REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 62894/18

(1) REPORTABLE: YES/**NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED: **NO**

Date: 5 August 2024

JA Kok

In the matter between:

Nel, Chenique APPLICANT

and

Road Accident Fund RESPONDENT

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JUDGMENT

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**Kok AJ**

[1] The plaintiff was injured on 20 May 2014 in a motor collision. The merits have been settled. The defendant also provided an undertaking in relation to the plaintiff's future medical expenses. General damages stand over for later determination. In this judgment I only consider the plaintiff's claim for future loss of earnings.

[2] At the start of the hearing, I granted an application in terms of Rule 38(2) allowing the plaintiff to adduce her expert evidence on affidavit. The defendant did not

oppose the application. The defendant did not appoint experts of its own. The leading of oral evidence for the experts to confirm the facts, their assumptions, their expert opinions and the basis for their opinions where the defendant was not in a position to contest these, would only have led to the running up of unnecessary expenses and legal costs.

[3] The plaintiff and defendant submitted arguments on how the various experts' opinions should be interpreted and applied in determining the award to be made for loss of future income. The following experts' reports were considered: Mr Whittaker (actuary), Dr Birrell (clinical psychologist and neuropsychologist), Dr Maritz (counselling and educational psychologist), Dr Annandale (plastic and reconstructive surgeon), Dr Mazabow (clinical psychologist and neuropsychologist, Mr Wessels (industrial psychologist) and Dr Nel (psychiatrist).

[4] It is not necessary to analyse these expert reports in great detail in this judgment. The main disagreement between the plaintiff and defendant was how the following amendment to the expert reports should influence the court's award:

[5] In Dr Maritz's initial report dated 2019/07/15, it was stated that pre-accident the plaintiff had the potential to complete a NQF level 4 qualification, either through a vocational college or by completing grade 12. The post-accident prognosis was a condoned grade 11.

[6] Dr Maritz's subsequent report of 2023/11/03 notes that the plaintiff was at the date of this report registered for office administration at a TVET college for a National Certificate (Vocational) level 3 qualification, which is the equivalent to grade 11. The report then states that "with the transfer to TVET, [the plaintiff] will probably be exposed to more practical application of skill sets. Given her circumstances prevail, she can probably acquire the NCV qualification on NQF level 4".

[7] Mr Wessels's report of 29/3/2021 could obviously not take into account the subsequent report by Dr Maritz. Based on Dr Maritz's initial assessment, Mr Wessels opined that pre-accident the plaintiff would have entered an over-

saturated semi-skilled labour market and post-accident would be limited to a highly dense unskilled labour market at minimum wage.

[8] The actuarial calculation was in turn based on the Wessels report of 29/3/2021.

[9] Based on Dr Maritz's view that the plaintiff's pre-accident potential was to acquire a NQF level 4 qualification and post-accident "can probably acquire the NCV qualification of NQF level 4", the defendant argued that the plaintiff's pre-accident and post-accident earnings should therefore be roughly the same. Plaintiff's counsel submitted that the actuarial calculation already included a pre-accident deduction and post-accident contingency deduction. The plaintiff is enrolled for a grade 11 qualification and had not obtained a grade 12 qualification.

[10] The following aspects of the experts' reports are also relevant.

[11] Mr Wessels noted in his report of 29/3/2021 that "plaintiff's residual ability and earning capacity has been further compromised/curtailed. She will in all probability find it substantially difficult to secure employment on a permanent basis. It is expected that her employment tenure will be characterized by substantial periods of unemployment and a disposition of total unemployment cannot be excluded".

[12] Dr Nel's expert opinion was that the plaintiff "will not reach her full pre-accident potential due to the post-accident anxiety and mood symptoms with associated cognitive deficits."

[13] Although at first blush an attractive premise, the defendant's submissions do not take into account that irrespective of the actuarial calculation, the expert reports establish that post-accident the plaintiff has more limited employment prospects.

[14] The calculation of the award to be made for future loss of earnings lies somewhere between a calculation made on some logical basis and a gut feeling or guesswork. *Goldie v City Council Of Johannesburg* 1948 (2) SA 913 (W) 920; *Southern*

*Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) 114A; *Road Accident Fund v Kerridge* 2019 (2) SA 233 (SCA) paras 40-43.

[15] Where actuarial calculations are relied on, a court should consider the assumptions on which the calculations were made. Compare *Bailey NO* 113H.

[16] Where a court is satisfied that a patrimonial loss has been suffered, the court must then assess the award to be made, using the evidence before it as best it can. *Bailey NO* 114A-E and the authorities cited there.

[17] The expert reports taken as whole establish that the plaintiff pre-accident already faced some challenges which would have impacted on her scholastic progress. Pre-accident her employment and remuneration prospects were already limited. Post-accident her prospects decreased further still.

[18] It is so that the actuarial calculation is based on the assumption that pre-accident the plaintiff's prospects were to qualify with an NQF 4 level (grade 12), while these prospects diminished to grade 11 post-accident. The later addendum to Dr Maritz's report speculates that the plaintiff could probably obtain a vocational qualification on NQF level 4, which were not reflected in the industrial psychology report and subsequently not in the actuarial calculations.

[19] On the other hand she will probably face limited employment prospects until retirement or even face extended periods of unemployment.

[20] The evidence established that the plaintiff suffered a patrimonial loss. The actuarial calculations in this matter provide me with some basis from which to assess an award. Even taking the deductions into account that the actuary has already applied, the calculation still seems to be somewhat inflated, as it is based on the more pessimistic forecast of a post-accident grade 11 qualification. In my view the actuarial calculation should be adjusted downwards.

**ORDER**

**In the result, the following order is granted:**

1.1. The medico-legal reports and affidavits as referred to in the Rule 38 application are adduced into evidence.

1.2. The adjudication of general damages is postponed *sine die* pending the outcome of the decision of the HPCSA Appeal Tribunal.

1.3. The merits of the action have been settled between the parties as 100% in favour of the plaintiff, payment of R2 000 000 to the plaintiff as loss of earnings, with costs.

1.4. The amount of R2 000 000 shall be payable by direct transfer into the trust account of Adams & Adams, details of which are as follows:

Nedbank
Account number : 1[...]
Branch number **: 1[...]**
Pretoria
Ref: N[...]

2. The defendant shall furnish the plaintiff and her trustee with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, to compensate the plaintiff for 100% of the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of any services or supplying of any goods to the plaintiff resulting from the injuries sustained by her as a result of the accident that occurred on 20 May 2016.

3. The defendant is liable for payment of the reasonable costs of the trustee appointed in terms of paragraph 5 of this order, in respect of establishing a trust and any other reasonable costs that the trustee may incur in the administration thereof including his fees in this regard, which shall be recoverable in terms of the undertaking issued in terms of section 17(4)(a), and which costs shall be governed in accordance with

paragraph 16.1 to 16.3 of the Trust Deed attached hereto marked as Annexure A.

4. The nett proceeds of the payments referred to above as well as the plaintiff's taxed or agreed party and party costs payable by the defendant, after deduction of the plaintiff's attorney and own client legal costs and interest on unpaid disbursements ("capital amount"), shall be payable to the Trust, to be established within one year of the date of this order.

5. **HERCULES ALEXANDER SANDENBERGH** will be the first Trustee with powers and abilities as set out in the draft Trust Deed attached hereto, marked as Annexure **"A".**

6. The main provisions of the Trust Deed attached hereto marked as Annexure "**A**" shall deal with the following aspects: -

   6.1. The objectives of the trust, set out in paragraph 5 of the attached trust deed;

   6.2. The powers of the trustee set out in paragraph 8 of the attached trust deed;

   6.3. The duties of the Ttustee set out in paragraph 11 of the attached trust deed.

   6.4. The termination of the trust set out in paragraph 13 of the attached trust deed;

   6.5. The remuneration of the trustee set out in paragraph 16.1 to 16.3 of the attached trust deed;

   6.6. The amendment of the trust set out in paragraph 18 of the attached trust deed;

   6.7. The trustee shall be obliged to furnish security to the satisfaction of the Master of the High Court of South Africa for the assets of the Trust and for the due compliance of all his/her obligations towards the trust set out in paragraph 3.2 of the attached trust deed.

7. Should the aforementioned trust be established within the one year period, the trustee

thereof is authorised to pay the plaintiff's attorney and own client costs and interest on unpaid disbursements out of the trust funds in so far as any payments in that regard are still outstanding at that stage.

8. Should the aforementioned trust not be established within the one year period:-

8.1. The plaintiff's attorneys are directed to approach the court within six months thereafter in order to obtain further directives in respect of the manner in which the capital amount is to be utilized in favour of the plaintiff;

8.2. The plaintiff's attorneys are authorised to invest the capital amount in an interest bearing account in terms of section 86(4) of the Legal Practice Act to the benefit of the plaintiff with a registered banking institution pending the finalization of the directives referred to in paragraph 8.1 above;

8.3. The Plaintiff's attorneys are prohibited from dealing with the capital amount in any other manner unless specifically authorised thereto by this court, subject to the provisions contained in paragraphs 5 to 8 hereof.

9. Until such time as the trustee is able to take control of the capital amount and to deal with same in terms of the trust deed, the plaintiff's attorneys are authorised and ordered to pay from the capital amount:

9.1. any reasonable payments to satisfy any of the plaintiff's needs that may arise and that are required in order to satisfy any reasonable need for treatment, therapy, care, aids or equipment that may arise in the interim;

9.2. the attorney and own client costs and interest on unpaid disbursements of the plaintiff's attorneys;

9.3. such other amount(s) as may reasonably be indicated and/or required for the well-being of the plaintiff and/or in her interest which a diligent *curator bonis* would have paid, had such *curator* been appointed.

**JA Kok**

**Acting Judge of the High Court**

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

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| For the plaintiff: | JJ Scherman |
| Instructed by: | Adams & Adams |
| For the defendant | M Sekgotha |
| Instructed by: | State Attorney |
| Date of the hearing: | 29 February 2024 |
| Date of judgment: | 5 August 2024 |