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**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NUMBER: RAF174/2020

Reportable: YES/**NO**

Circulate to Judges: YES/NO

Circulate to Magistrates: YES/NO

Circulate to Regional Magistrates: YES/NO

In the matter between:-

D[...] J[...] M[...]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

FMM REID, J:

Introduction:

- [1] The plaintiff, an adult female born on 15 April 1997 instituted action against the defendant on the basis of injuries she sustained in a motor vehicle collision that occurred on 30 October 2016 (the collision). In this matter the merits have been settled between the parties in that the defendant admitted 100% liability of the damages resulting from the

collision. The merits were conceded in writing by the defendant.

- [2] The defendant also conceded to provide to the plaintiff an undertaking as contemplated by section 17(4)(a) of the **Road Accident Fund Act** 56 of 1996 (RAF Act) (as amended), to compensate the plaintiff for the costs of future caregiving, case management and future accommodation of the plaintiff in a hospital and / or nursing home, and/or treatment of or rendering of a service and/or supplying of goods to the Plaintiff, after the costs have been incurred and on proof thereof, resulting from the injuries sustained as a result of the collision. The undertaking in terms of section 17(4)(a) by the defendant was also done in writing.
- [3] The issues before court are the plaintiff's claims for loss of earnings and her general damages suffered as a result of the collision.
- [4] The plaintiff is represented by Adv Gianni. The defendant is not represented. After being satisfied that the defendant has been duly informed of the date of set down of the matter, I ruled that the matter proceed in the absence of the defendant's representative or the defendant.

Material background

- [5] On 30 October 2016 along Ganyesa, Tosca Road a motor vehicle collision occurred between a motor vehicle with the registration numbers and letters J[...] N[...] (the first insured vehicle) as driven by Otsile Oliphant (the first insured driver), driven by Ignatious Goitsemodimo (the second insured driver).
- [6] The plaintiff was travelling as a passenger in the first insured vehicle. The two (2) insured vehicles collided heads-on and the plaintiff was admitted to hospital for the injuries suffered during the collision.

- [7] At the time of the collision the plaintiff was 19 years old and she is 26 years old at the time of the trial.

Expert evidence

- [8] The plaintiff brought an application that the expert evidence to be tendered on behalf of the plaintiff, be accepted on affidavit in terms of Rule 35(8) of the **Uniform Rules of Court** instead of the experts being called to testify.
- [9] The defendant has not filed any opposing expert evidence and there was no representative of the defendant present who would cross-examine the expert witnesses.
- [10] Having consideration of the fact that there is no opposing expert evidence and no prospect of disputing the expert's evidence and reports in the absence of a representative of the RAF, I granted the application to admit the affidavits of the plaintiff's experts as evidence in terms of Rule 35(8).
- [11] The following expert reports were filed by the plaintiff:
- 11.1. Dr J Prins – Orthopaedic Surgeon (Report of Assessment dated 10 March 2020, including RAF4 Serious Injury Assessment Report of the same date);
 - 11.2. Dr L Berkowitz – Plastic and Reconstructive Surgeon (Report dated 4 April 2023, including RAF4 Serious Injury Assessment Report of the same date);
 - 11.3. Dr M Mazabow – Neuropsychologist (Report dated 19 April 2023);

- 11.4. Ms M Doran – Occupational Therapist (Report dated 11 June 2020 and Addendum Report dated 26 July 2022);
- 11.5. Ms L de Rooster – Educational Psychologist (Report dated 21 July 2022 and Addendum Report of 13 May 2023);
- 11.6. Mr M Day – Industrial Psychologist (Report dated 8 September 2021 and Addendum Report dated 4 May 2023); and
- 11.7. Mr Morris – Consultant and Actuary (Report dated 5 August 2022).

[12] The reports by the plaintiff's medical experts indicated that the plaintiff suffered the following injuries as a result of the collision:

- 12.1. A displaced right clavicle fracture;
- 12.2. Bruises and lacerations to the right forearm extending to the elbow;
- 12.3. Lacerations and abrasions to both knees;
- 12.4. Left finger fracture;
- 12.5. A soft tissue injury to her chest; and
- 12.6. Shock and psychological trauma.

[13] After the collision the plaintiff was admitted to the Ganyesa Hospital, she underwent ex-ray diagnosis and she was discharged the next day with her arm in a sling. She attended the follow-up consultations at Klerksdorp Hospital upon referral from Ganyesa Hospital. She received surgery to her left finger and a splint was applied post-operatively. She was discharged after a few days.

[14] The plaintiff gave birth to a child during 2018.

[15] The expert reports confirm that the plaintiff has suffered the following bodily injuries as a result of the collision. The expert reports also support the plaintiff's case that the plaintiff's complaints of pain in her body, are substantiated:

- 15.1. Pain of the right clavicle during cold / inclement weather;
- 15.2. Left middle finger pain when doing the laundry;
- 15.3. A post-surgical scar over her right clavicle;
- 15.4. Her right clavicle is hypertrophic and disfiguring;
- 15.5. Painful ranges of motion, especially in full abduction;
- 15.6. The middle finger of the plaintiff's left hand is deformed and she has flexion of the proximal interphalangeal joint to about 80°, resultant in less functionality of the left hand. The left hand middle finger lacks 30° of full extension and approximately 30° of full flexion;
- 15.7. A post-abrasion scar measuring 140mm x 50mm overlying the exterior surface of the proximal third of the right forearm;
- 15.8. A post-abrasion scar measuring 70mm x 40mm overlying the anterior aspect of the left knee;
- 15.9. A post-surgical scar measuring 120mm x 20mm at its widest point, overlying the whole length of the plaintiff's right clavicle;
- 15.10. A horizontal "V-shaped" scar measuring 20mm x 1mm overlying

the dorsum of the proximal and middle phalanges of the left middle finger;

- 15.11. The plaintiff suffered emotional shock and trauma as her friend and two (2) other people passed away as a result of the collision;
- 15.12. The plaintiff stopped social netball due to the pain in her upper limbs and it is confirmed by Dr Prins that her decision is justifiable considering the plaintiff's injuries;
- 15.13. On a physical level, the plaintiff has reached maximum medical improvement but will benefit from surgical scar removal;
- 15.14. On a psychological level, the plaintiff suffers from psychological disturbances as a result of the collision, which includes chronic severe depressive mood disorder and chronic post-traumatic anxiety disorder;
- 15.15. The psychological disturbances combined with the plaintiff's chronic pain has given rise to cognitive and/or behavioural disturbances which includes an inclination to self-harm. The psychological symptoms have been present for 6 and a half years, and it is expected to be present for the rest of her life.

[16] I now turn to determine what a reasonable and fair amount of general damages in compensation of the plaintiff's injuries as mentioned above, would be.

Quantum of damages

[17] In **Rabe v Road Accident Fund** 2011 (6E7) QOD 13 (GNP) an amount that equates to a 2023 figure of R349,000 for a plaintiff that sustained the following injuries: a left supra-orbital laceration, abrasion of the left

forearm, fracture of the left clavicle and a tibial plateau fracture of the right knee. The plaintiff's most serious injuries were the fracture of the right knee joint and fracture of the shaft of the left clavicle.

- [18] In **Silombo v Road Accident Fund** 2022 (HD3) QOD 1 (MM) the plaintiff, a male delivery assistant fractured his right clavicle and shoulder blade. The fracture of the right clavicle was treated surgically with implants. Other injuries appear to have been collateral. The plaintiff had chronic pain which generally worsened by the lifting of heavy weight and inclement weather. His circumstances were aggravated since he was right-handed. It was determined that he will probably be suffering from pain for the rest of his life. He ultimately lost his employment.

Conclusion

- [19] I deem compensation in the amount of R400,000.00 (Four Hundred Thousand Rand) to be a fair and reasonable amount of compensation for general damages to be awarded to the plaintiff, on the following basis:

- 19.1. The plaintiff has chronic pain in her left shoulder and right hand middle finger;
- 19.2. There is no prospect that the pain will improve;
- 19.3. She has unsightly scars on her body as a result of the collision;
- 19.4. She has minimised function and range of functionalities in her left shoulder and right hand;
- 19.5. She suffers psychological *sequelae* from the collision, since her friend as well as two (2) other people passed away as a result of the collision;

19.6. The psychological *sequelae* includes depression and suicidal thought; and

19.7. The psychological *sequelae* has reached maximum improvement.

[20] The next aspect to be determined is the plaintiff's loss of earnings and/or earning capacity.

Loss of earnings and/or earning capacity

[21] As a starting point, the academic qualifications and proficiencies of the plaintiff has to be taken into account when determining what a reasonable and fair amount for compensation would be for loss of earnings and/or earning capacity.

[22] The plaintiff attended a crèche from the age of 2 years old and failed Grade 2 and Grade 10. She was in Grade 11 when the collision occurred. She was promoted to Grade 12 on the marks obtained in Grade 11, but failed Grade 12.

[23] The psycho-educational assessment of the plaintiff indicated the following:

23.1. That the plaintiff's cognitive functioning is reflected in the below average range with deficits in working memory and fluctuated proceeding speed;

23.2. No executive dysfunction or concentration problems were noted;

23.3. Visual-motor integration skills were average, with an average work speed;

23.4. Emotionally, she presented with significant signs of depression

and mild signs of stress; and

23.5. Scholastically, the plaintiff presented with exceptionally low levels of functioning in both literacy and numeracy.

23.6. The plaintiff's written expression is very poor for her age and grade level. The plaintiff would consequently not be suitable to do sedentary work.

[24] The plaintiff's IQ is found to be below average being 70 – 79. It is determined by the experts that the plaintiff's pre-morbid ability indicates that the plaintiff would probably not have been able to pass Grade 12. As such, her highest education level pre-morbid would remain to be Grade 11 (NQF3).

[25] In application of the above factors and after a careful study of the plaintiff's expert reports, I hold the view that the plaintiff's intellectual aptitude is not of such a nature that she would easily occupy and maintain a profession that requires high intellectual skills.

[26] But for the collision, the only employment that the plaintiff would have been able to do, would be reliant on her physical abilities. However, as a result of the collision, the plaintiff's upper limbs (her arm and her shoulder) has been compromised and the utilisation of her arm and her shoulder has been limited.

[27] The plaintiff would find it challenging to sustain occupations such as a general worker or domestic worker. Had it not been for the collision, the plaintiff would probably have been reliant on manual / physical work and would resort in the unskilled or semi-skilled capacity earning category. It is postulated by the plaintiff's experts that she would have reached her career ceiling at approximately 45 years old and would then have received only inflationary based increased until the

retirement of 65 years.

[28] At the very best for the plaintiff, the expert reports indicate that the plaintiff has been left with at least 10% loss of work capacity as a result of the collision. At worst, Mr Day opined that the plaintiff experienced a loss of working capacity between 25% to 35% post-collision.

[29] Mr Morris, the plaintiff's Actuary postulated the plaintiff's loss of earnings as follows:

29.1. A 5% contingency deduction was applied on the uninjured scenario and a 5% to the injured scenario equating to a total past loss of income of R30,334.00.

29.2. In relation to the future loss of income Mr Morris applied a 15% contingency deduction on the uninjured scenario and a 30% contingency deduction on the injured scenario which equates to a loss of future income in the amount of R1,052,442.00.

29.3. The total of the loss of earnings amounts R1,082,776.00 (One Million Eighty-Two Seven Hundred and Seventy-Six Thousand Rand).

[30] At the time of the trial, the plaintiff was employed as a contract worker on a farm.

[31] Due to the plaintiff's loss of the full extension and capabilities of her left shoulder and right hand, and the chronic pain experienced by the plaintiff, I find that the plaintiff is vulnerable as an employee due to the injuries sustained in the collision.

[32] I agree with the calculations done by the Actuary that the plaintiff has suffered the total amount of R1,082,776.00 (One Million Eighty-Two

Seven Hundred and Seventy-Six Thousand Rand) as a loss of future income or earning capacity.

- [33] I hold the view that the amount of R1,082,776.00 (One Million Eighty-Two Seven Hundred and Seventy-Six Thousand Rand) is a fair and reasonable amount in compensation to the plaintiff for her loss of future income or earning capacity.

Conclusion

- [34] For the reasons stated above, I have found that general damages in the amount of **R400,000.00** would be a fair and just amount in compensation of the general damages suffered by the plaintiff as a result of the collision.

- [35] I also find that the amount of **R1,082,776.00** (One Million Eighty-Two Seven Hundred and Seventy-Six Thousand Rand) is a fair and reasonable amount in compensation to the plaintiff for her loss of future income or earning capacity as a result of the collision. Contingencies have already been taken into account on this amount.

- [36] As such, it would be fair and reasonable that the plaintiff be compensation in the total amount of **R1,482,776.00** (One Million Four Hundred Thousand Eighty-Two Thousand Seven Hundred and Seventy-Six Thousand).

Cost

- [37] The normal principle is that the successful party is entitled to his / her costs. I find no reason to deviate from this normal principle.

- [38] As such, I find that the defendant is to pay the costs of the plaintiff.

Order:

[39] In the premises I make the following order:

- i) The defendant is declared liable for 100% of the plaintiff's proven and/or agreed damages resulting from the collision which occurred on 30 October 2016.
- ii) The defendant is to pay to the plaintiff the amount of **R1,482,776.00** [One Million Four Hundred Thousand Eighty-Two Thousand Seven Hundred and Seventy-Six Thousand] (the capital amount) in full and final settlement, directly into the trust account of Messrs. Savage, Jooste and Adam Attorneys, being:

Savage, Jooste and Adams Attorneys

Bank: NEDCOR – ARCADIA

Branch code: 1[...]

Account no: 1[...]

Ref: Mr Makole/KM593

- iii) The amount of R1,482,776.00 (One Million Four Hundred Thousand Eighty-Two Thousand Seven Hundred and Seventy-Six Thousand) is calculated as follows:
 - a. General damages in the amount of R400,000.00.
 - b. Loss of income in the amount of R1,082,776.00 (One Million Eighty-Two Seven Hundred and Seventy-Six Thousand Rand).
- iv) The defendant will be liable for interest on the capital claim in terms of Act 56 of 1996 (as amended), calculated at the applicable *mora* rate from date of judgment.
- v) The defendant is to provide the plaintiff's attorney of record with an unlimited Undertaking as contemplated by section 17(4)(a) of

the **Road Accident Fund Act 56** of 1996 (as amended), to compensate the plaintiff for the costs of future caregiving, case management and future accommodation of the patient in a hospital and/or nursing home, and/or treatment of or rendering of a service and/or supplying of goods to the plaintiff, after the costs have been incurred and on proof thereof, resulting from the injuries sustained as a result of a motor vehicle accident which took place on 30 October 2016.

vi) The defendant is ordered to make payment of the plaintiff's taxed or agreed party and party costs, on the High Court Scale which costs shall include but is not limited to:

a. The fees consequent upon the employment of counsel, including but not limited to counsel's preparation for and attendance at trial on 16 and 17 May 2023;

b. The reasonable taxable transportation, accommodation and other costs incurred by the plaintiff in attending the medico-legal appointments and Court, subject to the discretion of the taxing master;

c. The costs of the follow expert reports, addenda, RAF 4 Serious Injury Assessment Reports, the preparation fees and reservation fees (where applicable) and attendance at Court (where applicable) as the taxing master may, upon taxation, determine:

i. Dr J Prins – Orthopaedic Surgeon (Report of Assessment dated 10 March 2020, including RAF4 Serious Injury Assessment Report of the same date);

ii. Dr L Berkowitz – Plastic and Reconstructive Surgeon (Report dated 4 April 2023, including RAF4 Serious Injury

Assessment Report of the same date);

- iii. Dr M Mazabow – Neuropsychologist (Report dated 19 April 2023);
 - iv. Ms M Doran – Occupational Therapist (Report dated 11 June 2020 and Addendum Report dated 26 July 2022);
 - v. Ms L de Rooster – Educational Psychologist (Report dated 21 July 2022 and Addendum Report of 13 May 2023);
 - vi. Mr M Day – Industrial Psychologist (Report dated 8 September 2021 and Addendum Report dated 4 May 2023); and
 - vii. Mr Morris – Consultant and Actuary (Report dated 5 August 2022.
- vii) The cost of the plaintiff's instructing attorney and correspondent attorney, which includes but is not limited to the reasonable travelling costs, costs of preparing for pre-trial conferences, costs of drafting practice notes, pre-trial agenda and pre-trial minutes, costs for preparation for and attending of Judicial Case Management Conferences, costs of preparation of and application for the Case Management Meetings (if any), drafting all Notices in terms of the Rules of Court as well as attendance at court on 16 and 17 May 2023.
- viii) Should the defendant fail to pay the plaintiff's party and party costs as taxed or agreed within 60 (sixty) days from the date of taxation, alternatively date of settlement up to and including date of final payment thereof.

- ix) The plaintiff shall, in the event that the parties are not in agreement as to the costs referred to in paragraphs 4 and 5 above, serve the notice of taxation on the defendant's attorneys and shall allow the defendant fourteen (14) days to make payment of the taxed costs.
- x) There is a Contingency Fee Agreement applicable and it complies with the Act.

FMM REID
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

DATE RESERVED: 17 MAY 2023

DATE OF JUDGMENT: 20 JULY 2023

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