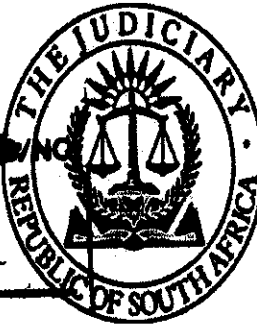


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 (3) REVISED



DATE

30/03/2017

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IN THE HIGH COURT OF SOUTH AFRICA
 (GAUTENG DIVISION, PRETORIA)

CASE NO: 53289/2013

30/3/2017

In the matter between:-

MAMHEPELA DS

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

NKOSI AJ

INTRODUCTION

- [1] The plaintiff instituted an action for damages against the Road Accident Fund claiming inter alia past and future loss of income. The other heads of damages have already been settled. The Plaintiff is only pursuing her claim for past and future loss of income.

- [2] It has since emerged that the defendant concedes plaintiff's claim for past loss of income and is willing to accept the plaintiff's actuarial calculations of past loss of income. However, in so far as the claim for future loss of income is concerned, the defendant is of the view that the plaintiff has not suffered any loss of income.

FACTUAL BACKGROUND

- [3] The plaintiff is an adult female person born on the 24 September 1986. She was a passenger in a motor vehicle which collided with another motor vehicle on the 4 February 2012.
- [4] At the time of the collision, she was employed on a contract basis as a Safety Officer at Sebcon Contracting Service in Middleburgh. Her responsibilities would entail risk assessment, training of staff on safety – related issues, implementation of safety procedures, and reporting of incidents. She was required to walk and stand for prolonged periods of time, get into confined spaces and to climb stairs. After the collision she was employed as a planner at the same company.
- [5] She sustained a fracture dislocation in the left acetabulum. An open reduction and internal fixation procedure was done at Wilgers Hospital. Approximately four months later a total hip replacement of left acetabulum and femur head was done. According to Dr. Francois A Booyse, the plaintiff will require at least three hip revision surgeries in

her lifetime, one every 12 years. She also has a 2cm leg length shortening which has resulted in pelvic obliquity and resultant disturbance of sagittal balance and increasing lower back pain.

ISSUES

- [6] The dispute between the parties is whether the plaintiff suffered loss of future income as the result of the motor vehicle collision which happened on the 4th February 2012. If the court finds that there is loss of future income, what contingency deductions must be applied.

ANALYSIS

- [7] Ms Louise Schubart, the plaintiffs Industrial Psychologist is of the view that, the plaintiff's pre - accident earnings would probably have progressed to a Paterson c1/c2 level, in approximately 5 years time. Further that she would have had a further growth to a career ceiling likely falling on Patterson c4/c5 level. She would have reached her maximum in her mid - forties and thereafter the salary increase would be influenced by the inflation trends.
- [8] According to Ms Schubart, the plaintiff was earning R 10 554 per month, provident fund included.

- [9] The pre – morbidity scenario as postulated by Ms Schubart yielded the following actuarial calculations, done by Mr. Wim Loots.

(a) Income had accident not occurred	R 9 827 926.00
(b) Income having regards to accident	<u>R 8 055 266.00</u>
TOTAL LOSS	<u>R 1 772 660.00</u>

The calculations do not make provision for any contingency deductions.

- [10] According to Ms Talifhani Ntsieni, the Industrial psychologist for the defendant, the plaintiff earned R 4 876.00 per fortnight. She would have likely secured a permanent job and would have reached her career ceiling at Peterson c1/c2 level by age 45, thereafter received inflationary increases until retrenchment age of 60 – 65.

- [11] The actuarial calculations done by Mr. Loots in line with Ms Ntsieni's postulation indicate that :

(a) Income had accident not occurred	R 7 099 628.00
(b) Income having regards to accident	<u>R 7 059 406.00</u>
Total loss	<u>R 40,222.00</u>

These calculations also do not make provision for any contingency deductions.

[12] Both industrial psychologists agree to large extent regarding the Post Morbidity Scenario, they agree that :

- (i). The plaintiff returned to work in August 2012 and continued to receive her fortnightly basic wage.
- (ii). She secured a permanent position as a Planner at Howden in February 2016. Her basic salary has been R 19 500.00 per month, and she is entitled to a travel allowance (R 2 925 per month at present) as well as fringe benefits.
- (iii). Her current earnings level corresponds to a Paterson C2 level between lower quartile and median.

[13] The said psychologists differ in the following respect

- (i). Ms Schubart assumes, for quantification purposes, that the plaintiff will likely continue with her current position as Planner. However her prospect of following a career as a Safety officer her preferred career , has been truncated completely. She might reach a career ceiling at Peterson C3 as her maximum earning. Early retirement between ages 60 and 63 is indicated.
- (ii). Ms Ntsieni is of view that the plaintiff seems likely to continue working in line with her skills and residual capacity and growth in her earnings and career will still be as her pre – accident scenario.

ISSUES CONSIDERED

- [14] There is no doubt that the plaintiff sustained severe injuries which are mainly orthopaedic and to some extent psychological in nature. The severity of her injuries put an end to her choice of career, that of a Safety Officer. Prior to the accident in question, she was generally in good health.
- [15] She passed her grade 12 in 2004. In 2007, she passed a course in boiler making level 5, in 2006 she obtained a qualification in end user computing, in 2008 she obtained a qualification in Safety Management Training programme, in 2013 she passed a course in Project Planning and Control using Primavera as well as a course in MS Project 2010 - Level 1 and 2 in the same year. She furnished proof of all the courses she obtained.
- [16] She reported to both Industrial psychologists, that she enjoyed her work as a Safety Officer and consequently enrolled for a National Diploma in Safety Management through UNISA in 2012. The accident in question interrupted her aspiration. However, she did not furnish the both Industrial psychologists with proof of enrolment. This aspect lead to a controversy, whether she did indeed enrol for the said Diploma. The defendants' attitude is that "she who alleges must prove ". On the other hand, the plaintiff argued that she had the inspiration to study further and obtain the Diploma in Safety Management.
- [17] Having regard to plaintiff's post matric education history, I have no doubt that her aspiration is genuine. Notwithstanding her physical and psychological challenges, she

managed to enrol and complete a course in Project Planning and control using Primavera, in 2013, post accident. This is a course relevant to her current occupation as a Planner. She strikes me as a dedicated, hard working, disciplined and focused person. It is recorded that her current employer is happy with her performance at work. According to Mario Meyer, Lead Project Planner, the plaintiff was regarded as an exceptional employee with great potential. She was a very good worker with excellent knowledge of the plant. She would have secured a promotion at a significantly later stage in her work life.

[18] It is true that the general principle is that, "he who alleges must prove". However in this instance, the defendant is not merely expected to defend lawsuits. The defendant is a creature of statute; the Road Accident Fund Act 56 of 1966 ("the act"). The act imposes certain statutory obligation on the defendant. The act in its format imposes limitations to common law rights of victim of a motor vehicle accident. The constitutionality of the limitations has attracted the attention of various courts and in particular the constitutional court. The Constitutional Court¹ held that the said limitation impacts on the victims right to security as entrenched in section 12(1) (c) of the constitution.

[19] The right to security is of great importance not only to the victim but to the institution entrusted with administering social justice as expected in term of the constitution. The object of the Road Accident Fund is not merely to compensate victims of the Road

¹ Law Society of South Africa and others v Minister of Transport and Another 2011 (1) SA 400 (CC), 2011 (2) BCLR 150 at para 75.

Accidents but also to actively investigate the circumstances of the accident and consequences thereof so that the victim is justly and adequately compensated.

[20] *"That during the last decade the Fund has too often failed to perform in a manner consistent with the realisation of its object of rendering an indispensable service to vulnerable member of society , with resultant prejudice to third party claimants, is evident from the adverse remarks made in a signification number of superior court judgements given during that period "*²

[21] In *Road Accident Fund v Klisiewicz*³ per Howie JA ,the court stated that :

"A special cost order is therefore not only appropriate but necessary. The [Fund] exists to administer, in the interest of the road accident victims, the funds it collects from the public. It has the duty to effect that administration with integrity and efficiency .This entails the thorough investigation of claims and where litigation is responsibly contestable, the adoption of reasonable and timeous steps in advancing its defence. These are not exacting requirements. They must be observed".

[22] In *Madzuye and another v Road Accident Fund*⁴ the court ,per Maya JA went on to state that

² *Daniels and others v Road Accident Fund others* (8853/2010) [2011] ZAWCHC 104 (28 April 2011)

³ *Road Accident Fund v Klisiewicz* [2002] ZASCA 57 at para 42 also see *Daniel and others v Road Accident Fund and others* ,supra at para 18

"This is particularly so having regard to the fact that the intention of the act, in terms of which the respondent functions, is to give the greatest possible protection to victims of negligent driving of motor vehicles".

- [23] In this present case, the one crucial issue which appears to have been brushed aside is whether the plaintiff registered with UNISA for a National Diploma in Safety Management. It does not appear from Industrial psychologists or any expert report before court that there was an effort to investigate the plaintiff's allegation. This is disturbing. In my view expert witnesses are not there to regurgitate what the patient alleges, but to also verify crucial information which will impact on the quantification of the damages. This is so because their final postulation will necessarily attract doubt if not founded on investigated or verified facts. The Failure to verify or investigate material allegations of fact should not be held against the victim of the road accident fund.
- [24] The Road Accident Fund, has not conducted an efficient or any investigation of the plaintiffs' education history. The defendant was alerted by its own Industrial psychologist that the plaintiffs alleges she had enrolled with UNISA for a course in Safety management. Instead, the defendant places the plaintiffs to the proof thereof and does not initiate its own investigation. The Head office and one of the branch offices of the defendant as well as UNISA are situated within the jurisdiction of this court. It is a matter of a few minutes from the defendants' branch office to UNISA. It wouldn't have been an onerous task to investigate whether plaintiff was indeed enrolled with UNISA as alleged.

⁴ Madzuye and another v Road Accident Fund 2007 (1) SA 165 (SCA) para 17-18. Also see Bovungana v Road Accident Fund 2009 (4) SA 123 (E) at Para 3 where the court noted with concern the increasing tendency on the part of the Fund to disregard its objective.

DAMAGES

- [25] There is no doubt before court that the plaintiff aspired to pursue a career as a safety officer. The only criticism is that she did not produce proof of registration with UNISA. I am not persuaded by such argument. The worst should not be assumed but the well investigated facts should speak for themselves and be before court.
- [26] The undeniable fact is that the plaintiff is no longer the same person mostly physically. Her aspiration and career choice have been shuttered. She suffers from physical and psychological challenges which had a direct and negative impact on her pre accident earning capacity.
- [27] Having regard to her career choice, she would have pursued her aspiration of becoming a better Safety officer with better prospects of salary increment. The opinion of Mr Mario Meyer about plaintiffs' character bears testimony to this fact.
- [28] I am inclined to accept the plaintiff's actuarial calculations based on Mr Loot's subsequent and final calculations but to factor appropriate contingency deductions.
- [29] In my view the following calculation are fair and equitable :

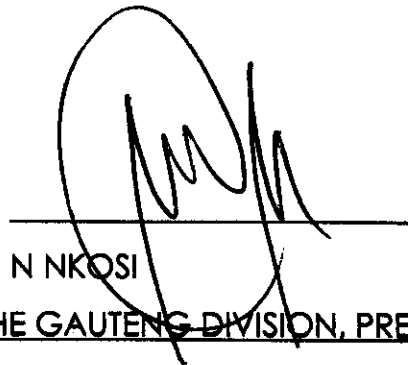
(i).	Income had accident not occurred	R 9 827 926.00
	less 15% contingency deduction	<u>R 1 474, 188, 90.</u>
	Subtotal	<u>R 8,353,737.10</u>

(ii).	Income having regard to accident	R 8 055,266.00
	less 35% contingency deduction	<u>R 2 013,816.50</u>
	Total loss	<u>R 6 041 449, 50</u>

Total Loss R 8 353 737,10 – R 6 041 449, 50 = R 2 312 287 ,60

[30] I therefore make the following order

- (i). The plaintiff succeeds in her claim for compensation against the Road Accident Fund,
- (ii). The Road Accident Fund is to pay the plaintiff a sum of R 2 312,287.60 her loss of past and future income ,
- (iii). The defendant is to pay cost of this action which includes all the plaintiff's experts qualifying and reports delivered before the hearing of this matter and the cost of plaintiff's counsel.


N NKOSI

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA