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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED:

Date: **21st September 2018** Signature: _____

CASE NO: 2015/26884

In the matter between:

M, B

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

ADAMS AJ:

[1]. The plaintiff claims delictual damages from the defendant in terms of the provisions of the Road Accident Fund Act number: 56 of 1996, as amended ('the

Act'). Her damages arise as a result of personal injuries sustained by her in a motor vehicle collision which occurred on the 5th November 2011 in Mayfair ('the collision').

[2]. The plaintiff, whose date of birth is the [...] May 1985, was 26 years old at the time of the accident, and she sustained in essence abdominal injuries and soft tissue injuries to the lower back and neck. Her age at present is 33 years old.

[3]. The issue of the merits / negligence was resolved between the parties on the basis of a full concession of liability by the defendant in favour of the plaintiff. This means that the defendant has accepted liability for 100% of the damages suffered by the plaintiff as a result of the injuries sustained by her in the collision.

[4]. The plaintiff has no claim for past hospital and medical expenses. The reason for this is that on the day of the collision and immediately thereafter the plaintiff was admitted to and received treatment from a Government Hospital and she was not required to pay for the medical treatment received by her from the Government Hospital. As far as the plaintiff's general damages are concerned, the defendant disputes that the plaintiff's injuries were of a serious nature and that she qualifies for general damages as provided for in the Act and the regulations promulgated thereunder. The parties have accordingly agreed that the plaintiff's general damages would be referred to the Appeals Tribunal of the Health Professions Council of South Africa ('the HPCSA').

[5]. As far as future hospital and medical expenses are concerned, the parties agreed that the defendant would furnish the plaintiff with an unlimited statutory Undertaking in terms of the provisions of section 17 (4) (a) of the Road Accident Fund Act number 56 of 1996 (as amended) ('the Act'). The said Undertaking would therefore cover the plaintiff in respect of 100% of future hospital and

medical expenses incurred by the plaintiff. I am required to make an order to that effect by agreement between the parties.

[6]. This means that the only issue which remain unresolved between the parties is that of the plaintiff's future loss of earnings / loss of income earning capacity / loss of employability. The plaintiff's case is that she should be awarded an amount of R2 604 409 for her alleged past and future loss of earnings, whereas the defendant is of the view that the plaintiff has not suffered any such loss.

[7]. After the accident on the 5th of November 2011, the plaintiff was transported by ambulance from the scene of the collision to the Helen Joseph Hospital in Johannesburg. She was nine months pregnant when she was involved in the accident, and she suffered an injury to the back and neck, abdominal injuries, an injury to the groin area and an injury to the leg.

[8]. The plaintiff was admitted and hospitalised for a period of four days at the Helen Joseph Hospital and thereafter for a period of six days at the Coronationville Hospital. She reportedly had abdominal bleeding, and a laparotomy and a caesarean section were performed. .

[9]. At the time of the collision the plaintiff was working at Abdille Discount Curtains as a sales lady and cashier. She had been working there since the beginning of 2009. The plaintiff had taken maternity leave prior to the accident on the 15th of October 2011 for a period of three months. By the time she had gone on maternity leave she had been employed at this store for approximately three years. At the time she went on maternity leave, the plaintiff was earning R7500 per month. It is the case of the plaintiff that, but for the collision and her resultant

injuries, she would have continued working in that capacity or in a similar position until normal retirement age.

[10]. But for the accident, the plaintiff, who was earning R7500 per month as a sales lady and cashier, would have continued in the same or similar employment for the same remuneration, which, by all accounts was in excess of what this position normally pays, until retirement at age 65.

[11]. Now that the accident has occurred, it is the plaintiff's case that, as a result of the injuries sustained by her in the accident and the sequelae thereof, she has now been rendered incapable of gainful employment at any level in the open labour market. The plaintiff therefore contends that she has been rendered completely unemployable as a result of the accident and the injuries she sustained and it is therefore projected that post – morbid she would not be earning any income. The phraseology used on behalf of the plaintiff is that she has been rendered 'functionally permanently unemployable'. In other words, it is the plaintiff's contention that in consequence of the injuries she sustained in the collision and the sequelae thereof she has no residual earning capacity.

[12]. The defendant's contention is that the sequelae of the injuries suffered by the plaintiff in the collision, if any, have not interfered in any way with her earning capacity or potential. It is therefore the plaintiff's case that there has been no impairment of plaintiff's income earning capacity.

[13]. The plaintiff's case was supported by the evidence of three expert witnesses, namely an orthopaedic surgeon, an occupational therapist and an industrial psychologist, as well as the evidence of two lay witnesses, namely the plaintiff herself and a business manager of Abdille Discount Curtains, one Hassan.

[14]. The plaintiff's Orthopaedic Surgeon, Dr Versfeld, testified that, in his expert opinion, the soft tissue injuries suffered by the plaintiff were of a serious nature. The reason for this opinion he explained to be the persistence of the symptoms over a period of five years from the time of the accident until the time he examined the plaintiff on the 14th of July 2016, coupled with his clinical findings based on his clinical examination of the plaintiff as supported by the x-ray plates and reports.

[15]. On a clinical examination of the plaintiff's left hip injury, Dr Versfeld found that the plaintiff had a positive Trendelenburg gait and a positive Trendelenburg sign. He explained that this indicated that there was something wrong with the workings of the hip.

[16]. Surprisingly Dr Versfeld expressed a view, quite forcefully, on the severity of the plaintiff's head injury. In that regard he placed emphasis on the plaintiff's complaints. He remained adamant, in the face of evidence to the contrary by psychologists, that the head injury was of a serious nature and has an effect on the plaintiff's claim. This unreasonable stance by Dr Versfeld, in my view, detracts from the reliability of the expert opinion of Dr Versfeld, who was singular unimpressive.

[17]. The plaintiff's occupational therapist, Ms Suzette Murcott, testified that the plaintiff's tolerances for standing and for working in stooped postures are limited. Her right hand grip strength was substantially decreased and that her safe load handling was less than 10 kg. In her report she had noted that the plaintiff's abilities to perform her pre – accident work 'are restricted' as a result of the consequences of the accident and her chances to secure suitable work matching her residual functional capacity 'are compromised'.

[18]. The plaintiff's industrial psychologist, Ms Anne Jamotte, testified that in the collision the plaintiff sustained polytrauma, which rendered her unemployable for the type of work she was doing in the past. She had been unemployed for some time and it is unlikely that she would resume employment and it is perceived that effectively the accident has rendered her 'functionally unemployable', whatever that term means. Her evidence was furthermore that the nature of the plaintiff's employment prior to the collision was of a semi – skilled or unskilled nature and that, having regard to the sequelae of the injuries she sustained in the collision and her basic education and the problems that refugees experience in obtaining work in South Africa (which was confirmed by the plaintiff), would render the plaintiff 'functionally unemployable' in any capacity in the labour market.

[19]. Importantly, Ms Jamotte conceded that, from a physical point of view, the plaintiff had retained a residual capacity to be employed and to earn an income. What that residual capacity is she was not able to say as she had clearly not applied her mind to the issue. Additionally, she attached considerable weight to this concept of 'functional employability', which she described as a term used by industrial psychologists with reference to a situation in which the circumstances of a claimant dictates the future projected career and income. I have a difficulty with applying this concept as it is not in accordance with the legal principles applicable to claims based in delict. The effect of the application of this concept is to award damages against a defendant on the basis of factors not attributable to a defendant.

[20]. The plaintiff herself also gave evidence in support of her claim. She testified that she was bleeding internally following the collision until she underwent a laparotomy and a caesarean section to deliver her baby.

[21]. Thereafter, Hassan, the plaintiff's manager, testified about the plaintiff's pre – morbid occupation and how he as the shop manager (who also appointed

her) depended on her assistance and support. He spoke of her performance prior to the accident and confirmed that she was a hard worker, who valued her employment and her position. However, when the plaintiff returned to work, after the accident, the standard of her work was not up to scratch. She could no longer cut material. She was unable to handle money and she was not as active and as energetic as she was before the accident. She was no longer able to remove from the shelves and carry the rolls of material as she was required to do on a daily basis in her job and which she was well able to do pre – morbid.

[22]. Hassan confirmed that, according to him, the plaintiff was unable to resume her work normally as required because of the injuries she has sustained in the accident. Because she was not able to work, they decided to terminate her employment on the 20th of January 2012 due to health concerns. He also confirms that the plaintiff was earning R7500 per month at the time when she went on maternity leave.

[23]. On behalf of the defendant, the following witnesses gave evidence: an occupational therapist, an orthopaedic surgeon and an industrial psychologist.

[24]. The defendant's occupational therapist, Ms Mamotshabo Magoele, testified that the plaintiff complained to her of back pain in all the activities affecting standing, walking, sitting, bending and carrying. Ms Magoele expressed the view that post – morbid the plaintiff is able to perform her pre – morbid occupation, that being that of a cashier. It was submitted by the plaintiff that this opinion is wrong because the plaintiff was not a cashier before the accident, but a sales lady, who was required to remove rolls of material from the shelves and carry same, which, so the argument went, was not the same functions as those of cashier who would be required to stand or sit for most of the day. The importance of this piece of evidence will become clear later on in my judgment.

[25]. The second witness for the defendant was its orthopaedic surgeon, Dr D E Gantz, who testified that the plaintiff suffered a cervical spine injury as well as a thoracolumbar injury / pain and furthermore confirmed that soft tissue injuries would not show on an x-ray. Dr Gantz deferred to the occupational therapist regarding the plaintiff's employment. He did not see the injury to the left leg of the plaintiff as reported on by Dr Versfeld and he accordingly did not report thereon.

[26]. The defendant's industrial psychologist, Mr Tshepo Tsiu, testified that, in his opinion, the plaintiff was overpaid by her employer at the time of the accident and that a market – related salary for her would be in the region of R26 000 per annum in current monetary terms. He expressed the view that there was no future loss of earnings suffered by the plaintiff.

[27]. I am not persuaded that the plaintiff has made out a case for the award contended for by her. Objectively speaking it is, in my judgment, highly improbable that the plaintiff has been rendered completely unemployable as a result of the injuries sustained by her in the collision. The injuries consisted in the main of soft tissue injuries to the plaintiff's neck and lower back. All of the experts on behalf of the plaintiff confirm, in as many words, that the plaintiff has retained a residual income earning capacity

[28]. Dr Botha, in his report, confirms that the plaintiff has recovered fully from the abdominal trauma that precipitated the labour process and that there would be no long – term consequences. Ms Anne Jamotte, the plaintiff's industrial psychologist, testified that the plaintiff has been rendered unemployable for the type of work she was doing in the past. She did however concede during her evidence that the plaintiff has retained a residual income earning capacity, but she was not in a position to give an indication of what the residual income earning capacity is. The obvious possibility which comes to mind is the position of cashier, as testified to by the defendant's industrial psychologist. However, as I indicated,

the plaintiff's industrial psychologist did not consider this possibility as she had clearly made up her mind that the plaintiff has been rendered completely unemployable on the basis that her injuries has rendered her 'functionally unemployable' in the open labour market.

[29]. Since the accident, the plaintiff, who, on her version, has been completely incapacitated, gave birth to three children. The import of the foregoing relates to issues of contingencies.

Loss of Income

[30]. The pre – morbid projected career and income path of the plaintiff is common cause between the parties.

[31]. The dispute relates to the residual income capacity of the plaintiff after the accident. As I have already indicated, I do not accept that the plaintiff has been rendered completely unemployable. In my judgment, it would be reasonable and just, in the absence of an opinion by the plaintiff's industrial psychologist in that regard, to allocate a percentage to such residual. In that regard, I believe that, having regard to the injuries of the plaintiff, she had been compromised to the tune of 10%.

[32]. The employability of the plaintiff at any given point in time is a matter for this court to decide, based on the facts and the considerations which went into the opinions of the expert witnesses.

[33]. In *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another*, 2001 (3) SA 1188 (SCA) at paras 36 and 37 the following is said:

[36] That being so, what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. That is the thrust of the decision of the House of Lords in the medical negligence case of *Bolitho v City and Hackney Health Authority*, [1998] AC 232 (HL (E)). With the relevant dicta in the speech of Lord Browne-Wilkinson we respectfully agree. Summarised, they are to the following effect.

[37] The Court is not bound to absolve a defendant from liability for allegedly negligent medical treatment or diagnosis just because evidence of expert opinion, albeit genuinely held, is that the treatment or diagnosis in issue accorded with sound medical practice. The Court must be satisfied that such opinion has logical basis, in other words that the expert has considered comparative risks and benefits and has reached 'a defensible conclusion'.

[34]. In making an assessment of the weight to be attached to the conclusion of plaintiff's experts relative to the employability of the plaintiff, and applying the above principles *in casu*, I have had regard to the objective and undisputed facts in this matter.

[35]. A fact which weighs heavily on my mind is that the plaintiff has suffered soft tissue injuries, and it is difficult to perceive on what basis she had been rendered completely unemployable. It is not as if the plaintiff on any version has become completely disabled from a physical point of view. Her difficulty is the pain which she has to endure. However, she has been subjected to this pain for more than six and was seemingly able to live a normal life outside of the workplace.

[36]. Accordingly, I am of the view that the evidence suggesting that the plaintiff has been rendered completely unemployable is unconvincing and in contrast with the objective facts in this matter.

[37]. In the premises, I find that post – accident, the plaintiff's projected career path and income would have been the same, but for the fact that the plaintiff would have been compromised and would have suffered a loss of income earning capacity equivalent to 10% of her pre – morbid projected income.

[38]. According to the actuarial report by the plaintiff's actuary, which calculations I accept, plaintiff's gross pre – morbid income, before the application of contingencies, would have amounted to the total sum of R2 990 029.

[39]. Applying my aforesaid findings to this amount results in the following net amount: $R2\ 990\ 029 \times 10\%$ (the percentage by which the plaintiff's capacity has been reduced) = R299 003. Therefore, in my judgment, the plaintiff's past and future loss of income amounts to R299 003.

[40]. Therefore, under this head of damages I intend awarding the plaintiff the total amount of R299 003

Order

In the result, I make the following order.

1. The defendant shall pay to the plaintiff delictual damages in respect of her loss of earnings in the sum of R299 003 (Two Hundred and ninety nine thousand, and three rand).
2. The plaintiffs claim for general damages is referred to the Appeals Tribunal of the Health Professions Council of SA ('the HPCSA') for a finding.
3. The aforesaid capital amount and High Court party and party costs shall be paid to the Plaintiff's attorneys' trust account, the particulars of which are: Joseph's Incorporated Trust Account, RMB Private Bank, Account Number: [...], Branch Code 261 251
4. The defendant shall furnish the plaintiff with an undertaking in terms of the provisions of section 17(4)(a) of the Road Accident Fund Act, No 56 of 1996, to pay 100% of the costs of the future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of a service or supplying of goods to her, arising out of the injuries she sustained in the motor vehicle collision on 5 November 2011, and the sequelae thereof, after such costs have been incurred and upon proof thereof.
5. The defendant shall pay plaintiff's taxed party and party costs on the High Court scale, such costs to include:
 - 5.1 the costs attendant upon the obtaining of payment of the full amount referred to in paragraph 1 above; and
 - 5.2 the costs of the medico-legal reports and qualifying fees (if any) of the following medical legal experts: Dr G Versfeld (Orthopaedic Surgeon), Dr M P Ligege (Radiologist), Dr G Versfeld (Orthopaedic Surgeon) with respect to the RAF4 Serious Injury Assessment Report, Dr A P J Botha (Specialist Physician), Dr A P J Botha (Specialist Physician) in

respect of the RAF4 Serious Injury Assessment Report, Ms S Murcott (Occupational Therapist) and Ms A Jamotte (Industrial Psychologist).

5.3 The costs of the attendance at Court of Mr G. Whittaker (Consulting Actuary).

5.4 Counsel's charges.

6. The defendant shall pay Interest to the plaintiff on the aforesaid amount of R299 003 at the rate of 10.25% as from 14 days from date of this order until date of payment.

L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON: 23rd, 24th, 25th, 28th and 29th May 2018

JUDGMENT DATE: 21st September 2018

FOR THE PLAINTIFF: Advocate M Chaitowitz SC, together with
Advocate D J Combrinck

INSTRUCTED BY: Joseph's Incorporated

FOR THE DEFENDANT: Adv H R Liphosa

INSTRUCTED BY: Kekana Hlatwayo Radebe Attorneys