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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 number: 3664/2016

In the matter between:

C M

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

HEARD ON: 10, 11 & 13 SEPTEMBER 2019

JUDGMENT BY: VOGES, AJ

DELIVERED ON: 23 OCTOBER 2019

[1] On 11 September 2013 the Plaintiff was a passenger in a motor vehicle with registration number [...] FS travelling from Qwa-Qwa towards Bethlehem.

The driver of this vehicle lost control of the vehicle, it overturned and the Plaintiff sustained injuries.

[2] In terms of section 17(1) of the Road Accident Fund Act, 56 of 1996 the Defendant (RAF) is obliged to compensate the Plaintiff for damages sustained in this accident.

[3] In this action the Plaintiff claims R3 810 000.00 compensation from the Defendant as a result of injuries sustained during this incident in the following amounts:

- | | | |
|------|---|------------------------------|
| 3.1. | Past medical expenses | R10 000.00 |
| 3.2. | Future Medical Expenses: | Section 17(4)(a) undertaking |
| 3.3. | Past and future loss of earnings and earning capacity | R3 000 000.00 |
| 3.4. | General damages | R 800 000.00 |

[4] The merits of the matter had been settled on the basis that the Defendant is liable for 100% of the proven or agreed damages of the Plaintiff and an order to this effect was issued on 28 May 2019.

[5] It is common cause that the matter of general damages was referred to the HPCSA because of the opinion of the neurosurgeon of the defendant that the Plaintiff suffered only mild injuries. At the onset of this trial the defendant argued that the matter should not proceed until the HPCSA has come to a conclusion. In line with **Botha v Road Accident Fund** 2015 (2) SA 108 (GP), where it was found that the high court still has jurisdiction to determine the claimant's claim for loss of earning capacity, this court ordered that the issues be separated and that the matter should proceed on the quantum of the loss of earnings.

(See also *De Bruyn v Road Accident Fund* Unreported case No 29608/2014 Gauteng Local Division delivered 9/5/2017)

[6] **EVIDENCE**

Except for joint minutes that were handed in, only the Plaintiff called witnesses, namely the following experts, whose reports were also handed in:

- 6.1 Dr H J Edeling, a neurosurgeon (Exhibit B)
- 6.2 Ms L de Rooster, educational psychologist (Exhibit G)
- 6.3 Ms R Hovsa, a clinical psychologist (Exhibit L)
- 6.4 Ms C Keyter, an occupational therapist
- 6.5 Mr G A Whittaker, an actuary (Exhibit P)
- 6.6 Mr K J Jooste, an industrial psychologist (Exhibit Q)

The Plaintiff did not testify herself but was extensively interviewed and/or examined by the different experts.

[7] The joint minutes were allowed as:

- 7.1 Exhibit A: Dr Edeling and Dr Ngandu
- 7.2 Exhibit F: Ms De Rooster and Dr du Plessis
- 7.3 Exhibit K: Ms Hovsa and Ms Viljoen
- 7.4 Exhibit N: Ms Keyter and Ms Moagi
- 7.5 Exhibit O: Mr Jooste and Ms Kheswa

[8] Dr Edeling assessed the Plaintiff on 23 May 2016. He also interviewed her husband and was availed of the RAF 1 form, hospital records and the report of Dr Ngqandu. He came to the conclusion that the Plaintiff sustained soft tissue injuries to the shoulders, chest and abdomen; blunt force facial trauma and lower

lip laceration; and a **head injury with moderate to severe traumatic brain injury** which led to a permanent loss of learning ability, employment capacity and amenities.

- [9] From the evidence of Ms De Rooster and Mr Jooste it transpired that the Plaintiff failed grade 10 at school and had to repeat it. She passed Grade 12 in 2010 with an average of 42%. In 2012 she enrolled for a National Senior Certificate (vocational) in Electrical Infrastructure Construction at Maluti TVET and completed Level 2 (equivalent to Grade 10) successfully.

She was registered for Level 3 when the accident occurred on 11 September 2013. In her final examination, after the accident, she failed two subjects.

She enrolled for Level 4 in 2014, but only managed to pass 3 of the 7 subjects.

She did not return to write her re-examinations as she had lost her bursary. She thus failed the year and has since been unemployed.

- [10] Ms De Rooster assessed the Plaintiff on 29 November 2017 and 4 May 2018 by using a comprehensive battery of tests and came to the conclusion that she is experiencing physical difficulties, behavioral changes, depression and memory problems as a result of the accident. By inter alia comparing her academic results prior to the accident with those thereafter she came to the conclusion that the Plaintiff would not be able to pass NQF4 with the physical difficulties she experiences since the accident. As a result she would not be able to compete successfully in the labour market.

Ms De Rooster also pointed out deficiencies in the tests applied by the defendant's educational psychologist, Dr Du Plessis.

- [11] Ms Hovsa evaluated the Plaintiff on 28 June 2019 by using a number of tests. She came to the conclusion that the Plaintiff's cognitive flexibility and logical memory were severely compromised as a result of the injuries she sustained. She also suffers from severe depression. Ms Hovsa is of the opinion that the Plaintiff suffered moderate brain injuries.
- [12] Ms Keyter assessed the Plaintiff on 30 November 2017. She also testified about the Plaintiff's present poor memory and concentration that do not correlate with her pre-accident functioning. According to her, the Plaintiff is "practically unemployable". Physically she will be able to do unskilled or semi-skilled work, but will be hindered by her neuro-cognitive and neuro-psychological impairments.
- [13] Mr Jooste pointed out that the plaintiff had already completed half of the course at the time of the accident. Himself and Ms Kheswa (for the defendant) agreed on the fact that the Plaintiff would likely have completed the rest of the course she enrolled for was it not for the accident. She would then have been able to start her career in 2015 as an artisan within the basic salary of the Paterson A1 level. At the age of 40 to 45 she would have advanced to the Paterson B3/B4 level where she would most probably have remained until retirement at the age of 65.
- After testing her present ability to work with language and numbers and her hand-eye coordination he too came to the conclusion that she is "practically unemployable".
- [14] Mr Whittaker based his calculations (per exhibit P) on the joint minutes of the industrial psychologists, Mr Jooste, Mr Linde and Ms Kheswa. He postulated three scenarios for projection of the Plaintiff's income earning capacity, taking into account the R4 500 income that she earned since the accident and applying

different percentage deductions for general contingencies. He came to the following results:

Basis 1: Rendered unemployable

Net past lost (after 5% contingency deduction)	:	R 376 513.00
Future net loss (after 15% contingency deduction)	:	<u>R4 429 252.00</u>
Total net loss	:	<u>R4 805 765.00</u>

Basis 2: Future injured earnings same as uninjured earning, i e ceiling at B3/B4 level

Net Past loss (after 5% contingency deduction)	:	R 376 513.00
Future net loss		
(after 35% contingency deduction on injured income)	:	<u>R1 042 177.00</u>
Total net loss	:	<u>R1 418 690.00</u>

Basis 3: Future injured earnings R1 500 per month + inflation until retirement

Net past loss (after 5% contingency deduction)	:	R 376 513.00
Net future loss (after 15% contingency deduction)	:	<u>R4 070 034.00</u>
Total net loss	:	<u>R4 446 547.00</u>

[15] **EVALUATION OF EVIDENCE**

This case has to be decided on the evidence that was presented to court by the Plaintiff, as the Defendant elected not to call any witnesses. All that is on record from the Defendant's side, is the joint minutes.

In **Thomas v BD Sarens** (Pty) (Ltd) [2012] ZAGPJHC 161 it was said that where certain facts are agreed between the parties in civil litigation, the court is bound by such agreement, even if it is skeptical about those facts. Where the parties engage experts who investigate the facts, and where those experts meet and agree upon those facts, a litigant may not repudiate the agreement 'unless it does so clearly and, at the very latest, at the outset of the trial' (par 11). In the absence of a timely repudiation, the facts agreed by the experts enjoy the same status as facts which are common cause on the pleadings or facts agreed in a pre-trial conference.

In **Bee v Road Accident Fund** 2018 (4) SA 366 (SCA) at par [66] it was stated:

"Where, as here, the court has directed experts to meet and file joint minutes, and where the experts have done so, the joint minute will correctly be understood as limiting the issues on which evidence is needed. If a litigant for any reason does not wish to be bound by the limitation, fair warning must be given. In the absence of repudiation (i e fair warning) the other litigant is entitled to run the case on the basis that the matters agreed between the experts are not in issue."

[16] In the joint minute of doctors Ngqandu and Edeling dated 8 September 2019 it is agreed:

2.1 We have found no evidence of any pre-existing neurological pathological condition or disability.

- 2.2 In the motor accident Mrs M sustained soft tissue injuries of the shoulders, chest and abdomen; facial injuries with lower lip laceration; and a head injury with traumatic brain injury.
- 2.3 Her injuries have resulted in a permanent neuropsychological disorder with forgetfulness and short-temperedness, recurrent headaches, scarring of the lower lip and a mood disorder.
- 2.4 In relation to the neuropsychological sequelae of her brain injury we refer to the assessment findings of the expert neuropsychologists. Provision should be made for future treatment of headaches as set out in our reports. Plastic surgeons will be deferred to in relation to the scarring.
- 2.5 She reported hearing loss and vertigo to Dr Edeling, but not to Dr Ngqandu. She reported lower back pain to Dr Ngqandu, but not to Dr Edeling. ENT surgeons and orthopaedic surgeons will be deferred to in relation to these reports.
- 2.6 At the time of the accident she was a 2nd year electrical engineering student. After the accident she had to abandon her studies due to sequelae of her injuries.

During the evidence of Dr Edeling it was pointed out by Mr Jeje, for the Defendant, that Dr Ngqandu has since changed his opinion. There was, however, no evidence forthcoming from the Defendant in respect of this issue.

- [17] There are no aspects of disagreement between the occupational therapists, Ms Keyter and Ms Moagi in their joint minute (exhibit N). They agreed, inter alia, that the Plaintiff's general functioning is affected by the severe neuro-cognitive and neuro-psychological injuries she sustained (par 2g); that the accident has left her a

vulnerable individual; that her occupational potential has been significantly compromised (par 2h) and will make her a less competitive employee in the open labour market (par 2i).

I have no qualms in accepting the agreements contained in these joint minutes.

[18] As far as the rest of the joint minutes are concerned, there was no agreement between the different experts (Exhibits F, K and O).

[19] I find no reason to doubt the reliability of the findings of Ms De Rooster, Mr Jooste or Ms Hovsa, especially so in the absence of any evidence to the contrary. The methods/tests employed by them to come to their conclusions seem to me to be sound.

It is, however, so that they do not have any independent knowledge of the Plaintiff's condition prior to the accident. The matter is further complicated by the limited academic success of the Plaintiff, both at school and at TVET. Her losing the bursary also played a part in not proceeding with her studies.

On the other hand it is so that she managed to comply with required standards until the time of the accident and presently she struggles to cope at the internet café where she is employed.

[20] It is common cause between at least the neurosurgeons and the occupational therapists that the Plaintiff sustained permanent debilitating injuries which impacts on her employability. She at least now suffers a diminished earning capacity and may only be suitable for light/sedentary work.

[21] **LEGAL PRINCIPLES**

In **Rudman v Road Accident Fund** 2003 (2) SA 234 (SCA) at par [11] it was said that a physical disability which impacts on the capacity to an income does not, on its own, reduce the patrimony of an injured person. There must be proof that the reduction in the income earning capacity will result in actual loss of income.

[22] In **Herman v Shapiro & Co** 1926 TPD 367 at 379 the court said the following:

“Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages.”

[23] In respect of what a fair and adequate compensation to an injured party should be, the following was said in **AA Mutual Association Ltd v Maqula** 1978 (1) SA 805 (A) at p 809:

“It is settled law that a trial court has a wide discretion to award what it in the particular circumstances considers to be a fair and adequate compensation to the injured party for his bodily injuries and their sequelae.”

[24] There are no hard and fast rules to be applied in deciding what a fair and adequate compensation to an injured party should be. Arbitrary considerations must inevitably play a part. Any enquiry into future loss of income is by nature speculative because it involves a prediction of the future, as was said in **Southern Insurance Association v Bailey NO** 1984 (1) SA 98 (AD).

[25] In respect of actuarial calculations the following was said in **Southern Insurance Association Ltd v Bailey NO**, supra at 114E:

“...while the result of an actuarial computation may be no more than an “informed guess” it has the advantage of an attempt to ascertain the value of what was lost on a logical basis”

[26] **CONTINGENCIES**

In exercising its discretion in respect of what fair and adequate compensation would be, a court must allow a discount for contingencies or the “vicissitudes of life”. These include such matters as the possibility that the plaintiff may in the result have less than a “normal” expectation of life; and that she may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case.

See ***Van der Plaats v South African Mutual Fire and General Insurance Co Ltd*** [1980 \(3\) SA 105 \(A\)](#) at 114 - 5.

The rate of the discount cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case.

In ***Bee v Road Accident Fund***, supra at par [16] it was said that the younger the victim the longer the period over which the vicissitudes of life will operate and the greater the uncertainty in assessing the claimant's likely career path.

[27] In this matter there are various considerations which impact on the contingency deduction. The Plaintiff was 21 years old at the time of the accident and has no real work record. This makes it very difficult to assess her career path, especially

taking into account her limited (pre-morbid) academic abilities and the fact that she has since had a child.

- [28] In my view a contingency deduction of more than the 15% applied by the actuary should be applied. On the facts of this case, I would accept Mr Whittaker's Basis III calculations and apply a contingency deduction of 35% on the uninjured future loss of earnings.

Thus: Uninjured income	R5 210 885 – 35% =	R3 387 075
	Less Injured income	R <u>359 218</u>
	Net future loss	R 3 027 857
	Plus net past lost	R <u>376 513</u>
	Total net loss	<u>R3 404 370</u>

- [29] It appears from the evidence of Dr Edeling that the Plaintiff may in future require further medical attention as a result of the injuries sustained. An order in terms of section 17(4)(a) of the Road Accident Fund Act would thus be appropriate.

- [30] In the result the following order is issued:

1. The Defendant shall make payment in the sum of **R3 404 370,00 (Three million Four Hundred and Four Thousand Three Hundred and Seventy Rand)** (hereinafter referred to as the "capital amount") to the Plaintiff's attorneys, Edeling van Niekerk Inc, in respect Loss of Income of the Plaintiff's claim which amount shall be payable by direct transfer into their trust account, details of which are as follows:

Account Name	:	Edeling Van Niekerk Inc
Bank	:	Nedbank
Branch	:	Business Westrand
Account number	:	[...]
Branch code	:	128605

2. The Defendant shall pay interest *a tempore morae* on the capital amount aforesaid at a rate of 10.00% per annum from 14 (fourteen) days after date of this order to date of final payment.

3. The Defendant is to furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) for 100% (*One Hundred Percentum*) of the costs of future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the Plaintiff, after the costs have been incurred and on proof thereof, resulting from the accident that occurred on the 11th of September 2013.

4. The Defendant is liable for the Plaintiff's taxed or agreed party and party costs on the High Court scale as well as correspondent's fees and the Plaintiff's lodging and travelling costs in attending the Plaintiff's Experts as well as the Defendant's Experts as well as trial attendance, which costs shall *inter alia* include the following:-
 - 4.1 The costs of Counsel;

 - 4.2. The costs of the Reports of the Plaintiff's experts which shall include the preparation and reservation fees and joint minutes as well as travelling expenses and lodging costs of the expert witnesses. The experts being:
 - 4.2.1 Dr G Fredericks – General Medical Practitioner;
 - 4.2.2 Ms R Hovsha – Clinical Psychologist (including appearance fee);
 - 4.2.3 Dr HJ Edeling – Neurosurgeon (including appearance fee);
 - 4.2.4 Dr LA Fine – Psychiatrist;
 - 4.2.5 Ms L de Rooster – Educational Psychologist (including appearance fee);
 - 4.2.6 Ms A Crosbie (C Keyter) – Occupational Therapist (including appearance fee);
 - 4.2.7 Mr L Linde (K Jooste) – Industrial Psychologist (including appearance fee);
 - 4.2.6 Mr GA Whittaker – Actuary (including appearance fee).

4.3. Attorney's fees in conducting trial.

VOGES, AJ

On behalf of Plaintiff: Adv. A van Dyk
Instructed by: McIntyre & vd Post
Bloemfontein

On behalf of Defendant: Mr A Jeje
Instructed by: Maduba Attorneys
Bloemfontein