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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 48112/2014

DATE: 07/11/2017

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

In the matter between:

CATHERINE PHALANE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

D S FOURIE, J:

[1] The plaintiff instituted action against the defendant for damages suffered as a result of personal injuries sustained in a motor vehicle collision that occurred on 26 June 2011. On 20 May 2015 and by agreement between the parties it was ordered (insofar it is relevant) that the issues of liability and quantum be separated and that the defendant is liable to pay 100% of the plaintiff's agreed or proven damages. The matter was allocated to me to decide the issues relating to

quantum.

[2] During the course of the proceedings it was agreed between the parties that the defendant shall furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act No 56 of 1996. It was also agreed, for reasons not relevant at this stage, that the claim for general damages be separated and postponed *sine die*. This will be taken care of in the draft order which I intend to make an order of Court.

[3] The remaining issues relate to the plaintiff's claim for loss of earnings or earning capacity. The parties have agreed to formulate the issues as follows:

- (a) Whether the plaintiff is employable in the open labour market?
- (b) If she is indeed employable in the open labour market, what position(s) will she be able to obtain?
- (c) Whether the position(s) referred to above, is sustainable?
- (d) Contingencies remain the prerogative of the Court. It is noted that the calculation as it stands reflects the position of the plaintiff's functional unemployability. Depending on the Court's finding, alternative calculations will be obtained.

[4] It should be pointed out that the defendant came to Court without any witnesses. The defendant insisted that the plaintiff is "employable with limited capacity". It was agreed between the parties that, save for the medico- legal report prepared by the plaintiff's industrial psychologist, all other reports filed by the plaintiff may be accepted as evidence.

INJURIES:

[5] It is common cause that the plaintiff suffered a comminuted fracture of the right supracondylar. She was referred to the George Mukhari Hospital where she was placed in traction awaiting surgery. On 4 July 2011 an open reduction and internal fixation of her right femur was performed.

[6] According to the orthopaedic surgeon the internal fixation (pin) has been introduced through the knee and the distal end is sitting proud to the bone and causing erosion on the patella. She needs surgery to remove the metal pin but even thereafter, taking into account her age of 33 years, she is going to develop degenerative changes in her right knee which will necessitate a knee replacement at the age of 50.

[7] The plaintiff has a significant shortening of her right leg and, according to measurements it is 25 mm, but when she stands on wooden blocks to place her pelvis in a horizontal plane, it equates to 30 mm. It was reported to the orthopaedic surgeon by the plaintiff that she experiences pain in her right knee when she does a lot of walking, the right knee is relatively stiff with loss of movement and she is walking with a limp. In the long-term she has a guarded prognosis with the shortening of the leg and the change in the contour of the distal end of her right femur with damage to the knee joint.

[8] According to the report of the plaintiff's clinical psychologist the plaintiff developed serious behaviour disturbances that are coloured by symptoms of a post-traumatic stress disorder with delayed onset that is aggravated by an anxiety disorder and mild depression. A serious cause for concern is her unstable mental state and psychotic-like features that seem unusual. According to this report the prognosis of a post-traumatic stress disorder and anxiety are unpredictable. Not everybody recovers completely from these disorders. The symptoms may fluctuate and become worse when the subject is under stress.

VIVA VOCE EVIDENCE:

[9] The plaintiff testified as well as an industrial psychologist, Ms Viljoen. Pursuant to the close of the plaintiff's case, the defendant has closed its case without calling any witnesses.

THE PLAINTIFF:

[10] The plaintiff testified that she has a Grade 11 as well as Grade C security qualification. Prior to the accident she was self-employed as a hairdresser and vendor selling chickens. She was earning approximately R2 000.00 per month. After the accident she was unable to continue as a hairdresser as she is unable to stand for a long period of time. She is also unable to continue as a vendor because she no longer has a relationship with the man who provided her with stock. She is unable to collect the stock herself.

[11] After the accident she obtained employment as a security guard at a retail shop in Bela-Bela. This required a lot of standing and walking which she was unable to do. At some stage her employment was terminated whereafter she became unemployed. According to her she is still experiencing pain on a daily basis and she can only stand for a limited period whereafter her leg will become swollen and her back will then also become painful.

VILJOEN:

[12] Ms Viljoen is an industrial psychologist who prepared a comprehensive and detailed report. She testified that she had two consultations with the plaintiff and she was also provided with copies of medico-legal reports prepared by other expert witnesses. She testified that taking into account the plaintiff's limited career history, financial difficulties which prevented her from obtaining a driver's licence and completing further studies, the plaintiff would not have progressed further than a Grade C security. She also pointed out that the plaintiff's employment at the retail store was terminated for reasons not related to the accident, but subsequently she was offered a transferral to another branch of the same store which did not materialise as the plaintiff was experiencing difficulties in doing her job. This was confirmed by Mr Ngobeni, the plaintiff's superior, who informed the witness that she struggled to stand and to be on her feet for extended periods of time. According to him the plaintiff also took frequent sick leave as she indicated that she could not cope.

[13] The witness also referred to the medico-legal report of Dr Moloto which she

took into account. Dr Moloto is an orthopaedic surgeon who prepared a medico-legal report at the request of the defendant. According to that report, as referred to by the witness, the doctor was of the view that the injury which the plaintiff had sustained has not affected her ability to work, but *"in future her right knee may limit her work to sedentary type"*. According to the witness the plaintiff is not suitably qualified, neither has she the necessary experience, to perform sedentary work such as a receptionist, administrative clerk or control room operator. Taking also into account her psychological disadvantage, the witness was of the view that the plaintiff should be regarded as functionally unemployable as a result of the accident.

[14] This view was put to the test in cross-examination. The witness was challenged to explain why the plaintiff is regarded as functionally unemployable, whereas she was in fact employed as a security guard. The witness again deferred to the opinion of Dr Moloto who, according to his report, is of the view that the right knee injury may limit the plaintiff to sedentary type of work. This residual work capacity is, according to the witness, not within her current or potential competency framework. This means that the plaintiff is for all intents and purposes unemployable.

DISCUSSION:

[15] I have had the opportunity to see and hear the plaintiff and Ms Viljoen in the witness box. The plaintiff's evidence was not seriously challenged and I have no reason to reject any part thereof. Ms Viljoen prepared a detailed report referring in a balanced way to many other medico-legal reports which she took into account. She was well prepared and stood her ground well in cross-examination. She appeared to be determined and testified with confidence. I never gained the impression that she was biased in any way. Her opinion that the plaintiff should be regarded as functionally unemployable is well-founded, bearing in mind that she also deferred to the opinion of the defendant's orthopaedic surgeon that the knee injury may limit the plaintiff to sedentary type of work. Her view that the plaintiff is not suitably qualified for this kind of work goes unchallenged. I

therefore accept, without hesitation, that the plaintiff is functionally unemployable.

[16] Counsel for the defendant indicated during argument that if I would come to the conclusion that the plaintiff is functionally unemployable, the actuarial calculation prepared on this basis can be accepted as correct, save for the question as to what percentage contingency deduction should be applied for future loss of income. The actuarial calculation dated 18 October 2017 indicates that the plaintiffs past loss of income amounts to R111 495.00 after a 5% contingency has been applied. Both parties accept this deduction to be appropriate. The amount calculated for future loss of earnings amounts to R914 783.00 before any contingencies have been applied. Plaintiff's counsel suggested a 15% deduction, whereas defendant's counsel argued for 30%.

[17] Contingencies are the hazards of life that normally beset the lives and circumstances of ordinary people (*AA Mutual Ins Co v Van Jaarsveld* reported in Corbett & Buchanan, The Quantum of Damages, Vol II 360 at 367) and should therefore, by its very nature, be a process of subjective impression or estimation rather than objective calculation (*Shield Ins Co Ltd v Booysen* 1979 (3) SA 953 (A) at 965G-H). Contingencies for which allowance should be made, would usually include the following:

- (a) the possibility of illness which would have occurred in any event;
- (b) inflation or deflation of the value of money in future; and
- (c) other risks of life such as accidents or even death, which would have become a reality, sooner or later, in any event (Corbett, The Quantum of Damages, Vol I, p 51).

[18] In the Quantum Yearbook (by Robert Koch, 2017 Edition, p 126) the learned author points out that there are no fixed rules as regards general contingencies. However, he suggests the following guidelines:

"Sliding scale: Yz% per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in the middle age..."

Normal contingencies: The RAF usually agrees to deductions of 5% for past loss and 15% for future loss, the so-called normal contingencies."

[19] I accept that this approach is only a guideline as contingencies, by its very nature, is a process of subjective impression or estimation rather than objective calculation. In the present matter it is common cause that the plaintiff is 33 years old and would have retired, but for the accident, at age 65. This means that the "relevant period of risk" for purposes of determining a contingency deduction is 32 years. Taking into account that the plaintiff is neither a youth, nor a person in her middle age, it appears to me that a 15% contingency deduction for future loss would be fair and reasonable. The total net loss therefore amounts to R889 061.00 calculated as follows:

(a) Past loss with a 5% contingency deduction as calculated by the actuary

(b) Future loss as calculated by the actuary Less 15% contingency deduction

R111 495.00
R914 783.00
<u>-R137 217.00</u>
<u>R889 061.00</u>

[20] This means that a total amount of R889 061.00 should be awarded to the plaintiff for past and future loss of earnings. This amount will be reflected in the draft order which I intend to make an order of Court. The certificate for future medical expenses as well as the separation and postponement of the claim for general damages will also be taken care of in the draft order.

ORDER:

In the result I grant the following order:

The draft order attached hereto and marked "X", is made an order of Court.

DS FOURIE
JUDGE OF THE HIGH COURT
PRETORIA

Date: 7th November 2017

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

On this the 7th of **November 2017**, before His Lordship,
Mr Justice Fourie,J

CASE NO.: 48112/2014

In the matter between:

CM PHALANE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DRAFT COURT ORDER

1. The Defendant is ordered to pay an amount of R 889,061.00 (EIGHT EIGHT NINE ZERO SIX ONE RAND)

in respect of Loss of Earnings, which amount shall be paid within 14 days to the credit of the trust account of the Plaintiff's Attorneys of record, Savage Jooste & Adams Inc, Pretoria, whose trust account details are as follows:

Nedbank name : NEDCOR ARCADIA
Account type : TRUST ACCOUNT

Branch code : 16-33-45-07
Account no : [...]
Reference no : Mr Makole / KP12

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, No 56 of 1996, to compensate Plaintiff for 100% of the cost of future accommodation in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to Plaintiff resulting from injuries sustained by her as a result of an accident that occurred on **26 June 2011**.

3. The issue of General Damages is separated from the other issues in terms of Rule 33(4) and postponed *sine die*.

4. The Defendant is ordered to pay the Plaintiff's costs of suit, subject to the discretion of the Taxing Master, on the Party-and-Party High Court Scale, which costs include (but not be limited to):

4.1. The costs of attending to the examinations and obtaining the medico-legal reports, addendum reports (if any), RAF4 reports (where applicable), Joint Minutes (if any), as well as the qualifying, preparation, reservation and attendance fees (if any), of the following experts:

4.1.1 Dr JJ van Niekerk (Orthopaedic Surgeon) and RAF4;

4.1.2 Dr L Berkowitz (Plastic and Reconstructive Surgeon) and RAF4;

4.1.3 Dr DL Kirsten (Pulmonologist);

4.1.4 Dr DG Maluleke (Clinical Psychologist);

4.1.5 Ms van Wyk [Anneke Greeff] (Occupational Therapist);

4.1.6 Ms Viljoen [Kobus Prinsloo] (Industrial Psychologist);

4.1.7 Mr Whittaker [Algorithm] (Actuary).

4.2 The cost of senior-junior counsel, including her preparation and day fee of 1 November 2017.

4.3 The reasonable costs of transportation calculated at the AA rate and reasonable accommodation of the Plaintiff to attend the medico-legal examinations for both the Plaintiff and Defendant;

4.4 The cost of preparation of four trial bundles as per the Gauteng High Court Directives.

5. No interest will be payable on the capital sum, provided payment is made 14 days after the Court Order. Should payment not be made timeously, the Defendant will pay interest at the applicable *mora* interest rate per annum from due date to date of payment.

6. The party and party costs are payable within 14 days after receipt by the Defendant's attorneys of the stamped allocator, thereafter interest will be charged at the applicable *mora* interest rate per annum from date of the stamped allocator to date of payment.

7. The Plaintiff entered into a Contingency Fees agreement, signed on 21 May 2014.

BY ORDER

REGISTRAR

For Plaintiff: Adv M van Rooyen
(Instructed by Savage Jooste & Adams: 012 452 8200)

For Defendant: Adv F Matika
0730097867

Date: 7th November 2017

X

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GAUTENG DIVISION, PRETORIA

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BY ORDER

REGISTRAR

For Plaintiff: Adv M van Rooyen
 (Instructed by Savage Jooste & Adams: 012 452 8200)

For Defendant: Adv F Matika
 0730097867