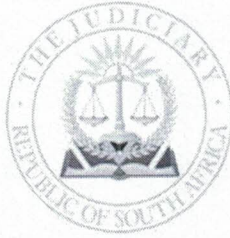


REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 1989 / 2014

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED:
DATE: 25/10/2017 SIGNATURE: <i>[Signature]</i>	

In the matter between:

MOKGOTHO JEMESHIA HLOMOHANG

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

SIKHWARI AJ

- [1] In this matter merits are settled 100% in favour of the plaintiff on the 15 June 2015. The issue of future medical expenses has been settled by way of a certificate in terms of Section 17(4)(a) of the

Road Accident Fund Act. Plaintiff's injuries and possible treatment thereof is common cause.

- [2] It is common cause that the plaintiff has suffered no past loss of earning. The issue of general damages was referred to the HPCSA. The issue before court is for the determination of future loss of earning capacity; and applicable contingency thereof.
- [3] It is common cause that the plaintiff is almost 24 years of age, having been born on the 8 February 1993. The cause of action arose from a motor vehicle accident that occurred on the 2 February 2013 at or along the R37 road at Ga-Kgwete near Burgersfort when the plaintiff was a passenger in a motor vehicle to wit CGP 585 L which was involved in a motor collision with the vehicle to wit BKX 920 L.
- [4] It is common cause between the parties that plaintiff sustained injuries which are described as a mild head injury, soft tissue injury to the neck, soft tissue injury to the back and scar of the forehead. The parties agreed to argue the matter on papers without leading evidence.

- [5] It is common cause that the plaintiff was in Grade 12 when the accident occurred. The plaintiff has failed and repeated one secondary school grade prior to the accident. School reports were not provided. She failed Grade 12 in 2013 and counsel of the plaintiff attributed same to the accident. She passed supplementary exam in 2014. She is struggling with her tertiary studies where she is enrolled for electrical engineering certificate at the FET in 2015she has failed three major subjects.
- [6] The plaintiff's submissions in support of future loss of earning capacity are that the plaintiff has a long terms neurocognitive impairment or deterioration to her cognitive, behavioural and psychiatric functioning. According to Ms Monyela, the sequelae to the accident will disadvantage the plaintiff in manual skills careers. She may be suffering from post-concussion syndrome. She did complain to her occupational therapist of blurry vision, loss of memory, recurring headache especially in inclement weather. She also complained of painful neck which gets worse when she moves her neck and lower back pain when she sits for a long

period. Dr Moloto of the defendant was of the view that the plaintiff is exaggerating her complaints.

- [7] The plaintiff prays for contingency deduction of 20 per cent and referred the court to various decisions.
- [8] The defendant contend that the plaintiff has the basic life skills to live independently. The plaintiff has managed to retain her working ability as a student. No complaints have been raised regarding her performance. The defendant contends further that the plaintiff's occupational therapist has confirmed that it is expected that if the plaintiff follows the recommended treatment, she will be able to perform jobs that are medium to heavy in nature with improved endurance capacity and further that the plaintiff will be able to compete fairly well in the open labour market, and her working life is not expected to shorten as a result of the accident.
- [9] In the case of **Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194**, the court stated that "it is no doubt exceedingly difficult to value the damage in terms of money, but that does not relieve the court of the duty of

doing do upon the evidence which has been acted on in several cases in South African”.

[10] In **Rudman v Road Accident Fund 2003 (2) SA 234 (SCA)** the court held that there must be a proof that the reduction in the earning capacity indeed gives rise to peculiarly loss when Jones AJA stated in para (11) that “... where a person’s earning capacity has been compromised, ‘that incapacity constitutes a loss, *if such loss diminishes the estate*’ (Rumpff CJ in the above quotation from *Dippenaar’s* case) and ‘he is entitled to be compensated *to the extent that his patrimony has been diminished*’ (Smalberger JA in *President Insurance Co Ltd v Mathews*) ... A physical disability which impacts upon capacity to earn does not necessarily reduce the estate or patrimony of the person injured. It may in some cases follow quite readily that it does, but not on the facts of this case. There must be proof that the reduction in earning capacity indeed give rise to pecuniary loss”.

[11] The court in *Rudman* went further to warn the courts that they must guard against making an award in the final analysis which is based on speculation rather than evidential foundation.

- [12] In the case of **Naude v Road Accident Fund 2013 (6C5) QOD 8 (GNP)** it was held in para (29) that “the court must accordingly do the best it can on the material available to it and in exercising its discretion the court must consider an award which it considers to be just and fair under all circumstances.”
- [13] It is manifest that in determining loss of earning capacity and / or applicable contingencies either approach involves some degree of guesswork to some extent. In the case of **Bhekisisa Simon Dlamini v Road Accident Fund (599188/13) [2015] ZAGPPHC 646 (3 September 2015)** at para [31] the court stated that “when a court is called upon to exercise an arbitrary discretion that is largely based on speculated facts it must do so with necessary circumspection. In the absence of contrary evidence, the court can assume that a reasonable person in the position of the plaintiff would have succeeded to life rather than to accept them. Both favourable and adverse contingencies have to be taken into account in determining the appropriate contingency deductions. Bearing in mind that contingencies are not always adverse, the court should in exercising its discretion lean in favour of the plaintiff as he would not have been placed in the position where his income would have to be the subject of speculation if the accident had not occurred.”

- [14] In the case of **Goodall v President Assurance Company 1978 (1) SA 389 (WU)** at pages 392H – 393A, Margo. J stated that “in the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the sort of science of foretelling the future, so confidently practiced by ancient prophets and soothsayers, and by modern authors of a certain type of almanac, is not numbered among the qualifications for judicial office.”
- [15] In my view, there is overwhelming evidence from other experts which contradicts the baseless opinion of the plaintiff’s industrial psychologist to the effect that *“the accident has had a definite negative impact on Ms Mokgotho’s physical and emotional capacities. The accident injuries have not only limited her future prospects and work capacity but it has also affected her entire life in terms of family, career and potential for earning. She should be adequately compensated for her loss of earning in respect of her injuries and limitations of future work prospects...”*
- [16] In the case of **Dippenaar v Shield Insurance Co Ltd 1979 (2) SA 904 (A)** at para [9] it was stated that “in our law under the *lex Aquilia*, the defendant must make good the difference between the value of the plaintiff’s estate after the commission of the delict and the value it would have

had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes his estate".

[17] It was further stated in **Legal Insurance Company Ltd v Botes 1963 (1) SA 608 (A)** at page 614F that "in assessing the compensation the trial judge has a large discretion to award what under the circumstances he considers right. He may be guided but is certainly not tied down by inexorable actuarial calculations".

[18] On taking into account the nature and extent of the plaintiff's injuries as well as the opinion of various experts herein, except the plaintiff's industrial psychologist, I am not persuaded that the plaintiff has suffered any future loss of earning capacity. The injuries she has sustained will heal and restore her full premorbid condition if she can follow the treatment properly. There is no evidence based on the facts to sustain the suspicion that her inability to pass Grade 12 at once and her challenges at the FET are connected to the accident. In the absence of her school reports, I am persuaded on the evidence before me that the plaintiff is a person of average ability on academic matters.

[19] in my view, the actuarial calculations of the plaintiff are without basis as there is no evidence of future loss of earning. I cannot be tied to the actuary if I find no basis for same, as I did in this case.

[20] The plaintiff's claim for future loss of earning capacity should fail. I see no reason why costs should not follow the event.

[21] I accordingly make the following order:

1. The plaintiff's claim for future loss of earning capacity is dismissed with costs.



MS SIKHWARI AJ
ACTING JUDGE OF THE HIGH
COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

For Plaintiff	:	Adv HL Ngomane
Instructed by	:	Makgahlela Mashaba Attorneys
For Defendant	:	Mr PT Rampyapedi
Instructed by	:	Pule Incorporated
Date of Hearing	:	8 August 2017
Date of Judgment	:	25 October 2017