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**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case Number: 2955/2018

Heard: 22 May 2024

Delivered: 16 August 2024

Reportable: YES / **NO**

Circulate to Judges: YES / **NO**

Circulate to Regional Magistrates: YES / **NO**

Circulate to Magistrates: YES / **NO**

In the matter between:

DOLORES DAPHE BOUGHAN

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

Coram: Tyuthuza AJ

JUDGMENT

Tyuthuza AJ

INTRODUCTION

1. The plaintiff, Ms Boughan, instituted an action against the defendant, the Road Accident Fund, claiming damages arising from the injuries she sustained as a result of a motor vehicle collision that took place on 22 January 2014.
2. The defendant conceded 100% liability for the plaintiff's proven damages in the action. The matter served before me in respect of the quantum of Plaintiff's claim, there was no appearance at the hearing of this matter by or on behalf of the Defendant.
3. I granted the Plaintiff her application in terms of Rule 38(2) for her expert witnesses to give evidence on affidavit, to wit, Dr P Olivier (orthopaedic surgeon), Ms S Maree (occupational therapist), Dr E Jacobs (industrial psychologist) and Mr W Loots (actuary).

Dr Piet Olivier: Orthopaedic Surgeon

4. Dr Olivier examined the plaintiff on 29 June 2017, three (3) years after the accident. He reported that the plaintiff previously underwent a laminectomy procedure in 2005, and that the plaintiff advised that she was virtually asymptomatic after the procedure and was able to perform normal physical activities. He recorded that the accident resulted in an acute fracture involving the pedicle of L2 necessitating an instrumented posterior spinal fusion. The plaintiff presented with significant mechanical backache as a result of segmental instability at the L2/L3 motion segment. Her ability to perform physical activities is compromised which has a negative impact on her future employability and her ability to perform the normal activities of daily living. She is unable to continue with her own occupation, the injuries are serious in nature as they have resulted in significant and long-term functional restrictions.
5. Dr Olivier further noted that the plaintiff will be due for surgery in the near future, as she experiences significant mechanical backache, and that she is expected to experience mild to moderate backache on a permanent basis.

According to Dr Olivier, the plaintiff is severely impaired in regard to her ability to perform the basic activities of daily living on a permanent basis. He further reported that the plaintiff would not be able to continue her duties as a nursing sister, as she is unable to perform the strenuous physical activities required by the job. He further reports that the plaintiff is able to perform a job which entails sedentary duties only and that future surgical intervention would not improve her current degree of disability significantly.

Ms Maree: Occupational Therapist

6. Ms Maree, an occupational therapist, who evaluated the plaintiff on 25 August 2020, and had been instructed to comment on the effect of any injuries on the functional ability and to discuss additional assistance, special and adapted equipment and adaptations required.
7. She reported that the plaintiff presented with diminished ability for continuous sitting. She was unable to assume squatting and was able to perform activities only from the waist to shoulder level, but not below the waist or above shoulder levels. She is not suited to sedentary work demands and that her current work demands exceed her physical capacity. According to Ms Maree, the plaintiff is unable to lift any objects from floor level or to work beyond waist level due to diminished back movements and would not be able to perform continuous driving. After having conducted tests, she found that the plaintiff is unable to do any work as a ward sister and it is conceivable that she is tolerating persisting pain and discomfort while performing her daily tasks. The injuries sustained by the plaintiff resulted in significant functional limitations and the vocational capacity is compromised. Her functional limitations are impacting on activities of daily living like personal care, home management and participation in leisure activities. Regarding interventional measures, she reported that the plaintiff would benefit from occupational therapy, assistive devices and equipment.

Mr Everd J Jacobs: Industrial Psychologist

8. Mr Jacobs was instructed to consider the plaintiff's most probable career paths; he conducted three interviews with the plaintiff.
9. In regard to the plaintiff's uninjured career path, he reported as follows; the plaintiff's career is at risk, that further career progressions were highly unlikely, and that the plaintiff probably has reached here plateau considering her age at the time of the accident (57 years old). The plaintiff would have been able to work on contract employment after retirement, as she is well qualified with extensive nursing experience. In regard to the plaintiff's injured career, he reported as follows: the plaintiff would not be able to moonlight after retirement, that she is not suitable to work as a professional nurse after the accident.

Mr Wim Loots: Actuary

10. Mr Wim Loots, an actuary, was retained to provide actuary calculations regarding the plaintiff's potential loss of earnings as a result of the accident. He was provided with the industrial psychologist report of Mr Jacobs and has based his calculations on the earnings as per Mr Jacobs report. He was advised that the plaintiff was unemployable from June 2021.
11. Mr Loots provided the following calculations to determine the value of the loss of earnings as at 1 October 2023.

11.1 Past earnings: had the accident not occurred:

R2 181 266 (past loss of earnings)
- R 109 063 (less 5% contingency deduction)
= R2 072 203 (total loss of earnings)

now that the accident has happened:

R1 686 918 (past loss of earnings)
- R 168 692 (less 10% contingency deduction)
= R1 518 226.00

R2 072 203 – R1 518 226.00 = R553,977 (total loss of past earnings).

11.2. Future earnings: had the accident not occurred:

R 437 202

- R 21 860 (less 5% contingency deduction)

= R415 342.00 (total loss of future earnings)

Plaintiff:

12. The Plaintiff was 56 years old at the time of the accident and was employed as a theatre assistant. She states that as a result of the injuries she sustained, she was accommodated in administrative work and subsequently retired in November 2022. She complains that she has back pain, and as a result, is not in a position to do moonlighting. She complains that as a result of the back pain, she has to make use of cushions to support her in the vehicle and when she is sitting, she complains that she has to be assisted to put on her socks.

EVALUATION OF EVIDENCE:

13. In *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA), the court emphasised that: “...where a person’s earning capacity was compromised that incapacity constitutes a loss, if such loss diminishes his estate and that he was entitled to be compensated to the extent that his patrimony was diminished.”
14. In *Southern Insurance Association Ltd v Bailey* NO 1984 (1) SA 98 (A) at 113G-114A, Nicholas JA stated as follows: “Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of

an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non-possumus attitude and make no award. See Hersman v Shapiro & Co 1926 TPD 367 at 379 per Stratford J)".¹

15. The legal principle in respect of a claim for diminished earning capacity is trite in that the plaintiff must be placed in the position he would have been in had the injuries not occurred. To succeed in the claim for loss of income or earning capacity, the plaintiff has to establish on a balance of probability that as a result of the accident, she has lost future earning capacity.²
16. It is common cause that at the time of the accident the plaintiff was employed as a theatre assistant, and as a result of the injuries she sustained she was accommodated in administrative work and later retired in 2022, before she turned 65. As a result of her injuries, she is unable to continue to work.
17. I am satisfied that the plaintiff has shown that the injuries she sustained in the collision have caused a loss of earning capacity. I find no reason to reject the version of the plaintiff as supported by the various experts. In my view, it would be justified in the circumstances of this case to award an amount for loss of earnings in the amount of R926 929.00.
18. In *Legodi v Road Accident Fund*³ the court stated the following:

¹ See also *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at para 8.

² *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA).

³ (50948/17) [2021] ZAGPPHC 566 (2 September 2021).

“[50] General damages include a person's physical integrity, pain and suffering, emotional shock, disfigurement, a reduced life expectancy, and loss of life amenities.”

19. An award for general damages *“must be fair to both sides - it must give just compensation to the plaintiff, but must not pour out largesse from the horn of plenty at the defendant’s expense”*.⁴
20. The injuries sustained by the plaintiff in the accident has rendered her not able to perform any other work other than that of a sedentary nature. The injuries sustained by the plaintiff have caused significant functional limitations and compromised her vocational capacity.
21. Considering the injuries sustained by the plaintiff and the relevant case law, an amount of R 500, 000.00 in respect of general damages is fair and reasonable.

In the premise, the following order is made:

1. The Defendant shall pay to the Plaintiff the sum of R 1 426 929.00 (“the capital sum”), being the Plaintiff’s damages, in the manner and on the date set out in paragraph 5 hereunder by way of electronic transfer into the Trust account of the Plaintiff’s Attorneys of record, details of which are set out in paragraph 6 hereunder.
2. The Defendant shall provide an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 (“the Undertaking”), to compensate the Plaintiff for 100% of the costs arising from the collision which occurred on the 22nd day of January 2014 relating to 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 Plaintiff, after the costs have been incurred and on proof thereof.

⁴ *Pitt v Economic Insurance Company Ltd* 1957 (3) SA 284 (D) at 287E-F.

3. The Defendant shall pay the Plaintiff's taxed or agreed costs on the High Court scale as between party-and-party, including for the sake of clarity but not limited to, the costs as further set out hereunder:
 - 3.1. Plaintiff's taxed or agreed costs incurred after the date hereof attendant upon obtaining payment of the capital amount referred to in paragraph 1 above and/or any costs incurred in finalising the matter after the date hereof;
 - 3.2. The reasonable costs of obtaining all medico-legal reports compiled by the experts listed hereinbelow ("the experts"), as taxed or agreed, including the costs attached to the procurement of such medico-legal reports, the costs of X-rays, if applicable and on proof thereof and subject to the taxing master's discretion. The reasonable costs also include the costs to the Plaintiff of attending all medico-legal examinations, travelling, accommodation, and food, subject to the taxing master's discretion:
 - 3.2.1. Dr Olivier, Orthopaedic Surgeon;
 - 3.2.2. Susan Maree, Occupational Therapist;
 - 3.2.3. Everd Jacobs, Industrial Psychologist;
 - 3.2.4. Munro Actuaries;
 - 3.3. The taxed or agreed fees of Plaintiff's Counsel in accordance with the High Court tariff;
 - 3.4. The Taxing Master shall allow and/or determine within his/her discretion the reasonable travelling costs incurred by the Plaintiff in respect of his attendance at the medical-legal examinations.

4. In the event that costs are not agreed upon, the Plaintiff will be entitled to have the costs provided for in this Order taxed by the Taxing Master of the Northern Cape Division of the High Court and the Plaintiff shall serve a Notice of Taxation on the Defendant's attorneys of record. The Plaintiff shall allow the Defendant (one hundred and eighty) 180 days to make payment of the taxed costs.

5. The payment provisions in respect of the foregoing are as follows:

5.1 Payment of the full capital sum set out in paragraph 1 above, shall be paid by electronic transfer directly into the Plaintiff's attorneys' Trust account, listed hereinbelow, within one hundred and eighty(180) calendar days from the date of this Order.

5.2 Payment of the taxed or agreed costs shall be paid within (one hundred and eighty) 180 calendar days of agreement or taxation ("the due date") and shall likewise be effected by electronic transfer to the Plaintiff's attorneys' Trust account, listed hereinbelow.

6. Plaintiff's attorneys' Trust account banking details are as follows:

Bank:	ABSA
Account Name :	P JOUBERT INCORPORATED
Branch Name:	S[...] B[...]
Branch Code:	6[...]
Account number:	4[...]

T TYUTHUZA
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

APPEARANCES:

On behalf of the Plaintiff:

Adv D Jankowitz

On the instruction of:

DSC Attorneys

On behalf of the Defendant:

No appearance