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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: 3932/2015

In the matter between:

K M

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

HEARD ON: 22 JUNE 2018

JUDGMENT BY: LEFENYA, AJ

DELIVERED ON: 14 AUGUST 2018

Introduction

[1] This is an action arising from injuries the plaintiff sustained on 17 January 2013 in Bloemfontein in a motor vehicle collision. She

was a pedestrian. At the time of the accident she was a 30 year old Secondary School educator. The plaintiff, who was seriously injured, sustained the following injuries;

1. Head injuries
2. Thoracic spinal fracture
3. Right forearm injury
4. Right ankle / leg injury

[2] The parties had, before the trial, settled the issue of liability on the basis that the defendant will pay the plaintiff 100% of the agreed or proven damages as well as the aspect of quantum in relation to past medical expenses. At the beginning of the trial the parties further agreed to the amount of R650 000, 00 as the award for general damages to the plaintiff. The defendant further made an undertaking in terms of section 17 (4)(a) of the Road Accident Fund Act 56 of 1996 to provide for the plaintiff's future medical expenses.

[3] The only unresolved issue for determination is therefore in respect of the plaintiff's loss of future earning capacity. Counsel for the plaintiff argued, basing this on the experts reports, that the plaintiff is likely to retire at an earlier age of 45 years therefore the appropriate amount to award her is R3 926 280- 00 . Counsel for the defendant on the other hand argued differently that the correct amount to be awarded the plaintiff is R 612 900-00 for future loss of income.

- [4] The plaintiff testified in her case, called a qualified industrial psychologist Ms. Van Jaarsveld and also the plaintiff's ex-colleague Ms. Hannah Nikelo. The defendant closed its case without calling any witness. A bundle of several experts' reports was submitted as exhibit "A" together with a further actuarial report as exhibit "B".

Evidence

- [5] The 3 witnesses testified as follows;

Plaintiff

The plaintiff testified that prior to the accident she taught Science and Mathematics to Grades 11 and 12. After the accident, due to her limited abilities, she started teaching Grades 6 and 7 and also changed schools and moved to a school closer to her home. This according to her was to enable her to cope with her workload. She testified that she still has problems with her back as she experiences pains on the lower and upper back. She further testified that because of the injuries that she sustained in the motor vehicle accident she struggles with pains on her left leg as a result of which she cannot stand for a long period of time. Her evidence was further that after the accident, when the weather is cold she felt more pains. She also testified that after the accident she lacked confidence in herself and doubted her abilities and capabilities which was not the position before. This even made her fail to apply for the position of Head of the Department at her school which was available at some stage. She explained that she had memory loss after the accident and she described how she was trying to deal with it.

Ms. Van Jaarsveld

Ms. Van Jaarsveld is a qualified industrial psychologist with extensive experience in her field. Her duties involve making assessments of people injured in motor vehicle accidents and compiling reports for both plaintiffs and the Road Accident Fund (RAF). She testified that she assessed the plaintiff on 24 February 2017. Her assessment of the plaintiff was based on the interview with the plaintiff and further based this on medical reports that she received from doctors who had examined the plaintiff. She did not do the psychometric assessment because the plaintiff was still an established teacher at the time. What Ms. Van Jaarsveld noted was the injuries that the plaintiff sustained which include spinal fracture. The complainant also described to her the difficulties that she experienced. According to the assessment report, pre- accident, the plaintiff could have stayed in her career until the age of retirement at 65 years. The report further found that the plaintiff had more prospects of being promoted at the ages between 42 and 45 years. However post-accident, this changed. Ms. Van Jaarsveld's finding was that the plaintiff now, as a result of the injuries she sustained, will not be able to perform her duties optimally as a teacher until the age of retirement which is 65 years. Further according to Ms. Van Jaarsveld, if the plaintiff does sedentary work, she can be able to perform her duties and continue working until the age of 55 years, but, if not, she will only be able to do her work up to the age of 45 years. She based this on Ms. Grobler and the orthopaedic surgeon's findings that the plaintiff, due to her injuries, is unable to perform her duties as before the accident and the

recommendation that she should be accommodated to do sedentary work.

Hanna Nikelo

Ms. Nikelo is the plaintiff's ex- colleague and they attended school together. They worked together from 2007 to 2014 when she, Ms Nikelo left in February. She testified that before the accident and the injuries, the plaintiff was a hardworking, dedicated teacher who would go an extra mile and give her learners extra classes. That after the accident the plaintiff returned to school in the beginning of 2014. According to Ms. Nikelo after the accident a lot changed about the plaintiff. She had experienced some problems in walking and she would, as a result be late for classes. She testified that the plaintiff could not do what she was required to do because of her physical impairment. She testified that according to her, the plaintiff has not yet fully recovered as she still struggled with emotions and lacked confidence. She further testified that 80% of the time teachers are required to do their work whilst standing and walking and that this would naturally pose challenges to the plaintiff.

- [6] Experts reports were also submitted in a bundle as exhibit "A". Amongst these there were reports of Ms. Van Jaarsveld who also testified and that of Dr. Oelofse, an orthopaedic surgeon who assessed the plaintiff on the 25 October 2016 which was more than three years after the accident. The doctor received the information from the plaintiff herself. In his report, Dr. Oelofse stated that the plaintiff struggled with standing or sitting over long period of time, writing with her right hand, working hunched over

for a long period of time and reaching for items with her right hand. The doctor also observed that the damage on the plaintiff was permanent and could deteriorate over time.

Issues

[7] There are, in my opinion 2 issues for determination. These are as follows;

1. Whether having regard to the fact that the plaintiff is still employed by the same employer, with her salary unaffected and with the employer allowing her to do less strenuous duties it can be accepted that the plaintiff therefore will not suffer any loss of earning capacity;
2. If any calculation in respect of loss of earning must take into account the defendant's submission that the plaintiff was being paid the same salary as before the accident.

The Legal Principles

[8] The plaintiff bears the onus on the balance of probabilities to prove her case that she is entitled to an award for loss of future earning capacity. See **Kunene v Road Accident Fund** 2011 ZAGPJHC 194 (8 DECEMBER 2011).

[9] It is accepted in many decisions that it is not an easy task for the court to value damages in terms of money. See **Sandler v Wholesale Coal Suppliers Ltd** 1941 (AD) 194; **Lee Z v Road Accident Fund**, Case no 24915/2008 North Gauteng, Pretoria.

- [10] In **Bane and others v D'Ambrossi** 2010 (2) SA 539 the court quoted with approval the following dictum by Nicholas JA in **Southern Insurance Association Ltd v Bailey NO** 1984 (1) SA 98 at 113 to 114;

“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 2 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 calculation, 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. It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award.”

- [11] In **Kunene v Road Accident Fund** *supra* at paragraph 20 Moshidi J referred to the case of **Bridgman No v Road Accident Fund, Cape of Good Hope Provincial Division**, case no. 5622/98 where the following was said regarding loss of earning capacity;

“It is apparent from the South African case law that, in the majority of cases the correct approach in assessing damages for loss of earning capacity involves a comparison between the present value of the future income and which the plaintiff could have earned in an uninjured state, on the one hand with the present value of the plaintiff’s estimated future income, if any, in his or her injured state on the other hand”.

- [12] The court should therefore determine the case justly and equitably taking into account all circumstances.

EVALUATION OF THE EVIDENCE

- [13] It is common cause that before the accident, the plaintiff was a 30 year old hard working Secondary School teacher who was physically active and took joy in her work. It is on record that the plaintiff took part in sport and was a soccer coach. It is not in dispute that all these changed after the accident. She is not physically active anymore, she now tires easily and she experiences pains and depends on painkillers. It is also common cause that after the accident the plaintiff moved to a Primary School where she is now teaching the lower grades. This was done so as to make her to be closer to her home and in order to ease her work load. She is therefore accommodated by her employer in this position because of her struggles and suffering due to pains. It is common cause that prior to the accident the plaintiff was never injured in any way and she did not suffer from any back pain and was generally in good health.
- [14] The undisputed evidence is that the plaintiff pre-accident had the potential to get a promotion in her field of work. She could be promoted to the position of the Head of the Department and even possibly eventually the position of a Principal. She also had the potential to continue working until she reached the pension age of 65 years.
- [15] Post- accident this is definitely not guaranteed and the odds are against her. Based on the medical reports, in my opinion the

plaintiff is limited to the post that she currently occupies. This of course still depends on the sympathy and understanding of her employer being the Department of Education, her supervisors like the Principal and others like her colleagues, should they continue to accommodate her in her current situation.

[16] In cross examination to Ms. Van Jaarsveld, Counsel on behalf of the defendant contended that the plaintiff returned to her work and was accommodated by the department. It was therefore argued that there is nothing to suggest that the department will not continue to accommodate the plaintiff in the future. Ms. Van Jaarsveld conceded that, but correctly added that there is also no guarantee that the department will continue to accommodate the plaintiff. It should be noted that on this aspect, the plaintiff testified that she initially struggled to get transfer to her current school and that it eventually took her over 2 years to get the transfer. This was despite doctors' recommendations. According to the plaintiff it got to an extent of her having to "beg" the department. Therefore, there is no guarantee, whatsoever, that the department will continue to cater for the plaintiff's special needs.

[17] It is accepted, as Counsel for the defendant argued, that because the plaintiff did not disclose her challenges to her current school she could not be accommodated. However it cannot be ruled out that with changing times and different management the plaintiff may encounter challenges or problems in the future.

[18] If all these are taken into account, there is no way that one can say there will be a guarantee in future that the Department and all

stake holders will accommodate her challenges especially if she can consider taking another job or moving to another school.

- [19] Another argument by Counsel for the defendant was that there is no indication that the plaintiff's injuries hindered her salary progression. This is quite true, but as it was held in **Fulton v Road Accident Fund** 2012 (3) SA 255 at 262 B-D; *"The basic principle of compensation in delictual actions is to place the plaintiff in the position she would have been in had the delict not occurred. When a third party intervenes and makes payment to the plaintiff out of generosity or benevolence or charity, the collateral source rule comes into play. Ultimately this rule states that such payments are res inter alios acta and must be disregarded when quantifying the damages. One of the reasons behind this is the reluctance on the part of the law to allow the 'wrongdoer' to benefit from the acts of kindness of another unrelated party."*
- [20] This dictum is apposite here. The defendant can therefore not rely on the argument that, the Department of Education, which is the third party in this case, may continue with its generosity or benevolence towards the plaintiff. What needs to be taken into account, is Ms. Van Jaarsveld's finding that, based on the orthopaedic surgeon's findings, the plaintiff, if allowed to do sedentary or light duty work will be able to continue working until the age of 55 years, but, if not, it will be 10 years earlier at the age of 45 years. This means that whatever that happens the plaintiff will not be able to work until the normal retirement age of 65 years.
- [21] It was further argued for the defendant that the plaintiff's wellbeing might be improved if she undergoes further treatments

like physio therapy which the defendant has undertaken to pay for. This is indeed correct, however, the injuries that the plaintiff has sustained in the accident cannot be overemphasized. There is therefore no guarantee that the therapies that the plaintiff will undergo will reverse her condition to pre-accident. The defendant in paragraph 10 of the heads of argument alluded to this where the following was said, *“the proposed medical and psychological intervention will not provide a miracle cure for all plaintiff’s complaints, but logic dictates that should it be successful, and there is no reason to believe it won’t be, it will provide substantial relief.”* This statement, without a doubt reveals that the defendant admitted that there is no guarantee that the plaintiff can heal completely or recover fully.

[22] The doctor’s opinion is also that the injuries that the plaintiff sustained in the accident had a profound impact on her productivity and working abilities. According to the doctor’s report, even with successful treatment the plaintiff will continue to have a deficit on her spine and right forearm. These according to Dr. Oelofse will degenerate with time and will impact on her ability to do physical activities. As stated above being an educator involves lot of physical activities.

[23] Another argument by the defendant was that as plaintiff indicated that she is willing to grab any opportunity, should it arise, with both hands, then it means that the plaintiff will not suffer loss of earning capacity. This in my opinion only proves the plaintiff’s resilience and eagerness to do better and to pull up her socks despite challenges, but her resilience does not diminish the high possibility of degeneration and her need to go on early retirement.

- [24] It was further stated in different reports that the injuries that the plaintiff sustained placed her in an unfair competition in the open labour market. This cannot be overlooked when considering the plaintiff's loss of future earning capacity. It is on record that, because of the effects of the accident the plaintiff lacked confidence and she doubted her abilities and capabilities hence she did not even apply for the available post despite being encouraged to do so. Evidently, had it not been for the accident she could have had the confidence and trusted herself to be up to the task and applied for the post.
- [25] It is trite that the courts in matters like these, have to exercise their discretions judicially taking into account all the circumstances surrounding the case. There are 2 actuarial reports prepared by Munro Actuaries which were submitted on behalf of the plaintiff. Counsel for the defendant's argument is that I should reject the second report (Exhibit "B"). According to the second actuarial report, there are 2 scenarios regarding the plaintiff taking an early retirement. The first scenario is of the plaintiff taking an early retirement at the age of 55 years and the second one is for her retiring even earlier at the age of 45 years. The calculations in respect of the first scenario were lower at the amount of R 2 460 705 – 00, whilst the calculations on the second scenario are higher at the amount of R3 926 280 – 00. The plaintiff's Counsel has opted for the second scenario in which calculations are made for the retirement at the age of 45 years.

- [26] I am also mindful of the contentions by Counsel for the defendant and I have assessed them as against the version of the plaintiff regarding the possible age of retirement of the plaintiff.
- [27] The plaintiff is currently 35 years old and her condition improved from time to time after the accident. Initially she had difficulty walking, she then walked using two crutches, thereafter she used one crutch, she then walked with a limp and eventually she walked almost normally. At that stage, the plaintiff was still 30 years old and age was without a doubt on her side for her to recover. There is therefore no guarantee that this condition will continue until age of 65. The opinion expressed by Dr. Oelofse is that with time the injured spine and right forearm will degenerate and impact on the plaintiff's ability to do physical work. There was no other medical report to dispute this. I therefore find no reason to reject this finding.
- [28] I also take into account the joint minutes report by Dr. Kruger and Dr. Ngoandu. The two doctors are of the opinion that the plaintiff, because of the head injuries, has an increased risk of developing epilepsy in future. They further agree that the plaintiff has since the accident struggled with loss of memory and lack of concentration. I further take into account the evidence adduced on behalf of the plaintiff and the opinions expressed in the various reports in exhibit "A", which dealt with high possibility of the plaintiff going on early retirement. All these factors will obviously impact on the plaintiff's future earning capacity.

- [29] In her evidence, the plaintiff referred to one Doctor Louw who according to the plaintiff examined her and made some recommendations. Counsel for the defendant's submission in this regard is that this version of the plaintiff should be rejected as there was no report submitted of Dr. Louw nor was the doctor called to testify. I agree.
- [30] The 2 above- mentioned actuarial reports are based on the report by the industrial psychologist, Ms Van Jaarsveld. In compiling the actuarial report it was taken into account the future uninjured income as well as the future injured income of the plaintiff. **See Bridgman No v Road Accident Fund** *supra*. Counsel for the defendant's submission in this regard was that I should disregard the second actuarial report by Munroe as it is speculative. I however disagree. The second report was made by the very experts that compiled the first one. In my opinion, if anything, the most recent report is the one that is most acceptable under the circumstances.
- [31] The real possibility therefore in my opinion which is apparent from the evidence and experts' reports is that the plaintiff will suffer loss of future earnings. I am therefore not satisfied with the defendant's offer of an amount of R612 900, 00. This in my opinion will not be adequate under the circumstances of this case.
- [32] Having said that, I do not find any reason why the plaintiff cannot continue in her current employment and current position until the age of 55. It is on record that after she disclosed her challenges at her work place she was accommodated to do sedentary work.

According to medical opinion if she is allowed to do sedentary work she may be able to continue working until the age of 55 years. Taking the above-mentioned into account, I am therefore of the view that there are high possibilities that the plaintiff will not be able to continue to perform her duties optimally until the retirement age of 65. I cannot, however, say that I am satisfied as it was argued for the plaintiff, that she will not continue in her employment until the age of 55 and that her possible retirement age is 45 years.

[33] As indicated above, most issues were settled. The only issue left for the determination is the plaintiff's loss of future earning capacity. The parties suggested different amounts as the plaintiff's loss of future earnings. From this, I can safely say that both parties agreed that the plaintiff will suffer loss of earning capacity. What is in dispute is how much she is entitled to.

[34] Based on the evidence and the facts presented by the plaintiff and the experts, as well as the experts' reports I consider the most probable retirement age for the plaintiff to be 55 years. Therefore scenario 1 of Munro's second report (Exhibit "B") appears to be the most applicable in the circumstances of this case. I have, therefore, taken their calculation of the projected future loss of income capacity as the point of departure. I have also taken into serious consideration the calculations and total amounts proposed by the defendant.

[35] Based on the above and in my discretion, I concluded that an amount of R 2 000 000, (Two million Rand) would be an

appropriate and fair amount to award the plaintiff for future loss of earnings.

[36] Accordingly the following order is made;

1. The defendant shall pay the Plaintiff the amount of R2000 000- 00 (Two Million Rand) in respect of future loss of income.
2. The defendant shall provide the Plaintiff, as agreed, with an undertaking in terms of section 17 (4) (a) of the Road Accident Fund Act No. 56 of 1996, to compensate her 100% for the costs of her future accommodation 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 sustained in a motor vehicle on 17 January 2013, after such costs have been incurred and upon proof thereof;
3. The Defendant shall pay to the plaintiff the agreed amount of R 650 000, 00 (Six Hundred and Fifty Thousand Rand) in respect of general damages.
4. The capital sums shall be paid within 14 days of date of this order , after which interest shall accrue on the capital sum at a rate of 10, 0% per annum;
5. Defendant shall pay plaintiff's costs on the High Court scale as between party and party as taxed or agreed, including, but not limited to the following
 - (i) All costs attendant upon the obtaining of payment of the capital sum;
 - (ii) The qualifying fees and all reasonable and necessary fees and disbursements of the expert witnesses referred to herein below;
 - (a) Dr. FL Oelofse [Orthopaedic Surgeon];

- (b) Ms. Marli Grobler [Occupational Therapist]
- (c) Me. S van Jaarsveld [Industrial Psychologist]
- (d) Me. L. Grootboom [Clinical Psychologist]
- (e) Dr. JH Kruger [Neurosurgeon]
- (f) Dr. D Hoffman [Plastic Surgeon]
- (g) Dr. K roux [Psychiatrist]
- (h) Munro Forensic [Actuaries]

It is recorded that it shall be in the Taxing Master's discretion to determine whether the experts are entitled to be compensated for reasonable and necessary expenses

6. Payment of the taxed or agreed costs shall be effected within 14 days of date of agreement or taxation, after which the agreed or taxed costs shall accrue interest at the rate of 10,0% per annum
7. In the event of the costs not being agreed the Plaintiff shall serve the notice of taxation on defendant's attorneys of record.

B. LEFENYA, AJ

On behalf of the plaintiff:

Adv. Steenkamp
Instructed by:
Honey Attorneys
Bloemfontein

On behalf of the defendant:

Adv. De La Rey
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