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REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(1) REPORTABLE: Electronic Reporting.
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

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Case No. 33463/2008

In the matter between:

BRIDGETT MERLE SMITH Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

MEYER, J

[1] The plaintiff is claiming payment of compensation for damages as a result of bodily injuries caused by a motor vehicle collision that occurred on 6 August 2007 ('the 2007 collision). The plaintiff was the left front passenger in a car that was driven by her husband. They were stationery in heavy traffic when their car was hit very hard from behind. The impact caused the seat on which the plaintiff was seated to break loose from its secured position. The efforts of members of the Fire Brigade were required to free the plaintiff from the car. An ambulance took her to the Lenmed Hospital where she was admitted. She spent about one and a half weeks in hospital. The issue of liability has been settled. The defendant is liable to compensate the plaintiff for 100% of her agreed or proven damages caused by the 2007 collision.

[2] The parties agreed that the defendant is liable to pay to the plaintiff the sum of R400, 000.00 in respect of her general damages, the sum of R1, 953.00 in respect of her past medical expenses, and that the defendant will issue the plaintiff with an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996 for her future medical expenses, but the percentage of the defendant's liability in terms of the undertaking is in issue. What remains to be decided is whether the plaintiff suffered any loss of earnings, both past and future, and if so, the amount or amounts thereof.

[3] The following medico-legal reports, hospital records and clinical notes contained in the plaintiff's hospital and medico-legal reports bundles (exhibits 'A.1' and 'A.2') were admitted by the parities: (a) medico-legal reports by an occupational therapist, Ms Kim Kaveberg (exhibit 'A.1' item 5), by an anaesthesiologist/pain management practitioner, Dr Russell P Raath (exhibit 'A.2' item 1) and by a neurologist, Dr AP Rossouw (exhibit 'A.2' item 2); (b) radiologist reports by Dr Morris Shapiro dated 28 June 2011, by Dr

GM Omar Inc dated 18 June 2007, 11 July 2007, 14 July 2007, 8 August 2007, 21 April 2008 and 26 April 2008, and by Drs Matisonn Scott and Tobias Inc dated 30 September 2008 (exhibit 'A.1' item 9); (c) clinical notes by a physiotherapist, Ms Brigitte Alexander (exhibit 'A.1' item 10), by Dr Y Cassim of Lenmed Clinic (exhibit 'A.1' item 11), by an orthopaedic surgeon, Dr E Ismael (exhibit 'A.1' item 15), by Dr Zaid Eshak (exhibit 'A.2' item 4), and by Dr A Pillay (exhibit 'A.2' item 5); (d) a letter from Ms Tiffany Gordon of the Psychology Department at Helen Joseph Hospital (exhibit 'A.1' item 14); and (e) hospital records from Chris Hani Baragwanath Hospital (exhibit 'A.1' item 12) and from Helen Joseph Hospital (Chronic Pain Management Unit (exhibit 'A.1' item 13). The medico-legal reports of an orthopaedic surgeon, Dr PFB von Bormann, and of an occupational therapist, Ms L Toerien, which are contained in the defendant's medico-legal reports bundle (exhibit 'A.3, items 1 and 2) are also admitted by the parties. The parties further agreed to the truth of the contents of the joint minutes of the occupational therapists, Ms Kim Kaveberg and Ms Leazanne Toerien, and of the industrial psychologists, Ms Christa du Toit and Ms Sonet Vos (exhibit 'B', items 2 and 3). During the course of the trial the parties also agreed to the production into evidence of three actuarial reports, one which Ivan Kramer CC prepared for the plaintiff (exhibit 'A.2 item 6) and one which it prepared for the defendant (exhibit 'A.3 item 5) and another one which Independent Actuaries & Consultants (Pty) Ltd prepared for the defendant (exhibit 'A.3' item 6). The parties agreed to the correctness of the method of the calculations contained in each actuarial report.

[4] The plaintiff testified. The plaintiff also called a neurosurgeon, Dr J Earle (exhibit 'A.1' item 4), the clinical psychologist, Dr J Watts (exhibit 'A.1' item 3), and the industrial

psychologist, Ms C du Toit (exhibit 'A.2' item 3) as witness. The defendant called the orthopaedic surgeon, Dr PFB von Bormann (exhibit 'A.3' item 1) as its only witness.

[5] The defendant, during the course of the plaintiff's case, sought leave by way of a formal application to discover and produce documents of a previous claim which the plaintiff had lodged with the defendant when she had been injured in a collision on 6 October 2004. The plaintiff initially resisted the application, but it was then agreed between the parties that the relief should be granted and that the plaintiff and Dr Earle should be permitted to be recalled as witnesses if the plaintiff considers it necessary once the plaintiff's industrial psychologist, Ms du Toit, and the defendant's orthopaedic surgeon, Dr von Bormann, had testified. I accordingly granted an order in terms of prayers 1 and 2 of the defendant's notice of motion dated 11 February 2013. The costs of the application were reserved. The documents forming the subject-matter of that application are contained in the bundle which was received as exhibit 'D'. An amendment of the plaintiff's particulars of claim which relates to the plaintiff's alleged loss of future earnings or earning capacity was effected by agreement between the parties at the commencement of counsel's closing arguments.

[6] The plaintiff was born on 17 February 1972. She passed grade 11 at secondary school in 1989. The plaintiff has no other qualifications. She and her husband, who is a machine operator by profession, have been separated since some time after the 2007 collision. They have three children between the ages of 12 and 21 years. The plaintiff was employed as a receptionist from August 1990 until February 2000. She worked in temporary positions from March to May 2000. She was employed by McCarthy Motors and later known as Sandown Motors from June 2000 until 2006. She started as a

receptionist. She was promoted to service receptionist in 2004 and to service advisor in 2005. From 2006 until October 2008 she was employed as a service advisor at General Motors. She was thereafter employed by Toyota, The Glen until January 2011 as assistant to the manager in the parts department. She resigned and was unemployed from February 2011 to November 2011. She was employed as a service advisor at Toyota Melrose Arch from December 2011 to May 2012. Her claim for loss of past earnings relates to the periods February 2011 until November 2011 and June 2012 until the date of the trial. The plaintiff's claim for loss of future earnings or total loss of earning capacity relates to the period as from the date of the trial until her postulated retirement age of 60 – 65 years in the motor industry.

[7] The plaintiff testified that she was a passenger in a bus that was involved in an accident with two motor vehicles on 6 October 2004 in Randburg. The plaintiff was asleep at the time when the bus and motor vehicles collided. She testified that she sustained a whiplash injury to her neck and an injury to her lower back in the 2004 collision. The hospital records and clinical notes show that the plaintiff was treated conservatively with a cervical collar and pain medication for her neck injury. The lower back injury caused the plaintiff to undergo a lumbar spine fusion at L5/S1 during July 2007, about three weeks before the 2007 collision. The plaintiff testified that she was recovering well from the lumbar spine fusion surgery. She walked without aid within two weeks after the operation and she estimated that she was about 90% pain free during the week that preceded the 2007 collision.

[8] The plaintiff sustained a whiplash type injury to her cervical spine and a lower back injury that was superimposed on her recovering lumbar spine fusion as a result of

the 2007 collision. The mechanism of how the plaintiff's injuries were caused, is, in the words of Dr von Bormann '[a] sudden movement of the spine column without direct impact.'

[9] An MRS scan that was taken of the plaintiff's cervical spine on 21 April 2008 shows a 'significant disc herniation' at the C5/C6 level. The plaintiff subsequently received a cervical fusion. She has, in the opinion of Dr Earle, made a good recovery from her neck surgery. Dr Earle examined the plaintiff on 10 December 2012. He is of the view that the 2007 collision had a far more violent impact on the plaintiff's cervical spine than the 2004 one. Dr Earle is of the view that the disc herniation at the C5/C6 level had a slow onset of about eight months whereafter the plaintiff underwent 'a very necessary operation.' Dr Earle is of the view that such condition usually takes time to manifest '…but not more than a year and certainly not four years.' It is in the opinion of Dr Earle 'exceptional and unlikely' that the plaintiff would have 'lasted' four years with such condition had it been the result of the 2004 collision. She, in his view, '… would not have survived such a threatening disc for four years.' Dr Earle is of the view that the 2004 collision contributed 30% and the 2007 collision 70% to the plaintiff's cervical spine *sequelae*.

[10] Dr von Bormann examined the plaintiff on 4 July 2007. He is of the view that the plaintiff's cervical spine was 're-injured' in the 2007 collision. In the words of Dr von Bormann '[t]here were damaged goods in the neck and it suffered disproportionate damage which would not have taken this severe form if there was a perfectly well cervical spine.' Dr von Bormann agreed that a disc herniation would have caused immediate pain requiring immediate alleviation. He explained that herniation of a

vertebral disc means the rupture of the fluid bag – 'vogsakkie' – when fluid is squeezed out and the fluid then constitutes an irritating mechanism of acute pain. He is of the view that the fluid bag can weaken slowly over years until it suddenly ruptures. He accordingly is of the view that it cannot be said that the disc herniation was 'solely' as a result of the 2007 collision. Dr von Bormann initially expressed the opinion that 50% of the *sequelae* of the plaintiff's neck injury are due to the 2004 collision. He, however, made it clear that such apportionment is 'an educated guess' and that he was 'uncertain' as to what the apportionment should be. Dr von Bormann was also prepared to accept that 60% of the *sequelae* of the plaintiff's neck injury should be ascribed to the 2007 collision.

[11] The contributions of the 2004 and 2007 collisions to the plaintiff's cervical spine sequelae are only relevant to the percentage of the defendant's liability for the plaintiff's future medical treatment under the undertaking which the plaintiff offered to furnish to the plaintiff in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996. I consider it fair and just to both parties to take the mean between the two opinions, which is that the 2004 collision contributed 35% and the 2007 collision 65% to the plaintiff's cervical spine sequelae.

[12] There are two areas of injury to the plaintiff's lumbar spine, a compression wedging of the L1/T12 and the L5/S1 fusion. I agree with Dr Earle's assumption that the compression wedging of the plaintiff's L1 and T12 vertebral bodies with which she presented a day after the 2007 collision was probably caused by that collision, particularly since there was no sign of it on the x-ray examination of her lumbar spine that was performed prior to the 2007collision on 18 June 2007. There is no evidence of

any other trauma to the plaintiff's lumbar spine between 18 June 2007 and the 2007 collision. Dr von Bormann also did take issue with the view of Dr Earle on this aspect. It was by the time of the 2007 collision in the opinion of Dr Earle 'far too early to expect the bones' involved in the L5/S1 fusion to unite. The procedure left the plaintiff virtually pain free. She could walk unaided. Dr Earle is of the view that the plaintiff was doing well and her outlook was good had it not been for the 2007 collision. Dr Earle is of the view that the 2004 collision contributed 20% and the 2007 collision 80% to the plaintiff's lumbar spine sequelae.

[13] Dr von Bormann is of the view that at the time of the 2007 collision the plaintiff had a healing wound involving her lower back. The 2007 collision in his view would have '… caused disproportiate damage to that part of her lower spine' which she would not have incurred if she did not have the 2007 collision. Dr von Bormann is of the view that 50% of the plaintiff's lower back pain is attributable to the lower back injury she sustained in the 2007 collision that was superimposed on her recovering lumbar spine fusion. Dr von Bormann, however, also said that all the evidence points to a considerable deterioration of the plaintiff's condition since he had seen her on 4 July 2011 and by the time when Dr Earle had seen her on 10 December 2012. He conceded that the opinion of Dr Earle was more current than his own and that Dr Earle was in a better position to express an opinion pertaining to the plaintiff's condition since he had insight into other medico-legal reports, such as the one from the pain specialist, which Dr von Bormann had not seen. I accordingly rather accept the opinion of Dr Earle and I consider a 20/80 apportionment of the plaintiff's lumbar spine sequelae to the 2004 and 2007 collisions respectively as appropriate in all the circumstances.

[14] The plaintiff's claim for loss of income is based on the contention that the 2007 injury to her lumbar spine and the physiological and psychological *sequelae* thereof have caused her to be totally unemployable. The plaintiff testified about her debilitating lower back pain. At present she uses various forms of medication to give her some relief, notably 40 mg morphine twice daily. The medical experts seem to be *ad idem* about the extreme nature of the plaintiff's lower back pain.

[15] Dr von Bormann expects the continuous pain emanating from the plaintiff's lower back to be '24/7' and to increase with movement. He is of the view that the plaintiff is now suffering from a 'chronic pain syndrome', that a 'great deal more treatment can be expected before bringing about some relief' and he considers her 'chronic low backache' as a permanent disability. Dr von Bormann is, however, of the view that the plaintiff is capable of working and that '[s]he would be able, orthopaedically, to meet her job functions.' He, as I have mentioned, however, readily conceded that Dr Earle is in a better position to express an opinion on the plaintiff's condition.

[16] Dr Raath is of the opinion that the plaintiff suffers '… from Regional Sympathetic Dystrophy (RSD) also known as Chronic Regional Pain Syndrome (CRPS) due to nerve injury following the injury after her spine surgery.' Dr Raath *inter alia* states in his report: 'As is typical with these patients the pain becomes totally debilitating and gradually increases with time in spite of various medications and in spite of many surgeries. This patient reached the point now where she can no longer care for herself and her daughter needs to wash her, dress her and shave her and to help with all her bodily functions because she is no longer capable of helping herself. So her quality of life has just about disappeared as can be seen from reports from other professionals –

there is no need to repeat that all here.' Dr Raath notes '… that patients that had received the spinal cord stimulator system for RSD are often able to live normal lives and even go back to work, maybe not their original occupation, but they can become self-supportive and self-caring as well.' The plaintiff testified that she has had this therapy and that its desired effects are short lived. The plaintiff nevertheless at present experiences the debilitating effects of the pain emanating from her lower back. She cannot walk unaided and she still uses other forms of medication, including morphine.

[17] Dr Earle is of the view that the plaintiff's '… back has escalated in symptomatology beyond all else and is restricting her in all activities.' He is of the view that '[t]here is no way at present that she can do work of any kind' and that she 'can probably barely manage any household work and needs help at every point.' He is of the view that the plaintiff is not '… capable of working or of earning and that it is probably permanent.' He considers her prognosis for recovery to be 'poor'.

[18] Dr Watts is of the view that there is no evidence that the 2004 collision was psychologically of any consequence to the plaintiff. The plaintiff, in the opinion of Dr Watts, falls within a fragile personality structure. Dr Watts diagnosed the plaintiff as suffering from major clinical depression and she, in the opinion of Dr Watts, is a possible suicidal risk. When Dr Watts assessed the plaintiff on 30 November 2012, she, in the opinion of Dr Watts, manifested all nine criteria of major clinical depression. Five or more of the nine criteria are required for a diagnosis of clinical depression. Dr Watts explained that there is a correlation between pain and depression and the plaintiff's psychological condition in her view is predicated on pain. Dr Watts is of the view that it is not likely that a person can work when all nine criteria of major clinical depression are

present. It is, in the opinion of Dr Watts, highly unlikely that the plaintiff will be able to function in an office environment and she is presently not capable of working. Dr Watts is of the view that the plaintiff's depression will lift if her pain lifts. Dr Watts is of the view that the plaintiff suffers from a serious and debilitating psychiatric condition. Recovery from major depression '… is a long, slow journey'. Her prognosis in the case of the plaintiff is guarded.

[19] Ms Kaveberg is also of the opinion '… that in her present condition and level of pain, she would not cope with the demands of any position in the open labour market.' The joint minutes of the occupational therapists, Ms Kaveberg and Ms Toerine, also record their agreement '… that considering Mrs Smith's physical and emotional presentation at present she would not be able to meet the demands of her pre-accident position (service advisor) and the work she had as parts administrator and assistant parts manager thereafter, or any position in the open labour market. She needs urgent intervention of an intra-disciplinary team …'.

[20] The opinion of Ms du Toit which is recorded in the joint minutes of the industrial psychologists is that '[c]onsidering the bigger picture and Ms Smith's age of 40 years, experts' opinions, prognosis and the combination of physical constraints, emotional reactions and poor prognosis in this regard as well as Dr Raath's opinion about the debilitating impact of the condition, Ms Smith's chances of securing work in future are projected as extremely slim and she probably will remain mainly unemployed and have little chance of securing any meaningful income for the rest of her career life.'

[21] I am in all the circumstances of the view that the plaintiff has suffered a complete loss of earning capacity since June 2012 as a result of the 2007 collision. Improvement of the plaintiff's physiological condition or of her psychological condition in the future is a possibility, but I am unable to find any such future improvement to be a probability. The plaintiff claims compensation from the defendant for her past loss of earnings during the period February 2011 until November 2011. Dr Watts is of the view that there was a progressive deterioration of the plaintiff's pain experience and her mood disorder was getting increasingly worse. Dr Watts is of the view that the plaintiff probably did not fulfil all the criteria for major clinical depression during the time that she returned to work after the 2007 collision. It was when Dr Watts interviewed her in November 2012 that she fulfilled all the criteria. The plaintiff returned to work after the 2007 collision until January 2011. She was unemployed for the period February 2011 until November 2011 when she returned to work again until May 2012. It has in my view not been proved on a balance of probabilities that the plaintiff's unemployment during this period was related to the 2007 collision. The plaintiff's primary reason for resigning her employment at the time was to receive her Provident Fund payment in order for her to settle debts and particularly the arrear and outstanding amounts that were owed in respect of the house in which she and her children continued to reside after her husband had left her and had stopped paying his contributions to the household.

[22] The industrial psychologists in terms of their joint minutes agreed that the plaintiff's pre-morbid 'career exposure was mainly in the motor retail industry' and 'that she could have continued earning on approximately Paterson level B5/C1 (basic salary) depending on work policies and commission earned, with increases mainly inflation-

based.' They further agreed 'on a retirement age of 60 – 65 years depending on preferences and circumstances.' It is recorded that Ms Vos only had sight of one of the available nine reports and she '… therefore defers to an updated opinion'.

[23] Ms du Toit has undertaken an extensive review of the various medico-legal reports. I accept her opinion that had it not been for the 2007 collision the plaintiff probably would have continued working as a service advisor or assistant manager - which positions are regarded by Ms du Toit as being in the same category – in the motor industry until normal retirement age between 60 to 65 years of age and that it should be assumed that her future earnings could have fluctuated between R10, 000.00 to R14, 000.00 per month, which income should be regarded as the plaintiff's career ceiling, increasing only with inflation until retirement age. The assumptions on which the actuarial calculation of Mr Ivan Kramer (exhibit A.2 item 6) is founded – but for the accident the plaintiff's earnings would have been R12, 000.00 (the mean) with inflationary increases until retirement at age 62.5 (the mean) and having regard to the accident her earnings amount to zero – are in my view appropriate in all the circumstances. I am also of the view that a 25% contingency, which is higher than the norm, should be deducted from the actuarially calculated amount of the plaintiff's loss of future earnings in the sum of R2, 081, 730.00. I consider an award of R1, 561, 298.00 for the plaintiff's future loss of income to be reasonable and just.

[24] Counsel for both parties agreed that the plaintiff's total claim for loss of past earnings represents a period of 17 months and that the period February 2011 until November 2011 represents a period of 9 months thereof. Counsel agreed that should the plaintiff's claim for loss of past earnings in respect of the period February 2011 until

November 2011 fail and in respect of the period June 2012 until the date of trial succeed, that I should make the following calculation in order to arrive at the amount of the plaintiff's loss of past earnings: the appropriate actuarially calculated amount of the plaintiff's past loss of earnings ÷ 17 × 8 = gross amount – R6, 000.00 (a settlement amount that the plaintiff received from her then employer) - appropriate contingency = net amount to be awarded to the plaintiff. I consider it appropriate if a 15% contingency, which is higher than the norm, is deducted from the actuarially calculated amount of the plaintiff's loss of past earnings. An amount of R69, 638.35 should accordingly be awarded to the plaintiff in respect of her claim for loss of past earnings.

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

1. The defendant shall pay to the plaintiff the sum of R2, 032, 889.88 within 14 days of this order.

2. Payment of the amount referred to in paragraph 1 of this order shall be made into the account of Levin van Zyl Attorneys at Nedbank Branch 146905 with account no […]

3. The defendant shall pay interest on the balance of the outstanding amount referred to in paragraph 1 above at the rate of 15,5% per annum if the payment is not made timeously.

4. The defendant shall provide to the plaintiff an undertaking as envisaged s 17(4)(a) of the Road Accident Fund Act 56 of 1996, for the costs of the plaintiff's future accommodation in a hospital or nursing home or medical treatment of the

plaintiff or the rendering of a service or supplying of goods to her arising out of the injuries sustained by her in the motor vehicle collision which occurred on 6 August 2007, after the costs have been incurred and on proof thereof, provided that the defendant's liability under and in terms of this undertaking shall be limited to 65% in respect of the plaintiff's cervical spine and 80% in respect of her lumbar spine.

5 The defendant shall pay the plaintiff's taxed or agreed party and party costs of the action, which costs shall include the qualifying and reservation fees (if any) of the plaintiff's expert witnesses Drs Earle, Enslin, Raath, Rossouw Schepers and Watts and Ms du Toit, Ms Kaveberg, Ivan Kramer Inc and BSM Consulting, as well as the costs of the defendant's application dated 11 February 2013.

P.A. MEYER
JUDGE OF THE HIGH COURT

31 March 2013

Date of hearing:	06 – 13 February 2013
Plaintiff's counsel:	Adv Lubbe
Plaintiff's attorneys:	Levin Van Zyl Inc, Randburg
Defendants' counsel:	Adv C Snoyman
Defendant's attorneys:	Kekana Hlatshwayo Radebe Inc, Parktown