IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO
Case no: 937/2021

In the matter between:

CJ HECHTER Plaintiff

and

ROAD ACCIDENT FUND Defendant

CORAM: HEFER AJ

HEARD ON: 6 and 7 FEBRUARY 2024 (Heads delivered on 19 February 2024)

DELIVERED ON: 9 MAY 2024

[1] The Plaintiff, an adult female of 22 years of age, was involved in a motor vehicle accident on 12 August 2020.

[2] The Plaintiff alleges that as a result of the accident, she sustained injuries and *sequelae* as mentioned in the various medico-legal expert reports served and the RAF4 form.

[3] In the Plaintiff's action against the Defendant for recovery of her damages, the merits-aspect has been settled. The parties have further settled the aspects expenses as the Defendant has tendered an undertaking in terms of Section 17(4A) of the Road Accident Fund Act 19 of 2005.

[4] The Court is called upon to determine the award to be made in respect offuture loss of earnings/ earning capacity and contingencies to be applied.

[5] At the outset of proceedings, Plaintiff proceeded with a formal application in terms of Rule 38(2) of the Uniform Rules of Court to adduce the expert evidence by way of affidavits incorporating the contents of the expert reports. The application was not opposed by the Defendant and after argument an order was granted accordingly.

[6] The Plaintiff relied on the expert reports of Dr L Smit (neurologist), Dr FJ Greyling (orthopaedic surgeon), Mr C Etzebeth (clinical psychologist), Me S Maree (occupational therapist), Dr J Wilkinson (neurosurgeon) and Dr EJ Jacobz (industrial psychologist).

Evidence by the Plaintiff:

[7] The Plaintiff testified during the hearing. I must agree at the outset, with the submission by Mr *Van Onselen,* appearing on behalf of the Plaintiff, that she was a good and reliable witness. Her evidence made sense and was logical. She was open and candid and her evidence contained no contradictions. The Defendant did not argue to the contrary in this regard.

[8] The Plaintiff testified that she completed her studies at the University of North- West during 2023 and that she was to be awarded her degree during April 2024.

[9] Of importance is that the Plaintiff's field of studies is in respect of

younger children, in particular in respect of children in Grade R to 3. This, according to the Plaintiff, means that she, in the fulfilment of her duties as a teacher, needs to often bend down to assist the children in their tasks in class.

[10] The crucial part of her evidence relates to her practically being employed as an educator for a 6 month period at a primary school in the Western Cape during 2023. During this time, she was employed as an assistant teacher. It is important to remember that her qualifications are a Bachelor of Education degree in Foundation Phase teaching. As the Plaintiff explained, this is to teach young children from Grade R (pre-school year) up to Grade 3. As she testified, she is not qualified to teach grown children in higher grades in primary school or high school with this qualification.

[11] The Plaintiff described in detail what her daily activities entailed when she was working as an assistant teacher with reference to the physical aspects such as constant standing, bending down, crouching, etc. It was also compulsory for her to coach extra-mural activities after school and she gladly assisted with netball. It appears that it is a common occurrence that primary school teachers also double up after school as coaches for tennis, netball, cricket, rugby, swimming and alike. Her work day was five hours of teaching (with normal breaks at school) and from 02:00 in the afternoon an additional two hours for extra-mural activities.

[12] The Plaintiff testified that she struggled to cope. She experienced intense pain and discomfort in especially her lower back and hip. A teacher who she was assisting was aware of her physical shortcomings and often allowed her to take breaks (over and above the regular school breaks). There were even occasions when she was allowed to go home early as she simply was not able to cope.

[13] The Plaintiff further confirmed that she still experiences daily backpain and cannot stand for periods longer than 30 minutes. The same occurs when she has to sit doing administrative duties. In her own words, the only way she can

alleviate the pain is to lie down.

[14] Currently the Plaintiff is employed as a swimming coach at Ryk Neethling's Academy in Stellenbosch. She commenced this endeavour towards the end of 2023. She testified further that she experiences pain and discomfort doing this job but it is less physically demanding (with reference to her injuries) and she spends the majority of her time in the pool and in water. The buoyancy assists and she manages to cope with her daily duties. The Plaintiff further confirmed that she decided to rather work as a swimming coach than actively seeking employment as an educator (given her qualifications). With reference to her experience in the six months during 2023 when she assisted as an educator, she simply realised that she cannot cope with the physical demands and hence she feels that she is not physically ready to pursue her lifelong passion of teaching.

[15] The Plaintiff further testified that she has not received any treatment in the form of physiotherapy or by a chiropractor. She confirmed that this is due to the lack of funds and that her intention is to pursue a treatment regime once she received funds from her claim. Once her injuries and symptoms abate slightly and/or improve she intends she to enter the education labour market in approximately two years' time.

[16] When the Plaintiff was asked why she did not attend a government hospital for treatment, her response was "/ *do not know why".*

[17] The Plaintiff further described two episodes of epilepsy where she fainted in the bathroom. No collateral history is however available at present.

[18] The Plaintiff testified that there is no history of epilepsy in her family and the seizures and/or episodes only commenced after the accident. Mr *Van Onselen* submitted that the issue of whether or not the so-called epileptic seizures and/or seizures / episodes are a *sequelae* of the brain injury which she incurred is a moot point. He further submitted that it is clear from the calculations and the reports by the experts, that the Plaintiffs claim for loss of income is not based in

loss of income on the neurocognitive *sequelae* of the brain injury.

[19] In this regard, it must also be borne in mind that the clinical psychologist, Mr C Etzebeth, who has done the neurocognitive assessment of the Plaintiff, opined that the traumatic brain injury has not resulted in any significant neurocognitive *sequelae.*

[20] This aspect is according to Mr *Van Onselen* a very minor element which has caused slight issues with short-term memory and concentration. At best, according to him, this is an aspect which can be taken into account when determining reasonable post-morbid contingency deductions from the actuarial calculations. The Plaintiff's case is according to Mr *Van Onselen* predominantly based on the serious vertebrae and hip fractures and the devastating daily pain and *sequelae* from those injuries. The impact on her physical functionality is the reason she will suffer a loss of earnings in future.

Expert evidence:

Dr L Smit (neurologist)

[21] According to Dr Smit, the hospital records confirm a pelvis fracture (superior inferior rami on the left), L5 transverse process fracture, diastasis of right SI joint, displaced sacral body fracture with S2 level sacral angulation, laceration on her scalp and forehead including concussion, a spinal injury and various soft tissue injuries.

[22] She further confirms that Plaintiff's main complaints included lower back pain and pelvic pain between her legs.

[23] Specific enquiries elicited complaints of headaches two to three times per week, reduced hearing in her left ear and short-term memory deficits.

[24] Neurological examination revealed normal cranial nerves, except for

hearing of the right ear. Motor-, sensory- and cerebellar examination as well as her gait is within normal limits.

[25] Dr Smit opined that the Plaintiff probably suffered a mild traumatic brain injury over and above her orthopaedic injuries sustained. She further opined that the two episodes of loss of consciousness is in keeping with defaecation syncope. The Plaintiff has a 5% change of developing epilepsy later in life according to her.

Dr J Greyling (orthopaedic surgeon):

[26] Dr Greyling confirmed the injuries sustained and treatment received which correlate with that recorded by Dr Smit.

[27] At the date of examination the Plaintiff complained of constant pain in her lower back and pelvis, pain in her lower back causes numbness in her legs if she sits too long, difficulty for long periods of time to study, problems with short-term memory which interfered with studies and an inability to be physically active.

[28] As far as the Plaintiffs work ability is concerned, the injuries she incurred and the pain she experiences has an impact on her ability to sit or stand for long periods of time which is expected of this work. She is also no longer able to pursue a career of becoming a professional netball player or swimmer. From an orthopaedic point of view, the accident and injuries has had a profound impact on her career. According to Dr Greyling, the Plaintiff may continue to have difficulties in becoming a teacher without reasonable accommodations for the pain she experiences on a daily basis. She may require a sympathetic employer to allow for these accommodations.

[29] After Dr Greyling had insight in the report by Dr Wilkinson, the neurosurgeon, he did find it necessary to revise his initial prognosis concerning the patient's working life expectancy. He refers to Dr Wilkinson's suggestions that the Plaintiff may experience progressive neurogenic symptoms that could significantly impact her ability to maintain employment. These symptoms are

directly related to the complex nature of her spinal and sacral injuries and may lead to chronic pain, ability issues and other neurological deficits.

[30] Dr Greyling then concludes as follows:

> "In light of this new evidence and after a careful re-evaluation of the patient's current and anticipated future medical condition, I concur with Dr Wilkinson's assessment. It is my revised opinion that Ms Hechter may (own emphasis) indeed face a necessity of early retirement, potentially up to 1O years prior to the normal retirement age."

Dr J Wilkinson (neurosurgeon):

[31] According to Dr Wilkinson the Plaintiff uses painkillers on a weekly basis to relieve headaches and lower back pain. He confirmed that the Plaintiff complained of weekly headaches in the frontal area. This causes sensitivity to sharp light. She also has daily lower back ache when sitting, standing or walking for periods exceeding 30 minutes.

[32] According to Dr Wilkinson he also has ascertained from the Plaintiff that she has memory deficits and her short-term memory is mildly affected. Her long- term memory is slightly better. She is aware of this and has to put in extra effort studying for exams. She also has impaired concentration as she takes regular rests breaks when her concentration wanes. Her concentration was much better prior to the accident.

[33] Dr Wilkinson's own observations reveal that *inter alia* the Plaintiff sustained a head-, pelvis- and lumbar spine injury.

[34] In a later addendum to his report, Dr Wilkinson expressed his opinion as follows:

> "Education is very strenuous occupation and involves physical activities.

> By the age of 50 years, she might not be able to resume her work as a teacher. Even her sitting ability and standing ability would be compromised as a result of spine problems.
>
> If her retirement age is postulated at 65 years, early (ill-health retirement) could follow at the age of 50 years. That would be 15 years prior to retirement age.
>
> I agree with Dr Greyling that her occupational career might (own emphasis) be shortened by spine problems.
>
> The client also sustained a mild traumatic brain injury and posttraumatic dementia might follow in later years. That would also contribute to future occupational disability."

Mr Cobus Etzebeth (clinical psychologist):

[35] According to Mr Etzebeth, it would appear that the mild traumatic brain injury has not resulted in any significant neurocognitive *sequelae.*

Me S Maree (occupational therapist):

[36] This expert evaluated the Plaintiff to determine the impact of the injuries on her functionality. Her report, compiled subsequent to the evaluation of the Plaintiff, revealed *inter alia* that the Plaintiff complained of constant lower back pain aggravated by prolonged standing and sitting in a vehicle. Pain is also exacerbated with swim training and during her monthly menstrual cycle. The most important function or loss is her inability to play netball on a professional level.

[37] The constant pelvic pain is aggravated by standing, sitting and walking for long periods and is worse at night. The most functional loss is her inability to be as competitive and skilful with swimming as pre-morbidly.

[38] As far as post-concussion symptoms are concerned, Me Maree commented that the Plaintiff complained of frontal headaches at least once a week.

[39] Testing by the expert, elicited pain when sitting for more than 30 minutes and standing for longer than 15 minutes. Pubis symphysis pain occurred. The same was applicable to her lower back. Maintaining positions during testing was extremely awkward. The deviation she demonstrated interferes significantly with functionality.

[40] As far as standing is concerned, the Plaintiff was able to maintain a standing posture for 5 - 10 minutes with two positions and adjustment during testing. She required a rest time after each activity and would sit down for a few minutes.

[41] In summary, during the occupational therapy assessment, Plaintiff presented with diminished postural tolerances in stooping and lowered work in sitting while tolerating constant lower back- and pelvic pain. She struggled with dynamic strength activities and performed tasks with a progressing slower pace, moderate deviations and constant lower back pain.

[42] Before the accident, the Plaintiff was competitive in the open labour marker and had the same chance as everyone else to work until retirement age.

[43] Plaintiff's career path of becoming an educator is within the light to medium work demands. She will require certain work accommodations to cope with her physical demands of teaching with reference to constant standing, stooping and sitting. Due to her brain injury, she has secondary complications of frequent headaches, tinnitus, hearing loss, vertigo and decreased memory and concentration. This will place her at a disadvantage when performing work in the open labour market. Teaching requires a significant amount of dedication and the ability to plan and work independently.

[44] The Plaintiff is currently an unequal competitor for her future work position because she needs to tolerate lower back and pelvic pain while performing her job requirements. She will probably struggle to fulfil all the physical requirements of the profession. She will experience physical and cognitive limitations in her career as a foundation phase educator. Her work opportunities are narrowed and she would probably have to be very selective. This negatively impacts on her employability and she will struggle to teach classes for specialised education. This will in all probability cause periods of unemployment and a truncation of her vocational progression. Functional capacity tests results concluded that she will be suited to frequent sedentary to frequent light work demands.

Dr E Jacobs (industrial psychologist):

[45] This expert evaluated the Plaintiff on two occasions, before the original reports were filed. Due to updates on her studies and receipt of addendum reports by certain of the other experts, this culminated in a final addendum report.

[46] He obtained collateral information from Ms Aldrich. This is the person with whom Plaintiff did her practical training at Willem Postma School for one month. The collateral was that Plaintiff was good with her learners and passionate about teaching. It was confirmed that for Grade 1 an educator needs to sit on the floor, on the knees, bends and assist the young kids at all times. It is physically demanding and strenuous.

[47] After collating all the opinions of the other experts, this expert opines that it seems that Plaintiff is not regarded as suitable to work as a teacher. She will have to tolerate pain and discomfort. Teaching requires light to medium demands and Plaintiff is only suited for frequent sedentary to light medium demands. She will need accommodations. Periods of unemployment are to be expected as well as foreseen probable early retirement (with reference to the

neurosurgeon and orthopaedic surgeon).

[48] The expert tabulates the income scales applicable for educators as per Koch as well as STATSSA.

[49] Pre-morbidly, in his opinion, the Plaintiff would have been able to complete her degree and she would have been able to be renumerated as teacher with a four year degree and progress per notch as per policy and apply for promotions as any healthy and ambitious teacher will do.

[50] Post-morbidly, the Plaintiff will still be able to complete her degree. In the opinion of Dr Jacobs, she will strive and obtain teaching positions, but she will face various challenges (not physically and mentally fully suitable to work as teacher; periods of unemployment, will need continuous accommodation, will not be able to work to retirement age, will not be an equal competitor and might not be a candidate for choice for a vacancy and later promotion or position). She might leave teaching and seek a lighter physical career at some stage. She will experience productivity problems due to pain and the effects of her brain injury. Additionally, she might not be able to coach sport in future.

[51] He states as follows:

> "In summary, due to the lack of a timeframe for early retirement provided by the relevant experts, it is suggested to deal with her case by not allowing for promotions and regular movement between schools (only notch increases) and secondly applying a contingency deduction on her postmorbid earnings. It is for the court or parties to decide, but in my opinion her future loss might be significant."

[52] Furthermore, it is stated:

> "It is my revised opinion that Ms Hechter may indeed face a necessity of early retirement, potentially up to 10 years prior to the normal retirement

age."

[53] In this regard he concurs with the assessment by Dr Wilkinson, save for the fact that according to Dr Wilkinson, the Plaintiff might retire 15 years instead of 10 years earlier. In summary, his initial projection of Ms Hechter's work life expectancy until the normal retirement age is no longer tenable in light of Dr Wilkinson's report and the associated clinical findings.

[54] Dr De Jager further opined that the Plaintiff is not an equal competitor in the labour market and also not in the teaching profession. She will however in his opinion, continue with a career as a teacher as she is very committed to teaching but will most likely not be able to perform on the same level as compared to her being fully physically and mentally fit. She will in particular not be an equal competitor when applying for teaching jobs or become an HOD:

> "She will not be an equal competitor when applying for teaching jobs or become an HOD. Although it is not unlikely that she will become a HOD it is uncertain whether she will be able to stay in teaching until age 45 and/or thereafter. It is normally expected from a teacher to also do physically demanding tasks such as coaching sport teams, standing on their feet teaching, negotiating stairs and walking around the class and school terrain for discipline or order purposes."

[55] He then continues as follows:

> "It is therefore my opinion that a promotion to HOD is less likely compared to being uninjured and that too many uncertainties exist to credit her for certain any promotions. She will however receive her notch increases. Take note that the role of the industrial psychological is to address likely scenarios and the injuries have resulted in her to not being able to complete equally for promotions. Take also note that a HOD is still an 'active' teacher in a classroom for some additional administrative responsibilities (it is not an office job)."

Mr G Whittaker (actuary):

[56] Updated actuarial calculations have been obtained based on the addendum report of the industrial psychologist, Dr Jacobs and using the opined income levels premorbid and postmorbid scenario. The updated calculations also include the recently opined early retirement. From this report it is noted that the figures have not increased substantially due to the inclusion of early retirement. This is due to the effect of the capitalising of the losses in those future years. The early retirement makes approximately a R500,000 difference to the claim,. for loss of earnings.

[57] The actuary has for illustrative purposes computed two scenarios with deferring contingencies differentials. Scenario 1 is based on a 15% differential (15% higher post-morbid contingency deduction) and scenario 2, 20%.

Loss of earnings and contingencies:

[58] Mr *Van Onselen* submitted that for the reasons listed in the report of the industrial psychologist, that these differentials are more than justified and reasonable under the circumstances. The Plaintiff has been blighted and will suffer continuously from the effects of the polytrauma throughout her entire working career.

[59] Mr *Van Onselen* then further submitted to be fair to the Defendant, that the scenarios be averaged out. This will imply a 17.5% post-morbid contingency deduction.

[60] Ms Banda, appearing on behalf of the Defendant, with reference to the calculation of the actuary in respect of the first scenario by the actuary, submitted that the Plaintiff has not suffered a loss of earnings but rather her earning capacity would be effected thus contingencies of 26% should be applied on the pre-accident scenario and 30% on the post-accident scenario.

[61] In support of her submissions, Ms Banda argued that Dr Greyling compiled an addendum report approximately one year after his initial examination and after considering the report of Dr Wilkinson. Dr Wilkinson compiled his addendum report one year after the initial examination and after considering the report of Dr Greyling. In their initial reports, both experts did not foresee the need for surgical intervention or that she will retire early. According to Ms Banda, these experts' opinions should be treated with caution as there was no new clinical information such as revised X-rays / MRI scans / EEG reports or follow-up consultations. According to Dr Wilkinson, not only age-related but injury accelerated degeneration of her lumbar spine will follow. He then indicates that surgery might follow and the chances of her requiring surgical intervention in future in the next five years is at 10% and it accumulates with 10% every 5 years. Furthermore, the experts also indicated that the Plaintiff would retire early with Dr Wilkinson indicating that she will retire 15 years prior to normal retirement age whilst Dr Greyling indicated that she will retire 10 years earlier. Mr *Van Onselen* on the other hand, however submitted that the *"inevitable"* extensive spinal surgery foreseen is the main reason for early retirement.

[62] I must agree with the contentions on behalf of the Defendant more in particular to the effect that the primary expert reports of Dr Wilkinson and Dr Greyling indicate that the finding and recommendations are based largely on the probabilities and an anticipation of what the Plaintiff's future condition may / might be. Furthermore, I agree that the physical demands of a teacher are of light to medium work. According to the occupational therapist, the Plaintiff has a physical capacity for sedentary to light work with accommodations. Given that the Plaintiff can apply for work within Government, she can be accommodated, as Government will not discriminate against her injury thus can continue working. To date, the Plaintiff has not attended treatment but with rehabilitation her condition should improve.

[63] Furthermore, in relation to future promotions, it must be noted that the Plaintiff will only be promoted if and when a position is available, thus no guarantee that she will be promoted. These factors should be taking into consideration when

contingencies are applied.

[64] It is trite law that when actuarial calculations are adopted to quantify loss, the trial judge is not tied down by inexorable calculations. There is a large discretion to award what is considered right. One of the elements in the exercise of that discretion is the making of a discount for contingencies for the *"vicissitudes of life"*[1] In **De Kock v RAF**[2]**,** Kgomo J held as follows:

> "[6] Contingencies may consist of a wide variety of factors. They include matters such as a possibility of error in the estimation of a person's life expectancy, the likelihood of illness, accident or unemployment which in any event would have occurred and therefore affects a person's earning capacity ... "

[65] In **AA Mutual Insurance v Van Jaarsveld**[3] it was held that a court has a wide discretion that must however be based upon a consideration of all the relevant facts and circumstances. Justice and fairness for the parties is served by contingencies to be applied on the particular proven facts of the case.

[66] Taking into account the evidence before Court, and the submissions on behalf of the parties, I find that contingencies of 23% should be applied to the pre-accident scenario and 34% to the post-accident scenario.

Therefore, I make the following order:

Order:

1. Defendant is liable to compensate the Plaintiff for 100% of her proven or agreed damages resulting from the injuries the Plaintiff sustained in the motor vehicle collision which occurred on 12 August 2020.

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[1] South Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A) at 117 B-D.
[2] (3237/2013) [2015] ZAGPPHC 224 (22 April 2015)
[3] 1974 (4) SA 72 (A)

2. The Defendant shall pay the following amount to the Plaintiff's attorney, Stefan Greyling Incorporated's trust bank account, in full and final settlement of the Plaintiff's claim in respect of the following heads of damages:

2.1	General damages	R 700,000.00
2.2	Loss of earnings	R2,032,088.00
	Total	R2,732,088.00

3. The amount referred to in paragraph 2 above shall be payable by direct transfer into the trust account of Stefan Greyling Incorporated details of which are as follows:

Account Name:	Stefan Greyling Inc.
Bank Name:	First National Bank
Account number:	6[…]
Branch number:	**252 445**
Reference:	HEC1/SG

4. The Plaintiff shall allow the Defendant 180 (one hundred and eighty) calendar days to make payment of the capital from date of this court order, failing which the Plaintiff will be entitled to recover interest at the applicable interest rate from the 15 (fifteenth) day of this court order to the date of the payment of the capital amount. The Plaintiff will not proceed with issuing of a writ prior to the expiry of the aforesaid period.

5. The Defendant must furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) in respect of 100% of the costs of the future accommodation of the Plaintiff in a hospital or nursing home and treatment of or rendering of a service or supplying of goods to her, after the costs have been incurred and on proof thereof, resulting from the accident that occurred on 12 August 2020.

6. The Defendant shall make payment of the Plaintiffs taxed or agreed party and party costs in a High Court scale subject to the Taxing Master's discretion, which shall include the following:

6.1 The fees of counsel for 6 and 7 February 2024 and the cost of preparing Heads of Argument and Supplementary Heads of Argument requested by the Court;

6.2 The reasonable qualifying fees incurred by the following experts appointed by the Plaintiff:

6.2.1 Dr Greyling;
6.2.2 Dr L Smit;
6.2.3 Dr J Wilkinson;
6.2.4 Mr C Etzebeth;
6.2.5 Ms S Maree;
6.2.6 Mr EJ Jacobs;
6.2.7 Mr GA Whittaker.

6.3 The reasonable taxable costs of obtaining all expert, medico-legal, RAF4 serious injury assessment and actuarial reports from the Plaintiffs experts which were served and filed;

6.4 The reasonable taxable accommodation and transportation costs incurred by or on behalf of the Plaintiff in attending medico-legal consultations with the experts listed in subparagraphs 6.2.1 to 6.2.7 above, as well as the trial proceedings. The Plaintiff is declared a necessary witness;

6.5 The above costs will also be paid into the aforementioned account. It is recorded that the Plaintiff's instructing attorneys do not act on a contingency-fee basis herein.

7. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:

7.1 The Plaintiff shall serve the notice of taxation on the Defendant's attorney of record;

7.2 The Plaintiff shall allow the Defendant 180 (one hundred and eighty) calendar days to make payment of the taxed costs from date of settlement or taxation thereof;

7.3 Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the applicable interest rate on the taxed or agreed costs from date of allocator to date of final payment;

7.4 The Plaintiff shall not issue a writ prior to the expiry of the 180 (one hundred and eighty) day periods.

HEFER AJ

Appearances on behalf of the Plaintiff:	Adv C van Onselen
Instructed by:	Stefan Greyling Incorporated Kimberley c/o EG Cooper Majiedt Inc. Bloemfontein
On behalf of Defendant:	Adv NP Banda State Attorney Bloemfontein