REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

DATE SIGNATURE

CASE NUMBER: **5199/2017**

30/8/2019

In the matter between

NOSIPHO ZINTLE GLENICE MAPHALALA Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

R DU PLESSIS (AJ)

THE FACTS

[1] Plaintiff instituted action in 2017 against the defendant based on a collision that occurred on or about 8 January 2014 at or near the intersection of Booysens Road and John Street, Johannesburg.

[2] The collision occurred between a green Nissan vehicle bearing registration number [….] driven by E Tsamba, and a white Toyota vehicle bearing registration number [….] driven by H Mhlanga. The plaintiff was a passenger in the lastmentioned insured vehicle at the time of the collision. It was alleged that the collision was caused by the sole negligence of the first insured driver on various grounds.

[3] The plaintiff claimed in the particulars of claim to have sustained serious bodily injuries consisting of multiple facial fractures, a forehead laceration, bilateral occipital condyle fracture, fracture of C2, C7 and T1, and she lost several teeth.

[4] The plaintiff has received medical treatment, and will receive medical treatment in future on a permanent basis and for life, she has incurred medical costs and will incur future medical costs, and she has suffered a loss of earnings and will suffer a future loss of earnings on a permanent basis and for life.

[5] She also claimed for a loss of amenities of life, pain, suffering, disfigurement and disability in the past and in the future.

[6] It is not necessary to indicate the amounts that were claimed by the plaintiff save for the claim of the plaintiff for purposes of loss of

earnings, and a future loss of earning capacity. For that claim, the plaintiff originally claimed payment of an amount of R1.5 million, which was annexed later.

[7] The claims for the other amounts became settled between the parties as follows:

7.1. past hospital, medical and related expenses were settled between the parties, in an unknown amount;

7.2. future medical related expenses – the defendant tendered a statutory undertaking for 100%;

7.3. general damages were settled in an amount of R450 000.00.

[8] This court therefore only has to deal with the question of past loss of earnings, the loss of future earning capacity, and costs.

[9] The matter came before me on 10 June 2019, when all the quantum issues were still in dispute, but the abovementioned settlements were entered into thereafter.

[10] After judgment was reserved, plaintiff brought an application in terms of rule 28(10) for replacing the amount of R1.5 million with the amount of R4 726 990.00 in the heading preceding paragraph 15, and in paragraph 18, and in prayer (c) of the particulars of claim. This application was unopposed and the application for the amendment is therefore granted.

[11] One further dispute existed between the parties, namely the effect and extent of admissions made at the last pre-trial conference.

[12] I will therefore deal with that issue firstly, which also relates to the nature of the evidence presented, and secondly with the issue of

loss of earnings and loss of future earning capacity.

THE PRE-TRIAL CONFERENCE

[13] A pre-trial conference was held on 29 April 2019, which was the second pre-trial conference between the parties.

[14] The plaintiff recorded the following pertaining to the plaintiff's expert witness reports:

"11. The plaintiff records that the following expert-witness reports have been filed in terms of rule 36(9)(a)&(b):

11.1 Dr K Le Fevre (psychiatrist) filed on 24 April 2017;

11.2 Dr K Cronwright (plastic surgeon) filed on 24 April 2017.

12. The plaintiff further records that the following expert-witnesses reports will be filed in terms of rule 36(9)(a)&(b) by no later than 13 May 2019:

12.1 Dr Z Domingo (neurosurgeon);

12.2 Ms M Le Roux (occupational therapist)

12.3 Ms K Kotze Blake & Associates (industrial psychologist);

12.4 Munro Consulting (actuary)."

[15] The following recordals were made and admissions were sought by plaintiff from defendant in terms of the Practice Manual of the High Court of South Africa, Gauteng Division, Pretoria, as amended on 1 October 2018:

"13. The parties agree that the defendant shall indicate, by no later than 5 (five) court days before the hearing, which of the

expert reports delivered by the plaintiff it admits.

14. *The parties agree that should the defendant fail to indicate by the said date in paragraph 13 supra that it does not admit any of the reports, it is agreed that such report shall be deemed to have been admitted.*

15. *It is agreed that if the defendant denies the expertise and findings of the plaintiff's experts, the defendant is required to provide reasons for its denial, by no later than 5 (five) court days before the hearing.*

16. *It is agreed that if the defendant denies the factual allegations and opinions contained by the plaintiff's various expert reports, the defendant is required to state, by no later than 5 (five) court days before the hearing.*

16.1 *Which factual allegations the defendant denies and the reasons therefor?*

16.2 *What the defendant's contentions are in respect of the aforesaid factual allegations?*

16.3 *Which of the opinions expressed do the defendant deny and the reasons therefor?*

16.4 *What are the defendant's contentions in respect of the aforesaid opinions?*

17. *If the defendant does not deny any fact(s) and the opinions contained in an expert report, by no later than 5 (five) court days before the hearing, it is agreed that the defendant shall be deemed to have admitted such facts and opinions.*

18. It is agreed that the defendant shall state whether it admits the injurie(s) and sequelae as set out in the plaintiff's various medico-legal reports and if not, the defendant is required to provide reasons for its denial thereof, by no later than 5 (five) court days before the hearing.

19. If the defendant does deny any fact(s) contained in an expert report filed by the plaintiff, it is agreed that the evidence regarding such a fact(s) shall be introduced by way of an affidavit in terms of rule 38(2), to save costs."

[16] It was further recorded that the defendant does not intend filing any expert reports and defendant in fact did not file any expert reports. There was no dispute about the correctness of the wording of the pre-trial minute.

[17] It was common cause between the parties that the defendant did not take any of the actions referred to above pertaining to the required admissions, and the question therefore arose as to what extent the expert reports of plaintiff were admitted, insofar as the correctness of the contents thereof are concerned, in respect of both the facts and opinions contained therein.

[18] This question brings to the fore what exactly may be construed as an express admission alternatively a deemed admission by default, of certain facts and evidence in a trial, with specific reference to pre-trial proceedings.

[19] Parties may agree before the commencement of a trial that certain facts and evidence, or documents are admitted. That includes the

authenticity of a document and/or the contents of a document.

[20] Parties should normally also file a joint minute of expert witnesses wherein such experts may agree on certain facts and/or evidence and/or opinions.[1] Such an agreement may either bind the parties, or only the experts as witnesses, depending on the agreement between the parties.

[21] Where certain facts are agreed to between the parties in civil litigation, the Court is bound by such agreement, even if it may be sceptical about those facts. In respect of expert witnesses a litigant may not repudiate any agreement pertaining to facts agreed to between experts, unless it does so clearly, and at the very latest at the outset of a trial. The same is applicable to an expert opinion, but it depends on the agreement between the parties, and a Court is not necessarily bound to an agreed opinion of experts.

[22] Facts agreed upon by parties and also experts, are binding, unless a litigant timeously repudiates such an agreement - that is before commencement of the trial.[2]

[23] A party should not without special circumstances be allowed to deviate from an agreement about agreed facts and evidence reached at a pre-trial conference, which would negate the object of

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1 Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft fűr Schädlingsbekämfung GmbH 1976 (3) SA 352 (A); Jacobs v Transnet Ltd t/a Metrorail 2015 (1) SA 139 (SCA); Thomas v BDC Sarens (Pty) Ltd 2012 (ZAGPJHC) 151, par13; Malema v Road Accident Fund 2017 (ZAGPJHC) 275 at par94.

2 Thomas v BDC Sarens (Pty) Ltd 2012 (ZAGPJHC) 161; Bee v Road Accident Fund (2018) ZASCA 52 (29 March 2018) at paras64 – 80.

rule 37.[3]

[24] Together with the abovementioned, the law pertaining to admissions should be considered. Where a party makes an adverse statement, for instance in a letter, or in pre-trial documentation, that requires an answer from the opposing party, and if it is not answered, the question arises whether there is an admission of the truth of the assertions made. That depends on ordinary commercial practice and the circumstances of each case.

[25] An absence of a reply where one would normally expect a reply, will usually be evidence of an admission of the correctness of averments made.[4]

[26] It is clear from the wording pertaining to the admissions sought by plaintiff from defendant above that certain consequences would follow if defendant did not, within the agreed time periods, react to the questions. The consequences would be that the expert reports filed by plaintiff would be deemed to have been admitted, and defendant would be deemed to have admitted all facts and opinions in such expert reports.

[27] There was nothing ambiguous in respect of this agreement, and in my view there is no doubt that the defendant, in fact, without reacting in terms of the agreed time periods set out in the pre-trial

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3 Filta-Matix (Pty) Ltd v Freidenberg & Others 1998 (1) SA 606 (SCA) at 614C – D; MEC v Economic Affairs Environment and Tourism; Eastern Cape v Kruizenga & Another 2010 (4) SA 122 (SCA) at para6; Bee v Road Accident Fund 2018 (4) SA 366 (SCA) at paras64 – 73.

4 See: McWilliams v First Consolidated Holdings (Pty) Ltd 1972 (2) SA 1 (A) at p10D – F; Benefit Cycle Works v Atmore 1927 TPD 524; Seedat v Tucker Shoe Store Company 1952 (3) SA 513 (T); Petzer v Radford (Pty) Ltd 1953 (4) SA 314 (N); Poort Sugar Planters (Pty) Ltd v Umfolozi Cooperative 1960 (1) SA 531 (D); Resisto Dairy (Pty) Ltd v Auto Protection Insurance Company Limited 1963 (1) SA 632 (A); Hamilton v Van Zyl 1983 (4) SA 379 (E) at 388F – G.

minute at least, tacitly agreed to the correctness of the facts and opinions in the expert reports filed by plaintiff, and referred to in the pre-trial minute.

[28] It is clear from Bee v Road Accident Fund 2018 (4) SA 366 (SCA) that in the absence of a timeous repudiation of such an agreement, the facts agreed by the experts enjoy the same status as facts which are common cause on the pleadings, and the same applies to opinions that an expert has expressed in an expert report. The same principles apply in this matter, where defendant did not file any expert reports.

[29] If a litigant for any reason does not wish to be bound to such an agreement, fair warning must be given to the other side, and that must occur before commencement of the trial.

[30] Furthermore, in respect of expert opinions, if a court is minded to reject the opinion on the available evidence, litigants should be alerted by a court so that they can consider introducing any further evidence, if necessary.

[31] That will only occur if the trial court itself is for any reason dissatisfied with an agreement between experts, or an agreement pertaining to the correctness of the opinions of the experts of one of the parties, and alerts the parties to the need to adduce further evidence on the agreed material.

[32] It is also clear from the aforegoing that the defendant:

32.1. admitted the expert reports;

32.2. admitted the expertise and findings of the plaintiff's experts;

32.3. admitted the factual allegations and opinions contained in the expert reports;

32.4. admitted the injuries and the *sequelae* set out in the plaintiff's expert reports.

[33] It follows therefore that the issue of loss of earnings should be adjudicated with reference to and by acceptance of the expert reports delivered by plaintiff. There is no basis for any challenge of those reports not being correct under the circumstances, with reference to the facts or the opinions expressed therein, and I have not found any basis to not accept the correctness of the facts and opinions expressed by those experts in their reports.

[34] There is one aspect that must be highlighted in respect of the aforegoing that the courts have not yet dealt with comprehensively, and that is the question whether any agreed opinions of experts, can bind the parties with reference to any principle or element of a cause of action that must be proved by one of the parties.

[35] There is a clear difference as to whether parties only allow the experts to agree in respect of their opinions, and whether an agreement binds the parties further than only the opinions of the experts. I refrain from dealing with that further herein, but it is an aspect that parties should take into account and consider when reaching agreements during pre-trial conferences.

[36] I am furthermore satisfied that the expert witnesses themselves did not have to be called under the circumstances, and in the

absence of any expert reports filed by the defendant nor any expert witnesses called by the defendant, I am of the view that I am bound to accept the correctness of the contents and opinions of the plaintiff's experts' reports, save where I am duty bound not to do so.

[37] I have considered the criticism levied by the defendant's counsel to the expert reports and the opinions of the expert witnesses of the plaintiff, but I am of the view that such criticism, although it may have constituted cross-examination material, was not sufficient to persuade me to reject the opinions of any of the expert witnesses of the plaintiff as expressed in their reports.

PLAINTIFF'S EXPERT WITNESSES

[38] Karen Kotze, an industrial psychologist, compiled an expert report pertaining to the plaintiff.

[39] She took into account that the plaintiff was in a relationship and that the plaintiff has two children, at the time of the report aged 13 and 4. The plaintiff completed Grade 12 in 1998 and achieved a diploma in Hospitality Management, after a course duration of 3 years. She also completed a computer course at PC College. She worked at McRib in Durban as a waitress previously, and then as an administrative clerk for the period 2004 to 2005.

[40] For the period 15 November 2007 to 27 August 2014, until after the date of the accident, she was employed by Foschini Retail Group (Pty) Ltd at a salary of R7 000.00 per month, plus overtime of R1 260.00, but she resigned owing to accident related *sequelae*

as well as a pregnancy.

[41] From August 2014 to December 2015 she was unemployed, and thereafter she became employed again from January 2016 to present at Maphalala's Transport in Soweto, with remuneration of ±R6 540.00 gross profit per month, and in 2019 she earned approximately R1 550.00 nett profit per month.

[42] Currently the plaintiff is contracted to certain learners for purposes of transportation, and the agreed rates with parents vary. She has to contribute towards a fuel expense as well as remuneration of the driver and her nett profit is therefore only approximately R1 550.00 per month.

[43] She experiences physical challenges daily such as headaches, facial pain, neck pain, backache and a reduced ability to sit for prolonged periods and chew hard foods. She suffers from forgetfulness and poor concentration, as well as emotional liability and anxiousness as a passenger in a vehicle.

[44] She was 32 years old at the time of the accident. Her career had shown rapid progression from general worker at Foschini's in 2007 to store manager in 2013. But for the accident, she would probably have been able to continue to function as a store manager or similar work, and she may have been transferred to bigger stores with higher personnel and turnover rates. She may also have progressed to store manager of large retail branches and/or an area manager.

[45] It can also be reasonably accepted that she would likely have

worked until the normal retirement age of 65, depending on her circumstances. She could have progressed to earn remuneration in line with a shop / store manager in the retail sector, which would equate to R414 358.00 per annum.

[46] According to this expert, the plaintiff's occupational functioning in her pre-accident work role has been negatively impacted by the *sequelae* of the injuries sustained in the accident, which has resulted in a loss of productivity and efficiency. It has further been impacted upon by the psychological and psychiatric *sequelae* of the injuries sustained. That has caused a lack of motivation and drive to succeed, which will be a permanent disadvantage. She is therefore occupationally more vulnerable.

[47] The witness is of the opinion that plaintiff's career prospects have been truncated by the *sequelae* of the injuries sustained in the accident. Her loss of likely earnings could be based on the difference between the likely pre- and post-accident earnings, but earlier retirement would not be necessary, should she continue with treatment.

[48] Dr Domingo produced a report dated 27 December 2017, which indicated the seriousness of the nature of the plaintiff's injuries, in that there is a serious long term impairment or loss of body functions, and a permanent serious disfigurement.

[49] He is of the view that she can work, but in a sedentary capacity, and she will have to be accommodated regarding mechanical neck pain, and will also have to attend rehabilitation physiotherapy. In

his view she would be able to work until normal retirement age.

[50] Dr Le Fevre, a psychiatrist, produced a report dated 27 May 2016, and found that the level of changes pre- and post-accident is considerable. She was a functional mother, partner and worker with a high level job, whereas she is now in pain, has lost self-confidence and feels stressed and unhappy. She also finds it difficult to cope at work.

[51] This again indicates the severity and permanent nature of the psychiatric injuries of the plaintiff.

[52] Dr Cronwright, a plastic and reconstructive surgeon, produced a report dated 8 November 2016, wherein he addressed the problems the plaintiff has experienced regarding the loss of her teeth, the difficulties with headaches, and speech problems. These will impact upon her future earning capacity.

[53] Martinette le Roux, an occupational therapist, produced a report dated 6 June 2018, which highlighted the difficulties that plaintiff experienced when she returned to work after the accident. She could no longer lift and carry heavy items, experienced headaches, could not speak properly, and did not want to communicate with clients. She could not assist customers, struggled to focus and concentrate and was forgetful. She made errors, forgot to carry out instructions and complaints were made about her. She felt that she could not cope and this eventually caused her to resign.

[54] An original actuarial report by Munro Forensic Actuaries calculated

uninjured earnings and injured earnings, on the basis of the facts set out above, pertaining to the plaintiff's loss of earnings.

[55] A further report was introduced by Munro Forensic Actuaries dated 10 June 2019, which was not part of the agreement at the pre-trial conference, but which was also not disputed by the defendant.

[56] It has been argued by plaintiff's counsel that uninjured past earnings reflected in the first Munro report of R727 200.00 should be accepted and uninjured future earnings of R5 760 300.00. It was also submitted that injured past earnings should be accepted as calculated in the second Munro report at R192 600.00 and injured future earnings should be calculated on the basis of R785 300.00, instead of the lower amount of R257 400.00, as calculated in the first Munro report.

[57] I am, however, of the view that the calculation in the second Munro report must be accepted, purely because of the fact that the second report contradicts the first report, and clearly reflects a reconsideration by the actuaries pertaining to the correct figures to be calculated.

[58] The figures that were calculated in the second Munro report, are the following:

58.1.	past uninjured earnings	R 772 700.00
58.2.	future uninjured earnings	R5 796 800.00
58.3.	past injured earnings	R 192 600.00
58.4.	future injured earnings	R 785 300.00
58.5.	past loss of earnings	R 580 100.00

[59] The total loss of earnings therefore amounts to R4 589 300.00.

[60] The only question to determine is whether contingencies of 20% as mentioned in the second Munro report, or 15% as referred to in the first report, should be applied.

[61] The approach to contingencies has recently been explained in the decision of the Road Accident Fund v Kerridge 2019 (2) SA 233 (SCA) at para 40 to 44:

''[40] Any claim for future loss of earning capacity requires a comparison of what a claimant would have earned had the accident not occurred, with what a claimant is likely to earn thereafter. The loss is the difference between the monetary value of the earning capacity immediately prior to the injury and immediately thereafter. This can never be a matter of exact mathematical calculation and is, of its nature, a highly speculative inquiry. All the court can do is make an estimate, which is often a very rough estimate, of the present value of the loss.

[41] Courts have used actuarial calculations in an attempt to estimate the monetary value of the loss. These calculations are obviously dependent on the accuracy of the factual information provided by the various witnesses. In order to address life's unknown future hazards, an actuary will usually suggest that a court should determine the appropriate contingency deduction. Often a claimant, as a result of the injury, has to engage in less lucrative employment. The nature of the risks associated with the two career

paths may differ widely. It is therefore appropriate to make different contingency deductions in respect of the pre-morbid and the post-morbid scenarios. The future loss will therefore be the shortfall between the two, once the appropriate contingencies have been applied.

[42] Contingencies are arbitrary and also highly subjective. It can be described no better than the oft-quoted passage in Goodall v President Insurance Co Ltd where the court said: 'In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practiced by ancient prophets and soothsayers, and by authors of a certain type of almanack, is not numbered among the qualifications for judicial office.'

[43] It is for this reason that a trial court has a wide discretion when it comes to determining contingencies. An appeal court will therefore be slow to interfere with a contingency award of a trial court and impose its own subjective estimates. This court in Road Accident Fund v Guedes set out the circumstances under which an appeal court is entitled to interfere with the trial court's assessment of the appropriate contingency deduction. These are where: (a) there has been an irregularity or misdirection (for example the court considered irrelevant facts or ignored relevant facts); (b) the appeal court is of the opinion that no sound basis exists for the award made by the trial court; (c) where there is a

substantial variation and striking disparity between the award made by the trial court and the award which the appeal court should have made.

[44] Some general rules have been established in regard to contingency deductions, one being the age of a claimant. The younger a claimant, the more time he or she has to fall prey to vicissitudes and imponderables of life. These are impossible to enumerate but as regards future loss of earnings they include, inter alia, a downturn in the economy leading to reduction in salary, retrenchment, unemployment, ill health, death, and the myriad of events that may occur in one's everyday life. The longer the remaining working life of a claimant, the more likely the possibility of an unforeseen event impacting on the assumed trajectory of his or her remaining career. Bearing this in mind, courts have, in a pre-morbid scenario, generally awarded higher contingencies, the younger the age of the claimant. This court, in Guedes, relying on Koch's Quantum Yearbook 2004, found the appropriate pre-morbid contingency for a young man of 26 years was 20% which would decrease on a sliding scale as the claimant got older. This, of course, depends on the specific circumstances of each case but is a convenient starting point."

[62] The plaintiff's counsel submitted that the defendant usually agrees to deductions of 5% for past loss and 15% for future loss, which are referred to as normal contingencies.

[63] He submitted that the contingency for past uninjured earnings

should be 5%, past injured earnings 0%, future uninjured earnings 15% and future injured earnings 15%.

[64] I am of the view that this is a correct approach under those circumstances.[5] It accords with the general approach of the defendant and of the courts.

[65] Therefore, past loss of uninjured earnings amounts to R772 700.00 less 5%, which equals R734 065.00 less past injured earnings of R192 600.00, which equals R541 465.00.

[66] Future uninjured earnings amounts to R5 796 800.00 less 15%, which equals R869 520.00. Future injured earnings amounts to R785 300.00 less 15%, which equals R667 505.00.

[67] Therefore, R4 926 280.00 less R667 505.00 equals R4 258 775.00. The total loss is therefore R4 258 775.00 plus R541 465.00, which equals R4 800 240.00. The total loss of earnings will then amount to R4 800 240.00. However, plaintiff claims R4 726 990.00 in the particulars of claim, and that is therefore the amount that should be awarded.

[68] I have not been asked to make any orders pertaining to the other quantum issues that have been settled, and I have not been provided with any information pertaining to the settlement of past hospital, medical and related expenses.

[69] I therefore intend to grant an order only in respect of loss of earnings, together with costs. Should it be necessary to amend the order, any of the parties can approach me in this regard.

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5 See Dr Robert J Koch, The Quantum Yearbook 2019 p115

[70] I therefore make the following order:

1. The defendant shall pay to plaintiff for total loss of earnings, including past and future loss of earnings, a total amount of R4 726 990.00.

2. The abovementioned amount shall be subject to interest at the current prevailing *mora* interest rate, namely 9% per annum.

3. The defendant shall pay the party and party costs of plaintiff, including all the qualifying costs of the expert witnesses in respect of which the plaintiff filed expert reports, which includes the second Munro actuarial report and which includes the costs of obtaining expert reports and any ancillary costs thereto.

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R DU PLESSIS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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