HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)

Case No.: 532/2022

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED
25 March 2024 DATE	[redacted] SIGNATURE

In the matter between:

NGOMANE NDZUNDZUKANI **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

BHENGU AJ

[1] The Plaintiff was involved in a motor vehicle accident on 16 May 2021, whist she was conveyed as a passenger. The Defendant conceded merits in its offer dated 14 June 2022. The Plaintiff does not qualify for General Damages as determined by the Health Professions Council on 04 October 2023. The matter is only proceeding for determination of the Plaintiff's loss of earnings.

[2] In order to prove its case, the Plaintiff appointed the following experts:- Dr Oelofse (Orthopeadic Surgeon), Ms Stipp (Occupational Therapist), Ms de Vlamingh (Industrial Psychologist) and Mr J Potgieter (Actuary). The experts have filed affidavits confirming the contents of their reports. The Defendant did not appoint any experts. The Plaintiff made an application in terms of Uniform Rule 38(2) that the experts reports be admitted into evidence without having to call the experts to give evidence viva voce. The Defendant does not object to the application and consequently, the application is granted.

Evidence of the Plaintiff

[3] In summary, the Plaintiff testified that she is currently 27 years old. Her highest level of education is Grade 10 which she obtained in 2014. She is currently unemployed. She sustained hip trauma and spinal injuries in the accident. She was conveyed by an ambulance to Tintswalo hospital where she was treated for four days.

[4] Before the accident she was a seasonal farm worker harvesting oranges. Her work included carrying a bag around her chest to put oranges. She used a ladder to climb the tree. She would come down when the bag is full to offload the oranges into a bin. She was on her feet for most of the time from 08h00 to 16h00. She was paid according to the number of bags she filled up. She had to be quick so as to make more money. She stopped working in 2020 and she was unemployed at time of the accident. She was unable to return to her work because she gets cramps on her hips and due to her spinal injuries. She is unable to bend as it becomes painful.

Expert Evidence

[5] According to Dr Oelofse, Orthopaedic Surgeon, the Plaintiff sustained soft tissue injuries to her left sacro-illiac joint, a lumbar spine injury described as disc lesion at level L5-S1 and retrolisthesis at L5-S1. The injuries have resulted in the joint dysfunction and radiculopathy at lumbar spine. Dr Oelofse recommended surgical intervention in the form of posterior lumbar laminectomy, discectomy, and fusion with internal fixation. He recommended that the Plaintiff should look for less demanding jobs in the future such as light manual work or sedentary work.

[6] According to Ms Stipp, Occupational Therapist, the Plaintiff is suffering from pain in her left hip and lower back, and she ambulates with a single crutch. Ms Stipp opined that she remains with the capacity to perform work of a sedentary physical nature. She noted that as the Plaintiff has a Grade 9 level of education and limited work experience, she has been rendered an unequal competitor in the open labour market and she is not suited for manual labour due to her injuries.

[7] According to Ms De Vlaming, the Plaintiff will not be able to reach her pre accident earning potential as a result of the sequelae of her injuries. She has been physically compromised and has no real chance of securing employment in the formal sector of the labour market. Ms de Vlamingh opined that subject to recommended treatment, she may be able to secure employment in the informal capacity, but in a much lower level of income. She may suffer long periods of unemployment over the remainder of her working life. Ms de Vlamingh suggested that this should be addressed by application of higher than normal contingencies. For quantification purposes two scenarios were postulated as per the actuarial calculation by Mr Potgieter.

Scenario 1

[8] It is postulated that but for the accident, the Plaintiff would have secured entry level unskilled employment by July 2022. She would have started earning a minimum wage of R23,19 per hour. He income would have increased in a straight line until reaching R72,000.00 per year in March 2023 terms at age 45 earning between median and upper quartile for unskilled workers. Thereafter she would receive inflationary increases until retirement age 65. It is postulated that the Plaintiff is unemployable post-accident.

Scenario 2

[9] It is postulated that the Plaintiff will receive no income from the date of accident until 30 June 2024 to allow for recommended treatment. From 1 July 2024 she would obtain employment on a part time basis working three days a week earning an income of R26,000.00 per year (lower quartile earnings of unskilled workers in July 2023 terms). It is postulated that her income will increase in a straight line until reaching R36,000.00 per year at age 45. Thereafter, her earnings will increase with inflation until retirement age 65.

Plaintiff's submissions on contingency deduction

[10] The Plaintiff's counsel suggested that a 10% contingency deduction should be applied to the Plaintiff's past loss of income. This percentage is double the normal amount of 5% due to the fluctuating nature of unskilled employment. Regarding future income it was submitted that a higher than normal pre-morbid contingency of 25% should be applied for the benefit of the Defendant. Plaintiff's counsel recommended that post accident, a much higher than normal contingency deduction of 35% be applied. He submitted that as per the Industrial Psychologist's opinion, factors such as progressional vulnerability, the sequelae of the accident and the need for

Plaintiff to undergo future surgery justifies the application of a much higher than normal contingency deduction. He suggested that a median of the two scenarios should be used to compensate the Plaintiff.

Defendant's case

[11] Mr Mkansi on behalf of the Defendant contended that the Plaintiff's premorbid potential was already compromised due to her limited level of education, limited work experience as a seasonal farm worker and no formal vocational training. He argued that the Plaintiff is not in possession of a driving license and that she was unemployed at the time of the accident. He is of the view that the limitations that the Plaintiff is complaining about are not only as a result of motor vehicle accident. He referred to the Occupational Therapists report, that indicated that the Plaintiff is obese. He supports the view that she will benefit from consultations with a Dietician for advice on how to lose weight in order to reduce strain on the affected joints. This according to Mr Mkansi will improve the Plaintiff's chances of obtaining employment in the future.

[12] The Defendant acknowledged that the Plaintiff is compromised due to her physical limitations and that she suffered earning capacity loss. Regarding contingency deductions, the Defendant proposed that for quantification purposes, a 15% contingency should be applied on the Plaintiff's pre-morbid earnings and a 25% contingency on the post morbid earnings. He argued that the pre and post-accident scenario should remain the same (R1 464 960.00). He suggested that the contingency deduction with a 10% differential spread should be applied. He submitted that a fair and reasonable compensation for Plaintiff's claim for loss of earnings is an amount of R146,496,00.

Analysis

[13] The Plaintiff was 25 years at the time of the accident. She completed Grade 10 level of education with no further qualification. Although there was conflicting information on whether or not she passed Grade 10, I find that issue to be immaterial in the determination of her claim for loss of earnings as it is common cause that she did not obtain Matric and has no further qualification. Her work experience ranged from being a domestic worker and a seasonal farm worker. These kinds of occupations require physical exertion. It is clear from the evidence of the Plaintiff and supported by the experts' opinion that the Plaintiff is compromised due to her orthopaedic injuries.

[14] I find that even though the Plaintiff was not employed at the time of the accident in 2020, her working history demonstrated that she was someone who had sought work and was able to earn an income. I do not accept the Defendant's contention that the Plaintiff's earning potential is still the same post the accident and that any potential loss should be addressed by contingency deduction based on an obesity diagnosis by the Occupational Therapist. It is noted that the Occupational Therapist opinion was not final as she deferred to an opinion of a Dietician.

[15] Furthermore, it clear from the report of Dr Oelofse that the Plaintiff's injuries resulted in the joint dysfunction and radiculopathy at lumbar spine. There is future surgical treatment indicated by the expert in the form of posterior lumbar laminectomy, discectomy, and fusion with internal fixation. The experts recommended that that the Plaintiff is now suitable for light manual work or sedentary work. Taking into account the Plaintiff's limited education, prospects of obtaining sedentary jobs are slim if not non-existent. It is for these reasons that the Defendant's argument should be rejected.

Contingency Deductions

[16] Regarding contingencies, the approach adopted in Goodall v President Insurance 1978 1 SA 389 (W) of a sliding scale of ½ % per year to retirement age is accepted as normal contingency. That is, 25% for a child, 20% for a youth and 10% in the middle age. The Quantum Yearbook (2023) by Robert Koch states the following regarding contingencies: -

"The deduction is the prerogative of the courts…The RAF usually agrees to deductions of 5% for past loss and 15% for future loss, the so-called normal contingencies".

[17] In RAF v Guedes [2006] 2006 (5) SA 583 (SCA) at para 8, Zulman JA stated the following regarding loss of earnings:-

"The court exercises a wide discretion when it assesses the quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right. Courts have adopted the approach that in order to assist in such a calculation, an actuarial computation is a useful basis for establishing the quantum of damages. Even then, the trial court has a wide discretion to award what it believes is just".

[18] The Plaintiff was still young at the time of the accident (25 years), and she still had 40 years to participate in the open labour market. Using the sliding scale of ½ % per year until retirement will result in 20% contingency. However, taking into account the argument by the Plaintiff's counsel that the Plaintiff's occupation was only limited to the unskilled sector in the informal labour market which in the main require manual work positions, it is accepted that she was going to face periods of unemployment and fluctuating earnings. In this regard, I therefore find that an increased contingency of 25% in the pre accident scenario is reasonable.

[19] In the post accident scenario, I agree with the Industrial Psychologist that the Plaintiff is currently a vulnerable employee in the open labour market

due to her injuries and that she is excluded from performing strenuous tasks. She will require time off work to attend to recommended treatment. in Krugell v Shield Versekeringsmaatskappy Bpk 1982 (4) SA (T) 95 at 105, the court found that the expert evidence proved that the claimant would be able to obtain employment for interrupted periods. The court had regard to the additional challenges that arose as a result of the accident which would affect the likelihood of the claimant obtaining subsequent employment and retaining such employment. The court applied a contingency deduction of 35%. I therefore find that a higher than normal contingency of 35% in the post accident scenario is reasonable.

[20] Regarding Plaintiff's past loss of earnings, 5% is accepted as normal contingency. I am satisfied that a 10% contingency, which is double the normal 5% contingency is reasonable. This increased contingency takes into account the fact that the Plaintiff was unemployed at the time of the accident and that employment in the unskilled sector is vulnerable to periods of unemployment and fluctuating income.

[21] I am of the view that a median of scenarios 1 and 2 as per the actuarial report of Mr, J Potgieter represent reasonable compensation for the Plaintiff's loss of earnings.

[22] In the result, it is ordered that: -

1. The Defendant is to pay 100% of the Plaintiff's proven or agreed damages;

2. The Defendant is ordered to pay to the Plaintiff the amount of **R903 867.00 (Nine Hundred and Three Thousand Eight Hundred and Sixty-Seven Rand),** in respect of past and future loss of earnings, within 180 days from the date of this order.

4. Should the Defendant fail to make payment as set out in paragraph 2 above then, in this instance, the Defendant shall be liable for payment of interest, calculated from 15 days after date of granting of this order, at the *tempore morae* rate.

5. The Defendant will furnish to the Plaintiff with an unlimited Undertaking in terms of section 17(4)(a) of Act 56 of 1996, to pay the 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 arising from injuries sustained by her in a collision which occurred on 16 May 2021, after the costs have been incurred.

6. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on a High Court scale.

[redacted]________

JL BHENGU
ACTING JUDGE OF HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

For the applicant: Adv APJ Bouwer briefed by Frans Schutte & Mathews Phosa Inc

For the respondent: Mr C Mkansi – State Attorney, Mbombela

Date of Judgment: 25 March 2024