REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **33599/2015**

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

_____ _____

Date: **WHG VAN DER LINDE**

In the matter between:

Chakela, Masabata Emily **Plaintiff**

and

Road Accident Fund **Defendant**

JUDGMENT

Van der Linde, J:

Introduction

[1] This is an action for damages resulting from personal injuries sustained by a metro police officer when she was run down by a motor vehicle on 26 June 2014. At the time she was employed by the Benoni Ekurhuleni Metropolitan Council. She sustained soft tissue injuries to her right ankle and right shoulder, soft tissue injuries to the axial skeleton involving both the cervical and dorso-lumbar spine, and multiple rib fractures.

[2] Pleadings were exchanged, discovery undertaken, and experts consulted and their reports received. The opposing experts met and prepared joint minutes of their meetings, recording the agreements that they had been able to reach. The agreements reached were such that ultimately, just before the matter was called on 31 May 2017, the parties were able to agree a stated case in terms of rules 33(1), (2), (3) and (6), and it was received as exh A.

[3] That document comprised not only a setting out of the common cause facts, an identification of the issues remaining in dispute, and the parties' contentions thereon, but also three attachments, being the three joint minutes of the meetings between the parties' opposing experts, being respectively the orthopaedic surgeons, the occupational therapists, and the industrial psychologists. These three sets of minutes reflected in each instance the agreements that had been reached between the three sets of experts, and the plaintiff did not hand up any of the underlying original expert reports.

[4] Exh A reflected that a single issue remained in dispute between the parties. It was two-fold, the first being whether the plaintiff had suffered any future loss of earnings; and the second, if she has suffered such a loss, whether a contingency differential should be applied in calculating any difference in the plaintiff's future earnings but for the injuries, and her future earnings having regard to those injuries.

[5] The plaintiff's counsel proceeded to make submissions on the plaintiff's behalf, and then closed her case. The defendant's counsel then began making submissions on behalf of the defendant, and in the course of those, wished to refer to the contents of some of the

original expert reports. Since those were not evidence before the court, I indicated that unless the reports went in without objection, they could not be referred to.

[6] The plaintiff's counsel was requested by the defendant's counsel to agree to the mere handing in of the original expert reports, but he declined to provide his consent. The defendant informed the court that the defendant wished to call two experts who had provided reports to testify viva voce, since the defendant disagreed with the joint minutes of the experts that were attached to the stated case, at least to the extent that they might suggest that in fact a loss of earnings had been suffered. The matter stood down at the defendant's request to afford it an opportunity to telephone these experts.

[7] After the lunch adjournment the court was informed that the defendant's industrial psychologist was not available, and that it had not been possible to make contact with the orthopaedic surgeon. The defendant proceeded to apply for a postponement of the trial sine die on the basis of the unavailability of these experts.

[8] After hearing argument from the parties, the matter was stood down until later in the afternoon when I delivered a judgment with reasons. The judgment concluded with a refusal of the application for a postponement, with costs, and the trail then stood down until 10h00 on 1 June 2017.

[9] On that day the defendant made its submissions, and the plaintiff replied. Judgment was reserved.

<u>The parties' respective cases</u>

[10] The submission for the plaintiff was that the fact that impairment had occurred had been shown, and that the contingency differential that would appropriately reflect the extent of that impairment, was between 30% and 25%, although in reply the plaintiff's counsel rested his case on 25%. The five reasons that were advanced, and the bases relied on, were the following.

Loss of efficiency and productivity

[11]The plaintiff relied here on the agreement between the orthopaedic surgeons, that *"she is always likely to have some residual chronic pain."* The defendant submitted that the plaintiff's superintendent said that there had been a marked deterioration in her performance post the accident, but it did not appear that she was, in consequence, sent for retraining. Accordingly, according to the submission, this basis fails.

Possible forced early retirement

[12]The plaintiff relied here on the agreement between the industrial psychologists *"that allowance should be made for a possible truncation in her career as it refers to her potential to the rank of inspector."* Reliance was also placed on the agreement between the occupational therapists, to the effect that *"if/when she develops pathology in the right ankle, right shoulder or spine she can be considered unable to do the work of a metro police woman."*

[13]The defendant submitted that the plaintiff's own industrial psychologist opined that the plaintiff will be able to continue working, provided she receives medical treatment. The submission was that she was being give an undertaking in terms of s.17(4)(a) of the Road Accident Fund Act 56 of 1996, and so she has the means to receive the correct treatment. Logically, she will thus be able to continue working. Further, the submission was that the defendant's industrial psychologist opined that in fact the plaintiff will be rendered pain free.

Promotion impairment

[14]Here the plaintiff relied on the juxtaposition said to be established in the minutes of the industrial psychologists between the pre- and post-accident scenarios. In respect of the former, they recorded: *"She was considered to have potential for progression to the rank of inspector and possibly the rank of superintendent (long term)."* In respect of the latter, they

recorded, as said above: "*"that allowance should be made for a possible truncation in her career as it refers to her potential to the rank of inspector."*

[15]The defendant submitted that there was no proof at all for this. The submission was that if she was not promoted when she ought to be, she would be able to lay a charge at the CCMA based on the discrimination against her. It was pointed out that pre-accident she was never promoted, as she had remained in the position of constable. The submission was that ultimately promotion was vacancy bound.

At risk employee

[16]The plaintiff submitted that she was now, post-accident, an at risk employee, and that her employment potential in the open market had been impaired. Here reliance was placed on the express agreement between the occupational therapists that the plaintiff was *"an at risk employee."*

[17]The defendant submitted that the industrial psychologists have agreed that there will be no early retirement, and so this basis has not been shown.

Time off work to receive treatment

[18]Here the plaintiff submitted that it followed as a matter of axiom that if she is to receive future medical treatment – as is common cause – she will have to take off work to receive it. This impairs her standard provision for being off sick.

[19]The defendant submitted that the plaintiff does not suffer any loss in this respect, since she will be on paid sick leave.

No impairment of earning capacity shown

[20]The defendant's overarching submission was however that the plaintiff has not shown on a balance of probability that she has suffered, as a fact, any impairment in her capacity to earn an income in the future. It is only once impairment has, as a fact, been established, that the

question of quantification arises. And the question of an appropriate contingency provision fits into the quantification exercise; not the first, a priori, enquiry.

[21]In this context the defendant referred to the following judgments. In Deysel v Road Accident Fund (2483/09) [2011] ZAGPJHC 242 (24 June 2011) the following appears at [15] and [18] (emphasis supplied):

"15. Loss of income arises primarily from a loss of earning capacity, In other words, if the plaintiff loses a certain degree of earning capacity', this will show in that they will lose actual income in future. This is also true in that when a person loses income due to a damage-causing event such loss is due to a lowered earning capacity arising from the same cause of action."

…

"18. In my view this does not mean that such plaintiff would be claiming for loss of income and not loss of earning capacity per se it is merely this loss of income that provides evidence of a loss of earning capacity, and visa-versa. Earning capacity is part of a person's patrimony, but this capacity can only be proven to have been lowered, and the damages for this quantified by proving án actual loss of income. However, when both of these losses have been shown to exist, then the claim for one is also the claim the other and they appear to be interchangeable."

[22]In Rudman v Road Accident Fund (370/01) [2002] ZASCA 129; [2002] 4 All SA 422 (SCA) (26 September 2002) the following is said (emphasis supplied):

"[11] 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 emphasizes 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).[8] (The underlining 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."

[23]In Van Heerden v Road Accident Fund (6644/2011) [2014] ZAGPPHC 958 (8 December 2014) the following dicta are relied on (emphasis supplied):

"75. The loss of work capacity postulated by the orthopaedic surgeons does not, however, equal to a straight loss of income, but represents an inconvenience at work and at times pain, possibly sick leave. It is clear therefore that her allegations in the particulars of claim for a future loss of income, are not supported by the evidence.

76. I therefore, find, that the plaintiff has failed to prove that her injury had a cognisable effect on her earning capacity and the type of work she does. It would have been different if she had been, for example, a domestic worker. Her damages are therefore nil and accordingly no award will be made under this heading. Given the view I take there is no need for me to consider the amounts postulated in the actuarial report. They are based on a fallacious premise."

[24]Finally, reliance was placed on Prinsloo v Road Accident Fund (3579/06) [2008] ZAECHC 193; 2009 (5) SA 406 (SE) (18 November 2008) where the following appears from the judgment of Chetty, J (emphasis supplied):

"[18] Dr Holmes expressed the opinion in his report that post-accident "whatever prospects Ms Prinsloo may have enjoyed for promotion to the rank of captain, and, therefore, superintendent, would now be very reduced if not negated". Ergo, he concluded that the plaintiff was unlikely to proceed beyond the level of inspector and was likely to suffer emotional trauma, become frustrated in her normal working life and, as a result, be compelled to opt for early retirement. During his testimony Dr Holmes laid stress on the fact that given the plaintiff's penchant for the physical demands of her job, the growing realisation that she could no longer do so, would cause her such frustration that she would no longer be able to perform optimally and would gradually lose interest to such an extent that she would virtually give up.

[19] This conclusion is in my view untenable. The impression I gained is that the plaintiff, notwithstanding the injury, has not allowed it to impact on her performance. She admittedly has some difficulties for instance in driving for long distances or standing for prolonged periods but these aside, she never adverted to the fact that she was not coping. In fact when regard is had to her performance plan, (exhibit "F") compiled and scored by her, it shows, unequivocally that the plaintiff consistently excels in her work situation. The results of the performance plan are inconsistent not only with Dr Holmes' findings but with the plaintiff's evidence regarding her present work performance.

…

[21] The evidence of Ms De Witt does not in any manner advance the plaintiff's claim under this head of damage. Her report and the evidence adduced by her is primarily concerned with the plaintiff's ability to cope given the pain she admittedly endures. The agreement reached by the medical experts suggests that the envisaged treatment would result in an 80 % significant reduction of pain. Working in an ergonomically friendly environment, would also prove beneficial. Consequently her conclusion that the plaintiff's "work abilities have also been severely compromised" can no longer be sustained. It is regrettable to say the least, that despite being referred to the medical experts' agreement she steadfastly defended her conclusion.

[22] In my judgment therefore I remain unpersuaded that the plaintiff has discharged the onus resting upon her to show that her earning capacity has been compromised by her injury. No award can consequently be made under this head."

[25]These judgments are pertinent in the present context. Having regard to them, the correct approach is, in my view, the following. There is a conceptual difference between the question whether a plaintiff has suffered an impairment of earning capacity, and the question whether a plaintiff will in fact suffer a loss of income in the future.

[26]The answer to the former question is determined on a balance of probability, and the plaintiff has the onus to discharge. The latter is a question of assessment in respect of which there is no onus in the traditional sense. This assessment involves the exercise of quantifying as best one can the chance of the loss actually occurring.

[27]Put differently, the answer to the former question is, at least theoretically, answered affirmatively if the plaintiff will have established a 51% change of the impairment being present; the answer to the latter question is provided by the best match between the likelihood of a loss being suffered, and a fraction expressed as a percentage.

[28]Turning then to the agreed facts of this case, the first question is whether the experts' agreements attached to and incorporated within the stated case establish, probably, permanent impairment of future earning capacity. Here the crucial expert views must of necessity be, at least as a starting point, those of the orthopaedic surgeons, to whom the occupational therapists and the industrial psychologists must necessarily defer.

[29]This proposition may be put the other way around: if the orthopaedic surgeons conclude that there have been no injuries, or that there have been injuries but that there has been complete recovery from those, then it would follow that any consequences or sequelae discussed by the occupational therapists or industrial psychologists have no causatively relevant origin.

[30]The plaintiff saw the two specialists relatively recently. As regards her lower back, the observation on examination was some tenderness, over the C3, C4 and C5 regions, in the paraspinal muscles of the dorso-lumbar spine, and lumbo-sacral spine. The plaintiff had

discomfort at the extreme ranges of movement of her neck. There was also discomfort over the T 7 to T10 vertebrae. Finally, there was tenderness over the L4, L5, and S1 vertebrae.

[31]The x-rays of the ankle, foot and shoulder were all normal, but there was discomfort on passive dorsiflexion of the right ankle.

[32]It is common cause between these two experts that ongoing conservative treatment was necessary. Regrettably these experts do not express a view as to future employability. The furthest they were able to go, was to conclude that there is likely always to be some residual chronic pain. What may be concluded, however, is that these experts agree that there have been injuries; and they agree too that that the plaintiff has not completely recovered from these, and will, as a matter of probability, in the future continue to experience the consequences of these injuries.

[33]The occupational therapists agreed, however, that if the plaintiff has access to assistance and optimal management, she should have relief of her endurance and pain problems. They say that in those circumstances she *"would be able to continue her current work till retirement age."*

[34]But they then go on, in the very next sentence, to agree: *"She is an at risk employee."* And they in turn defer to the industrial psychologists, specifically as regards the extent to which she might be an *"at risk employee."* These latter experts then agree *"that allowance should be made for a possible truncation in her career."*

[35]At the end of the day it seems fair to say that the expert agreements conclude that the plaintiff is not the person she used to be, that much is certain. But they opine that the extent to which, if any, this change will impact her financial future, is uncertain.

[36]That seems to me to fit precisely the difference between clearing the first hurdle on a balance of probability, and then leaving it to a measure of crystal ball-gazing to fit an appropriate contingency differential to the chance of monetary loss actually occurring in the

future. Therefore, the first hurdle has been cleared; she is an at risk employee – that is what the experts agreed. Now, what about the contingency differential percentage fit?

[37] In my view the extent to which the plaintiff is no longer the person she used to be, is slight. The pain is not a persistent presence; it is a recurring if unwelcome visitor. And it can and should be treated.

[38] I should add too that it seems wholly artificial to pretend that a court can rationally distinguish, in the present context, between contingency differential margins as small as 5%. It seems to me that the appropriate number is either 10% or 25%; but not really anything in between.

[39] In my view the realistic fit errs on the conservative side, and should therefore be 10%. There parties were agreed that the conclusion to which I come should be reflected in paragraph 1 of the draft order that was handed up, that order being agreed in respect of the remainder of the paragraphs. In the result the amount for which judgment is entered in paragraph one of the draft order is R275 724.

[40] In the premises I make an order in terms of prayers 1 to 7 of the draft order attached hereto, the amount to be inserted in paragraph being R275 724.

WHG van der Linde
Judge, High Court
Johannesburg

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