NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MTHATHA

Case no: 1168/2011

In the matter between:

LINDISWA HAZEL MPOSI **Plaintiff**

vs

ROAD ACCIDENT FUND **Defendant**

Date heard	:	30th October 2014
Date delivered	:	26th February 2015
Summary	:	This is an action for damages resulting from a motor accident. The issue to be decided was the plaintiff's damages regarding her loss of income earning capacity. Each party called one expert, an industrial psychologist. Their opinions were contradictory. The Court decided the case on the basis of the plaintiff's expert witness.

JUDGMENT

TSHIKI J:

[1] On the 30th April 2009, the plaintiff herein was a passenger in a motor vehicle which was involved in an accident. Consequently, the plaintiff, a female person, suffered damages in particular a fracture to her right femur which required surgical reduction. At the time of the accident, the plaintiff was 22 years old having been born on the 17th March 1987. As a result of the damages caused by the accident, the plaintiff instituted action against the defendant for damages and in terms of section 2 and 3 of the Road Accident Fund Act 56 of 1996 (hereinafter referred to as the Act).

[2] On the 30th October 2014 the parties herein made an agreement which was made an order of the Court on the following terms:

[2.1] “that the defendant shall pay to the plaintiff the sum of three hundred and fifty thousand rand (R350 000.00) as and for general damages;

[2.2] payment of the aforesaid amount is to be made within 14 days of this order;

[2.3] if payment is not made by the date referred to in paragraph 2.2 above, interest shall accrue on the capital amount at the prescribed legal rate, until the date of final payment;

[2.4] the defendant shall within fourteen days hereof issue to the plaintiff, in terms of section 17 (4) of the Road Accident Fund Act 56 of 1996, an undertaking for the reasonable costs of medical treatment which plaintiff may require for the injuries, or sequelae thereto, arising out of the motor vehicle collision which occurred on 30th April 2009, including a claim for costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to her, after such costs have been incurred and upon proof thereof.

[2.5] the trial in regard to plaintiff’s further damages is hereby postponed *sine die*, pending the judgment of the above honourable Court;

[2.6] the issue of any and all costs for the trial dates of 30th November 2014 and 31 November 2014 is reserved pending the judgment of the above honourable court in regard to further damages, as referred to in paragraph 5 above.”

[3] The parties further agreed which agreement was made an order of the Court, that the merits of the matter were settled with the defendant being liable for 100% of the plaintiff’s proven damages. The only issue between the parties being the quantification of plaintiff’s damages relative to loss of income earning capacity was to

be determined based upon the evidence of two witnesses, as well as a medico-legal report which was handed in by consent between the parties. The following documents were handed in by agreement of the parties as follows:

[3.1] an occupational therapists' report compiled by *Ms Peliwe Mdlokolo* on behalf of the defendant, was admitted as well as an actuarial report compiled by Munro Consulting as exhibit "B". a second bundle of documents on behalf of the plaintiff inclusive of an actuarial report prepared by *Mr Ivan Kramer* was also admitted. Another bundle which was submitted included the plaintiff's matric certificate and her academic record at Walter Sisulu University and was handed in as exhibit "C". It was further agreed by the parties that once the matter had been decided by the Court upon the available evidence, that the applicable actuarial report of the successful party would be utilised as the basis for the final damages award, which would incorporate the applicable contingency deduction deemed appropriate by the Court.

[4] It, therefore, became clear that the only issue in dispute is the quantification of plaintiff's damages relative to the loss of income earning capacity. This is so, because each party led evidence of an industrial psychologist whose evidence was contradictory. Therefore, the plaintiff's damages regarding her loss of income earning capacity was to be determined on the basis of the contradictory evidence of two industrial psychologists Messrs *Gregory Shapiro* and *Jean Du Randt*. *Pheliwe Dlokolo*'s report was in regard to the plaintiff's occupational therapist's report which was handed in by consent on behalf of the defendant.

[5] *Mr Gregory Shapiro* an industrial psychologist was called to testify on behalf of the plaintiff and *Mr Jean Du Randt* also an industrial psychologist gave evidence on behalf of the defendant.

[6] Both *Du Randt* and *Shapiro* agree on the following:

[6.1] that the plaintiff would probably have been able to work until retirement age of 65 years pre-morbidly.

[6.2] The plaintiff would have a loss productivity post-morbidly and will have limited career options. In this regard, *Mr Du Randt* opined that this was so because, in addition to the damages reflected in the defendant's actuarial report, damages were calculated by using a higher than usual post-morbid contingency as had been sustained by the plaintiff. Both parties seem to be in agreement that a higher than normal contingency deduction be applied to the post-morbid scenario. According to *Shapiro* this was so to cater for the plaintiff's post-morbid career prospects, due to the lack of productivity and competitiveness plaintiff would suffer as a result of the injury she sustained.

[7] As already stated above, this Court has to determine one issue, being the extent of the plaintiff's pre-morbid earning capacity as against her post-morbid earning capacity.

[8] The relevance of the evidence of both *Shapiro* and *Du Randt* was to assess and look at how the plaintiff's employment and earnings would be affected with regards to the plaintiff's future earnings. In other words, the Court has to establish how plaintiff's career may have progressed if plaintiff was not injured and therefore

establish the effect the accident has had on her future employment and possible loss of income as a result of the injuries plaintiff had sustained. The same assessment was also made *by Mr Du Randt* as well. In order for the two industrial psychologists to come to an informed decision they have to also have regard, *inter alia*, to the plaintiff's educational history inclusive of her matric studies and beyond. It is common cause that at the time of the accident she was already a full time student doing a Bachelor of Commerce (BCom) degree with Walter Sisulu University. According to *Mr Shapiro*, the plaintiff would have progressed and would have passed her BCom degree. On the contrary, according to *Mr Du Randt* who also had to have regard to the same academic progression of the plaintiff, testified that the latter would not have passed her degree.

[9] In a nutshell in the opinion of *Mr Du Randt*, the plaintiff would have left university due to financial reasons and repeated failures in 2010 and would have entered the formal labour market in 2011. He opines that due to a disability bursary which the plaintiff received as a result of the accident, she remained at university longer than she would have otherwise remained. She, therefore, would have thus entered the formal labour market some three years later than she would otherwise have had. This, therefore, has slowed her career progression somewhat and this should be catered for in the actuarial calculations.

[10] On the contrary, according to *Shapiro*'s opinion the plaintiff would have obtained a degree and entered the formal labour market a year earlier than she has, had the accident not occurred.

[11] In my view, the fact that the plaintiff had indicated that she intended to follow the profession of the chartered accountant does not mean that she could not end up changing to another degree in the commercial sphere, or any other degree for that matter which would ultimately land her in a supervisory position. Even if she may not have been able to pass the degree of chartered accountant that does not necessarily mean that all doors were shut for her to pursue another commercial degree or an equivalent tertiary qualification. This is so, for the reason, *inter alia*, that she managed to progress to her third year level of her BCom degree. Post-accident she even registered with Unisa with the view to try and complete her studies. Any contention that plaintiff would not have passed any degree when she had so many credits towards graduating her BCom degree (not necessarily a chartered accountant) borders on pure speculation. *Mr Du Randt*'s contention that the plaintiff would never pass a degree pre-morbid was not based on any cogent underlying reasoning based on the facts of this case.

[12] It is well established that an expert is required to assist the Court, not the party for whom he or she testifies. Objectivity is the central prerequisite for his or her opinions. In assessing an expert's credibility an Appellate Court can test his or her underlying reasoning and is in no worse a position than a trial Court in that aspect. In *Stock vs Stock* 1981 (3) SA 1280 (A) at 1296 E-F Diemont JA remarked as follows:

> "An expert …must be made to understand that he (or she) is there to assist the court. If he (or she) is to be helpful he (or she) must be neutral. The evidence of such a witness is of little value where he, or she, is partisan and consistently asserts the cause of the party who calls him (or her). I may add that when it comes to assessing the credibility of such a witness, this court can lest his

> reasoning and is, according[ly] to that extent, in as good a position as the trial court was." (My emphasis)

[13] The Court is at large to assess the expert evidence on the record before it can decide which one, if any, of the two conflicting opinions is to be preferred. In this case, it cannot be concluded with certainty that the plaintiff could never have passed her degree. I say so for the reason that she had progressed to the third year level of her degree. It would be pure speculation to suggest a generalised assumption which forms the basis of the defendant's expert evidence.

[14] It is common knowledge that an expert is expected to give the Court the benefit of his or her expertise and for the benefit of the Court. That he or she has been called by a particular party is as a result of the reason that he or she has evaluated the facts to which he or she applied the expertise upon which he or she made an opinion favourable to the party that has called her or him. That, however, does not absolve the expert from providing the Court with an objective and unbiased opinion based on his or her expertise. When confronted with evidence or facts which are contrary to his opinion he or she is expected to agree or at least to explain why he made his or her conclusion at the time it was made. He or she is not expected to give evidence which goes beyond the logic which is dictated by the scientific knowledge which the expert claims to possess. (*Schneider No and Others v AA and Another* 2010 (5) SA 203 (WCC) at 211J-212B).

[15] In this case, it is common cause that the qualifications of both parties' expert witnesses were not disputed in any manner whatsoever.

[16] I agree with *Ms Redpath-Molony* that the main point of differentiation between *Shapiro* and *Du Randt* is the extent of the plaintiff's pre-morbid earning capacity. *Shapiro*'s opinion is that plaintiff would have ultimately achieved her university degree, would have started as a semi-skilled level B3 and go on to achieve a C4 skilled position. *Du Randt* disagrees and has opined that the plaintiff would not have achieved a university degree and would have remained in a semi-skilled position thus making her unable to achieve more than a B4 level. *Du Randt* is also quoted by *Koch's Quantum Yearbook* for 2014 as having regularly recommended use of 50% of the corporate total package when projecting loss of earnings for informal sector employment. His (*Du Randt*'s) opinion is said to be not tested and is therefore without justification. To me it also does not make sense for *Du Randt* to opine that the plaintiff's position would be the same as pre-morbidly with the exception that a higher than usual contingency deduction should be catered for. On the other hand, Shapiro is of the opinion that the plaintiff would not have progressed beyond a semi-skilled B3 level. *Du Randt* also opined that plaintiff would have left university due to financial reasons, repeated failures in 2010 and would have entered the formal labour market in 2011. He further states that plaintiff has remained at university longer that she would have otherwise done. He has thus entered the formal labour market some three years later than she would otherwise have had. For this reason, says *Du Randt*, plaintiff should be catered for in the actuarial calculations because her career progression has somewhat been slowed.

[17] On the other hand, *Shapiro* disagrees with *Du Randt* and is of the opinion that plaintiff would have obtained a degree and entered the formal labour market a year earlier than she has, had the accident not occurred.

[18] The plaintiff explained the reason for her failure at Walter Sisulu University in 2008 as having been caused by the lecturer's lack of knowledge of the subject he or she was lecturing. *Shapiro* is of the view that this explanation is valid in that it had the potential for resulting in the plaintiff failing the course. *Shapiro* further explains that the effect of the plaintiff's injuries caused by the accident would have had an effect on her academic performance in 2009. He gives some of the reasons as lack of mobility, the recovery period relating to the accident and other reasons such as emotional impact of the accident which would have a disadvantage on her life including her preparation for her studies. The above explanation is also explained by the plaintiff's ability to pass her 2010 and 2011 academic years. In my view, there is some sense in what *Mr Shapiro* says in this regard. I cannot agree with *Mr Du Randt'*s attempt to downplay the effect of the accident in the plaintiff's failure as a result of the accident. Evidence shows that the plaintiff has shown determination in her ability to get positive marks in her studies. Her resilience is also proof of the fact that she would likely have completed her degree pre-morbidly a fact that *Mr Du Randt* does not agree with and without convincing reasons in my view.

[19] I am satisfied that the evidence of the plaintiff in establishing on a balance of probabilities that she would have obtained her tertiary education degree has been proved. This would have enabled her to achieve a place at the level of C4 rating as testified for by Mr Shapiro.

[20] For the above reasons, I do not agree with *Mr Duda* for the defendant, that the plaintiff has not proved her case on a preponderance of probabilities.

[21] At the beginning of the case, it was agreed by the parties that once the matter has been decided by the Court upon the available evidence that the applicable actuarial report of the successful party would be utilised as the basis for the financial damages award which would incorporate the applicable contingency deductions deemed appropriate by the Court. The Court has decided in favour of the plaintiff and it follows, therefore, that the actuarial report of the plaintiff is to be utilised herein.

[22] It, therefore, follows that the calculations referred to in the plaintiff's actuarial report reflect the usual contingency deductions of 5% and 15% to future loss of income pre-morbidly and then reflect a 30% contingency deduction in regard to future income post-morbidly.

[23] The net loss reflected in the actuarial report, based upon the contingency deductions reflected in paragraph [22] above is R5 434 248.00

[24] Wherefore I make the following order:

(a) **the Defendant is ordered to pay the plaintiff the sum of R5 434 248.00 in respect of her claim for past and future loss of income/earning capacity;**

(b) **payment of the aforesaid amounts in paragraph (a) above shall be made within 14 days from date of this order directly to the trust account of the plaintiff's attorneys of record;**

(c) the reasonable travel and accommodation expenses incurred by plaintiff's legal representatives in attending consultations in preparation for trial;

(d) interest on the amount of damages awarded (at the legal rate) to run from 14 days after date of judgment to date of payment; and

(e) interest on costs (at the legal rate) from a date 14 days from allocateur to date of payment.

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P.W. TSHIKI
JUDGE OF THE HIGH COURT

For the plaintiff	:	Adv N Redpath-Molony
Instructed by	:	Nonxuba Inc MTHATHA
For the defendant	:	Mr S Duda
Instructed by	:	Mnqadi Inc MTHATHA