IN THE HIGH COURT OF SOUTH AFRICA

MPUMALNGA DIVISION MBOMBELA

(MAIN SEAT)

Case No: 2242/23

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE**: 06/09/2024**

SIGNATURE

In the matter between:

LUCY FORTUNATE MOKONE **PLAINTIFF**

And

THE ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

MSIBI AJ

INTRODUCTION

[1] In this action the plaintiff an adult female, residing at Casteel, Acornhoek, Mpumalanga Province; sues the defendant for injuries that she sustained from a motor vehicle accident.

[2] On 08 May 2020, the plaintiff was a passenger in a motor vehicle with registration number J[...] 2[...] M[...] when the vehicle got involved in a collision. The plaintiff is suing for loss of earning capacity and general damages. The merits were

settled 100% in favour of the plaintiff. The defendant has further agreed to furnish an undertaking to the plaintiff in terms of section 17 (4) (a) of the Road Accident Fund Act 54 of 1996. The defendant made an offer in respect of the plaintiff's loss of income and general damages. The offer was rejected by the plaintiff, since the amounts were low.

[3] The only issues for determination by this court are therefore loss of income and general damages.

THE DISPUTES

[4] On 8 May 2020, the motor vehicle that the plaintiff was a passenger in a motor vehicle with registration numbers J[...] 2[...] M[...], when another motor vehicle with registration numbers J[...] 3[...] M[...] of the drove into the lane of the vehicle in which the plaintiff was travelling. As a result, the first motor vehicle avoided a collision with the second motor vehicle and overturned. At the commencement of the trial, the parties agreed that the matter be proceeded with based on the reports submitted by the plaintiff, in terms of rule 38(2). The court was also informed that the issue of merits had been settled 100% in favour of the plaintiff. It was also agreed that the defendant would furnish the plaintiff with an undertaking in respect of future accommodation, hospital and medical expenses in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996. Consequently, the only issue for determination in this trial were the plaintiff's claim for general damages and also past and future loss of earnings.

[5] There was an application in terms of Rule 38 (2) o the Uniform Rules of Court to have the evidence of the plaintiff's experts heard on submission of affidavits. The application was granted. The defendant did not submit any expert evidence. The following expert reports were relied on by the plaintiff:

- Orthopaedic Surgeon

- Neurosurgeon

- Clinical Psychologist

- Occupational Therapist

- Industrial Psychologist

- Actuary

PLAINTIFF'S EXPERTS REPORTS

Orthopaedic Surgeon- Dr Matekane

[6] The orthopaedic surgeon examined the plaintiff and compiled a report on 30 August 202. He deposed to an affidavit confirming the contents of his report.

[7] In his report he noted that the plaintiff sustained soft tissue injuries on the spine right leg, facial laceration and soft tissue injuries on the right wrist. He opines that the prognosis is fair, the soft tissue injuries have largely resolved even though she may continue to experience chronic back pain, leg and wrist pain. The expert noted a 3 cm scar on her right leg. The plaintiff worked as a cashier pre and post - accident. She reported having experienced some limitations at work caused by prolonged standing, carrying and lifting of heavy objects. Her injuries may in future affect her ability to compete fairly in the open labour market; especially in jobs that involve physical strain.

[8] Her WPI is 3%, therefore she does not qualify for general damages based on her orthopaedic injuries.

Neurosurgeon –Dr Mkhonza

[10] The plaintiff was assessed by the neurosurgeon who compiled a report and deposed to an affidavit confirming the contents of his report. He considered the RAF 1 form and the hospital records. He noted that the plaintiff sustained a mild head injury and soft tissue injuries on the face, left shoulder, wrist, right lower limb, and concussion. She was 4 months pregnant at the time of the accident. She had a

normal delivery and the baby is alive. No future neurosurgical operation is anticipated regarding the mild head injury. He opines that the plaintiff's level of concentration and memory has been affected. He deferred this to a clinical psychologist for neurocognitive assessment.

[11] The plaintiff has never been involved in a motor vehicle accident before. With regard to her educational level, the plaintiff failed her matric in 2018, she repeated grade 11. She is able to do her house hold chores. Her risk of epilepsy is the same as that of the general population. As a result of the accident the plaintiff complains of painful wrist, painful thoracic spine and amnesia/forgetfulness. Clinical examinations confirmed neurocognitive deficits, which are a sequel of the mild traumatic brain injury that was sustained during the accident. The plaintiff did not lose consciousness during the accident, however she hit against the taxi door.

[12] Based on the serious injury assessment report the neurosurgeon qualified the plaintiff for general damages based on the narrative test at WPI 13% for severe long term mental and severe behavioural disturbance or disorder.

Clinical Psychologist-- Dr Modiba

[13] The plaintiff was assessed by the clinical psychologist, who compiled a report and also deposed to an affidavit confirming the contents of his report. She considered the report of the orthopaedic surgeon and the neurosurgeon and the conclusions made therein.

[14] He reordered that pre-morbid the plaintiff was functioning optimally, she had no injuries or medical condition. Post-morbid the plaintiff has from neurocognitive deficit; namely mild verbal short term memory deficit, mild attention deficit, decline in intellectual functioning level. She also suffers from mild depression and mild anxiety. She suffers from personality and behavioural changes; namely irritability and withdrawal from other people. With regard to the above mentioned post – morbid conditions the expert recommends a psychotherapy with clinical psychologist for about 10 months.

Occupational Therapist—Dr Sagwati Sebapu

[15] The plaintiff was assessed by the occupational therapist who then compiled a report on 14 October 2021. She also deposed to an affidavit confirming the contents of her report.

[16] The plaintiff's highest standard of education is grade 11. Pre-accident the plaintiff worked as a cashier at a fast food outlet, earning a salary of about R2900 00 to R3200 00 per month. Her job involved travelling to and from work for about 30 minutes. She worked 15 days in a month on shift basis. Her specific duties involved taking of orders, receiving money and cleaning counters. After the accident she recuperated for a week and returned to work thereafter. At the time of the report she was still working as a cashier at Debonairs Pizza restaurant. She was not on any kind of medication at the time of assessment.

[17] The physical demands of her work entailed occasional periods of standing, bending and frequently handling weights of about two kilograms daily. Her work fell in the light sedentary category. She returned to her work after recuperation. She was able to lift weights of about 10kg on a safe and dependable basis frequently. She reported pain of bilateral wrists with regard to 15 kg weight. It did not appear that the plaintiff experienced pain with sitting. She was able to squat, kneel, crouch and crawl. The plaintiff was able to stand for about 30 minutes during her assessment, she showed equal weight bearing throughout the activities. She however continued to experience pain in her left wrist particularly during busy periods and cold weather.

[18] The plaintiff's highest standard of education is grade 11. She thereafter managed to obtain a security certificate and a computer literacy certificate. Due to her low level of education the plaintiff would be expected in future to continue to rely on her physical aptitudes as an economic safety net. Her reduction in physical capacity constitutes a significant loss as it negatively affects her prospective employment.

Industrial Psychologist—Patricia Baloyi

[19] The plaintiff was assessed by the industrial psychologist who compiled a report and deposed to an affidavit confirming the contents of his report. The expert considered the medico legal reports of all other experts and their opinions including the plaintiff's history of employment.

[20] Before the accident the plaintiff was a cashier. Her income fell between the lower and the median quartile of the suggested salary scale of semiskilled workers in the non-corporate sector. She would be expected to develop to the upper quartile of semiskilled workers in the non-corporate sector. Experts reported a reduction in her physical psychological and cognitive capacity. These factors are expected to compromise her work performance, her capacity to work and earn. Although she has returned to her employment after the accident, she currently does not qualify for a promotion. The expert opines that the plaintiff has suffered loss of income. Her post accident income is averaged at R4 189 42 per month, which is manually calculated at R50 273 12 per annum. Her income falls between the median and upper quartile of the suggested salary for unskilled workers in the non-corporate sector, which is R21 600 –R37 900- R86 000 per year (Robert Koch, 2020).

[21] The expert obtained collateral information from Ms Tebogo Malomane, the plaintiff's supervisor who confirmed her employment, adding that her chances of promotion have been reduced due to the injuries.

Actuary –Munro

[22] The plaintiff's loss of income as postulated by the industrial psychologist was postulated by the industrial psychologist and calculated by the actuary. The actuary deposed to an affidavit confirming the contents of the report.

[23] The actuary calculated the plaintiff's loss of earnings was calculated at R2 936 300 with no contingencies applied.

SUBMISSIONS

[24] It is submitted that as a result of the accident the plaintiff will not be able to compete fairly in the open labour market and that career opportunities for her are

slim considering the fact that she has no a tertiary qualification. The fact that she is currently struggling in her current employed attest to her cognitive limitations. She might need to be accommodated by a sympathetic employer. She might have to retire earlier than the normal age of retirement. It is not in dispute that she should be compensated fairly applying just and reasonable contingencies.

[25] It was argued on behalf of the defendant that higher than normal contingencies should be applied. Despite her cognitive and physical limitations, the plaintiff is still employed by the same employee.

[26] The onus rest on the plaintiff to prove on a balance of probabilities that she has suffered loss of income and earning capacity and the extent of her loss. The only experts that filed reports are those appointed by the plaintiff. From the said reports the plaintiff suffered mild cognitive limitations, neck and right arm injuries and pecuniary loss. The plaintiff has discharged the onus that rests on her.

[27] The plaintiff has obtained a security certificate and a computer literacy certificate before the accident. It is clear that her computer literacy has benefited her in her current employment. Based on her highest level of education, the plaintiff would be expected in future to continue to rely on her physical aptitudes and these qualifications as an economic safety net. Her reduction in physical capacity constitutes a significant loss as it negatively affects her prospective employment.

[28] According to the Occupational Therapist the plaintiff will continue to suffer on going pain and limitations. According to the neurosurgeon she has suffered a whole person impairment of 13%. According to Dr Matekane, the Orthopaedic Surgeon she has suffered 3% whole person impairment. It is an undisputed fact that the plaintiff has suffered loss of income.

CONTINGENCIES

[29] It is trite that general contingencies cover a wide range of considerations which vary from case to case. Five percent and 15 percent for past and future loss of earnings, respectively, have become accepted as ‘normal’ contingencies. The usual

considerations include taxation, early death, employment, promotion prospects, divorce etc. (Robert J Koch The Quantum Yearbook 2015) The actuary did not apply contingency deductions.

[30] Contingency deductions are within the discretion of the court. In arriving at the appropriate percentage of contingency to be made, the court is guided by the circumstances of this case as contained in the expert's reports.

[31] In **Gwaxula v Road Accident Fund**[1]**,** the court in paragraph 25 stated the following:

> *"It is now well-settled that contingencies, whether negative or positive, are an important control mechanism to adjust the loss suffered to the circumstances of the individual case in order to achieve equity and fairness to the parties. There is no hard and fast rule regarding contingency allowances.* ***Koch*** *in* ***The Quantum Yearbook*** *(****2011****)* ***at 104*** *said:*
>
> *General contingencies cover a wide range of considerations which may vary from case to case and may include: taxation, early death, saved travel costs, loss of employment, promotion prospects, divorce, etc. There are no fixed rules as regards general contingencies.*
>
> *There are also unforeseen contingencies based on factors such as errors in the estimation of future earnings and life expectancy, loss of earnings due to unemployment and sickness, retirement at an earlier age and hazards of life. The list can never be exhaustive."*

[32] The plaintiff did not have a history of ailments or injury that could have a negative effect on her employment capacity before the accident The normal contingency deduction of 5% will be applied on the plaintiff's pre-injury earnings. A higher than normal contingency of 30 % will be applied to her post injury earnings.

[1] (09/41896)[2013]ZAGPJHC 240

CAPITAL VALUE OF LOSS OF INCOME

Pre-injury loss

R11600 less 5 % = R106 0 20

Less

R62 900 less 5% = R59 755

Total =R46 265

Post injury loss

Future uninjured earnings R3 964 700 less 30% = R2 378 820

Injured earnings R1 077 100 less 30 % = R753 970

Total loss injured loss = R1 698 190.00

Total loss = R 1 744 455.00

GENERAL DAMAGES

[33] In **De Jongh v Du Pisani 2004 (12) All SA 565 (SCA) at 682**, the court remarked as follows:

> *"The court in determining quantum for general damages must have regard to previou court is vested with a discretion which is to be exercised with due regard to the peculiar facts of the matter it is seized with."*

[34] In **Masemola v Road Accident Fund**[2] the neurosurgeon in that matter testified that the plaintiff had sustained a head injury, bilateral shoulder injuries, and left knee injury. The court awarded the plaintiff R1.2 million for general damages.

[35] The plaintiff's injuries in the present case are less severe than the injuries in the

above mentioned case. An amount of R400 000 00 is a fair and reasonable compensation for her general damages.

[36] Consequently, the following order is made:

[2] (7336/2017) [2023] ZAGPPHC765 (2 July 2023)

1. The defendant is ordered to pay the following amounts R1 744 855 which is made up of R1 744 455 for loss of earning capacity and R400 000 for general damages.

2. The defendant is ordered to pay the plaintiff's medical costs in the form of an undertaking.

3. The defendant shall be liable for interest thereon, at the applicable rate, fourteen days from the date of judgment to the date of payment.

4. The defendant is ordered to pay costs on a party and party scale.

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ACTING JUDGE OF THE HIGH COURT MBOMBELA (LOCAL SEAT)

Adv. S. MBHALATI For plaintiff

Instructed by Ngomana and Associates Attorneys: Mbombela

Adv. G. P MOKOENA For defendant

Instructed by the Office of the State Attorney: Mbombela