IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

Case Number: 40084/10

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

12 Nov 2013

DATE SIGNATURE

REGISTRAR OF THE NORTH GAUTENG HIGH COURT, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
JUDGE'S SECRETARY
2013 -11- 12
REGTERS KLERK
PRETORIA 0001
GRIFFIER VAN DIE NOORD GAUTENG HOË HOF, PRETORIA

In the matter between:

HEIDI KIMBER **PLAINTIFF**

vs

ROAD ACCIDENT FUND **DEFENDANT**

Coram: **HUGHES J**

JUDGMENT

Heard on: 28 August 2013

and 19 September 2013

Delivered on: 12 November 2013

HUGHES J

1. The plaintiff Heidi Kimber, a female born on 27 December 1963, sustained injuries arising from a motor vehicle collision on 5 October 2008.

2. Heidi sustained the following injuries: facial lacerations; neck soft tissue injury with degenerative changes at the fifth and sixth cervical vertebrae (C5/6); right upper limb lacerations; chest contusion; lumber soft tissue injury; multiple pelvic and hip fractures in the form of a right sacro-iliac joint dislocation, a superior and inferior pubic rami and bilateral anterior acetabulae fracture of the 2nd toe of the right foot.

3. On 23 November 2011 the Road Accident Fund formally conceded 100% liability and undertook to compensate the plaintiff for the damages suffered as a result of the collision.

4. The parties have settled the heads of damages set out below:

   4.1 Past medical and hospital expenses at R87 908.88

4.2 Future medical and related expenses – a statutory undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996.

4.3 General damages for pain and suffering, loss of amenities of life and disability at R350 000.00

5. The only issue remaining in dispute for the court's determination is that of past and future loss of earnings and earning capacity.

6. The admitted expert reports submitted by the plaintiff only are set out below: -

6.1 Dr Read (Orthopaedic Surgeon)

6.2 Romy Mark (Occupational Therapist)

6.3 Zurayde Shaik (Industrial Psychologist)

6.4 Ivan Kramer (Actuary) – Actuarial calculation excluding the contingency deductions applied.

7. At the time of the collision the plaintiff had just commenced her own business. In a detailed curriculum vitae (CV) she describes the venture undertaken as follows:

"Date of employment:	*Oct2007-2009*
Company name:	*Eezy Reach Window Cleaning*
Duties:	*Started my own window cleaning company* *Did market research as it is a new concept in South Africa imported from the UK* *Sourced and enquired about different systems used in the UK* *Ordered and installed the equipment* *Do the advertising and selling* *Do the admin and accounting functions* *Manage the operational teams.*
Reason for leaving:	*Broken my pelvis in motor car accident and was unable to continue with window cleaning."*

8. From the plaintiff's CV it is noted that she was, prior to her venturing out on her own, predominantly employed in the spheres

of managing, secretarial admin, accounting functions, cost control and debtors collection. This was for the period 2001 to 2007.

9. Dr Read had the following to say about the difficulties that the plaintiff experiences as a result of her injuries sustained:

"At the time of the accident the patient was self-employed. She started her own company, Eezy Reach Window Cleaning, at the beginning of 2008.
Following the accident, the patient remained off work for a period of two months. During this time she received no income.
She was never able to return to this work as a result of the symptoms she now experiences related to the injuries sustained in this accident.

At present the patient works in a temporary part-time position as a bookkeeper.

Although the symptoms are somewhat relieved by rest, she has difficulty finding a comfortable position in which to lie. She complains of occasional early morning and post-inactivity stiffness in her cervical spine and lumbar spine.

She notes that she has difficulty bending to pick up objects. She also has difficulty carrying heavy objects. She has difficulty standing in one position for prolonged periods of time. All these activities worsen her symptoms.

She also has difficulty sitting in one position for a prolonged period of time, e.g. when driving a motor vehicle. The patient notes that her driving is also affected as she has to make more use of the rear view mirror and she has to turn her whole body to check her blind sports. On specific questioning, she has no radiculopathy in relation to her upper limbs. She complains of radicular symptoms in both lower limbs, more severe in the right lower limb.

Pain in the pelvis

The patient complains of pain over the sacro-iliac joints bilaterally and anteriorly over the public rami and symphysis pubis. The pain is related to activity and inclement weather. The patient is unable to sleep on her side due to the pain she experiences.

Pain in the right foot

The patient complains of pain over her 2^{nd} toe. The pain is related to activity and inclement weather.

The patient rests and uses analgesics and muscle relaxants (Mypaid or Norflex Co) when her symptoms are severe.

Education and Employment

The patient has a Grade Twelve level of education.

The patient has completed her NTC3 and a Diploma in bookkeeping.

At the time of the accident the patient was self-employed, doing window cleaning. She had recently bought specialised equipment and started her own company. She was in the process of becoming well established in this industry.

Following the accident she was unable to return to her pre-accident occupation.

At present she works in a temporary capacity as a bookkeeper. She has to take regular breaks at hourly intervals, i.e. 20 minutes per hour.

She is currently seeking full-time employment closer to home to avoid driving for long periods of time.

The patient also experiences intermittent non-specific radicular symptoms in her lower limbs. It is likely that the patient's symptoms will progress to the stage where she will require further radiological investigation of the lumbar spine and may even require surgery. Radiological investigations will include CT scans, MRI scans and possibly discograms.

The cost of these investigations and surgery is in the region of R120 000-00.

Pelvic Fractures

The patient will require conservative treatment which will consist of analgesics, anti-inflammatories, muscle relaxants and physiotherapy.

An amount of R20 000-00 should be made available in this regard.

The patient will require surgery by way of a fusion of the sacro-iliac joints. Fixation can be by way of rods.

The cost of such surgery is R120 000-00.

The patient will subsequently require removal of the rods approximately one year later, at a further cost of R30 000-00.

A fracture of the 2nd metatarsal of the right foot

The proximal interphalangeal joint of the 2nd toe is now fused.

She has swelling and tenderness of the distal interphalangeal joint of the 2nd toe.

The patient requires conservative treatment which will consists of analgesics, anti-inflammatories, muscle relaxants and physiotherapy.

An amount of R10 000-00 should be made available in this regard.

Future Disability

If the patient attends to the treatment recommended in the body of this report, her future disability should be improved.

However, the patient is always likely to have some residual symptoms emanating from the injuries sustained in this accident.

Effect on Employment

She used to drive to various buildings with one assistant. She was in charge of cleaning the lower windows and using the machinery. She notes that she had to be very "hands on".

Following the accident, she was no longer able to cope with the physically demanding aspects of this work. She could not afford to train another person or employ a driver. She notes that the business was growing and would have continued to expand. She feels that she had great potential in this line of work and was passionate about the window cleaning technique she was marketing. She has since had to sell all her machinery.

At present she does some small bookkeeping jobs assisting friends when she is able to. She notes that she would have difficulty driving long distances to consult with other clients. She has difficulty sitting working at a desk doing the books for prolonged periods of time.

The patient requires eight weeks off in order to attend to the treatment recommended in the body of this report. Even following treatment, she will continue to have some difficulty even in a sedentary type job. I do not ever foresee her returning to her pre-accident occupation, i.e. cleaning windows. The patient will always require a sedentary-type job as a result of the injuries sustained in this accident. As to how her income and employment prospects have been affected and will continue to be affected in the future, I defer to the relevant experts in this field.

The patient may require one to two years early retirement even in a sedentary-type job as a result of the injuries sustained in this accident."

10. Romy Marks the occupational therapist states categorically that from her assessment of the plaintiff the plaintiff "demonstrated the physical strength to do sedentary to light work". She concluded further that the plaintiff is "currently suited to sedentary work only."

11. The Industrial Psychologist, Ms Shaik, submitted in her report that the plaintiff advised that she was a manager earning R25 000 per month at her own company Eezy Reach Window Cleaning. The plaintiff reported that from October 2008 to January/February 2009 she remained unemployed whilst she recuperated from her

injuries. When she returned to work she passed on her contracts to another business owner and closed her business in September 2009. Since then she works as a bookkeeper earning a net salary of R6000-00 per month. Ms Shaik made a point to highlight the following:

"NB: Financial statements that were submitted did no clearly document her income and the year of the statement but highlighted that there was no stability in her profit and it would vary up to R20 520,00 per month."

12. Shaik reports the following:-

"It is difficult to estimate possible future earnings of a business given that there are many factors that contribute to the business success including external factors such as the country's general state of the economy and some conditions within the industry in which the business is operating e.g. recession, could have a negative impact on her business. Ms. Kimber's business was still new and would have reached growth in the next three to five years pre-accident. However, given her strong employment history and numerous years of working experience the writer is of the opinion that her business most probably would have

eventually became sustainable, especially given that the business would have been managed by an individual who had nuberous years of skills and she would have obviously have continued to use her skills to market the business. The writer suggests that for purposes of calculating her loss of earnings, the above reported fighres can be taken into consideration with adjustments to reflect inflationary increases.

Like most self-employed individuals, Ms. Kimber most probably would have worked beyond the normal retirement age of 65 years, possibly into her seventies. It is likely though that as she grew older, probably in her sixties, she would have focussed more on the less physically demanding aspects of her business, e.g. managing and marketing the business.

The writer is also of the opinion that should her business proven not to be financially viable she could have re-entered the open labour market in administrative related positions. Considering she has the skills and experience in these categories of employments she would have been capable of easily securing alternative employment and earning at the Patterson Level B4/B5 until she retired with the applicable inflationary increases. In the formal labour market depending on circumstances she would have been capable of working until reaching the retirement age of 60 - 65 years.

Post-accident Scenario

Post-accident Ms. Kimber reported she was recuperating from her accident related injuries until end of November 2008. She reported she returned to her business in approximately January/February 2009, she did not document a profit to the writer, but indicated that she closed her business in September 2009, as it was not proving to be financially viable as a result of her accident related injuries. She indicated that in September 2009 she managed to secure employment as an accountant.

The writer documents Ms. Kimber's post-accident earnings scenario as follows:

Post-accident Ms. Kimber documented she could not return to her pre-accident employment as a result of the nature of her injuries. She indicated that she was recuperating until the end of November 2008. She further indicated that she returned to work in January/February 2009 but she did not document any profit. She reported that she closed her business in September 2009. This constitutes direct losses of income and she should be compensated accordingly.

Thereafter, she indicated that she secured employment as an accountant in September 2009 and she is currently earning a net salary of R6000-00 per months. The writer did not have documentary proof of income at the time of writing this report.

The writer is of the opinion that considering the orthopaedic surgeons evaluation Ms, Kimber is unlikely to resume work in self-employment as a result of the nature of her orthopaedic injuries. The writer is also of the opinion that post accident Ms. Kimber is likely to remain with her current employer for as long as she is accommodated, with the applicable inflationary increases. This would constitute losses of earnings as she is unlikely to reach her pre-accident earning potentials.

She should be compensated on a contingency basis for all losses in earnings (current and possible) and that the application of contingency deductions remains the prerogative of the court, or a matter for negotiation between the parties involved."

13. According to the Industrial Psychologist the plaintiff's earnings were taken at R20 520.00 per month. These were extracted from a potential projection that was forecast by the Industrial Psychologist and were not the plaintiff's actual earnings as at the time of the collision.

14. On an examination of the invoices submitted to substantiate the plaintiff's claim it transpired that for the financial year of 2008 she invoiced only R32 780.00 for that entire year. She also submitted proof of deposits made and these totalled an amount of R43 150.00 for the entire year. If one worked on either the

deposits or the invoices the plaintiff's earnings amounted to R3 595.84 per month or R2 731.60 per month respectively.

15. Currently the plaintiff earns on a temporary basis as a part-time bookkeeper, an amount of R6 000.00 to R8 000.00 per month. As opposed to what she earned running her own business, she is actually in a much better position than when she ran her own business.

16. From the experts reports on hand the plaintiff advised that she holds a bookkeeping diploma obtained 1990-1991 from Birnon Business College and she is as of September 2009 been employed on a temporary basis by a friend at Plasto Mining Pty Ltd as a bookkeeper earning a net salary of R6 000.00 per month. This has increased as at June 2013 to R8 000.00 per month and she still works on a temporary basis.

17. Of importance is the following which was stated by the Industrial Psychologist as regard the plaintiff's pre-accident occupation prospects (at page 57 of bundle 4):

"7.1 Pre-Accident Scenario

...she has working experience in personal assistance, accounting based position... Her employment history documents an individual who was capable of easy securing employment despite the various life changes she underwent. In addition, prior to the

accident in question she was capable of sustaining employment and maintaining a relative effective level of work performance in the absence of reported physical and cognitive limitations"

18. As set out above, in the report of the Industrial Psychologist, the plaintiff would have easily secured alternative employment in the administrative labour market as she currently has. Her earnings would have been on Patterson level B4/B5 with inflationary increases until retirement age 60-65 years. Now that accident has occurred she had to recuperate post-accident until November 2008 retuning to work January 2009, not making a profit, then starting her temporary employment in September 2009 earning R6 000.00 with an increase in June 2013 of R8 000.00. It's documented that she would remain in this employment as long as accommodated. There is also the issue of 2 years early retirement documented by Dr Reed, even if she is in a sedentary occupation, as she currently is, that needs to be taken in account.

19. On behalf of the plaintiff it was argued that, in the circumstances that she finds herself at present and taking into account the facts set out above, it would be fair for the plaintiff to be compensated for the period of October 2008 at an average of her earnings as self-employment which would amount to an amount of R3 163.72. This is because she earned no income in that specific month due

to the fact that she was recuperating. In the circumstance her return to the open labour market should be taken as September 2009 in the pre-accident scenario. Her earnings taken on a basic level on the Paterson B4/B5 level in the medium quatal between the two levels calculated at a basic salary of R134 500.00 per annum to commence and inflationary increases added thereto. Her current residual earning with inflationary increases are to be taken into account of the post-accident scenario. Further, instead of a 2 year early retirement counsel, for the plaintiff, request of me to take into account 1½ years instead. In the circumstances her retirement age would be considered as 63½ years instead. As regards the contingencies to be applied it was submitted, on behalf of the plaintiff, that taking into account the case of **SOUTHERN INSURANCE ASSOCIATION LTD v BAILEY NO 1984 (1) SA 98 (A)** the most reasonable applicable contingency to be applied pre-accident would be that of ½ % per annum to retirement, the plaintiff is 46 years old at present. Thus a total of 15% be applied as a contingency deducted on pre-accident scenario. As regards to post-accident scenario 30 % contingency should be applied in the circumstances.

20. I must add at this junction that in reply to the defendant's argument on the contingencies to be applied the plaintiff's representative accepted the proposal of contingencies of 10 %

pre-accident and 45 % post-accident being applicable to their proposed method of calculation of the loss of earning incurred by the plaintiff.

21. The representative on behalf of the defendant argued that all things considered with the proposed method of calculation of the loss of earnings the only differences that they could persist with, is that the salary notch should commence at the level of B4 Paterson basic salary scale being R 104 000.00 per annum (Lower Quartile). Inflationary increases to be applied with only one year early retirement to be taken into account. The reason advanced for this one year early retirement was that the plaintiff was able to work. Retirement age of 65 years was not an issue. The proposed contingencies as I have already alluded to above were proposed at 10 % pre-accident and 45 % post-accident. This was based on the information pertained in the medical reports, that though she had limitations she was able to work with the assisted occupational therapy offered by the defendant.

22. In line with the factors set out above an actuary, Ivan Kramer, was instructed by the court to perform the necessary calculation without the application of contingencies. The result is set out below:

HEIDI KIMBER

Values below are in rands

	But for the accident	Having regard to the accident	net loss
Gross accrued value of income	475 718	309 552	
Less contingency	0	0	
Net accrued value of income	475 718	309 552	166 116
Gross prospective value of income	1 438 496	1 014 077	
Less contingency	0	0	
Nett prospective value of income	1 438 496	1 014 077	424 419
Total value of income	1 914 214	1 323 629	590 585

Contingency %		
accrued	0.0%	0.0%
prospective	0.0%	0.0%

23. At this juncture I refer paragraph [80], [81] and [83] of **Sterris v RAF 2010 (6B4) QOD 26 (WCC)**.

"[80] The plaintiffs counsel referred me to Gauntlett, Quantum of Damages, Volume 1, Fourth Edition from which the following appear at pages 8, 48 and 51 respectively:

'Allowance for a prospective loss necessarily introduces a speculative element into the assessment of damages. While the general rule is that loss must be established upon a balance of probabilities, it has been held that justice may require that a contingency allowance be made for a mere possibility of certain forms of loss. In this regard, the distinction is drawn (in principle and not without difficulties) between causation and quantification: it has never been the approach of the courts to resolve the inescapable uncertainties by the application of the burden of proof. Mere difficulty in assessing this amount will not absolve the court from arriving at an estimate. The onus of showing that there is sufficient likelihood of such loss rests upon the plaintiff. This does not, however, mean that where the evidence suggests a range of possibilities, the courts will select the one least favourable to the plaintiff because he bears the onus, and has not proved that a more favourable possibility ought to be preferred.'

[81] At page 48, the authors comment as follows on how the loss may be calculated:

(1) Calculate the present value of the future income which the plaintiff would have earned but for the injuries and consequent disability;

(2) calculate the present value of the plaintiff's estimated future income, if any, having regard to the disability;

(3) subtract the figure obtained under (2) from that obtained under (1);

(4) adjust the figure obtained as a result of this subtraction in the light of all relevant factors and contingencies.

[83] Applying the principles set out above, I have considered whether the contingencies applied by the plaintiff in his actuarial report, 15% to the uninjured earnings and 35% to the 'already truncated earnings to age 49' (the quote is from argument on behalf of the defendant), were justified in this matter. The defendant's counsel argued that they were not."

24. Taking into account the normal considerations typically informing the contingency deduction, and the factors set out in the paragraphs above as well as the fact that the plaintiff had illustrated no loss having regard to the accident, but as is evident from the plaintiff's satisfactory employment history and service record, always being in gainful employment, prior to her venturing

into the world of self-employment, the past is a clear indicator of what her future would have held had she not ventured into the realm of self-employment. I have to take this into account when applying the contingencies to the calculation. To my mind, even though it would seem that she is being placed in a position much better than she was at the time of the collision I cannot loose sight of her work history and ethos prior to her venturing into the unknown of self-employment. For these reasons I am of the opinion that it is justified to apply the contingencies of 10% against the accrued loss and 45% as against the prospective loss.

25. The calculation illustrated below indicates that the net loss after the contingencies are applied totals an amount of R 382 979.85.

The calculation set out below:

Values below are in rands

	But for the accident	Having regard to the accident	net loss
Gross accrued value of income	475 718.00	309 552.00	
Less contingency at 10%	47 571.80	30 955.20	
Net accrued value of income	428 146.20	278 596.80	**149 549.40**

Gross prospective value of income	1 438 496.00	1 014 077.00	
Less contingency at 45%	647 323.20	456 334.65	
Nett prospective value of income	791 172.80	557 742.35	**233 430.45**
Total value of income	1 219 319.00	836 339.15	**382 979.85**

Contingency %		
accrued	10%	10%
prospective	45%	45%

COSTS:

26. None of the experts were called to give evidence as the defendant admitted the reports submitted. The only extra costing is that of the actuary Ivan Kramer, who had to conduct a further calculation on the instructions of the court.

27. Accordingly I make the following order:

27.1 Payment of the capital amount of R820 888.73 to the plaintiff made up as follows:

27.1 (a) Past medical and hospital expenses at R 87 908.88;

27.1 (b) General damages at R 350 000.00;

27.1 (c) R 382 979.85 in respect of past and future loss of earnings and earning capacity;

27.2 The capital amounts referred to in paragraph 27.1 above will not bear interest unless the defendant fails to effect payment thereof within fourteen calendar days of the date of this order, in which event the capital amount will bear interest at the rate of 15.5% per annum calculated from and including the 15th calendar day after the date of this order to and including the date of payment thereof;

27.3 The defendant is directed to furnish the plaintiff with an undertaking as contemplated in section 17(4)(a) of the Road Accident Fund Act 56 of 1996 to pay the plaintiff's future medical expenses, resulting from the injuries sustained by the plaintiff in the accident that occurred on 5 October 2008, after such costs have been incurred and upon proof thereof;

27.4 The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs, which shall include

26.4 (a) the costs of counsel;

26.4 (b) the costs of obtaining the reports of and the reasonable taxable preparation and/or qualifying fees of the following experts;

1. Dr Read (Orthopaedic Surgeon)

2. R Mark (Occupational Therapist)

3. Z Shaik (Industrial Psychologist)

4. I Kramer (Actuary)

W. Hughes Judge of the High Court

Heard on: 28 August 2013

and 19 September 2013

Delivered on: 12 November 2013

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