



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: 09/2016

In the matter between:

A B

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

HEARD ON: 11 & 12 JUNE 2019

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 24 OCTOBER 2019

Claim for future loss of earnings – Assessment and Enquiry into damages – Speculative nature thereof and the approaches to it.

- [1] This is a claim for future loss of earnings against the defendant as a result of injuries sustained by the plaintiff in a road accident that took place on 17 August 2002. The merits were conceded and settled on 28 February 2017 on the basis that the defendant is liable for 100% of the proven or agreed damages.
- [2] The plaintiff aged 29 years testified that she was involved in a road accident when she was 12 years and still a Grade 6 learner. She received medical attention at Dihlabeng Provincial Hospital, Bethlehem. X-rays were taken and she was discharged. After the accident she suffered from middle to lower back pain. As a result she struggled to participate in sports activities and was unable to pick up objects. In 2012 now employed, she hurt her back while attempting to pick up heavy crates.
- [3] The pain has not subsided despite taking medication for it. It has progressed to such an extent that she has been wearing a back brace

for the past two (2) years. It is a daily struggle and because of it she can only pick up light objects. This has resulted in her demotion at work because she could not perform optimally. She is experiencing irregular sleep because of excruciating episodes of pain. This has also had an adverse effect on her emotional well-being because she cannot go out and socialize with other people.

[4] Dr. Oelofse, the orthopedic surgeon, who examined the plaintiff and compiled a medico-legal report (whose report was handed in as evidence) testified on behalf of the plaintiff. He stated and confirmed in oral testimony that because of her injury, she will only be able to continue working in a light duty position. He was of the view that the provision should be made that the plaintiff will retire ten (10) years before the retirement age. It was his opinion that because of the spinal injury and its possibilities for degeneration, the progress to end-stage sponelylosis was real. Further that she will experience chronic pain for the rest of her life.

[5] The Occupational Therapist Anthea Jansen will also compiled the detailed medico-legal report on the plaintiff testified that she agrees

with the assessment of Dr. Oelofse on the pertinent issue of early-retirement.

[6] This is also the view of the Industrial Psychologist Dr. Everd Jacobs. His brief which was limited to investigating her uninjured and injured scenario concluded that based on medical opinion, the plaintiff will have to retire ten (10) years earlier.

[7] These witnesses whose evidence was not contradicted impressed me in the lucid manner that they explained their opinions, findings and conclusions. Their evidence is undisputed and I accept it. To that extent I conclude that a claim for future loss of earnings is sustainable. In particular Dr. Oelofse in his opinion concluded that because of progressive degeneration on her back injury, the plaintiff will have to retire ten (10) years earlier than the retirement age of sixty-five (65).

[8] The defendant's case relies heavily on the issue of causation. The argument is that the plaintiff has failed to determine that the collision is the *causa sine qua non* of the loss. In essence, that the plaintiff has failed to show that the collision is sufficiently closely linked to the loss.

The basis of this submission is that the x-rays that were taken in 2002 did not confirm any injuries and only in 2015 did the x-rays confirm injuries.

[9] The argument about causation is misplaced. The issues of negligence and causation were agreed upon and settled on 28 February 2017. This means that they have been adjudicated and the only outstanding issue is the damages and the quantum thereof. The second point of contention is the discrepancies of the x-rays as recorded by Dr. Repko and Oelofse in 2013 and 2015. The content of the report of Dr. Repko though admitted into evidence, its contents were not. This intricate medical aspect was adequately explained by Dr. Oelofse whose opinions were uncontradicted.

[10] This then brings me to one aspect for determination in this matter. The plaintiff's future earning capacity has been well articulated. The assessment of future loss of earning capacity was summed up as followed by Nicholas JA in *Southern Insurance Association Limited v Bailey* NO¹:-

¹ 1984 (1) SA 98 (A) at 113 G-H

“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.

It has open to it two possible approaches.

One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.

The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.”

- [11] In this matter the Actuarial Report prepared by Munro Forensic Actuaries was handed in per agreement without leading any oral evidence. This means that its contents have not been challenged at all. It is appropriate to mention that the total loss of earnings but for the accident is calculated at R893 060.00 after contingencies have been factored in their calculations. In my view the assumptions underlying calculation of capital values is based on sound principles to the extent that I can rely on it. However that does not mean that my discretion to award what is right is usurped.² It has long been accepted that the allowance for contingencies is not something that is readily ascertainable or can be accurately or mathematically ascertained. It will always depend on what the particular judicial officer's impressions are given the case before him/her. However, it should always be kept in mind that contingencies need not only be adverse necessitating a

² Legal Assurance Co Ltd v Botes 1963 (1) SA 608 (A) at 614 F

“scaling down”. Given the circumstances of this matter, I am convinced that the contingencies deduction for the net loss but for the accident in respect of prospective future loss of income have been calculated in the Actuarial Report and there is no cogent reason(s) to substitute them. Therefore I conclude that the plaintiff has proved her case and as the successful party she is entitled to be awarded costs.

Order

[12] The following order is made:

- 12.1. The plaintiff's claim for general damages (paragraph 8.1 of the particulars of claim) is separated from the remaining issues in terms of Rule 33(4), and stands over for later determination.
- 12.2. The defendant is liable for payment to the plaintiff in the amount of **R893 060.00 (Eight hundred and ninety three thousand and sixty rand)** in respect of the Plaintiff's claim for future loss of income resulting from a motor vehicle collision that occurred on **17 August 2002**.
- 12.3. The defendant is ordered to furnish to the plaintiff an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for 100% of the future accommodation of the plaintiff in a hospital or nursing home or the treatment of or the rendering of a service or the supplying of goods to the plaintiff arising out of injuries sustained by her in the motor vehicle collision mentioned above, in terms of which undertaking the defendant will be obliged

to compensate her in respect of the said costs after the costs have been incurred and on proof thereof.

12.4. The defendant to pay the plaintiff's taxed or agreed party and party costs on the High Court scale, until date of this order, including but not limited to the costs set out hereunder:

12.4.1 The costs attendant upon the obtaining of payment of the amounts referred to in this order;

12.4.2 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:

12.4.2.1 Dr P Repko (Neurosurgeon);

12.4.2.2 Dr LF Oelofse (Orthopaedic Surgeon);

12.4.2.3 Dr JHA Venter (Radiologist);

12.4.2.4 Geraldine Lourens (Occupational Therapist);

12.4.2.5 Anthea Jansen (Occupational Therapist);

12.4.2.6 Dr P Greeff (Clinical Psychologist);

12.4.2.7 Dr E Jacobs (Industrial Psychologist);

12.4.2.8 Munro Forensic Actuaries.

12.4.3 The counsels' costs of preparing for, and attending to pre-trials, and costs associated with necessary consultations with the plaintiff, the plaintiff's attorneys, the plaintiff's witnesses and the plaintiff's experts;

12.4.4 The attorneys' 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;

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

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

12.5.1 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:

Honey Attorneys	-	Trust Account
Bank	-	Nedbank, Maitland Street, Bfn
Branch Code	-	11023400
Account No.	-	[...]
Reference	-	HL Buchner/J02228
		(please quote the reference at all times)

12.5.2 Payment of the taxed or agreed costs shall be made

within 14 (fourteen) days of taxation, and shall likewise be effected into the trust account of the plaintiff's attorney;

12.5.3 No interest will accrue in respect of any of the aforesaid amounts if payment is made on or before the stipulated dates;

12.5.4 Should payment not be made in respect of any of the aforesaid amounts on or before the stipulated date(s), interest will accrue at 10.25 % (the statutory rate per annum), compounded.

12.6. In the event that costs are not agreed the plaintiff agrees as follows:

12.6.1 The plaintiff shall serve a notice of taxation on the defendant's attorney of record; and

12.6.2 The plaintiff shall allow the defendant fourteen (14) court days to make payment of the taxed costs.

M A MATHEBULA, J

On behalf of Plaintiff:

Adv. H De La Rey

Instructed by:

Honey Attorneys

Bloemfontein

On behalf of Defendant:

Adv. K Naidoo

Instructed by:

Maduba Attorneys

Bloemfontein

/roosthuizen