

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

Case Number: 56326/11

|                                    |                                                                                   |
|------------------------------------|-----------------------------------------------------------------------------------|
| DELETE WHICHEVER IS NOT APPLICABLE |                                                                                   |
| (1)                                | REPORTABLE: YES / NO.                                                             |
| (2)                                | OF INTEREST TO OTHER JUDGES: YES / NO.                                            |
| (3)                                | REVISED.                                                                          |
| 8/05/2015                          |  |
| DATE                               | SIGNATURE                                                                         |

|                                                                           |
|---------------------------------------------------------------------------|
| REGISTRAR OF THE HIGH COURT OF<br>SOUTH AFRICA GAUTENG DIVISION, PRETORIA |
| PRIVATE BAG/PRIVAATSAK X67<br>PRETORIA 0001                               |
| 2015 -05- 0 8                                                             |
| JUDGE'S SECRETARY<br>REGTERS KLERK                                        |
| GRIFFIER VAN DIE HOË HOF VAN<br>SUID AFRIKA GAUTENG AFDELING, PRETORIA    |

In the matter between:

SUNETTE LIEBENBERG

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

Coram: HUGHES J

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JUDGMENT

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Delivered on: 8 May 2015

Heard on: 19 March 2015

HUGHES J

1. The plaintiff, Sunette Liebenberg, an adult female born on 20 November 1990 was involved in a motor vehicle collision on 24 May 2008.

2. I do not propose to deal with the facts of the collision save to say that the plaintiff was a passenger and the respondent, the Road Accident Fund (RAF), conceded liability. The plaintiff was awarded 100% of her proven damages.
3. The plaintiff sustained a minor concussive head injury and soft tissue injuries to her neck, lower back and both her knees. The hospital records record that she has no epilepsy, memory loss or depression because of the head injury. After x-rays were processed, she was fitted with a neck collar for two weeks and provided with anti-inflammatories and analgesics. Her injuries to her knees remained painful for an entire month and in 2011 Dr Tromp, an orthopaedic, performed an arthroscopic debridement on both knees. She attended physiotherapy in order to decrease the pain, spasm and increase her joint mobility.
4. The parties have settled the following heads of damages in the amounts set out below:

|                       |             |
|-----------------------|-------------|
| Past Medical Expenses | R 11,823.23 |
|-----------------------|-------------|

|                         |                                                                     |
|-------------------------|---------------------------------------------------------------------|
| Future Medical Expenses | Undertaking in terms of S 17(4)(a) of the Road Accident Act of 1996 |
|-------------------------|---------------------------------------------------------------------|

|                 |              |
|-----------------|--------------|
| General Damages | R 200,000.00 |
|-----------------|--------------|

5. The issue left for determination is that of future loss of earning capacity.
6. At the time of the collision, the plaintiff was a scholar in standard nine. She proceeded to obtain her matric and a short course in Pastel Accounting.
7. Dr Birrell, an orthopaedic surgeon, instructed by the defendant examined the plaintiff sometime in 2013 and he records the plaintiff's complaint as follows:

“6.

*PRESENT COMPLAINTS OF PATIENT*

1. *She cannot wear high heels because of lower back and knee pain.*

2. *Sitting for a long time causes discomfort due to lower back pain.*
3. *She has pain in her lower neck and over the scapular area, associated with headaches. She also develops spasms when sitting for long periods.*
4. *She sleeps with a measure of discomfort and states that she has to use pillows to position the knees, the lower back and the neck.*
5. *She experiences severe daily headaches, which do not respond to painkillers. She is treated for this by a doctor (whose name she cannot recall) who uses anticonvulsant drugs.*
6. *She states that her symptoms are worse in inclement weather.*
7. *Sitting causes pain in the lower back after a while.*
8. *She cannot run or lift heavy loads and bending is very uncomfortable. For this reason she cannot bath and has to shower."*
8. Dr Birrell also recorded that the plaintiff has not sustained any past loss of work capacity however, she has sustained between 5% and 6% present and future loss of work capacity. No early retirement is anticipated.
9. Dr Birell goes on to state that she has a 2% to 3% chance of requiring back and neck surgery in the future. For the back surgery, she will require 16 weeks of sick leave whilst the neck surgery will require her to be off sick for 8 weeks.
10. The plaintiff instructed Dr Enslin as their orthopaedic. He concluded that her chronic non-specific neck pain was 2% whilst her chronic non-specific lumbar spine pain was 3%. Thus, her total whole person impairment equated to 5%. Dr Enslin concluded that:  
  
*"Ms Liebenberg currently does not experience any serious impairment. She should be able to perform her work tasks provided her back and knee symptoms do not become intrusive and she does not undergo failed surgery to*

*the various parts of the body that were injured on 24.05.2008. The percentage probability that she will develop intrusive symptoms in future is 10%”.*

11. Further, future surgical treatment anticipated is as follows:

*“i A surgical stabilisation of the cervical spine and/or the insertion of a disc prosthesis*

*There is a 4% to 5% contingency of occurrence.*

*Time off work after this procedure will be two months.*

*ii A surgical stabilisation of the lumbar spine and/or the insertion of a disc prosthesis*

*There is an 8% to 9% contingency of occurrence.*

*Time off work after this procedure will be three months.*

*iii Arthroscopic debridement of both knees*

*There is a 60% contingency of occurrence.*

*Time off work after this procedure will be three weeks.”*

12. The occupational therapist instructed by the plaintiff, Estelle Bester, noted the following in her report:

*“Ms Liebenberg has a grade 12 qualification and also completed a three-week course in Pastel Accounting. She has worked in positions of a cosmetic consultant, shop manager and personal assistant. She is currently employed in her father’s hardware shop as a shop manager.*

*In her current position, she is required to adhere to occasional handling of sedentary weight, frequent sitting and occasional walking climbing. She reported increased pain with prolonged sitting and climbing stairs. Fortunately, her position is as such that she can alternate regular between sitting, standing and walking.*

*She is unable to squat and handle heavy weight, however, it is noted that she is a lean, petite woman and would most likely not have been able to handle heavy work even since prior to the accident*

*Considering the assessment results, the assessor is of the opinion that the claimant should be able to continue working in her current position and all other sedentary, administrative type post. She would adapt her work station to reflect ergonomic precision and alternate between sitting, standing and walking. She will additionally be able to function with less pain and more physical comfort provided adherence to recommendations set out in this and other reports.*

*Should she seek alternative employment, she will be limited to light weight handling, infrequent bending and no squatting. She should be allowed to alternate between sitting, standing and/or walking. Given her work history and petite frame, however, she will most likely remain in sedentary positions."*

13. Ms C. J. Nel, an industrial psychologist, employed by the plaintiff conducted her assessment of the plaintiff on 2 July 2013 and 5 November 2013. In her report she states that the plaintiff is currently employed in her father's business in an administrative capacity. She was initially placed in an office on the first floor but has been moved to the ground floor, as the plaintiff complained "that it was tiring to use the stairs frequently". Immediately after this statement Ms Nel records the following: "(Note is taken that Ms Liebenberg attends a gymnasium 5 times per week)".
14. Ms Nel records the plaintiff's pre-morbid career path "*would have entailed the execution of semi-skilled work probably of an administrative nature.*" Past-morbid, Ms Nel states that "*The apparent impact of the accident and concomitant injuries on the functioning is evaluated as trivial: Ms Liebenberg is independently mobile*".
15. Lastly, Ms Nel in concluding her assessment states the following::

"LOSS OF EARNING

*Since the accident, she has worked as a sales assistant, shop supervisor, personal assistant and sales representative and administrative clerk including for her parents' business.*

*At present, Ms Liebenberg is performing the role of administrative clerk at Kanonkop Hardware in Middelburg, her father's business. At present, she earns R 6000p/m with no fringe benefits.*

*Future sick leave associated with the recommended treatment could constitute a loss of income i.e. forfeited leave.*

*Premature retirement is not indicated by the appropriate expert.*

*Dr Enslin awarded a WPI rating of 0.7%. She should be able to perform her work tasks provided her back, neck and knee symptoms do not become intrusive or if surgery fails. She has a 10% possibility of developing intrusive symptoms in future.*

*According to Ms Bester, she should be able to continue working in her current position and all other sedentary and administrative roles also in the light of her petite frame.*

*Mr Roper concluded that she has developed a Posttraumatic Stress Disorder as well as symptoms of a Major Depressive Disorder likely aggravated by her pending divorce.*

*Based on the opinions of the experts and this assessment it appears that Ms Liebenberg is able to continue in her current role and other work roles of a sedentary/administrative nature.*

*It would appear that her career prospects and level of occupational functioning have been truncated to a trivial degree by the sequelae to the injuries sustained in the accident. Concomitantly her competitiveness in the open labour market has remained mainly unaffected.*

*In respect of her likely post-morbid earning level the following inference is drawn:*

*Her likely pre and post-morbid earning levels remain comparable.*

*However, the pain and suffering portion of the claim should address any pain or discomfort that she experiences in a work context and additional effort require on her part.*

### CONCLUSIONS

*It is concluded that her earning capacity and likely future earnings have been curtailed to a trivial degree but resulted in no direct loss of income since the individual is considered to be employable much at her pre-morbid level of functioning."*

16. For the plaintiff to succeed with her claim for loss of earning capacity, it is trite law that the loss suffered must result in a diminution in her patrimony. See SANTAM VERSEKERINGSMAATSKAPPY BPK v BYLEVELDT 1973 (2) SA 146 (A); DIPPENAAR v SHIELD INSURANCE CO LTD 1979 (2) SA 904 (A) and RUDMAN v ROAD ACCIDENT FUND 2003 (2) SA 234 (SCA) paragraph [8]:

"[8] The trial Judge dismissed the claims for past loss of earnings and loss of earning capacity for the following reasons:

'On the evidence before me I must conclude that the losses suffered as a result of the temporary decline in the income generated by the professional hunting and professional outfitter operations due to the incapacity of the plaintiff are losses suffered by the company and do not represent a diminution in the patrimony of the plaintiff. I may pause to remark that the fact that the plaintiff personally is registered as the professional outfitter does not change the situation. According to the evidence before me it must be held that he was employed by the company in order to conduct that section of the business. The same holds true of the costs of employing a professional

hunter to stand in for the plaintiff as well as the employment of the repair and maintenance manager. . . . These persons are also employed by the company to take over functions performed by the plaintiff and they are paid by the company. Any loss which may have occurred as a result thereof is a loss to the company and not to the plaintiff's private estate. It follows that in real terms the plaintiff's private estate was not diminished due to his incapacity.

In my judgment the plaintiff has failed to prove that his patrimony was diminished due to any loss of earning capacity past or future resulting from his injuries and consequently he has failed to prove any entitlement to be compensated in respect of these heads of damages.'

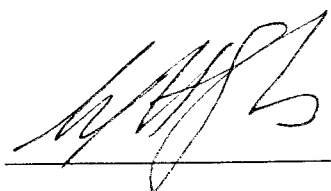
In other words, the learned Judge concludes that, although Rudman has proved physical disabilities which, potentially at any rate, could give rise to a reduction in his earning capacity, he has not proved that this has resulted in patrimonial loss. He has not proved that the reduction in earning capacity translates into loss in the sense that his patrimony after the delict was less than it would have been if the delict had not been committed." **My emphasis.**

17. Adv. Botha, for the plaintiff argued that there was no direct loss of earnings as reflected in the reports. However, this was an ideal case to adopt the mathematical approach by using Dr Birrel's total whole person impairment of 5%, which clearly indicates that in the future her capacity to earn would be compromised by 5%, in order to calculate the plaintiff's compromised future loss of earning capacity.
18. Adv. Rabayan, for the defendant, argued that it's evident from the reports that the plaintiff's patrimony has not been and will not be diminished at all. Even though the reports state that the plaintiff has loss of capacity to work, the said loss has not resulted in a diminution of her patrimony. She would still earn what she would have earned had the accident not occurred. The correct approach to factor in her 5% total whole person impairment was to factor this in under the heading of general damages.
19. I agree that it has been proven that there is indeed a reduction in the plaintiff's capacity to earn, be it 5% as indicated by Dr Birrel; however Ms Nel was correct to conclude that it is but trivial. The result is, it is so trivial it does not even translate to a reduction of the plaintiff's patrimony having regard to the collision.

This indicates that she would not earn less than what she would have earned had the collision not taken place.

20. Adv. Botha's reliance in SOUTHERN INSURANCE ASSOCIATION LTD v BAILEY NO 1984 (1) SA 98 (A) as regards the application of a mathematical calculation approach, rather than the application of round estimate made by a Judge. In the circumstances of this case it is ill-conceived because in the case of BAILEY, the injured was a young child who suffered a severe head injury as result of an accident, which resulted in "very severe intellectual and emotional retardation; ... inability to control her bladder and bowel functions; generalised clumsiness and spasticity of limb movements with weakness; squinting of the right eye outward; enlarged and unresponsive to light." (See BAILEY at 110 A-D) This resulted in the child's earning capacity being destroyed completely. She would never be able to earn anything.
21. BAILEY, above, is clearly distinguishable from the case at hand. The capacity to earn, as a result of the accident, was taken away completely from the child and it resulted in a diminution in the child's patrimony. The plaintiff in this case has no diminution in her patrimony at all; she will still earn what she would have earned had the collision not taken place. See BAILEY *supra* at paragraph 111 F-G.
22. The fact that her total whole body is impaired by 5% does not result in her patrimony being diminished in any way whatsoever.
23. In light of the above and as a result of the injuries sustained by the plaintiff, she has failed to prove that her patrimony would be diminished due to any loss of her earning capacity in the future. In my judgment I find that the plaintiff has failed to prove any entitlement in respect of future loss of earning capacity.
24. In conclusion I make the following order;
  - 24.1 The defendant is ordered to pay an amount of R 200,000.00 in respect of General damages.

- 24.2 The defendant is ordered to pay an amount of R 11,823.23 in respect of Past Medical Expenses.
- 24.3 The defendant is ordered to issue an undertaking to pay all the plaintiff's future medical expenses arising from the injuries sustained in the collision in accordance with section 17(4)(a) of the Road Accident Fund Act 56 of 1996.
- 24.4 The defendant is ordered to pay, on a party and party scale, the costs of the action excluding the costs of the proceedings on 19 March 2015;
- 24.5 The plaintiff's claim for future loss of earning capacity is dismissed.
- 24.6 The plaintiff is ordered to pay the costs of the proceedings of the 19 March 2015.



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W. Hughes Judge of the High Court

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