



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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

DATE

SIGNATURE

CASE NUMBER: 18/19420

In the matter between

M, A

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

DOSIO AJ:

INTRODUCTION

- [1] This is an action for damages sustained by the plaintiff resulting from an accident that occurred on the 8th of September 2017.
- [2] The parties settled the issue of merits 80/20 in the plaintiff's favour and general damages in the amount of R700 000.00 pre-apportionment.

- [3] The defendant offered an undertaking for future medical treatment relating to the injuries sustained in the motor vehicle collision, limited to 80%.
- [4] The only issue to be decided is the loss of income (past and future) and the contingencies to be applied.
- [5] One witness was called for the plaintiff, namely the industrial psychologist, Ms Lee Leibowitz ("Ms Leibowitz") and then the plaintiff's case was closed. The defendant called no witnesses and closed its case.
- [6] The trial proceeded with the exclusion of the defendant's industrial psychologist's report. The defendant had obtained an industrial psychologist's report, but it was filed late. I was accordingly only presented with the plaintiff's actuarial report, as the defendant did not compile one.
- [7] Joint minutes were compiled in respect to the reports of the orthopaedic surgeons, the occupational therapists, and the clinical psychologists.
- [8] The parties agreed that the summary of the medico-legal evidence, as compiled by the plaintiff's counsel, could be handed up as a reflection of the injuries sustained by the plaintiff and the sequelae.

Injuries

- [9] According to the plaintiff's appointed orthopaedic surgeon, Dr. Sher, the plaintiff sustained a closed head injury with concussion and a GCS score of 12/15 with a small left side subarachnoid haemorrhage. The head injury was considered to be moderately severe. The plaintiff also sustained a fracture of the cervical spine at level C2, which the experts considered to be moderately severe. According to the orthopaedic surgeon, the plaintiff would experience on-going symptoms attributable to the cervical spine, which may be aggravated by physical or psychological stress. From an orthopaedic point of view the C2 fracture stabilized satisfactorily, leaving the plaintiff with mild long-term impairment which could impact on her productivity. According to the orthopaedic surgeon, the plaintiff's working capability has probably been unaffected.

- [10] The plaintiff's appointed neurologist, Dr. Townsend opined that due to neurocognitive and neuropsychological sequelae of the head injury, the plaintiff's employment has been negatively affected. The plaintiff is fortunate that her husband is able to help her, as they are both estate agents. Dr Townsend's opinion is that the plaintiff is an extremely vulnerable individual in the open labour market as she sustained a moderate to severe primary diffuse traumatic brain injury and sustained a fracture of her C2 vertebra.
- [11] The parties' appointed neuropsychologists agree in their joint minute, that there is no evidence of any significant psychiatric condition, behavioural disorder or significant injury prior to the accident under discussion. According to the plaintiff's schooling and occupation, she is considered to be of average intelligence pre-accident. It is further agreed that post-accident, based on objective information, performance results and collateral documentation, that the plaintiff's traumatic head injury resulted in long-term neuropsychological difficulties. Tests done further revealed some cognitive difficulties and a travel related anxiety, post-traumatic stress, depression and a reduced tolerance. There is a decrease in her quality of life and her emotional, physical and cognitive difficulties which have affected her overall functioning in personal, occupational and social spheres. Although the plaintiff returned to her work as an estate agent, post-accident, she now does mostly administration tasks which she executes with difficulty due to the cognitive difficulties. The plaintiff is limited in going to see clients and this has resulted in financial loss. The plaintiff is to undergo thirty five sessions of psychotherapeutic intervention.
- [12] The defendant's appointed neurosurgeon, Dr. Okoli, regards the plaintiff's brain injury as moderate, however the plaintiff has since developed a mood disorder, low self-worth, headaches, forgetfulness and probably has become more tense as she grinds her teeth in her sleep. Dr Okali confirmed that the C2 fracture has caused impaired neck mobility. He rated her whole person impairment as 32%.
- [13] The plaintiff's occupational therapist, Sharilee Fletcher ("Ms Fletcher"), opines that although the plaintiff meets the physical demands of her previous occupations which were sedentary in nature, namely as an administrator, receptionist, personal assistant and manager, she will find it difficult to cope from a cognitive, endurance and perceptual perspective. Her mental endurance would significantly limit her abilities to cope with a full eight (8) hour day. She is fortunate to work with her husband who is

understanding of her difficulties since the accident. It is unlikely that this would be the case in the open labour market.

- [14] The plaintiff's appointed educational psychologist, Alet Mattheus, recorded that pre-accident the plaintiff obtained a matric at Die Fakkel high school in 1989 and a N4 qualification at the Insurance Institute of South-Africa in 2004. At the time of the accident she was busy with her N4 in Real Estate. She is currently awaiting her N4 Certificate. Pre-accident she would probably have been able to complete her N4 in real estate (NQF Level 4) and successfully complete the professional designation exam which would have allowed her to work independently as an estate agent and to start her own agency. Post-accident taking into consideration the severity of the brain injury, the educational assessment results, revealing neurocognitive difficulties impacting on her overall functioning, the plaintiff would probably no longer be in a position to complete the professional designation examinations of real estate and therefore not be able to practice independently.

The evidence of the Industrial psychologist Lee Leibowitz

- [15] Ms Leibowitz testified that she interviewed the plaintiff on the 6th of March 2019, with the purpose of establishing her earnings at the time of the accident and also to consider the impact of the plaintiff's injuries on her past and future loss of income.
- [16] This witness testified that at the time of the accident the plaintiff worked as a sales associate for a real estate agency and held the status of an intern. This witness was able to determine the plaintiff's salary as she had access to an IRP 5 for the 2018 year of assessment, created prior to the plaintiff's accident.
- [17] In the pre-accident scenario she postulated the plaintiff's income on two scenarios.
- [18] Scenario one, which this witness indicated was the more likely one, the plaintiff would remain as an estate agent and would've continued working as a sales associate in an intern position. Ms Leibowitz stated the plaintiff would have become an estate agent, (as this is what the plaintiff told her she wanted to be) and also based on the educational psychologist's report who stated that the plaintiff could have become an estate agent in the pre-morbid scenario.

- [19] In respect to the second scenario, based on the plaintiff's past experience, where she worked as a receptionist and secretary, if all else failed, she could go back and do a similar job. Ms Leibowitz stated this was the less likely scenario as the plaintiff had not done this type of work for many years and she enjoyed working as an estate agent.
- [20] Ms Leibowitz testified that the plaintiff returned in February 2018 to work as a real estate sales associate where she still holds the position of an intern. The plaintiff did however inform this witness that after the accident she has a fear of driving and relies on her husband to take her to work related commitments. The plaintiff informed her that she has difficulty remembering her clients and the properties which are for sale and that she has lost momentum to keep going.
- [21] This witness stated that regarding the plaintiff's earnings, it was difficult to postulate, however, at the time of the accident which was on the 8th of September 2017, the plaintiff was earning a monthly average of R32 065.00 per month. Post-accident (from March 2018 to the 28th of February 2019), the plaintiff earned an average income over a 12 month period of only R6 066.78. This witness concluded that in light of all the opinions of the relevant experts, the plaintiff is not functioning at her pre-accident levels and will not be able to achieve her pre-accident earnings. This witness stated that in her opinion, if the plaintiff is unable to continue with her current occupational pursuits, and if her husband was not there to help her, realistically speaking, she would have difficulty finding other work.

THE LAW

Contingencies

- [22] To claim loss of earnings or earning capacity, a patient must prove the physical disabilities resulting in the loss of earnings or earning capacity and also actual patrimonial loss. *Rudman v Road Accident Fund* 2003(SA 234) (SCA).
- [23] There must be proof that the disability gives rise to a patrimonial loss, this in turn will depend on the occupation or nature of the work which the patient did before the accident, or would probably have done if he had not been disabled. *Union and National Insurance Co Limited v Coetzee* 1970(1) SA295 (A) AT 300A.

- [24] In the case of *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at Paragraph [9] at 587 to 588 the court referred with approval to The Quantum Yearbook, by R Koch under the heading 'General contingencies', where it states that when:

“assessing damages for loss of earnings or support, it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is the prerogative of the Court. . . .”

- [25] The percentage of the contingency deduction depends upon a number of factors and ranges between 5% and 50%, depending upon the facts of the case. (*AA Mutual Association Ltd v Maqula* 1978(1) SA 805 (A) 812; *De Jongh v Gunther* 1975(4) SA 78 (W) 81, 83, 84D; *Goodall v President* 1978(1) SA 389 (W) 393; *Van der Plaats v SA Mutual Fire & General Insurance Co Ltd* 1980(3) SA 105(A) 114-115A-D).

- [26] The advantage of applying actuarial calculations to assist in this task was emphasised in the leading case of *Southern Insurance Association Ltd v Bailey* 1984 1 SA 98 (A) 113H-114E , where the Court stated :

“Any enquiry into damages for loss of earning capacity is of its nature speculative... 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.”

- [27] Where the method of actuarial computation is adopted, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations". He has "a large discretion to award what he considers right". One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the plaintiff may in the result have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic

conditions. The amount of any discount may vary, depending upon the circumstances of the case. (see *Southern Insurance Association Ltd supra*).

- [28] Over time, our courts have accepted that the extent of the period over which a plaintiff's income have to be established has a direct influence on the extent to which contingencies have to be accounted for. Put differently, the longer period over which unforeseen contingencies can have an influence over the accuracy of the amount adjudged to be the probable income of the plaintiff, the higher the contingencies that have to be applied. 1978 (1) SA 389 (W) 392H-393 G. *Goodall v President Insurance Co Ltd*

EVALUATION

- [29] I cannot find fault in the calculation of Ms Leibowitz regarding the fact that she only divided the income from 1 March 2017 to 28 March 2018 by 7 months instead of 12, as it is clear that the plaintiff was off work for 5 months from the 8th of September 2017 until February 2018. However, I do question why Ms Leibowitz never took into consideration previous IRP5's of the plaintiff. When she was asked by the defendant's counsel why she didn't comment on the previous IRP5's she stated "No reason". The IRP5 for 2016 reflects an income earned of R43679.00. The IRP5 for 2017 reflects an income earned of R86799.00. Ms Leibowitz stated that she used the information of what the plaintiff was earning at the time of the accident. Ms Leibowitz referred to the income earned for the 2018 year of assessment which amounts to R224 455.00. This is the highest of the three and is the amount most favourable to the plaintiff. During cross examination she was asked by the defendant's counsel if she knew whether South Africa is going through a recession and whether this may have an effect on the sale of properties to which Ms Leibowitz stated she was not a real estate agent nor an economist, however she agreed that the market was depressed. She also agreed that the market condition would have an effect on earnings and that this could affect the earnings generated by estate agents.

Pre-morbid contingencies

- [30] From the learned Koch's, *The Quantum Yearbook*, it is normal that 0.5% per annum be applied for the remainder of the plaintiff's working life of 20 years since the accident. This will amount to 10%. However, it would not be unreasonable to apply a slightly higher contingency due to the uncertainty of commission income in scenario one. In addition, I bear in mind that Ms Leibowitz did not take an average of the earnings of the

plaintiff for the three years preceding the accident.

Post-morbid Contingencies

- [31] Post-morbidly the plaintiff is a changed individual, as is evident from the summary of the expert reports. As per the joint minutes of the orthopaedic surgeons the cervical injury will probably leave the plaintiff with mild long term impairment but her working capability has probably been unaffected. As per the joint minutes of the occupational therapists, the plaintiff would be able to perform work in the light and sedentary categories, but she would find it challenging to compete in the open labour market. As per the joint minute of the clinical psychologists some cognitive difficulties exist and the plaintiff presents with symptoms of travel related anxiety, post-traumatic stress, depression and reduced tolerance.
- [32] The plaintiff was born on the 8th of March 2017. She was 45 years of age and healthy at the time of the accident. She is presently 47 years of age. She holds a grade 12 and she additionally completed an N4 in insurance and at the time of the accident was in the process of completing an N4 in Real Estate.
- [33] She is presently employed at Remax, but is mostly doing administrative work for her husband and herself. She is at risk of remaining unemployed should she loose her current employment. She is likely not to meet her pre-morbid educational goals of qualifying as an independent estate agent.
- [34] Considering the evidence of Ms Leibowitz I have considered scenario one as being the more favourable scenario and have considered the plaintiff's actuarial report based on the figures that Ms Leibowitz had at her disposal. In the first scenario the actuary found that an amount of R1 955 002.00 was a reasonable amount for the loss of earnings.
- [35] The provision for contingencies falls squarely within the subjective discretion of the court as to what is reasonable and fair. This will depend upon the underlying assumptions made which are not the domain of the actuary.
- [36] Plaintiff's counsel argued that a 10% in the pre-morbid scenario would be reasonable because she has twenty years left at 0.5% per annum. In the post-morbid scenario it

was argued that a 40% contingency would be appropriate because if she lost her job she would be unemployable.

[37] As stated by the joint minutes of the plaintiff's orthopaedic surgeon, namely, Dr Scher and the defendant's orthopaedic surgeon, namely, Dr Sithebe, her working capability will probably be unaffected. Taking into consideration the joint minute of the occupational therapists, namely Ms Fletcher and Mr Kuku, it is important to note that Mr Kuku considered the clinical psychologists comment that the plaintiff's *"neuropsychological profile is expected to have an impact of significance on her functioning in the formal work context, but it is not expected to prevent her from competing in the open labour market. In this regard, her functioning in the work context is likely to fluctuate, as her neurocognitive deficits are significantly under the influence of her chronic pain and psychological symptoms. Should her pain levels be adequately managed, and her psychological problems adequately addressed, her performance at work may likely improve and be more consistent."*

[38] I find that resulting from the fluctuations in the property market, which may be attributable to the depressed market, that a higher contingency should be applied pre-morbid than the 10% suggested by the plaintiff's counsel. In addition, due to the fact that there are indications that the plaintiff after coming back to work is coping better, and also due to the fact that the market is depressed and the plaintiff has only sold three houses since her return to work, that a lower contingency should be applied post-morbid than the 40% suggested by the plaintiff's counsel. I accordingly find that 20% be applied pre-morbid and 30% post-morbid.

ORDER

1. The defendant is ordered to pay a capital amount of R560 000.00 (FIVE HUNDRED AND SIXTY THOUSAND RAND) in respect of general damages and a capital amount of R707352.80 (SEVEN HUNDRED AND SEVEN THOUSAND THREE HUNDRED AND FIFTY TWO RANDS AND EIGHTY CENTS (post apportionment) in respect of the plaintiff's claim for loss of earnings. Payment shall be made into the trust account of the plaintiff's attorneys, details as follows:-

Mokoduo Erasmus Davidson Attorneys Trust Account
First National Bank, Rosebank Branch

Account Number: 62222488290

Branch Code: 253305.

2. The defendant is ordered to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, for the costs of 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 her arising out of the injuries sustained by her in the motor vehicle collision of 08 September 2017, after such costs have been incurred and upon proof thereof, limited to 80%.
3. The defendant will pay the agreed or taxed party and party High Court costs of the action up to and including trial costs of 15 and 16 May 2019, such costs to include:-
 - 3.1 the costs attendant upon the obtaining of payment of the capital amount referred to in paragraph 1 above;
 - 3.2 all reasonable travelling and accommodation costs of the plaintiff to attend all medico-legal appointments of the Defendant and to attend at relevant consultations in preparation for trial and the trial itself;
 - 3.3 the reasonable preparation, qualifying, reservation and travelling and accommodation fees, if any of all the plaintiff's experts. Such experts to include, but not limited to, Dr Scher, Dr Fourie (Burger Radiologist), Dr Makua, Dr Ramagole, Dr Townsend, A Mattheus, T da Costa, S Fletcher, L Leibowitz, W Loots, if any as may be agreed or allowed by the Taxing Master;
 - 3.4 time spent in the preparation of indexes and a minimum of 6 (six) copies of said bundles; and
 - 3.5 the plaintiff's attorneys shall serve the notice of taxation on the defendant's attorneys and shall allow the Defendant 14 (fourteen) court days within which to make payment of such costs.
 - 3.6 The plaintiff entered into a valid contingency fee agreement with her

attorney of record.

D DOSIO
ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the Plaintiff
Instructed by:

Adv. A.M. Van Der Merwe
NED Attorneys

On behalf of the Defendant
Instructed by:

Adv.M.R Latib
Tasneem Attorneys

Heard on 16th May 2019
Judgment handed down on 24th May 2019