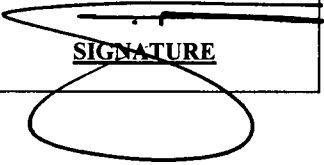


IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
③ REVISED. ✓	
27/3/2015. <u>DATE</u>	 <u>SIGNATURE</u>

27 / 3 / 15

Case Number: 7574/12

In the matter between:

M SITHEBE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

POTTERILL J

[1] The plaintiff instituted action against the Road Accident Fund for loss on damage suffered as a result of bodily injuries pursuant to a collision on 8 November 2008 at

Perdekop. The plaintiff was a passenger in a motor vehicle with registration number ND652678 driven by Mr. N.P. Mtebele hereinafter referred to as the insured driver.

[2] Upon amendment of its claim the plaintiff at trial was claiming the following:

- 2.1 Past medical and hospital expenses in the amount of R100 000;
- 2.2 Future medical and hospital expenses in the amount of R150 000;
- 2.3 Past and future loss of earnings and earning capacity in the amount of R408 140.00;
- 2.4 General damages in the amount of R400 000.

Thus a total of R1 058 140.00.

[3] The plaintiff would be entitled to 100 % of its proven or agreed damages as the plaintiff conceded the merits at 100 % due to the fact that the plaintiff was a passenger.

[4] At trial the plaintiff abandoned the past and medical expenses as well as the claim for general damages. The defendant provided an undertaking in respect of past and future medical and hospital expenses. The only issue in dispute thus relates to the past and future loss of earnings and earning capacity.

[5] At the time of the incident the plaintiff was 24 years old and had completed Grade 11. At the time of the collision she was employed at Siphulwazi Day Care as a teacher and earned a salary of R1 500.00 per month. The plaintiff did a basic certificate in early childhood development level 1 in 2009. She also acquired a further education and training certificate: Early Childhood Development (NQF Level 4) on 30 August 2014. She completed a Level 1 First Aid course in 2012 and she also completed an art therapy group as an ECD practitioner in 2014.

[6] The plaintiff sustained the following injuries:

- 6.1 A fractured distal left tibia/fibia;
- 6.2 Concussion;
- 6.3 Whiplash;
- 6.4 Soft tissue injury of the left elbow.

The plaintiff was taken to the Volksrust public hospital where she was stabilised, received treatment and was discharged the same day.

[7] The legal representative of the plaintiff relied on *inter alia* the industrial psychologist's report. This report was not placed in dispute by the defendant. The relevant passages relied on to sustain the plaintiff's claim for future loss of earnings and earning capacity is set out as follows:

"The accident under review occurred in November 2008 and Ms Sithebe only secured the position as principal in August 2014; almost 6 years later. It is accepted that, was it not for the accident she could probably have secured such a position during 2010/2011, noting her extensive experiences at day care centres.

It is furthermore accepted that she could also have started to sell Tupperware to earn an additional income. It is accepted that she would have earned more or less on par with her current income of ±R500 per month.

As such it is then accepted that Ms Sithebe would have been able to progress over time in a straight line to better paid salaries in similar type concerns and thus progress to salaries more or less on par with the median notch of the indicated salaries for semi-skilled workers i.e. a combined salary of about R4000 per month by age 45.

*Robert Koch indicated the following annual salaries in his **Quantum Yearbook 2014:***

Unskilled workers: R6 800-R17 400 – R50 000 per annum

Semi-skilled workers: R17 400-R50 000 – R127 500 per annum.

This can be regarded as her pre-accident earning potential and only annual inflationary increases would thereafter have applied.

She would have been able to continue working until age 65."

"As per the available information Ms Sithebe is currently employed as principal of a day care centre and she admitted that the work is less physical than when she was still teaching the children. It is however accepted justified that she could not cope with her work as teacher after the accident and resigned. She should then be compensated for the loss of income suffered in this regard".

- [8] The industrial psychologist accepted that Ms Sithebe was still suffering from symptoms of a Post-traumatic Stress Disorder related to her involvement in the accident at the time of the assessment. The conclusion the industrial psychologist drew was the following:

"Writer then accept that the abovementioned difficulties also contributed to her not seeking alternative employment immediately after she left her previous employment and to the fact that she only started working at a day care centre again, almost 6 years post-accident."

"Deference is given to the opinion of Ms van der Walt with regards to her ability to continue working in her current capacity as principal at a day care centre, but noting the reported work tasks and the fact that Ms Sithebe opined that she copes with this work, writer accepts that she would be able to continue working in this capacity for the foreseeable future. The relevant experts would however have to comment on early retirement.

She may however be less inclined to apply for similar work elsewhere as she would not be entirely sure if that job would not require of her certain tasks as teacher and it is then possible that she may rather decide to stay on in her current position where she knows what is expected of her and knows that she can cope with same."

- [9] Ms. Wilma van der Walt, the occupational therapist, concluded that Ms Sithebe will be able to meet the requirements of her work as an assistant to her mother who is baking cakes from home and in her self-employed capacity as selling Tupperware.
- "Her ability to return to her work as a day care teacher would be limited due to her low strength capacity. Her ability to return to such work would depend on the prognosis of her left knee and her neck. In the presence of any pathology at the left knee and with neck pathology I deem the work of a day care teacher an inappropriate work venture for her. She will not be able to do the work without an increase in her pain symptoms".*

[10] Dr. Deodat Maré found as follows:

"Ons vind nie enige definitiewe letsels wat kan lei tot ongeskiktheid nie."

[11] Leon Roper, the clinical psychologist in paragraph 17.11 summarises his opinion as follows:

"... the minor head injury sustained by the plaintiff is not expected to result in significant long-term neuropsychological difficulties. It can however be concluded that Ms Sithebe's involvement in the accident under discussion has resulted in deterioration in her psychological functioning, which is largely considered to be a reaction to the physical injuries she had sustained and her reported regular physical pain. In this regard, the plaintiff presented with symptoms of a Posttraumatic Stress Disorder and also mild depressive symptoms which are expected to have an ongoing negative impact on her interpersonal and occupational functioning, as well as on her quality and enjoyment of life."

"In light of these symptoms discussed he recommended that the plaintiff be rewarded funds for 25 sessions of psychotherapy, currently of a cost of about R850 per session. These should include family therapy."

On behalf of the plaintiff it was thus argued that the plaintiff would suffer a future loss of income. The loss of earning capacity is to be found in the fact that she could never work as a teacher again and could only work as a principal.

[12] On behalf of the defendant it was argued that one has to consider the following facts:

12.1 In March 2009 the plaintiff returned to her pre-morbid job but after three months resigned (June 2009) citing the reason for the resignation as TB, as well as the fact that she had to travel very far for a low salary.

12.2 From June 2009 to 2013 the plaintiff remained unemployed with no evidence as to why this was the case. No evidence could also be provided by the plaintiff.

12.3 From 2013 she started to sell Tupperware on a part time basis and she earned a commission of an amount of between R400-R600 per month. She also assisted her mother in baking cakes.

12.4 On 25 August 2013 the plaintiff secured a job as a principal at Enjabulweni Day Care in Katlehong earning R2 400 per month and is still currently

employed there. She had previously worked at this same day care centre from 2003 to 2005 with earnings of R650 per month.

12.5 The plaintiff currently earns R2 800 to R3 000 per month from her salary as principal as well as from selling Tupperware on a part time basis.

[13] The plaintiff did not experience difficulty with executing the work of a principal.

[14] The defendant criticised the industrial psychologist's report. Firstly, no reasons are given as to why the plaintiff was unemployed for two years from 2000 to 2006 and post collision for four years from June 2009 to 2013. Ms. Kotze's opinion or submission that she would probably have secured such a position during 2011/2012 is based on speculation and no reasonable grounds are set out for this speculation. There are simply no reasons as to why the plaintiff would have been guaranteed the position of principal during a specific time period, but for the accident. This is even more strange if regard is had as to why when the plaintiff was employed there she did not there and then get the promotion. The defendant also argued that Ms. Kotze did not give a single reason for the submission that Ms. Sithebe would have been able to progress over time in a straight line to the indicated salary for semi-skilled workers of R4 000 per month by the age of 45.

[15] It was also submitted that Ms. Kotze's report refers to Mr. Roper's report and from this formed the opinion that the *sequilae* of the accident did not only adversely affect her enjoyment of life, but also her employability. It was argued that this is not at all what Mr. Roper concluded. Mr. Roper concluded that therapy would be necessary and that would be covered by the undertaking provided by the defendant. Therapy will heal the plaintiff's psychological problems. At the age of 36 the plaintiff had not yet obtained her driver's licence and the mere fact that she was involved in a collision did not provide proof that now she will never obtain her licence.

[16] The defendant thus argued that the experts were unable to offer any link between employment and injury and explain or justify any resulting claim. Reliance for this was placed on the unreported matter of *Vavuma v The Road Accident Fund 2012 SA (GSJ)* delivered on 14 December 2012 by Satchwell J. In this matter the court found that the court was not provided with the essential information or evidence and was confronted with only speculative submissions which did not take the case any further. There was a total absence of any information pertaining to promotion requirements or redundancy possibilities. The court accordingly refused a claim for damages in respect of future loss of earnings and earning capacity.

- [17] On behalf of the plaintiff much reliance was placed on *Van Drimmelen v President Versekeringsmaatskappy Beperk* 1993 (4E2) QOD 19 (T). In this matter the plaintiff was subjected to amputation of the left lower leg due to a collision. There was also a closed fracture of the right femur and a segmental fracture of the left femur. The plaintiff was hospitalised for approximately two months. Thereafter the plaintiff in that matter had nine subsequent operations over about a period of two years. The plaintiff had acute pain for several months, and spent several periods in the Intensive Care Unit. The plaintiff had gangrene in the stump and was also subjected to painful manipulations and traction. The prosthesis was uncomfortable and irritated the plaintiff's stump. It was common cause that his relationships with the opposite sex was compromised. His previous activity in sport was drastically curtailed. The court ordered future loss of earnings in the amount of R450 000.
- [18] In that matter the earning capacity revolved around two aspects. The first question was whether on a preponderance of probabilities it was proven that the plaintiff's employment would be curtailed to an early retirement age. The court found that it was not proven that the plaintiff would not be able to attain normal retirement age. The court did however take contingencies into consideration that he would however be working with a broken body. It was also pondered whether the plaintiff would be entitled to find suitable work. The court also took into consideration that the plaintiff would have to overcome the perception that even with his prosthesis he would be a

good worker. The court was urged to utilise these contingencies also in the matter at hand.

[19] In this matter the plaintiff's injuries cannot even be mentioned in the same breath as that of the injuries in the *Van Drimmelen* matter *supra*. The orthopaedic surgeon found that there was no indication of proof that the plaintiff's work capacity was in any way affected. The industrial psychologist has opined that:

19.1 The plaintiff could have started to sell Tupperware to earn an additional income and therefore she would have earned more or less on par with her current income of R500 per month. No reasons are set out as to why she did not sell Tupperware, or could not sell Tupperware; in fact it is stated that she could sell Tupperware. This R500 a month could thus have been earned and accordingly sets up no claim for loss of future income or loss of earning capacity.

19.2 The proposition that the plaintiff would have obtained the position she now occupies 6 years ago, but for the accident, is unfounded. This is so because absolutely no reasons for this are set out. I have never seen such an expert report with little to no motivation for its propositions. There is not a single fact set out to back up the proposition that the plaintiff would have obtained this post of principal. In fact the facts prove it to the contrary. She

had not completed three of the four certificates prior to 2010 or 2011. She was unemployed for the period 2009 to 2013 thus rendering her with no work experience in those years. On these facts this submission by the industrial psychologist has to be rejected.

19.3 The submission that "Ms Sithebe would have been able to progress to better paid salaries in similar type concerns" once again has no foundation. What is a "similar type concern", and as what, a teacher or principal and on what basis would she have been able to progress? The facts again contradict this submission. At the time of the collision she was earning R1 200, she now earns R2 400. She did in fact progress to a better paid salary. There is no facts set out why she would have progressed to R4 000 over what time period. This submission does also not sustain a claim for loss of income and loss of earning capacity.

[20] It was also argued that from the occupational therapist's report it was clear that the plaintiff would not be able to return to her work as a day care teacher because her ability was limited due to her low strength capacity. Her ability to return to such work would depend on the prognosis of the left knee and her neck. The following opinion was also expressed:

"In the presence of any pathology at the left knee and with neck pathology I deem the work of a day care teacher an inappropriate work venture for her. She will not be able to do the work without an increase in her pain systems."

However in the very next paragraph the same occupational therapist sets out:

"It should be noted that Dr. Maré did not find objective evidence depicting any lesions to explain the pain complaints at the left lower limb and he did not find pathology at the knee. With conservative treatment her pain levels should improve."

The last conclusion in fact sets the expert's submission to bed. The finding that the plaintiff could perform only light strength demands was based solely on the plaintiff's subjective feeling of instability at the left knee and her subjective feeling of pain. If Dr Maré did not find any objective evidence I cannot on a mere speculative basis grant any amount of monetary reward.

[21] Much was also made of the fact that the neuro-clinical psychologist found poor concentration and an attention problem. However in paragraph 17.8.1 of his report

he finds that her performance pertaining to attention and concentration difficulties is only “a mild sustained attention difficulty”. The symptoms of Post-traumatic Stress Disorder and mild depressive symptoms would not result in significant long term neuro-psychological difficulties. The recommendation however is that the plaintiff be awarded funds for sessions in psychotherapy. This seems to be a correct recommendation and the solution should be in the undertaking given by the fund and not in a monetary reward to the plaintiff.

[22] In *Buthelezi v Ndaba* 2013 (5) SA 437 (SCA) page 437 in paragraph [14] the court found as follows:

“... Yet that determination is bound to be informed by the opinions of experts in the field which are often in conflict, as has happened in this case. In that event the court’s determination must depend on an analysis of the cogency of the underlying reasoning which led the experts to their conflicting opinions.”

Although there were no conflicting opinions *in casu* the cogency of the underlying reasoning of the experts for the plaintiff is lacking and unfounded.

[23] I accordingly make the following order:

The plaintiff's claim is dismissed with costs.



S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 7574/12

HEARD ON: 13 February 2015

FOR THE PLAINTIFF: ADV. A. DE VRIES

INSTRUCTED BY: Van Niekerk Attorneys

FOR THE DEFENDANT: ADV. A. VAN DER HAER

INSTRUCTED BY: Matsebane Attorneys

DATE OF JUDGMENT: 27 March 2015