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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 6688/18P

In the matter between:

A[...] M[...]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

Nicholson AJ

[1] At the onset of the hearing, Mr Sikoti, acting for the plaintiff pursued two amendments from the bar: first, the substitution of the plaintiff, Ms T[...] M[...],¹ with Ms A[...] M[...] (the 'plaintiff'), now twenty-four years of age, meaning she had reached the age of majority when this matter was heard, and second, an amendment to the quantum in accordance with rule 28(10) of the Uniform Rules. Both applications were granted unopposed.

[2] On 20 May 2017, a then sixteen-year-old plaintiff, was a grade eleven student, had travelled with her schoolteachers by motor vehicle, from Kokstad to Pietermaritzburg, to represent her school in a debating competition. While on

¹ The substituted plaintiff's mother.

Richmond Road near Pietermaritzburg, the vehicle was involved in an accident, resulting in her sustaining a head injury and a pelvic fracture.

[3] After been examined by various medical doctors, the full extent of her injuries were documented as follows:

- (a) a fracture of the left acetabular and dislocation of the internal sacroiliac joint;
- (b) post traumatic arthritis of the left sacroiliac joint;
- (c) vascular necrosis of the femoral head;
- (d) scalp swelling with CT brain scan indicating an un-displaced fracture of the right frontal bone; and
- (e) post traumatic migraine like headaches.

[4] In the circumstances, the plaintiff sues the defendant in accordance with the Road Accident Fund Act 56 of 1996 (the 'Act'). In terms of the Act, if specific criteria is satisfied, compensation may be provided to individuals who have sustained bodily injuries as a result of accidents occurring on public roads. In the case of death, it compensates the dependents of the victim for their loss.

[5] At the time of filing the summons, the plaintiff sought compensation for loss of earnings, future medical expenses, and general damages. However, following several adjournments, detailed below, the issues requiring my attention were narrowed.

[6] On 8 May 2023, 4 September 2023 and 19 February 2024, upon application by the defendant, and with the consent of the plaintiff, the matter was adjourned, with the respondent being directed to pay the wasted costs occasioned by the adjournment.

[7] On 7 October 2024, by the time this matter served before me, the defendant had conceded liability 100% in favour of plaintiff and, apart from the issue of future loss of earnings, all other heads of damages had been resolved among the parties. Accordingly, the sole issue for my determination is future loss of earnings.

[8] The plaintiff called four witnesses: the plaintiff, herself and three expert witnesses. The defendant, on the other hand, called only three expert witnesses.

[9] The plaintiff testified that on 20 May 2017, when she was in grade 11, her school selected her to attend a debating competition in Pietermaritzburg. Travelling with her teachers in a motor vehicle, she departed from her home in Kokstad at approximately 06.00 am. She recalls nearing Pietermaritzburg, and thereafter, recalls regaining conscious and being trapped inside the vehicle at approximately 08.00 am in the Thornville area just outside Pietermaritzburg.

[10] Her teachers were present, informing her that they had been involved in a motor vehicle collision. Paramedics were already on the scene and successfully extricated her from the vehicle. It is common cause that as a result of the collision, she sustained a head injury and a pelvic fracture.

[11] The plaintiff testified further that due to her head injury and pelvic fracture, she constantly experiences pain in her left hip, limiting her ability to walk, sit, or stand for long periods. She mentioned that while she is always in pain, it can become so severe that she needs medication, which only dulls the pain somewhat. Her hip injury prevents her from sleeping on her left side, so she needs to sleep on her right side only.

[12] As a result of the head injury, she testified that she experiences headaches, which she categorizes as moderate, severe, or intense. These headaches occur frequently. During episodes of severe or intense headaches, she requires medication and rest. Additionally, she has developed sensitivity to light and now needs to wear glasses.

[13] She testified that the accident caused her to repeat grade 11, and instead of achieving a bachelor matric pass, she only obtained a diploma matric pass. As a result of receiving a Diploma matric pass, she was not able to pursue her chosen career as a lawyer. Consequently, she decided to pursue National Higher Certificates; N4, N5 and N6 in hospitality. The course structure mandates that after

obtaining her N4, N5, and N6 qualifications, she must complete an additional in-service training. Upon successful completion of this training, she will be awarded a Diploma. Although the plaintiff has successfully obtained her N6 qualification, she has not yet completed the in-service training.

[14] The plaintiff had the opportunity to undergo in-service training at the Department of Correctional Services for six months; however, she resigned after two months due to the job demands. The role required her to stand from 9.00 am to 3.00 pm, set the menu, and cook the dishes. Additionally, she was responsible for maintaining kitchen cleanliness and supervising other staff members, who were prisoners and required extensive supervision.

[15] Due to the physical requirements of standing for extended periods, the lighting in the kitchen, carrying heavy items, and the noise levels, she found it difficult to meet the job demands and consequently resigned. The plaintiff testified that she is actively seeking opportunities to complete her in-service training and has submitted the necessary applications. Additionally, she is applying for full-time employment; however, she has not yet been successful.

[16] During cross-examination, the plaintiff did not provide any new information. However, it was shown that her average grades before and after the incident were very similar. Additionally, despite requesting all of the plaintiff's academic reports, only the grade 11 academic report was provided. Therefore, her past academic achievements remain unclear.

[17] The plaintiffs first expert was the plaintiffs occupational therapist, Ms Andiswa Gowa, who testified that she assessed the plaintiff on 14 September 2023. Her assessment aimed to determine the symptoms of the injuries and included evaluations of the plaintiff's physical capacity, functional limitations, cognitive function, and emotional state. She reported her findings from these assessments.

[18] In as far as the physical capacity and functional limitations:

- (a) persistent pain on her ankle, pelvic area, left upper thigh, lower back and left ankle;

- (b) reduced standing and walking endurance;
- (c) reduction in the range of movement for all the left lower limb joints;
- (d) reduced strength of the left lower limb muscles;
- (e) challenges to assume and sustain crouching, squatting with elicitation of back pain;
- (f) reduced sitting endurance;
- (g) compromised unilateral balance with the left and onset of dizziness;
- (h) limitation and elevated work, forwarding bending; and
- (i) significant compromised ability to pursue manual work with precautions to be adhered to due to the already evident degenerative challenges of the sacroiliac joint and avascular necrosis.

[19] In as far as the cognitive and emotional presentation, the assessments revealed the following:

- (a) impaired visual perceptual processing for coping and visual closure within inter-tests scatter;
- (b) compromised writing ability;
- (c) average basic memory functions;
- (d) challenges in basic mathematical functions;
- (e) challenges with accuracy and paying attention to detail;
- (f) attention and concentration challenges and she becomes distracted easily;
- (g) reduced ability to solve problems; and
- (h) persistent pain in her ankle, pelvis, left upper thigh, lower back, and left ankle.

[20] Based on these assessments, Ms Gowa concludes that the plaintiff is suitable for sedentary work with limited mobility requirements, in roles that do not require prolonged periods of sitting, walking, standing, or performing tasks at low levels involving crouching and squatting. Additionally, she indicated that the plaintiff is suited for unskilled or low semi-skilled work and will experience mood disorders, travel anxiety, and chronic pain, which are expected to adversely affect her overall emotional state. Further, Ms Gowa indicated that the plaintiff is expected to retire from work at age 50, rather than the normal retirement age.

[21] During cross-examination, the defendant did not pose any material objections to her testimony presented during the examination-in-chief.

[22] The next witness to testify for the plaintiff was Dr Carol Bustin, an educational psychologist.

[23] Dr Bustin stated that she assessed the plaintiff twice; during 2019 and 2023. Her findings revealed that the plaintiff is capable of passing matric and has average intelligence. She noticed that premorbid the plaintiff had never failed a grade and stated that children in South Africa normally obtain higher education than their parents. The subjects that she selected were what she described as gateway subjects and highly esteemed for future studies and is not a light load. Post-morbid, she has cognitive fall out.

[24] Under cross-examination, Dr Bustin stated that she only had limited reports and it is better to have a full set of reports, however, it is very rare that they ever receive a full set of reports. Dr Bustin stated that in the premorbid state, she would have qualified to study for a degree but it would have been more likely for her to study for a social sciences degree (ie a Bachelor of Social Science or BSocSci) than for Bachelor of Laws (LLB) due to her marks and the demand of the LLB degree.

[25] Both the plaintiff and the defendant called industrial psychologists. The plaintiff called Mr Tshepo Kalenka, and the defendant called Ms Karen Plaatjes. Their testimony was consistent with the information found in the report, and no additional significant details were provided.

[26] Mr Tiaan Ellis testified for the defendant. He is an educational psychologist. He indicated that he conducted a series of assessments and determined that the plaintiff has low to average intelligence. He mentioned that, while reviewing more premorbid school reports could have provided more insight into her academic ability; the marks on the reports he did view, were insufficient to secure a place at university, even though plaintiffs marks in the years preceding matric were a bachelors' pass.

The plaintiff's overall marks were slightly above the grade average, but due to the generally low school grade averages, this did not help in assessing her academic ability.

[27] Mr Ellis stated that had it not been for the accident, she would have completed grade 12 one year earlier. She would not have received good enough marks to become a lawyer, and if, as suggested by Dr Bustin, she attempted to pursue a social science degree instead, there too, she would not get a place, because of the limited spaces for the social sciences degrees, due to its high demand.

[28] He further testified that he reviewed the statistics for the year in which the plaintiff would have completed her degree if she had started it as planned and had the collision not occurred. He noted that only 16% of students completed their degrees within the minimum timeframe during that period.

[29] The defendant called Ms Priya Moodley, an occupational therapist who testified that she assessed the plaintiff on 24 October 2023. Her testimony was consistent with the evidence of Ms Gowa, her report, and the joint minute, with no additional significant details provided.

[30] After hearing evidence, the issues for my determination crystallised. The plaintiff is of the view that in the premorbid state, the plaintiff would have acquired a Bachelor's degree, within four years of completing matric, while the defendant avers that in the premorbid state, plaintiff would have obtained a diploma post matric.

[31] The parties agreed on the quantum of general damages, which compensate² for the reduction in quality of personal interests without affecting economic status. These interests include physical integrity, pain and suffering, emotional shock, disfigurement, reduced life expectancy, and loss of life's amenities. Despite their subjective and non-economic nature, they remain recoverable.

² Edouard v Administrator, Natal 1989 (2) SA 368 (O) at 386; Hendricks v President Insurance Co Ltd 1993 (3) SA 158 (C); JM Potgieter et al Visser & Potgieter Law of Damages 3 ed (2012) at 103 onwards.

[32] The matter to be resolved is the calculation of the amount for loss of earnings under the *actio legis Aquiliae*, commonly referred to as special damages. This remedy pertains to patrimonial loss, encompassing financial losses such as property damage and loss of income, thereby including future loss of earnings.

[33] In *Dlamini v The Road Accident Fund*,³ it was held:

'As a matter of substantive law, therefore, a plaintiff must prove his or her damages and the quantum thereof on a balance of probabilities. In particular, there must be evidence that the disability giving rise to the damages impacts detrimentally upon the work or occupation that a plaintiff would probably have pursued, had it not been for the accident.' (Footnote omitted.)

[34] In *Rudman v Road Accident Fund*,⁴ the Supreme Court of Appeal (SCA) held: 'In my opinion, the learned Judge in the Court *a quo* has not misdirected himself in his understanding of these authorities or in his application of the law to the facts. His judgment correctly emphasises that where a person's earning capacity has been compromised, "that incapacity constitutes a loss, *if such loss diminishes the estate*" (Rumpff CJ in the above quotation from *Dippenaar's* case) and "he is entitled to be compensated *to the extent that his patrimony has been diminished*" (Smalberger JA in *President Insurance Co Ltd v Mathews*). (The emphasis is from the trial Judge's judgment.) In his view, Rudman's disability giving rise to a diminished earning incapacity was proved, but the evidence did not go further and prove that his incapacity constituted a loss which diminished his estate.' (Footnotes omitted, emphasis as per the original.)

[35] It is common cause that the plaintiff suffered life altering injuries in the collision, which detrimentally altered the plaintiffs quality of life, academic and earning potential, and her working ability to adapt to a working environment. Further, having perused the medical reports and considered the evidence of the witnesses, I am satisfied that indeed plaintiff's injuries merits compensation for loss of earnings.

³ *Dlamini v Road Accident Fund* [2022]14 All SA 360 (GJ) para 74.

⁴ *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) para 11.

[36] After carefully considering the testimony of the expert witnesses, I have found minimal discrepancies in their accounts. As previously stated, the injuries and their subsequent effects are a matter of common cause, and it is concurred that the plaintiff would have achieved a tertiary qualification. The divergence in opinion resides with the educational psychologists. This is whether the plaintiff would have achieved a bachelor's degree or a diploma.

[37] It is instructive that while the plaintiff asserts that she would have pursued an **LLB**, the evidence of the educational psychologist, Dr Bustin, who was called to testify by the plaintiff, states that she would have likely pursued a bachelor's degree in the social sciences, in the premorbid state. Considering the statistics provided by Mr Ellis and the quality of the education that she received at the school she attended, I am inclined to agree that the plaintiff would not have obtained an **LLB**, at least not in the four years post-matric.

[38] In *Jacobs and another v Transnet Ltd t/a Metrorail and another*⁵
 'The high court was faced with conflicting expert opinions on this issue of an excessive speed limit. It is for the court to decide which, if any, to accept.'
 (Footnote omitted.)

[39] Dr Bustin's opinion is based on the fact that the plaintiff has average intelligence, has exceeded the grade averages in her historical reports, and the grades she obtained in the historical reports in the premorbid state, amounted to a bachelor's pass, had she been in - matric. Further, although there is no evidence of tertiary education in her family, it has been observed that in South Africa children are often better educated than their parents. The latter view is also shared by Mr Ellis.

[40] Mr. Ellis, who testified on behalf of the defendant, provided evidence that the plaintiff would likely have pursued a diploma qualification in her premorbid state. His opinion was based on his assessments, her school reports, and the school she attended, which, according to the provided reports, achieves grade averages between 35% and 50%. He further noted that social sciences degrees are in high

⁵ *Jacobs and another v Transnet Ltd t/a Metrorail and another* [2014] ZASCA 113; 2015 (1) SA 139 (SCA) para 14.

demand because, in most universities, the entry requirements are relatively low.

[41] Mr Ellis stated further that he had access to the statistics of the South African universities, which shows that the year she had intended to start university had the accident not occurred, after three years only 16% of students completed the university degree within the required time period, making it unlikely that the plaintiff would have completed a degree timeously.

[42] In *Hersman v Shapiro and Co*,⁶ the court held:

'Monetary damage having been suffered; it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages_'

[43] In *Goodall v President Insurance Co Ltd*⁷, the court opined:

'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.'

[44] Despite her mother tongue being isiZulu and attending a low achieving school, and living in a predominately isiZulu speaking area, plaintiff elected to testify in English. She presented in the witness box as very confident, assertive, articulate and intelligent. Further, post morbid but prior to competing the N6, the experts agreed that she would not be able to pursue any tertiary studies due to the sequelae of her injuries. I am impressed by her resilience and attitude. Accordingly, I have little doubt that in the premorbid state, the plaintiff would have pursued a tertiary qualification and may have eventually pursued a bachelor's degree, although the time frame of

⁶ *Hersman v Shapiro & Co* 1926 TPD 367 at 379; cited with approval in *Road Accident Fund v Kerridge* (2018) ZASCA 151; 2019 (2) SA 233 (SCA) (Kerridge) para 25.

⁷ *Goodall v President Insurance Co Ltd* 1978 (1) SA 389 (W) at 392H-393A cited with approval in *Southern Insurance Association Ltd v Bailey* NO 1984 (1) SA 98 (A) at page 113F-H; *NK v MEC for Health, Gauteng* [2018] ZASCA 13; 2018 (4) SA 454 (SCA) and *Kerridge* para 40.

four years as suggested by Dr Bustin is unrealistic.

[45] The question now arises as to when she would have completed the Bachelor of Social Science Degree if she had pursued it. Considering the evidence before me I am not convinced that plaintiff would have completed it in the four years because it is uncertain whether she would have started the degree immediately after completing matric or completing one or more bridging courses. This uncertainty is due to the fact that she attended a low achieving school, which means her academic limits may not have been tested until after school.

[46] The parties have presented with several spreadsheets which I understand is based on the actuarial report, which in turn is based on the scenarios developed by the Industrial Psychologists ('IP's'). Both IP's suggest scenarios where the plaintiff may have attained a diploma or a degree with various levels of contingencies.

[47] After evaluating the evidence and possible scenarios, I conclude that the "degree scenario" proposed by Ms. Plaatjes is appropriate. This scenario includes contingency deductions of 40% for premorbid earnings and 20% for post-morbid future loss of earnings. Following these deductions, the calculated figure for the loss of earning capacity amounts to R6,510,490.00, which I consider suitable compensation for her loss of earning capacity. It is essential to note that higher contingencies have been applied due to various uncertainties, including whether the plaintiff would have eventually pursued a degree and the time frame within which she would have completed it following her schooling.

[48] I see no reason, why costs should not follow the result. However, regarding costs, two further issues merit my comment. First, is relevant the scale of the costs on which they will be taxed. Given the complexity of the matter and the quantum involved, I deem scale C appropriate. Second, I had requested plaintiff to provide me a draft order, detailing the costs it seeks to recover. Unfortunately, plaintiff has not done so.

Order

[49] In the result, I make the following order:

1. Judgment is entered for the plaintiff in the sum of R6 510 490.00 in full and final settlement in relation to the special damages.
2. Payment of the amount referred to in paragraph 1 is to be made within one hundred and eighty (180) days from the date of this order.
3. Notwithstanding the delay in payment, the defendant will be liable for payment of interest on the aforesaid amount at the rate of 10.25% per annum after one hundred and eighty (180) days have elapsed from the date of this judgment.
4. The defendant shall pay the plaintiff's costs on scale C of the High Court scale, such costs to include:
 - (a) the costs of the plaintiff's attorney attending upon any consultations with witnesses in preparation for trial, including the consultations with the expert witnesses;
 - (b) all costs consequent upon attending and preparation for any judicial case flow conference and rule 37 conference, and drafting and preparation of written submissions in terms of Practise Directive 38A.
 - (c) the costs of counsel, including the reasonable and necessary costs of preparation for trial, attendance upon consultations, the perusal of the reports of the expert witnesses.
 - (d) The costs of the expert witnesses that testified.
 - (e) The fees and expenses reasonably incurred by the expert witnesses for, inter alia, deposing to affidavits, the qualifying fees of the under-mentioned expert witnesses, including the costs of the preparation of their reports were necessary and to qualify themselves to testify at the trial.
5. In the event that costs are not agreed:
 - (a) The plaintiff shall serve a notice of taxation on the defendant's attorneys of record; and
 - (b) The plaintiff shall allow the defendant one hundred and eight {180} days to make payment of the taxed costs.

NICHOLSON AJ

Date heard: 7, 8, 9 and 24 October 2024

Date handed down: 8 April 2025

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