IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 43405/2014

21/2/2017

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

21/2/2017
DATE

SIGNATURE

FOURIE, S M — PLAINTIFF

AND

ROAD ACCIDENT FUND — DEFENDANT

JUDGMENT

MOLEFE J

[1] The Plaintiff, a 40 year old female typist instituted an action for damages arising out of injuries sustained in a collision which occurred on 27 October 2011. The plaintiff was the driver of a Ford Bantam light delivery vehicle with registration numbers BJ87ND GP and collided with a motor vehicle with registration numbers WSR 060 GP being driven by Mr J Botha ("the insured driver").

[2] As a result of the aforesaid collision, the plaintiff sustained bodily injuries for which she had to receive medical treatment. Both the plaintiff and the defendant

commissioned various expert reports dealing with the injuries sustained by the plaintiff. At the time of the accident the plaintiff worked as a typist for Nedgroup Trust where she was employed since 1997.

[3] The issue of negligence of the insured driver is not in dispute, the defendant having agreed to pay 100% of the plaintiff's proven or agreed damages.

[4] The parties have agreed on the following heads of damages:

4.1 *Past hospital, medical and related expenses*

The defendant has agreed to pay a total compensation of R125 049.61.

4.2 Future medical expenses

The defendant has agreed to furnish an undertaking in terms of section 17(4) (a) of Act 56 of 1996 in respect of 100% of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service or the supplying of goods to her after the costs have been incurred and on proof thereof, resulting from the accident that occurred on 27 October 2011.

[5] The only issue that remains in dispute is the plaintiff's post-morbid loss of income and earning capacity as well as the contingency deductions. The parties have agreed on the pre-morbid value of income as calculated by the plaintiff's actuary at R4 967 849.00 less 15% contingency at R745 177.00 with the total being R4 222 672.00.

[6] Conclusive proof of injuries sustained by the plaintiff and the sequelae thereof is documented in the medico-legal reports obtained from various medical professionals in their respective fields of expertise. I will only refer to the relevant

reports for the purpose of the determination of the plaintiff's future loss of earnings/earning capacity.

6.1 **Dr D A Birrell-Plaintiff's Orthopaedic Surgeon**

- The patient's injuries will have no effect on longevity. She reports neck and lower back pain as well as frequent headaches, constant nausea, occasional instability in the right knee with decreased balance. The estimated loss of work capacity as a result of the accident is between 3% to 4%.
- The patient's chances of requiring neck surgery and lumbar surgery are not more than 2% to 3%.
- The X-ray reports shows that the soft tissue and bony alignment is normal. The end plates are smooth and the disc spaces and vertebral body heights are preserved.

6.2 **Dr J du Plessis – Plaintiff's Neurosurgeon**

- Based on the history provided by the plaintiff, the impression gained on examination and the radiological examination, she sustained a mild soft injury to her lumbar spine. This was not complicated by neurological sequelae. It is unlikely that the transverse processes of L4 and L5 were fractured in the accident under discussion but due to previous trauma.

6.3 **Dr M Mazabow – Plaintiff's Neuropsychologist**

- There is no indication of a traumatic brain injury.

- Plaintiff is presently experiencing a chronic severe depressive disorder. . . attributed to her frustration about her experience of chronic pain. . . and associated limitations on her physical competence. She also experiences chronic mild PTSD.
- The severity of plaintiff's depression, together with distracting effects of chronic pain would leave Ms Fourie vulnerable to concentration variability and slow performance, and these would represent obstacles in the workplace, rendering her a more vulnerable employee, especially in positions with high clerical/administrative demands, high interpersonal requirements and tight time-deadlines. This vulnerability may also affect her promotional prospects in future.

6.4 **Nicola Heyns – Plaintiff's Occupational Therapist**

- Through successful treatment and ongoing reasonable work accommodations in an accommodating work environment, plaintiff should be able to meet her demands as Will Drafter with less pain and fatigue. Residual chronic pain, fatigue and her psychological condition will however continue to impede on her ability to perform at maximum levels of personal output when compared to her pre-conduct ability. She will thus pre-accident ability. She will thus remain at a lower level than what she would have been capable of had she not been injured in the accident.

6.5 **Esme' Noble – Plaintiffs Industrial Psychologist**

- Based on the fact that plaintiff is working in the same since 2007, having applied unsuccessfully for promotion, it is postulated that her current position probably is her ceiling. Her guarantee package is expected to grow in real terms to the upper quartile by the age of 45 years, whereafter yearly increases based on the consumer price index is postulated until usual retirement at the age of 60 (as confirmed by Nedbank).

6.6 **Dr S S Mukansi – Defendant's Orthopaedic Surgeon**

- X-rays show less of cervical spine lordosis, pathology at two levels C4, C5/C6 and normal lumber spine.
- Patient suffered acute, subacute chronic pain as well as emotional pains. She can continue with her job as Wills Drafter.

6.7 **Hlobsile Dlamini – Defendant's Occupational Therepist**

- The plaintiff retains functional independence and capacity to remain a productive self-sufficient individual in the open labour market with moderate loss of life amenities as a result of the accident in question.
- She will benefit from Occupational Therapy and Biokinetics to manage the experienced pain.

6.8 **Elfiede Tromp – Defendant's Clinical Psychologist**

- Ms Fourie is suffering from a Depressive Disorder and Post Traumatic Disorder symptoms. The chronic physical pain she has been experiencing contributed significantly to the development of depression disorder symptoms post-accident. She will benefit from psychotherapeutic intervention.

[7] Plaintiff's actuarial calculations were based on three scenarios with the value of the pre-morbid future loss of income at R4 967 849. Scenario 1 was calculated at

22.50% contingency deductions, Scenario 2 at 25% and scenario 3 at 27.50% contingency deductions.

[8] Plaintiff's counsel, Advocate R Ferguson submitted that the plaintiff remains severely depressed despite psychotherapy and the use of anti-depressants. Prior to the accident, the plaintiff's career goal was to become a consultant, however the October 2011 accident worsened her pain sequelae to such an extent that she no longer feels that she will be able to accomplish her goal. Counsel contends that scenario 3 of 27.50% contingency deductions amounting to a total net loss of R620 981.00 is fair and reasonable.

[9] Defendant's counsel, Advocate F Matika submitted that based on the facts in this case, the Court should apply a 20% contingency deductions amounting to R248 392.80 on future loss of earnings.

[10] An enquiry into damages for loss of earning capacity is of its nature speculative as it involves a prediction as to the future without the benefit of crystal balls. Nicholas JA at 116 – 117 in **Southern Insurance Association v Bailey NO 1984 (1) SA 98 (A)** stated the following:

> *"Where the method of actuarial calculation is adopted, it does not mean that the trial Judge is 'tied down by inexorable actuarial calculations. He has a large discretion to award what he considers right'. (per Holmes JA in **Legal Assurance Company Limited v Botes 1963 (1) SA 608 (A) at 614 F**). One of the elements in exercising that that discretion is the making of a discount for 'contingencies' or the 'vicissitudes of life'. These include such matters as the possibility that the plaintiff may in the result have less than a normal*

expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary' depending upon the circumstances of the case".

[11] Our courts have alluded to the difficulties in arriving at a proper allowance for contingencies. In **Goodall v President Insurance Co Ltd 1978 (1) SA 389**, Margo J remarked as follows (at 392 H – 393 A):

"*In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art of science of foretelling the future, so confidently practiced by ancient prophets and soothsayers, and by modern authors of certain type of almanack, is not numbered among the qualifications for judicial office".*

[12] Mindful of these difficulties, the following factors *in casu* require consideration:

12.1 Plaintiff was involved in a collision in 1997 and sustained injuries to her neck; she was again involved in a collision in 2001 in which she injured her neck; in 2009 plaintiff was again involved in a motor vehicle accident and similarly sustained soft tissue injuries to her neck, back and both knees. On 27 October 2011, plaintiff was again involved in a motor vehicle collision and sustained soft tissue injuries to her neck and lower back which injuries superimposed on a pre-existing symptomatic neck and back pathology from the above-mentioned accidents.

12.2 Plaintiff matriculated in 1995 and attended in-service training during the course of her career. She obtained a diploma as a paralegal in 2012, after the accident in question. She also did short programme in personal financial planning and investment management during May 2007 for which she obtained an NQF 6 certificate. She also did short programmes in administration of deceased estates.

12.3 At the time of the accident plaintiff was employed as a Wills Drafter in the Nedbank Group where she is still employed even after the accident. The nature of her occupation demands prolonged sitting whilst typing.

12.4 According to Dr Birrell, the plaitiff's current loss of work capacity is between 3% and 4%. She suffered moderately acute pain for 5 to 7 days after the accident and does not qualify as a serious injury under Narrative Test.

12.5 Although her productivity increased during 2014, it significantly decreased again during 2015 when she was diagnosed with PTSD and depression which would have an impact on her everyday functioning.

[13] Having regard to all of the above factors, in particular to the plaintiff's pre-collision vulnerability, my view is that the actuarial calculations in scenario 2 with 25% contingency deductions on future earning capacity in an amount of R496 785.00 is a fair and reasonable award.

[14] In the result, the defendant is ordered to make payment of R621 834.61, made out as follows: past future loss of earnings R496 785.00; past medical and related expenses R125 049.61.

The draft order annexed hereto marked "X" is hereby made an order of Court.

D S MOLEFE
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Plaintiff	:	**Adv. R Ferguson**
Instructed by	:	**Adams & Admans**
Counsel on behalf of Defendant	:	**Adv. F Matika**
Instructed by	:	**Tau Phalane Inc.**
Date of Hearing	:	**17 February 2017**
Date of Judgment	:	**21 February 2017**