

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

CASE NO:39037/13

DATE: 18 MARCH 2015

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

MITCHELLE CHETTY

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

KUBUSHI, J

[1] The plaintiff is claiming for personal injuries sustained in the motor vehicle collision. At the time of the collision she was a passenger in the insured motor vehicle. I am informed that the defendant has conceded the merits. The defendant has also agreed to pay the agreed damages in respect of the following heads of damages:

General damages in the amount of R250 000;

Past medical expenses in the amount of R38 000;

In respect of future medical expenses the defendant has agreed to provide the plaintiff with an undertaking in terms of s 17 (4) of the Road Accident Fund Act.

[2] What remains in issue which I have to determine, is the damages for loss of earnings, that is, past and

future loss of earnings or damages for loss of earning capacity.

[3] The plaintiffs counsel handed in, by consent of the defendant, an actuarial report as annexure "X". The defendant's counsel handed in, by consent of the plaintiffs counsel, a copy of proof of the plaintiffs monthly salary of R7 000 as annexure "V".

[4] There was no evidence led. The parties' counsel agreed that the matter should be argued on the basis of the expert reports filed of record. The reports are uncontested and were provided by the plaintiff. The defendant has provided no reports and relies on those of the plaintiff.

[5] The reports filed of record are the following:

The report of the orthopaedic surgeon.

The report of the Occupational Therapist.

The report of the Industrial Psychologist.

[6] The injuries suffered by the plaintiff are common cause between the parties. She sustained a compound fracture of the right *humerus*. The fracture has healed in satisfactory alignment. The experts are agreed about the *sequelae* of the injuries in that she suffers from persisting pain in the right upper limb and lower back; she is not able to manipulate heavy objects with the right upper limb; she has persisting scars over the right arm and recreational activities are compromised.

EMPLOYMENT

[7] Prior to the accident, the plaintiffs work experience consisted of semi-skilled to skilled sedentary work in the food and retail industry. Her first job was in the family business as a shop manger earning a monthly salary of R4 000. She left that employment for a better career opportunity. At the time of the accident she was employed by The Hub as a casual worker for just over a year. Her duties included *inter alia* filing documents, general office administration, stock related tasks and occasional cashier work. She earned a monthly salary of R2 000. According to the occupational therapist who assessed her after the collision, this work format may be classified as work of a light to low range medium physical demand level.

[8] Her employer at The Hub rated the plaintiff as an "excellent" worker who was always ready and willing to take on any work assigned to her. Prior to the accident she was earmarked to become a permanent staff member in the near future.

[9] Following the accident, she convalesced from the injuries sustained for approximately six months and

was as such unable to work during that period. She resumed her pre-morbid employment in her casual worker position at the same monthly salary of R2 000. She was, however, made an acting manager which was a more administrative position. She did authorising as well as office administrative work. According to the plaintiff, when she returned back to work she had difficulty with writing and typing and often had to complete her work at home. She was later, once fully recovered from her injuries, permanently employed as an administration clerk. Because of an incident that happened at work, she resigned her position at The Hub and re-joined her family business where she works as a shop manager. She remains in that capacity to date.

FUTURE LOSS OF EARNINGS

The Report of the Orthopaedic Surgeon

[10] The orthopaedic surgeon in his narrative test states that the plaintiff has suffered serious long term impairment and loss of body function as a consequence of the injuries sustained. And, she is no longer able to manipulate heavy objects with the right upper limb.

The Report of the Occupational Therapist

[11] The findings of the occupational therapist are that the plaintiff shows a slight decline in muscle strength and range of motion to her right arm, although it remains functional. She currently meets all aspects of work at a sedentary, light and lower range medium physical demand level. The plaintiff's current position is of a sedentary nature, but the assessment showed that she has some limitation in seated work and is only able to maintain a seated position occasionally. The occupational therapist's opinion is that although the plaintiff is able to function in her current capacity, the injuries will negatively affect her productivity levels and could leave her vulnerable if she has to enter the open labour market for any reason. Though she is presently in a relaxed environment where she can work at her own pace, in the competitive job market she will struggle to find and maintain employment. Her physical limitations will need to be addressed by therapy and adequate physical accommodations made to allow her to produce work of an adequate standard.

The Report of the Industrial Psychologist

[12] According to the opinion of the industrial psychologist, the plaintiff was in the process of establishing a career for herself in the retail sector when the accident occurred. The industrial psychologist's conclusion is that because of the plaintiff's positive feedback and age, 20 years at the time of the accident, she would probably have been appointed to a permanent position at The Hub within the next few months, probably 1 April 2010. Her salary would have by then increased to approximately R5 000 *per* month. But for the accident, she would have continued to gain skills and experience in the retail and corporate sector over the years and be able to secure promotions and gradually increase her earnings as her career developed. The

industrial psychologist's contention is that the plaintiff would probably not have considered working in the family business as she has always wanted to prove her independence and make a career for herself. She would likely have remained working in the retail sector, but being physically able and fit she would have been able to secure alternative positions outside this environment if she so chose. In this way she would have been able to increase her earnings over the years (in a straight line) to peak at the upper quartile of a Paterson C2 level of earnings and thereafter receiving market related increases until retirement age. The current (2014/15) salary scales for this level is R24 927. This is the salary which the plaintiff would have received but for the accident.

[13] After convalescing for approximately six months, the plaintiff returned to work in her pre-morbid capacity as a casual worker for The Hub. She received no remuneration whilst convalescing. On her return she continued to earn the pre-morbid salary of R2 000 *per* month. Although she had been earmarked for permanent work, she however, needed to be accommodated for her arm injury, and only appointed permanently much later. She was thereafter permanently employed as an administration clerk earning an approximate monthly salary of R5 000. Due to an incident that happened at work she resigned her position at The Hub and re-joined her family business as a shop manager and has worked there to date. She currently earns a salary of R10 500 *per* month. According to the occupational psychologist this salary scale falls just below the median for a store manager in the non-corporate sector which is R10 625 per month.

[14] Based on the medical prognoses by the orthopaedic surgeon and the occupational therapist, the industrial psychologist opines that the plaintiff will in all probability have to remain working in a protected family business environment for the duration of her working career. Her earnings are likely to remain relatively stable at the current level, although overtime when her parents are no longer active in the business she should be able to secure a higher salary which may increase to a position between the median and upper quartile, that is, approximately R16 770. This is the salary which the plaintiff will receive because of the injuries as she is no longer able to pursue a career in the public retail business.

[15] The plaintiff's case is that because of the injuries she sustained in the collision she is now compromised - she is limited in the work she must do and should therefore be compensated.

[16] On the contrary, the defendant's contention is that the plaintiff's position after the accident does not show prospects of future loss of income. The defendant contends according to the experts, the plaintiff has healed satisfactorily and has returned to her pre-morbid status of functionality. The defendant's counsel argues that, even though the plaintiff has limitations, the occupational therapists' opinion is that she is currently able to meet all aspects of work at a sedentary, light and lower range medium physical demand level which is the work she was doing even before the accident. This is evidenced by the fact that The Hub employed her permanently despite her limitations. Even in her accommodated position, the employer saw no risk by

employing her in a permanent position. Nothing is mentioned by the employer about any functional limitation that the plaintiff experienced but was satisfied with her work. Sight should not be lost of the fact that her departure from The Hub was not accident related and that, in her present employment, she now earns more than what she earned before. Accordingly, she has no claim for potential loss of future earnings, so it is argued.

[17] I do not agree with the defendant's arguments.

[18] I am in agreement with the opinion by the industrial psychologist that the plaintiff was in the process of establishing a career for herself in the retail sector, when the collision intervened. Her manager at the time was satisfied with her performance and general attitude and earmarked her for an appointment to a permanent position, when the collision intervened.

[19] When she did return to work, six months later, she was retained in a temporary capacity for another eight months before she was eventually appointed in a permanent capacity with a significant salary increase. She would in all probability have received an earlier appointment were it not for her injuries which took long to heal. This in my view, indicates that she would pre-morbidly have continued to build her career in the retail industry and her earnings would probably have peaked.

[20] The fact that she was eventually still permanently appointed despite her on-going physical vulnerability and reduced capacity bears testimony to her positive attitude, motivation, skills and determination to make a career. According to the information received from her employer, the plaintiff was an excellent worker who was always ready and willing to take on any work assigned to her. She left her family business where she earned a salary of R4 000 and went to work at The Hub where she earned a salary of R2 000. This is indicative of a person who was prepared to be independent and build her own career.

[21] It is so that the plaintiff is currently able to meet all aspects of work at a sedentary, light and lower range medium physical demand level. Her previous as well as her present work are of a sedentary nature. However, the occupational therapist's findings are that although the plaintiff is able to meet the job demand capacity, she has residual deficits that will impact on her ability to perform her job. The residual pain in her arm and lower back was found to have a negative impact on the quality of her work performance. Her opinion, which I accept, is that the accident has resulted in serious long-term impairment that has and will continue to impact on her vocational and financial wellbeing.

[22] It is the industrial psychologist's opinion that the plaintiff will in all probability have to remain working in a protected family business environment for the duration of her working career. She is presently working in an accommodated position in her family business. She works in a leisurely environment and at her own

pace. Her work involves long periods of seated work and writing. She has been found to have some limitation in seated work and cannot sit for a long time because of the pain in her lower back. She has to constantly take breaks in order to cope with the pain. She is no longer able to manipulate heavy objects with the right upper limb. This, in my view, is an indication that she has limitations which make her not perform to her optimum. I have to accept the expert's opinion that the injuries will leave her vulnerable if she has to enter the open labour market for any reason. And, that in the competitive job market she will struggle to find and maintain employment. It is for these reasons that she will no longer be able to pursue a career in the public retail business, but will remain working in the family business. In this sense her salary prospects have been negatively affected and she will no longer achieve her pre-morbid potential.

[23] Even though at the moment it can be said that she is earning more than she earned before, but the potential loss of income is long term. As *per* the report of the actuary, the loss is calculated from the time of the accident until she reaches the age of retirement. The salary scales, to which the industrial psychologist refers to, showed that there is loss of income when the salary she would have earned had the accident not occurred as projected until her retirement age is compared with the salary which she earns now that the accident has occurred, which is also projected until her retirement age; as such the plaintiff is entitled to be compensated for this loss.

[24] I am mindful of the fact that the plaintiffs resignation from her employment at The Hub is not accident related. However, this will be taken care by contingency deductions.

[25] A further contention by the defendant is that the incorrect salary was used in the calculations. The defendant's counsel, with the consent of the plaintiffs counsel handed in a copy of the salary advice of the plaintiff which indicated that the plaintiff earned a salary of R7 000 *per* month and not R10 500 as used in the calculations. The plaintiffs counsel conceded that the amount that should have been used is the R7 000 and that the actuarial calculations should be amended accordingly.

[26] The calculations should be as follows:

	Had the accident not happened	Now that the accident has happened	Difference: Loss
Past earnings	471 195	341 445	
Less contingency deductions (5%/5%)	23 560	17 072	

Total loss of past earnings	447 195	324 373	123 262
Future earnings	5 778 717	2 374 810	
Less contingency deductions (10%/30%)	577 872	712 443	
Total loss of future earnings	5 200 845	1 662 367	3 538 478

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PAST LOSS OF EARNINGS

[27] It is common cause that the plaintiff spent some time from work convalescing. It is also not in dispute that she was not paid while she was off work. The plaintiff is as a result claiming for this loss of income. The period during which she was off work is in issue between the parties. The dispute is caused by the contradictory information contained in the experts' reports. The orthopaedic surgeon in his report refers to six weeks whilst the other two experts refer to six months. I take it that the orthopaedic surgeon must have made a mistake and the amount should be calculated on the period of six months.

[28] The defendant's counsel submits that there is no documentary proof of the salary which the plaintiff earned whilst employed at The Hub, as such, the plaintiff has not proven the loss. He offered payment of only two months. This is not the case. The amounts are confirmed in the expert's reports which the defendant has accepted. The experts concede in their respective reports that they were not provided with documentary proof in respect of the salary but relied on the information provided to them by the plaintiff and confirmed by the plaintiff's employer.

[29] The plaintiff was earning a salary of R2 000 and the loss is R24 000.

[30] Consequently the amount the plaintiff is entitled to for past and future loss of earnings is R3 661740.

[31] In the premises I make the following order:

- a. The draft order marked with an "X" and initialled is made an order of court.

E. M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES

HEARD ON THE: 02 March 2015

DATE OF JUDGMENT: 18 March 2015

PLAINTIFF'S COUNSEL: ADVJ. KHAN

PLAINTIFF'S ATTORNEY: BARBARA CHEIMAN ATTORNEYS

DEFENDANT'S COUNSEL: Mr. E MOGANE

DEFENDANT'S ATTORNEY: FOURIE FISMER INC.