**IN THE HIGH COURT OF SOUTH AFRICA,**

**FREE STATE DIVISION, BLOEMFONTEIN**

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| **Reportable:** | **YES/NO** |
| **Of Interest to other Judges:** | **YES/NO** |
| **Circulate to Magistrates:** | **YES/NO** |

Case number: 2536/2014

In the matter between:

**BARBARA-AAN HEBLER o.b.o** Plaintiff

**DANELLE STEYN**

and

**ROAD ACCIDENT FUND** Defendant

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**JUDGMENT BY:** MHLAMBI J,

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**HEARD ON:** 05, 06, 08 June 2018, 03 August 2018

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**DELIVERED ON:** 04 OCTOBER 2018

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**MHLAMBI, J**

[1] The plaintiff sued the defendant for general and special damages arising from a motor collision which took place on 21 April 2012 in Dan Pienaar, Bloemfontein. A settlement agreement was entered into and made a court order on 24 November 2017 in terms of which the merits, the aspect of general damages, medical and hospital costs were finalised. The only outstanding issue to be determined is that of the past and future loss of earnings or/ earning capacity.

[2] At the inception of the trial, the Rule 38 affidavits of the following persons were handed in by agreement: Benita Crouse, the Occupational Therapist; Dr EJ Jacobs, Industrial Psychologist; Dr Pieter Olivier, Orthopaedic Surgeon; Charl du Plessis, Actuary at Munro Consulting; Dr Shafik A Parker, Neurosurgeon; Mignon Coetzee, Clinical Psychologist.

[3] The issue to be adjudicated upon revolves around the amount of compensation to be awarded as reflected in paragraph 2 of the actuarial report by Munro Forensic Actuaries dated 21 February 2018. Paragraph 2.1 of the report states the following:

*"2.* ***EXECUTIVE SUMMARY***

*Basis of the Claim*

*The information provided indicates that the claimant:*

- *is not expected to reach her pre-accident career potential*
- *is expected to retire early at age 30*

*2.2* ***Capital Value of Loss of Income (no contingencies, RAF cap has no impact)***

*Scenario 1*

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| Past | R 26 000.00 |
| Future | R 1 185 300.00 |
| Total | R 1 211 300.00 |

Scenario 2

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|---|---|
| *Past* | *R -106 300.00* |
| *Future* | *R 6 016 400.00* |
| *Total* | *R 5 910 100.00"* |

The information underlying the loss of income calculation was based on the reports of the industrial psychologist, Dr E.J. Jacobs whose figures were updated to reflect current figures.

[4] Scenario 1 indicates the situation where the plaintiff would probably have been able to do unskilled work in the open labour market as a general worker and the plaintiff's loss was calculated to be R 1 211 300.00; if no past loss of income is taken into account and no contingencies having been applied. Scenario 2 is where the plaintiff would have been able to become a staff nurse and the plaintiff's loss was calculated to be R 6 016 400.00; if no past loss of income is taken into account and no contingencies having been applied.

[5] Dr Oliver opines in his report that the plaintiff will be forced to retire at the age of 30. From then onwards she will be able to perform a type of job that mostly entails semi-sedentary duties only. It was not foreseen that surgical intervention, such as a total knee replacement, would have a significant positive impact on her current level of disability. Dr Jacobs shares this opinion and in his view there are no guarantees that the plaintiff would be able to keep a job to the age of 30. Both counsel are *ad idem* that the plaintiff will retire at the age of 30 as stated by the experts. However, the bone of contention is which calculation the court should follow in determining the plaintiff's loss of earnings in the light of the scenarios contained in the actuarial report.

[6] The plaintiff's case is that it should be assumed that she would have achieved at least a grade 10 level of education and would have become a staff nurse. She would retire at age 30 or even earlier and will not be able to compete in the open labour market at all. The defendant contended that the plaintiff lacked the capacity to have progressed to such a level and would have entered the labour market as a general worker. Even if the accident had not occurred and in the absence of the injuries, the plaintiff would not have progressed and obtained the necessary qualifications in order to become a staff nurse as she lacked the capacity to do so. The accident was not the cause for the inability to obtain the said qualification. She would never have progressed beyond the position of a general worker in the open labour market. This is confirmed by the evidence of the defendant's witness, Ms Ntuli, the educational psychologist. The defendant submitted that the court should determine the plaintiff's loss of income by using the calculations in respect of scenario 1, with the application of the contingencies.

[7] In conclusion, the defendant submitted the normal contingencies of 5% and 15% ought to be applied should the court follow the calculations suggested in scenario 1. Should the court consider following the calculation in scenario 2, higher contingencies should be applied? It was suggested that the appropriate determination by this court would be an applicable contingency of 25% of the pre-morbid loss of income and between 40% and 50% on the post-morbid loss of income and that the said determination would be reasonable and just in the circumstances.

[8] I was referred by plaintiff's counsel to the case of **Burger v Union British Insurance Company**[1] and the following quotation:

*"I do not think, however, where the available evidence established a likelihood of some fact, situation or event as a consequence of the collision which is incapable of quantification within narrow limits, that I am obliged, because the onus is on the plaintiff, to act on the possibility least favourable to her…. What the Court will not do in such a case is to select, from the range of possibilities presented by the evidence, the possibility which is least favourable to the plaintiff because he bears the onus, and has not proved that a more favourable possibility ought to be preferred."* The court should not select, from the range of possibilities presented by the evidence, the possibility which is favourable to the plaintiff, but rather on the evidence before the court. I was urged to assume that the plaintiff would have achieved at least grade 10 of education and assume that she would have become a staff nurse and apply a contingency deduction of 35%.

[9] In **AA Mutual Insurance Associated Ltd v Maqula**[2] the court applied a higher contingency of 50% on the past loss of earning and future loss of earning capacity. Should such an application be adopted in the present case, it would entail that the plaintiff would be entitled to the payment in the amount of R2 955 050.00. The plaintiff's counsel submitted that the application of a contingency of 50% would be too conservative in the present matter, more especially viewed from the uncontested evidence of the plaintiff as against the evidence of the defendant and that the contingency deduction of 35% would be more appropriate. Such an approach would entail that an amount of R 3 841 565.00 would be payable to the plaintiff as compensation for her loss of earning capacity.

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[1] [1975] All SA 647 (W) at page 649
[2] [1978] All SA 249 (A)

[11] The uncontested evidence on record is that the plaintiff was busy with night school in Grade 11 at the time of the accident and that her scholastic performance to the date of the accident was restricted. Her concentration was affected by her pregnancy and affair with her deceased boyfriend whose death resulted in her failure to cope with her studies and led to her failing Grade 8 in 2011. She was 15 years old when she sustained the severe injuries. Her post-accident cognitive function remained the same. She started attending the night school in preparation for becoming a staff nurse at the instance of her mother who was a nurse. Her mother was of the view that the plaintiff was diligent at this school, much happier and would have obtained positive results had it not been for the accident. Dr Jacobs confirmed that the plaintiff would have attained either Grade 10 or 11, but less likely Grade 12. Grade 10 was a requirement for admission to the program of a staff nurse. The plaintiff showed an intention to better herself and her education and stood a good chance of achieving her goal. A factor to be considered was the level of education of both the parents and the siblings who all had at least a Grade 10 qualification.

[12] The educational psychologist, Ms Ntuli, who testified for the defendant, conceded that it would have been difficult and unlikely for the plaintiff to have achieved Grade 10 but that it was not impossible. Ms Kheswa, the industrial psychologist on behalf of the defendant, conceded that she never saw or evaluated the plaintiff herself, but her assistants did and prepared the source documents. She conceded that she “cut and pasted” the conclusions she arrived at, which were wrong. It is therefore clear

on the evidence presented, that the defendant failed to neutralise and refute the plaintiff's evidence; more especially the evidence of Dr Jacobs in that the plaintiff would have reached a Grade 10 or 11qualification and could have become a staff nurse. I therefore find that the plaintiff would have achieved either a Grade 10 or 11qualification which would have led her to becoming a staff nurse.

[10] Having considered the above, I am of the view that the application of 50% contingency is appropriate and the award of the amount of R 2 955 050.00 would be a fair and reasonable compensation for the plaintiff in respect of her loss of earning capacity.

[11] In the result, costs should follow the event.

[12] I therefore make the following order:

**Order:**

1. **The defendant is ordered to pay to the plaintiff the amount of R 2 955 050.00 in respect of loss of earnings;**
2. **The defendant is to pay the plaintiff's costs of the action.**

**MHLAMBI, J**

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| Counsel for the Applicant: | Adv. S Botha |
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| Counsel for Respondents: | Adv. A Sander |
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