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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 8854/2015

9/3/2018

Not Reportable
Not of interest to other judges

In the matter between

HENRIETTE NEL

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

PETERSEN AJ

[1] The plaintiff Henriette Nel instituted an action for damages against the defendant in terms of the provisions of the Road Accident Fund Act, Act 56 of 1996 ("the Road Accident Fund Act") arising from bodily injuries that she sustained as a passenger in a motor vehicle collision on 19 October 2012 at

approximately 17h00 at Mimosa Street, Wavecrest, Jeffreys Bay.

[2] The issue of liability (merits) have been conceded 100% in favour of the plaintiff. General damages were previously settled an amount of R450 000.00 and an undertaking given in terms of section 17(4)(a) of the Road Accident Fund Act in respect of future hospital and medical costs. The sole issue for determination by this court is loss of earnings. The parties' submissions of the calculations have been premised on the actuarial calculations of the plaintiff's actuary, Munro Actuaries in respect of future loss of earnings dated 22 February 2018.

[3] The main issue left to be determined, in light of the submission of counsel for the defendant, is the applicable contingencies to be applied. Both parties filed numerous medico-legal reports of various experts. The parties' agreed that the said reports may be accepted as evidence by the court.

[4] The orthopaedic injuries sustained by the plaintiff which are relevant to the main issue in dispute are common cause and include:

4.1 a comminuted fracture of the left tibia and fibula, involving the tibial plateau;

4.2 tri-malleolar fracture of the right ankle.

[5] The plaintiff completed grade 12 and thereafter obtained two Tour Guide certificates, a post graduate certificate in Creative Writing, Diplomas in Travel and Tourism and Small Child Development; and BA and BA Honours degrees from UNISA. At the time of the accident the plaintiff was unemployed. From 1997 to 2007, the plaintiff held many jobs, including that of a tour guide in Gauteng and the Western Cape, a teacher at Higher Technical School, Gardens in Pretoria and various nursery schools and as a secretary. The plaintiff's last fixed employment prior to the accident was at Elmar College in Pretoria where she was employed for approximately 1 year until her resignation in 2007 for personal reasons and her return to Jeffrey's Bay to live with her parents. She presently remains unemployed, on the premise that she cannot teach or work as a tour guide as a result of her previous injuries.

[6] Dr D.A. Birrell, the plaintiff's Orthopaedic Surgeon, states in his report that

he estimates the plaintiff's present loss of work capacity for work as teacher or tour guide, which requires standing or walking most of the day to be in the region of 25%. In 2014, already Dr Birrell opined that assuming the plaintiff who then was 38, returned to work as a teacher, where she would hopefully find some degree of accommodation from time to time in her work situation and with a loss of work capacity of some 25%, she would be able to work, until about the age of 50 as a teacher, but thereafter would only be able to do work of a totally sedentary nature.

[7] Maretha Davel of Carina Liebenberg Occupational Therapists notes that having matched the physical test results of the plaintiff to her previous job as teacher, her standing and walking endurance tested functionally poor and as a result she does not meet the inherent requirements of a teacher.

[8] The parties' agree that but for the accident the plaintiff would have returned to work as a teacher. The Industrial Psychologists in their joint minute agree that the plaintiff in the vent of her return to teaching would enter the labour market at entry level. Ms Nicolene Kotze, the plaintiff's industrial psychologist, was called to testify. Ms Kotze's evidence was left undisputed in respect her postulations which were used by the actuaries in the actuarial calculations. The only issue taken with Ms Kotze is that the plaintiff was unable to provide salary advices of her previous employment as a teacher to provide proof of her income at the time of the accident. Notably the plaintiff was unemployed at the time of the accident and had been for 5 years. In any event, the Industrial Psychologists, agree that for quantification purposes they agree that when the plaintiff secured employment, she could have progressed from the lower quartile of Paterson 84, to the upper quartile of Paterson 85 by age and then onwards only annual inflationary increases would have applied. They defer to the defendant's industrial psychologists report for the salaries.

[9] The Industrial Psychologists further agree that if the plaintiff was able to secure employment as a teacher again but for the accident she would then have been able to earn on par with the salaries indicated by Robert Koch (Quantum Yearbook 2018): Teacher (4 years tertiary) R245 700 - R556 035 per annum. They postulate that in considering the expert opinions available to them, that the plaintiff's job choices have been significantly curtailed and she would presently

only be able to perform work of a sedentary nature, but would be reliant on a sympathetic employer. Jobs that she is qualified for including teaching and tour guide would then no longer be available to her. The industrial psychologists differ on one point; for the defendant it is postulated that the plaintiff would still be able to earn an income as anticipated in the pre- accident scenario, whilst for the plaintiff it is postulated her income would differ premised on salaries in the clerical/administrative fields in the Jeffrey's Bay area, unless she sought employment in the bigger metros. In the final analysis both industrial psychologists agree that it would be apt to apply higher than normal post- morbid contingency deductions, considering the totality of difficulties that the plaintiff presents with.

[10] The parties argued the issue of contingencies on scenario 3 of the actuarial report; premised on Ms Kotze's postulations. Mr Marumo for the defendant contended that a 50% contingency deduction be applied premised on the lack of proof of income pre-morbid in the form of salary advices.

[11] Ms Coetzee for the plaintiff contended that a 5% contingency deduction on the past uninjured income was low and proposed that 10% would be more reasonable in the circumstances of this matter considering the fact that the plaintiff was unemployed at the time of the accident. On the future uninjured income with retirement age at 65, the plaintiff would be left with 23 years to work. On the basis of *Goodall v President Insurance* 1978 (1) SA 389 0(V), Ms Coetzee contends that applying a $\frac{1}{2}$ % per year to retirement age would bring one to 11,5%. It is contended that this then be doubled to 23% to account for the plaintiff being unemployed at the time of the accident. On the future injured income it is contended that a 65% contingency be applied considering the plaintiff's reduced employment opportunities and the job market in Jeffrey's Bay.

[12] In *Shield Insurance Co Ltd v Booysen* 1 79 (3) SA 953 (A) at 965 G-H, Trollip JA stated:

'... the determination of allowances for such contingencies involves, by its very nature, a process of subjective impression or estimation rather than objective calculation, in other words, allowances on which judicial opinions may vary appreciably...'

[13] In *Southern Insurance Association v Bailey* NO 1984 (1) 98 AD at 113 to

114C- D, two approaches that can be used to determine future loss of earnings is identified by Nicholas JA:

"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 guess work, a blind plunge into the unknown. The other is to try to make an assessment by way of mathematical calculations, on the 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. It is manifest that either approach involves guesswork to a greater or lesser extent. In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an "informal guess" it has the advantage of a logical basis".

[14] Robert J Koch refers to the sliding scale contingency theory as set out in Goodall *supra*. That theory embraces:

½ % per year to retirement age, i.e 25% for a child, 20% for youth and 10% in middle age"

[15] I am satisfied that the application of a contingency of 10% be applied to the past uninjured income. Whilst the parties agree that the plaintiff in all probability would have returned to teaching post-morbid, I cannot lose sight of the fact that she remained unemployed and had not been pursuing a career as a teacher for a period of 5 years prior to the accident. Her work history as a teacher was also not stable.

[16] Having regard to the totality of the evidence I am satisfied that a 10% contingency deduction be applied to the past uninjured income as agreed, that a 30% contingency deduction be applied to the uninjured income in the future loss, and a 65% contingency deduction be applied to the injured income in the future loss scenario. The net total loss of income accordingly amounts to R4 281 850.00.

[17] The order granted is in terms of the order attached marked X, duly incorporated into the judgment, with the insertion of the amount of R4 281 850.00.

AH PETERSEN

**ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA**

Appearances

For the Plaintiff: Adv. L Coetzee

Instructed by: Werner Boshoff Inc.

For the Defendant: Adv. RL Marumo

Instructed by: Morare Thobejane

Inc. Date Heard: 27 February 2018

Date of Judgment: 09 March 2018

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Before the Honourable Justice Petersen, AJ

On the 27th day of February 2018

Case number: 8854/2015

In the matter between:

HENRIETTE NEL

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

DRAFT ORDER

THE FOLLOWING ORDER IS MADE AN ORDER OF COURT:

1. The Defendant is ordered to pay the Plaintiff the amount of R 4,281,850.00 (Four Million, Two Hundred and Eighty One Thousand, Eight Hundred and Fifty Rand) which amount shall be paid to the Plaintiffs Attorneys, **Werner Boshoff Incorporated**, in payment of the Plaintiffs claim for past and future loss of earnings/ earning capacity.
2. In the event of the aforesaid amount not being paid timeously, the Defendant shall be liable for interest on the amount at the relevant

prescribed per annum, calculated from the 15th calendar day after the date of this Order to date of payment;

3. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale.

3.1 The party and party costs shall include:

- 3.1.1. the costs incurred in obtaining payment of the amount mentioned in paragraph 1 and 2 above;
- 3.1.2. the costs of senior-junior counsel which will include reasonable preparation and trial costs for the trial of 27 February 2018;
- 3.1.3. the costs to date of this order, which shall further include the costs of the attorneys, necessary traveling costs and expenses (time and kilometres), preparation for trial and attendance at Court;
- 3.1.4. the costs of all medico-legal, radiological, actuarial, addendum and joint reports obtained by the Plaintiff and furnished to the Defendant and/or its attorneys;
- 3.1.5. the reasonable preparation, qualifying and reservation fees, if any, as allowed by the Taxing Master, of the experts as referred to above, including the attendance fees of Ms. Kotze (Industrial Psychologist) for the trial on the 27th of February 2018;
- 3.1.6. the reasonable costs incurred by and on behalf of the Plaintiff in, as well as the costs consequent to attending the medico-legal examinations of both parties;
- 3.1.7. Plaintiffs costs for preparing 6 **(six)** trial bundles;
- 3.1.8. the costs of holding all pre-trial conferences, as well as round table meetings between the legal representatives for Plaintiff and Defendant, including senior-junior counsel's charges in respect thereof; costs from date of allocatur to date of final

payment.

4. The amounts referred to above will be paid to the Plaintiffs' attorneys, **Werner Boshoff Incorporated** , by direct transfer into their trust account, the details of which are as follows:

Account holder: WERNER BOSHOF INC TRUST ACCOUNT

Bank: Standard Bank, Lynnwood Ridge

Branch Code: 012 445

Account no: [...]

Ref: W B0SHOFFNK/MAT391

BY THE COURT:

REGISTRAR

On behalf of Plaintiff: **Adv. Lezanne Coetzee**
083 324 9540

On behalf of Defendant: **Adv. R.L. Marumo**
072180 3175