her normal duties. This alleged miscommunication is difficult to fathom.
- [13] One should bear in mind that out of the blue in her evidence the plaintiff testified about her side business in which she indicated that she did hair for customers. She testified that her income in that side business generated income in the amount of R150 and R250 per month. She did approximately 6 customers per week. It is difficult to discern how the plaintiff omit to inform Ms Van Jaarsveld of this important source of her income. This side business generated the bulk of her income. It brought a minimum of about R3 600 per month which is more than R1000 she earned in her formal employment. While no explanation was given for this omission, it hardly can be attributed to so called 'miscommunication'. At the most it goes to the heart of the credibility of the plaintiff. Ms Van Jaarsveld has no reason to allege that plaintiff informed her that 6 months after her light duties stint, plaintiff informed her that she returned to her normal

duties performing access control. The same cannot be said of the plaintiff.

- [14] On her own version plaintiff is of the view that she can still do the duties of a security officer. Her Counsel, however, in her heads of argument is of the opinion that plaintiff was not in a position to assess herself. She goes further and says that objectively speaking plaintiff could not do all the physical work required by the industry.
- [15] In my view this submission is without merit. Firstly, it is the plaintiff herself who is deeply involved in the industry. Surely she knows or is expected to know the competencies and demands of her job. At the time when she went for an evaluation by the Industrial Psychologist she had already returned to her job and was in a far better position to assess herself and make an informed decision as to her competency. Secondly, in my view the only challenge alluded to in evidence centred on the so called access control at the boom gate of Mangaung Metro and Vegetables. The plaintiff's left thumb had been amputated as a result of this accident. Admittedly she will have challenges in grabbing articles and at times holding things. But to make a blunt conclusion that she will be unable to perform access control duties seems too far-fetched.
- [16] I agree with the sentiments expressed by Ms Van Jaarsveld that the plaintiff will be able to secure employment in the informal sector with earnings equivalent to the median of an unskilled labourer in the informal sector. Having regard to the testimony of the plaintiff, the Occupational therapist and the Industrial

Psychologist, it is my considered view that the plaintiff is not unemployable. It is so that she may experience bouts of unemployment. This can hardly be attributed to her disability in view of the high unemployment rate in the country.

- [17] I have had the benefit of looking at the four scenarios sketched by the actuary in the calculation of loss of earnings. Having regard to the peculiar circumstances of this case. In view of the fact that the plaintiff did not lose her job due to the accident and the fact that she is not functionally unemployable, the fact that she may find alternative employment in the unskilled labour market and the fact that she may experience bouts of unemployment, I have decided to exercise my discretion and award to her damages which in my view seems fair and reasonable. I conclude that it would be fair and just to award compensation in the amount of R70 194.55 in respect of past loss of earnings having taken into account a contingency deduction of 5% on both the pre-morbid and post-morbid scenarios. In respect of future loss of earnings and earning capacity I find that the amount of R444 581.00 would be a fair and just compensation having taken into account a contingency deduction of 5% pre-morbid and 30% post-morbid scenarios.

I accordingly make the following order:

### **ORDER**

1. The Defendant is liable to pay to the Plaintiff an amount of R514 775.55( Five hundred and fourteen seven hundred and seventy five thousand rands and fifty five cents) being in respect of past and future loss of earnings;
2. The Defendant is liable to pay the plaintiff's taxed or agreed costs on the scale as between party and party, until date of this order, including but limited to the costs set out hereunder:
  - 2.1 The costs attendant upon the obtaining of payment of the amounts referred to in this order;
  - 2.2 The reasonable preparation / qualifying / accommodation / travelling and full reservation fees and expenses ( if any) of the following experts, and the costs relating to the plaintiff attending their medico legal examinations:
    - 2.2.1 Dr JF Ziervogel ( Orthopaedic Surgeon);
    - 2.2.2 Dr Mohlamme
    - 2.2.3 Susan Van Jaarsveld (Industrial Psychologist);
    - 2.2.4 Johan Sauer ( Actuary)
    - 2.2.5 Letitia Delport ( Occupational Therapist)
  - 2.3 The counsels' costs of preparing for, and attending to pre-trials, and costs associated with necessary consultations with the plaintiff, the plaintiff's witnesses and the plaintiff's experts;
  - 2.4 The attorneys' costs of preparing for, and attending to pre-trials, and costs associated with necessary consultation with

the plaintiff, the plaintiff's witnesses and the plaintiff's experts;

2.5 The travelling costs occasioned by the plaintiff, and the plaintiff's witnesses to attend to necessary consultation with his attorney and expert witnesses.

3. The payment provisions in respect of the foregoing are ordered as follows:

3.1 Payment of the capital amount shall be made without set-off or deduction, within 30 (thirty) calendar days from date of the granting of this order, directly into the trust account of the plaintiff's attorneys of record by means of electronic transfer, the details of which are the following:

|                        |   |               |
|------------------------|---|---------------|
| Pieter Skein Attorneys | – | Trust Account |
| Bank                   | - | ABSA          |
| Branch Code            | - | 632 005       |
| Account No.            | - | [....]        |
| Reference              | - | MOT662/0001   |

3.2 Payment of the taxed or agreed costs shall be made within 30 days of taxation, and shall likewise be effected into the trust account of the plaintiff's attorney.

3.3 No interest will accrue in respect of any of the aforesaid amounts on or before the stipulated dates.

3.4 Should payment not be made in respect of any of the aforesaid

on or before the stipulated date, interest will accrue at 10,25% compounded.

4. In the event that costs are not agreed:
- i. The plaintiff shall serve a notice of taxation on the defendant's attorney of record, and
  - ii. The plaintiff shall allow the defendant fourteen court days to make payment of the taxed costs.

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**P.E. MOLITSOANE, J**

On behalf of the Plaintiff: Adv. JF Mitcley  
Instructed by:  
Pieter Skein Attorneys

BLOEMFONTEIN

On behalf of the respondent: Mr Jeje  
  
Instructed by:  
Maduba Attorneys  
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