IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No.: 5881/2017

In the matter between:

P M Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

JUDGMENT: MOENG, AJ

HEARD ON: 13, 14 AND 16 AUGUST 2019

DELIVERED ON: 19 SEPTEMBER 2019

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[1] The plaintiff claims damages from the Fund for bodily injuries she sustained on 31 January 2016 in a motor collision which occurred at or near Witsieshoek within the jurisdiction of this court.

[2] Shortly before the start of the trial the liability of the Fund was conceded and the defendant accepted its duty to compensate the plaintiff for her future medical expenses by way of an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act. The parties are however at odds with the plaintiff's past medical expenses, past and future loss of earnings and earning capacity as well as general damages.

[3] The plaintiff testified in support of her claim and led the evidence of Dr LF. Oelofse(Spine Surgeon) and Mr Ben Moodie(Industrial Psychologist). The plaintiff was involved in a motor vehicle accident on 31 January 2016. She was a passenger in the vehicle when it lost control and overturned.

[4] She was taken to hospital by ambulance and was discharged on the same day. She returned to hospital with complaints of pain and she was readmitted and hospitalised for 88 days. She suffered an injury to her neck (C1 and C2 vertebrae) and to her knee. Her knee has however completely recovered.

[5] She was on sick leave for three months after being discharged. She soon resigned after her return to work as she could not cope due to severe pain. She experienced pain whenever she wanted to lift anything heavy and whenever she lifted her arms above shoulder height. She further suffered from severe headaches at least twice per week. This incapacitated her from continuing to work.

[6] She was employed at a crèche as a child minder. Her main responsibility was to manage the crèche. The crèche was a nonprofit organisation started by her mother. She took the management thereof over from her. The crèche was financially sustained by funding from the Department of Social Services. She, and all other employees, earned an income of R1750 per month.

[7] Dr Oelofse examined the plaintiff on 31 January 2018. He was placed in possession of her medical records. The history he obtained from her was in line with what was contained in the medical records. He noted in the records that she was booked for surgery to her neck but it was never done. Cone calipers were applied to immobilise her spine injury. The calipers were removed shortly before her discharge. A cervical collar was applied to her neck and she had to wear same for three months after her discharge.

[8] She sustained a cervical spine injury (C1-C2 vertebrae). She had severe limited neck movement and almost no rotation of the neck. She was still experiencing pain, two years after the accident. She suffers from chronic headaches and pain. She will experience chronic pain for the rest of her life.

[9] According to Dr Oelofse, she will not be able to do physical labour again and must be accommodated in a light duty/neck friendly environment as determined by an occupational therapist. The joint minutes by the occupational therapists, Anthea Jansen and Success Moagi, however, indicate that the plaintiff lacks the

physical capacity to meet the full range physical demands of light, medium, heavy and very heavy category of work.

[10] Mr Ben Moodie based his evidence on the reports of Dr Oelofse and the joint minutes of the occupational therapists. The plaintiff completed grade 11 and failed grade 12. She worked as a cleaner from 2004 until 2005 when she fell pregnant. She enrolled for an auxiliary nursing course in 2006 but had to take over the crèche when her mother passed away in 2006. From January 2007 until January 2017 she worked at the crèche where she earned R1750 per month.

[11] According to Mr Moodie, the plaintiff would have earned the minimum wage of R3500 per month from August 2018 until the normal retirement age of 65 years had it not been for the accident. Mr Moodie says that the plaintiff has been rendered unemployable, having regard to the joint minute of the occupational therapists that she lacks the physical capacity to meet the full range physical demands of light and medium, heavy and very heavy category of work. Sedentary work is in his view in the category of light duty work.

[12] He says the plaintiff's lack of proficiency in English and her lack of computer literacy will make her unsuitable for sedentary work and will thus render her unemployable. Her limitations, taking the high levels of unemployment into account, will make her an unfair competitor against candidates who do not suffer from the same limitations.

[13] Counsel for the defendant, Mr Grewar, argued in the main that the plaintiff did not prove that she is totally unable to work. He

submitted in his heads of argument that her whole person incapacity is 12%, that her mental capacity has not been affected and that the possibility of finding employment has not been excluded. He further contended that her physical condition will improve with the intervention of medical treatment.

[14] It is common cause that the defendant did not lead any evidence in rebuttal of the plaintiff's evidence. I am however mindful that the plaintiff's evidence and that of her experts should not be accepted as a matter of course, simply because the defendant did not lead any evidence in rebuttal.

[15] I am similarly alive to the fact that, if the court is unable to decide an issue without the assistance of someone qualified to do so, it may not replace the opinion of such an expert with its own view without proper justification. There are certain fields of expertise where courts cannot form independent opinions in the absence of cogent expert evidence.

[16] No evidence was tendered regarding the plaintiff's past medical expenses. This aspect may therefore be regarded as not having been proven. I need not deal with it any further.

[17] The submission by counsel that plaintiff did not prove that she is totally unable to work is in my view without merit. The undisputed evidence tendered by Dr Oelofse and the contents of his report is that the plaintiff sustained major trauma to her neck resulting in C1 and C2 fractures. She is still experiencing pain two years after the accident and she will experience chronic pain for the rest of her life.

[18] Dr Oelofse opined that she will not be able to do physical labour and that she should be accommodated in a light duty/neck friendly environment as determined by an occupational therapist. The joint minutes by the occupational therapists, in turn, indicate that based on her condition, she lacks the physical capacity to meet the full range physical demands of light category of work.

[19] It goes without saying that the purpose of a joint minute is to limit the issues to be tried and which expert evidence has to be presented. In the absence of a timeous indication from the defendant that it did not wish to be bound by the agreement entered into by its expert, the plaintiff was entitled to assume that the matters agreed to between the experts were not in dispute.

[20] Where experts in a joint minute reach an agreement on an issue, they signify that such an issue need not be adjudicated upon as the initial dispute simply does not exist. They in essence simply agree that a fact or opinion is not in dispute and it will in the normal course of events not be open for a court to cut the veil of such an agreement and question the veracity of the facts or opinion contained therein. By having reached an agreement, they put the dispute beyond the need for adjudication. See **Jacobs v The Road Accident Fund** (4558/2012) [2019] ZAFSHC 42 (2 May 2019).

[21] Sutherland J succinctly sets out the position regarding the effect of such agreements between experts in **Thomas v BD Sarens (Pty) Ltd** (2007/6636) [2012] ZAGPJHC 161 (12 September 2012) at para 11 and 12:

> 'Where the experts called by opposing litigants meet and reach agreements about facts or about opinions, those agreements bind both litigants to the extent of such agreements. No litigant may repudiate an agreement to which its expert is a party, unless it does so clearly and, at the very latest, at the outset of the trial. In the absence of a timeous repudiation, the facts agreed by the experts enjoy the same status as facts which are common cause on the pleadings or facts agreed in a pre-trial conference'.

[22] The majority in **Bee v Road Accident Fund** 2018 (4) SA 366 (SCA) held that 'effective case management would be undermined if there were an unconstrained liberty to depart from agreements reached by the litigants' respective experts. There would be no incentive for parties and experts to agree on matters because, despite such agreement, a litigant would have to prepare as if all matters were in issue'. An approach, similar to the one taken up by the defendant in this case, goes against the grain and spirit of efficient case flow management. With the known pressures our courts face with case management, precious court time is occupied with non-existent disputes.

[23] The majority in **Bee v RAF** further held that 'the position where experts in the same field reach an agreement differs from the position where experts differ on their respective opinions. In cases where they differ in opinion, a court must determine whether the factual basis of a particular opinion, if in dispute, has been proved and must have regard to the cogency of the expert's process of reasoning'.

[24] Logic dictates that where they agree, a court will in exceptional circumstances reject the cogency of their opinion and agreement. It is only where their agreement goes against the grain of the

evidence in totality that it may be rejected. There is in my view no factual basis upon which I may reject the agreement reached by the occupational therapists in their joint minute.

[25] There is no factual basis to doubt the evidence of Dr Oelofse and the joint minute. The undisputed evidence led by Mr Moodie is that the plaintiff has been rendered unemployable, having regard to the joint minute of the occupational therapists. Sedentary work is in his view in the category of light duty work. The plaintiff's lack of proficiency in English and her lack of computer literacy will make her unsuitable for sedentary work and will thus render her unemployable.

[26] Her limitations, taking the high levels of unemployment into account, will make her an unfair competitor against candidates who do not suffer from the same limitations. Her previous work history is indicative of her experience in a physical light duty environment which she is now not suited to perform. I have no reason to doubt that the accident has rendered the plaintiff unemployable.

[27] There is no reason to doubt the plaintiff's evidence that she was employed at the crèche. This version runs through her evidence like a golden thread and was related by the plaintiff to all the experts who testified. The bank statements that were supplied to Mr Moodie corroborate the version that she was in control of the finances at this particular crèche and that grants were paid into the particular bank account.

[28] The finances of the crèche were clearly run in an unconventional way. No salary advices were prepared and no record of salary

payments was kept. The plaintiff is not a sophisticated business woman who would have been expected to know of business records.

[29] The veracity of her evidence is shown by the fact that she did not attempt to inflate her income above that of her employees. I am satisfied that her pre accident income amounted to R1750. The conclusion by Mr Moodie that the plaintiff would have earned the minimum wage of R3500 per month from August 2018 until the normal retirement age of 65 years had it not been for the accident, cannot be faulted. The minimum wage is statutorily regulated and is a fair determination of her future earning capacity.

[30] The parties agreed to present the actuarial reports of their respective witnesses without the need to lead their evidence. Three different scenarios were depicted in the reports. Having concluded that the accident has rendered the plaintiff unemployable, I will ignore the two other scenarios. I have no reason to reject the actuarial calculations and contingencies applied by the plaintiff's actuary. The calculations are in line with the findings I made above.

[31] I was referred to a number of comparable cases regarding general damages. No two cases are exactly the same, therefore past cases can only serve as a rough guide and ultimately each case must be determined on its own merits. I will deal with the facts in this case and compare them to previous similar cases.

[32] I will take the following circumstances into account regarding the case at hand: the plaintiff was hospitalised for 88 days. While in hospital, cone calipers were applied to immobilise her until

shortly before her discharge. She had to wear a cervical collar for three months after her discharge. She was booked for surgery to her neck but it was never done. She has severe limited neck movement and almost no rotation of the neck. She was still experiencing pain, two years after the accident. She suffers from chronic headaches and pain. She will experience chronic pain for the rest of her life. She finds it difficult to do her home chores. This is exacerbated by the fact that she experiences pain when lifting her hands above her shoulders and she cannot carry heavy objects. I was referred to the following cases.

[33] **Van Der Spuy v Rondalia Versekeringskorporasie van SA Bpk** 1964 (1C2) QOD 324 (C). A 29 year old housewife suffered fractures of the two top vertebrae, healing was out of alignment, headaches and dizziness were likely to grow more in the future. There would be serious bone-grafting operation necessary to bind the vertebrae to the skull. She in addition suffered facial disfigurement and had a knee injury which required future operation to remove cartilage. An award of R3 500, 00 was made for general damages for the neck injury which translates to R288 000, 00 in 2017 per Koch.

[34] **Jones v AA Mutual Insurance Association Ltd** 1976 (2C2) QOD 793 (W). A violinist aged 30 at the time suffered neck and lower back injuries necessitating a posterior fusion of the 4th and 5th cervical vertebrae. A further fusion was recommended in the near future due to further injury extending beyond these two vertebrae. There was a possibility of a future operation in the lower back also becoming necessary. An award of R9 000, 00

(current value per Koch R349 000, 00) was made for general damages for pain and suffering, disability and loss of amenities.

[35] **Moagi v Senator Insurance Co Ltd1981 (3J2) QOD 236 (W).** A male passenger was thrown out of a motor vehicle in a head-on collision and sustained a spine injury. He experienced headaches about three days a week. He left hospital on the same day. R3750 was awarded which equates to R89 040.00 in current monetary terms

[36] **Van Niekerk v Constantia Insurance Co** Ltd1983 (3C2) QOD 386 (E). The plaintiff sustained neck injuries with compression fractures of the articular pillars on right of the fourth and sixth cervical vertebrae . Plaintiff also had comparatively minor injuries to the face, neck and chest. He received extensive treatment. Pain killers for over three years did not really help. His headaches and pain increasing. Immediate cervical spine fusion operation advised. He had serious loss of amenities and his relationship with friends was affected. General damages for pain and suffering, disability and loss of amenities, was awarded in the sum of R9000 (current value per Koch R349 000, 00).

[37] I am satisfied that considering the above facts and the comparable cases that I have been provided with, an amount of R300 000.00 will be reasonable under the circumstances.

[38] In the result the following order is made:

1. The defendant is liable for payment to the plaintiff in the amount of:

a. R929 749. 00 (nine hundred twenty nine thousand seven hundred and forty nine rand) for loss of past income and future loss of earning capacity and an amount of:
b. R300 000.00(three hundred thousand rand) for general damages, resulting from the motor vehicle collision as indicated above.

2. The defendant is ordered to furnish to the plaintiff an undertaking in terms of Section 17(4) (a) of the Road Accident Fund Act 56 of 1996, for 100% of the costs of the future accommodation of the plaintiff in a hospital or nursing home, or the treatment or the rendering of a service or the supplying of goods to the plaintiff arising out of injuries sustained by her in the motor vehicle collision mentioned above. In terms of this undertaking the defendant will be obliged to compensate her in respect of these costs after the costs have been incurred and on proof of these costs being provided.

3. The defendant is to pay the plaintiff's taxed or agreed costs on the scale as between party and party until date of this order, including but not limited to the costs set out below:
    a. The costs attendant upon obtaining payment of the amounts referred to in this order;
    b. The reasonable preparation / qualifying / accommodation / travelling and full reservation fees and expenses (if any) of the following experts, and the costs relating to the plaintiff attending their medico legal examinations:
        1. Dr LF Oelofse;
        2. Mr Ben Moodie.

4. No interest will accrue in respect of any of the amounts stipulated above if payment is made on or before the stipulated dates;

5. Should payment not be made in respect of any of the aforesaid amounts on or before the stipulated date(s), interest will accrue at 10.25 % (the statutory rate per annum), compounded;

6. In the event that costs are not agreed, the plaintiff shall serve a notice of taxation on the defendant's attorney of record; and shall allow the defendant fourteen (14) court days to make payment of the taxed costs.

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L. B.J MOENG, AJ

On behalf of the plaintiff: Adv. E. Bisschoff

Instructed by: Du Plooy Attorneys

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On behalf of the defendant: Adv. D.M Grewar

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