

**IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)**

CASE NO: 2005/925

In the matter between:

VAN VUUREN, MERLE KATHLEEN
(formerly JONES)

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

SALDULKER, J:

A. INTRODUCTION

[1] The plaintiff has instituted an action against the defendant for damages arising from personal injuries sustained in a collision that occurred on 8 February 2000.

[2] The defendant's liability is not in dispute.

[3] The quantum of the plaintiff's damages is in dispute and the following heads of damage require determination:

- 3.1 Past Hospital and Medical Expenses;
- 3.2 Past and Future Loss of Earnings;
- 3.3 General Damages.

[4] In regard to the plaintiff's claim for Future Medical Expenses, the defendant tenders an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996(The Act).

[5] In its amended particulars of claim the plaintiff claims the following:

- | | | |
|-----|-------------------------|--------------|
| 5.1 | Past loss of earnings | R202 008, 00 |
| 5.2 | Future loss of earnings | R444 019, 00 |
| 5.3 | General damages | R200 000, 00 |

[6] During argument the plaintiff further amended its particulars of claim on the following basis:

- | | | |
|-----|-------------------------|----------|
| 6.1 | Past loss of earnings | R302 906 |
| 6.2 | Future loss of earnings | R503,671 |

[7] The parties agreed on 15 of the 18 items contained in page 1 of exhibit bundle A. The plaintiff has proved claims for past medical expenses in an undisputed amount of R30 032, 94. However only the amount of R287-80 has not been proved.

B. THE EVIDENCE

[8] The plaintiff testified that she was born on 17 August 1938. On 8 February 2000, she was driving in Pretorius Street, Pretoria and had stopped at a robot, when she was involved in a motor collision. Another motor vehicle, travelling at a high speed collided with her vehicle from behind. Ms Ward, a friend, was a passenger in the vehicle. Immediately after the collision she was unable to move, and could not lift her head or her back.

[9] She suffered acute pain for 2 to 3 days after the collision and thereafter suffered severe pain. She suffered pain in her neck, back and bruising of her leg and knee. She received medical treatment consisting of X-rays, medication, a neck collar and physiotherapy. She was unable to take the prescribed medication, as it affected her stomach and caused her to experience palpitations. The plaintiff was referred to a neurologist who diagnosed a complicated or an extended whiplash injury of her neck. She received physiotherapy for two weeks and had to discontinue this as she could not afford it.

[10] She began her career as a cadet nurse in 1955, and pursued a career in nursing for a number of years. At the time of the collision she was doing 'home baking' and 'home nursing'. She was also nursing Mr Hattingh, Ms Ward's deceased husband but this was not for remuneration as they were planning to set up a clinic together. She lived with Ms Ward and did not "pay" for her board and lodging, Ms Ward provided her with a home, and the plaintiff in return nursed Mr Hattingh.

[11] She earned an income from her baking. She had started this home industry during the 70s. She sold a variety of cakes and earned a profit of approximately R200 per month at the time of the collision.¹ She had no records to reflect this amount as all the relevant receipts and invoices disappeared when she moved to Lydenburg.² She was 'planning' the setting up of a clinic at the time of the collision.³

[12] After the collision she could not continue with her baking activities.⁴ This was as a result of her neck injury and the pain she experienced. Her neck pain was constant, radiated into her back, shoulders and down her arms to her fingers. Her fingertips were very sensitive and as a result she could not hold a cup without difficulty or put in the pin numbers of her prepaid electricity meter. She did not have the same strength in her hands that she used to prior to the collision.

¹ Record, p17, lines 9-21

² Record, p30, lines 10-16

³ Record, p21, lines 3-25

⁴ Record, p17, lines 22-25

[13] Prior to the collision her health was excellent. She had no pain or discomfort. Had the accident not occurred, she would have opened and conducted a clinic where nursing procedures such as dressings, injections, blood pressures, testing blood sugars and the like would be performed. She had planned this clinic with Ms Ward and they had discussed this in 1998. She was prevented from commencing with the plan prior to the collision as she had been nursing Mr Hattingh.⁵ She assisted in nursing him from 1997 until 1999 when he died.

[14] She had applied for a state pension in 1999 and on receipt thereof, would have saved those funds to buy the necessities for the clinic and her re-registration with the nursing council. After the collision she did not have the physical energy to cope with this plan. She would have wanted to work for the rest of her life, nursing and helping people. She had provided her attorney with a list of how much she would charge for nursing procedures at the proposed nursing clinic which would have yielded her an income of at least R2 000, 00 per month.

[15] She had stopped earning an income from her nursing on 31 May 1990.⁶ She had an investment that she lived off until she applied for a State pension which was R820.00 per month. She produced a statement book in which she recorded the patients she invoiced from 1986 until 31 May 1990. There were

⁵ Record,p23,lines1-25

⁶ Record, p29, lines 20-21

also two subsequent statements in the same book for 4 and 10 January 1999.⁷

[16] When the plaintiff was referred to Dr Badenhorst's recordal in the MMF1 form that she had underlying osteoporosis⁸, she replied that she had never been diagnosed for it nor treated for it. When asked to explain why no loss of earnings or income were reflected on the MMF1 form, she replied that *"...I mean I know for definite that I got the pension and they knew how much it was a month and you know the accident was so great that I did not think about the home industry at that time. My concern was the pain and the agony Mrs Ward was going through took all concentration away from me"*⁹.

[17] As she was not working at the time, no claim was made in the MMF1 form for loss of earnings arising from the proposed clinic.¹⁰ Her loss of earnings related to her baking.¹¹

[18] She had been self-employed as a private district nurse for most of her working life. She could not estimate the costs of setting up the clinic and had applied for the pension "to be able to help to get funds so that I could get started with the nursing side". She testified that the proposed clinic was scheduled to be opened on the 14 February and she had planned to obtain her nursing certificate during that time.

⁷ Record, p32, lines 17-22

⁸ Exhibit A, p19, para 11

⁹ Record, p 42-45

¹⁰ Record, p 55, lines 17-25; p 56, 1-7; 20-25

¹¹ Record, p 55, lines 12-19

[19] The home baking was a hobby that she turned into an income generating business in 1998.¹² Her clients were those that visited Ms Ward's salon and neighbours. As a result of the collision she could not bake anymore.¹³ She did try to bake after the collision but this was with difficulty because her fingers were very sensitive and her neck was "the biggest problem".¹⁴

[20] She testified that serious plans to set up the clinic began in 1998 but by the time the collision occurred those plans had not been put into place, as she was nursing Mr Hattingh. Even though Mr Hattingh died nine months before the collision the plans for the clinic had not been executed. She could not remember whether she told her attorney about her plans to set up this clinic and to earn an income from it because she "was still very dizzy and confused". Furthermore she was in pain and concerned for the health and welfare of Ms Ward and herself.

[21] She could not remember informing Dr Kruger about the plans for the clinic when she saw him in September 2002, but recalled mentioning to him that she had intended nursing. She also informed him that she was receiving a state pension as an income. She was also referred to Dr Pienaar's report where he had recorded "cake decorating" as a hobby.¹⁵ To this she replied that she had informed him that cake decorating had been a hobby *"but I changed that in the 70's because it was too expensive to do it as a hobby. I had to do it for an income."*

¹² Record, p 49, lines 8-20

¹³ Record, p 18, lines 1-20

¹⁴ Record, p 49, lines 20-25

¹⁵ Exhibit A, Dr Pienaar report, p 40

[22] She was asked to respond to Dr Pienaar's opinion that even if the collision had not occurred she would not have worked at "this stage of her life."¹⁶ To this she replied that *"I will respond to it because we would have had the clinic, it would have been on going, and we would have been able to employ other qualified staff to run it and in fact I did have two phone numbers here of people that were interested when I got too busy to assist and to do shifts, and we in turn could have then been able to have help ourselves when we got older and could not do it, it would have still been running. It would have expanded, because our vision was far greater than just the clinic."* When it was put to her that the proposed clinic was only *"a vision and nothing more and nothing less"*, she replied that *"I have purchased things, I got the things ready to start the clinic and these are the only things that I still had to get a re-register. I had everything else."*

C. DEFENDANT

[23] The defendant closed its case without calling any witnesses.

D. THE ASSESSMENT

1. PAST HOSPITAL AND MEDICAL EXPENSES

[24] The plaintiff's claim for past hospital and medical expenses ought to be awarded in the amount of R30 032, 14, as the amount of R287, 80 has not

¹⁶ Exhibit A, Dr Pienaar report, p 46

been proved. The defendant tenders an undertaking in terms of section 17(4) (a) of the Act in respect of the Future Medical Expenses.

2. GENERAL DAMAGES

[25] The plaintiff suffered pain and suffering as a result of the soft tissue injury to her neck and back. She wore a neck collar for two weeks and received physiotherapy. Simple tasks like holding a cup and entering the pin on a pre-paid metre was now difficult. Her fingers were sensitive and had no strength. She suffered from constant pain in her neck which radiated into her shoulders and into her arms. However, Dr Kruger was of the opinion that the short-term prognosis of the neck and back were good, provided she got the necessary treatment.¹⁷ During Dr Pienaar's examination of the plaintiff some 6 years after the collision, the plaintiff complained of *inter alia*, neck pain, limited rotation of the neck, pain and weakness of grip strength.¹⁸ According to the Joint Minutes of the two experts, Dr Pienaar and Dr Kruger, the pain that the plaintiff suffers is chronic.¹⁹

[26] The MMF1 claim form records that the plaintiff has underlying osteoporosis and osteoarthritis.²⁰ At the time of the collision the plaintiff was 61 years old. Prior to the collision she was pain free and had no discomfort. She also baked regularly, from which she earned a meagre income. She has clearly suffered a significant loss of amenities of life. According to the plaintiff

¹⁷ Dr Kruger – report, p30-Exhibit A.

¹⁸ Dr Pienaar- report, p45- Exhibit A

¹⁹ Exhibit A – Joint Minute at p15-C

²⁰ Exhibit A p19,para11

she has suffered serious injuries which have resulted in her being, not only unable to pursue her baking business, but also her nursing venture.

CASE LAW

[27] In *Jacobs v Padongelukkefonds*, 2003. The Quantum of Damages, C3-131, Vol 5, a chartered accountant suffered a whiplash injury of the neck and back, resulting in chronic pain in her neck and back and post traumatic stress syndrome, causing a loss of work capacity of 5%. Enjoyment of outdoor activities was curtailed by pain. She was awarded the amount of R80, 000 for general damages. This amount is equivalent to R103, 000.²¹

[28] In *GGMM Janse van Rensburg v The Road Accident Fund*, 2005, The Quantum of Damages, C3-191, Vol 5, a 71 year old male engineer, sustained a whiplash injury to the neck. All his hobbies involved some physical activity. The injury appeared to be comparatively minor, but had significant consequences. Movements in his neck were severely restricted, he was unable to drive his motor vehicle nor continue with his work. The court awarded an amount of R80 000, 00 for general damages. Current value is R95, 000.

[29] In *Klisiewicz v Road Accident Fund* 2000 .The Quantum of Damages, C3-76, Vol 5, a 44 year old Polish surgeon sustained a whiplash injury to his

²¹ Robert Koch- The Quantum Yearbook, 2008

neck. He underwent surgery to fuse the C5 and C7 vertebrae, but became cyanosed on the operating table and sustained a measure of brain damage. His neck movements were restricted and painful, marked weakness of the right arm, he could no longer handle fine objects, and there were cognitive deficits from the brain injury. The Court awarded an amount of R200 000, 00 in 2000, with a current value of R320 000, 00.

[30] In *De Barros v Road Accident Fund*, 2001 C&B, C4-13, Vol 5, a 25 year old rigger employed by Telkom, sustained soft tissue injuries to his neck and back. He had 10 days bed rest and his neck pain settled in 6 months. His back pain persisted. He had mild to moderate depression, anxiety, irritability and was unable to cope with day- to- day life. The Court awarded an amount of R85 000, 00 for general damages which is currently worth R127 000, 00.

[31] In *Burger v Union National South British Insurance*, 1975, C & B Vol 2. The Quantum of Damages, 462, a 33 year old female sustained a whiplash injury to her neck. She had substantial discomfort in her neck and back, with severe headaches and dizziness. The Court awarded an amount of R7 000 which has a current value of R194 000, 00.

[32] In *Griffiths v Mutual & Federal Insurance* 1993, C&B , Vol 4,C3-33, a 31 year old female attorney sustained a whiplash injury to the neck. Permanent disability inasmuch that she would not be pain free. Her working capacity was diminished. She tired easily and could not handle stress at work. The Court awarded an amount of R45 000, 00, with a current value of R124 000.

[33] In my view, taking all of the foregoing into account the plaintiff's injuries, their *sequelae* and the awards that have been made in the past, a fair and just award for general damages is an amount of R120 000, 00.

3. PAST AND FUTURE LOSS OF EARNINGS

[34] The plaintiff's claim is not that she would have been employed in the open labour market as a nurse and would have earned a particular salary and now, as a result of the collision has suffered a pecuniary loss. The plaintiff's claim is that due to the collision she lost the opportunity to establish a nursing clinic from which she would have derived an income.

[35] Counsel for the defendant has submitted that the first question to be decided is whether the income the plaintiff claims she would have derived from the clinic is a causation or a quantification issue. Merely because the plaintiff proves that her physical disability brings about a reduction in her earning capacity, should not mean that all that remains is to quantify her loss. There must be proof that the reduction in her earning capacity indeed gave rise to pecuniary loss.²² If the court is certain that the plaintiff has suffered pecuniary damage then it is bound to award damages, and the enquiry becomes quantitative. According to the defendant, the plaintiff would not have earned R2000 from the clinic as it was just a "vision", and there is no proof that the reduction in earning capacity gave rise to pecuniary loss. Mr

²² Rudman v Road Accident fund 200392) SA 234 (SCA), at para11.

Shepstone for the defendant referred to the unreported Supreme Court Of Appeal decision of *Road Accident Fund v Roman Klisiewicz*²³, Case no 57/2001 delivered on 27 May 2002 , where Howie JA stated at paragraph 23 as follows:

“It was argued for the appellant that the respondent had to prove that it was probable that he would have passed the examinations, entered private practice and succeeded as a busy practitioner. This submission is, of course, contrary to authority in so far as it invokes application of the onus. Once it is clear, as it is, that the accident has disabled the respondent from working as a doctor of any kind, the ascertainment of his lost medical earning capacity (leaving aside for the moment any possible residual earning capacity in his disabled state) is a matter not of causation but of quantification. That being so, the general practice in this kind of case is to take into account future possibilities even if they have not been shown to be probabilities: Burger v Union National South British Insurance Co 1975 (4) SA 72 (W) at 74A- 75H; Blyth v Van den Heever 1980 (1) SA 191 (A) at 225G-226B.”

[36] In the *Klisiewicz* case the plaintiff had been a neurosurgeon and as a result of a collision could not earn as a neurosurgeon any longer. The case of the plaintiff is in stark contrast to that of Dr Klisiewicz. The plaintiff was not employed as a nurse nor was she registered as such at the time of the collision. She had been last registered and remunerated as a nurse in 1990, ten years before the collision. The plaintiff had not established a nursing clinic

²³ Appeal from the court a quo, supra, para 28

prior to the collision, and was not deriving an income from this venture. It cannot then be argued that the collision disabled her from deriving an income from the establishment of a nursing clinic. This is therefore a causation issue and the plaintiff bears the *onus* of proving on a balance of probabilities that she would have established a viable nursing clinic from which she would have earned R2000 per month.

[37] In her testimony the plaintiff speculated that had the accident not occurred they (Ms Ward and herself) were “*planning*” a clinic and that she would have worked for the rest of her life. The only evidence of the earning potential of the clinic was the plaintiff’s reference to a list of what she would charge for procedures which list had been sent to her attorneys. This list was not produced in evidence. In the report of Mr Jacobson dated 9 June 2006 there is a reference to the costs of such procedures but these amounts were not established in evidence. No factual basis was laid for the conclusion that she would have earned R2000 per month from this nursing clinic. The plaintiff also did not call an expert forensic accountant to give an opinion on the projected income from this nursing venture. Her evidence that she was relying on her state pension to purchase the necessities for the clinic is naïve and unconvincing.²⁴

[38] According to the joint minutes of the experts, they were in agreement that the plaintiff could not continue with her home industry, the cake baking. There is no mention that she could be employed as a nurse at all nor continue

²⁴ Record, p 24, lines 1-9

with her “vision” to set up a nursing clinic. The first mention by the plaintiff of her “*vision*” to establish a clinic is on 16 March 2006 when the clinical examination of the plaintiff by Dr Pienaar took place.

[39] The MMF1 records that she was not receiving any income prior to the collision. The plaintiff clearly did not consider at the time that the MMF1 was completed, (this is undated and Dr Badenhorst appears to have signed the medical report attached to the MMF1 medical report on 24 May 2001), that she had lost any income whether from the baking activities or from the establishment of a nursing clinic. When the plaintiff initially instituted her claim during January 2005, she claimed the sum of R200 per month for 60 months for past loss of earnings. She claimed R200 per month for 20 years for future loss of earnings. There is no reference to a claim for past and future loss of income based on the plaintiff’s inability to render nursing services in a clinic to be established by her.

[40] The plaintiff’s particulars of claim was amended on 19 September 2006. The amounts claimed for past and future loss of earnings were actuarially assessed by the actuary Mr Gerard Jacobson on the basis that the plaintiff earned R200 per month from decorating cakes and that the plaintiff was at the time of the collision in the process of setting up a private clinic, salon and a day- care facility for elderly people and would have earned R2000 per month from this venture.

[41] The plaintiff's explanation for not telling her attorneys of her plans for the establishment of the clinic, as her main concern was for her and Ms Ward's physical condition and that she was still suffering from spells of confusion and dizziness, is implausible and is rejected. The plaintiff did not produce any objective evidence of her plan to set up the clinic in the form of a business plan. The court was not appraised of the expected set-up costs and her ability to meet these expenses.

[42] In my view, other factors militate against the plaintiff succeeding in getting her "*vision*", of the nursing clinic, off the ground. The plaintiff was 61 years old at the time of the collision. At that stage she was already suffering from osteoporosis, osteoarthritis and tremors of her hands and head, which was also visible in court. The plaintiff conceded under cross-examination that the tremors existed prior to the collision²⁵ and that the tremors began after a dog bite incident in 1981. According to Dr Pienaar "even had the accident of 8/2/2000 not occurred, Mrs Jones would not have been working at this stage of her life".²⁶

[43] It is the plaintiff's testimony that she stopped earning an income as a nurse during May 1990. The plaintiff testified that she did not commence with the nursing business due to her taking care of Mr Hattingh, Ms Ward's husband on a full time basis, since 1997, for which she was not remunerated, and who passed away in May 1999, nine months before the collision. From the book that she produced in court she saw two patients in 1999 but did not

²⁵ Record, p63, lines 6-20

²⁶ Dr Pienaar's report, p46

charge them, as she had not re-registered as a nurse. In fact the plaintiff had ample time and opportunity to re- register as a nurse, to take up nursing again and to put her plans of setting up a nursing clinic into action but she did not do so. At the time of the collision she had not re-registered as a nurse.

[44] In these circumstances her testimony that she would have been able to generate an income of R2000 per month from February 2000 from the clinic that would be established, from which she would derive an income for various nursing procedures, is without substance, as she would first have had to re-register as a nurse to pursue this nursing venture, which she clearly made no effort to do.

[45] Although the plaintiff gave extensive detail of her experience and training as a nurse from 1955 up to 1990, it does not mean that this would have been the most probable employment route for her, taking into account her age, her medical condition, her tremors and the fact that she did not actively pursue her “vision” of the clinic. The fact that the plaintiff at the age of 60 was nursing Mr Hattingh who was bedridden and coped with these duties, is no indication that she would have coped with a nursing clinic which was open to the public, requiring in all probability more effort, time and energy.

[46] The possibility of the plaintiff establishing the nursing clinic is very remote. There is even a lesser possibility that she would be able to derive an income of R2 000 from the clinic. It is also doubtful whether the plaintiff would have been able to work after the normal retirement age of 65. It has not been

established that the plaintiff has suffered a loss of income in regard to her claim that she would have generated an income from the proposed clinic. Furthermore the plaintiff placed no evidence to assist this court in quantifying these damages. In view of all the foregoing the plaintiff has not proven on a balance of probabilities that she would have established a nursing clinic and her claim for loss of income in this regard must therefore fail.

[47] During argument the parties were requested to instruct an actuary to prepare calculations for the plaintiff's loss of earnings. The actuary, Mr Jacobson,²⁷ calculated the loss of earnings, *inter alia* on the *nursing basis* (Basis A) and on the "cake bake basis" (Basis B).

[48] As the plaintiff has failed to establish on a balance of probabilities that she planned to open a nursing clinic, it is not necessary to have any regard to Basis A.²⁸

[49] The plaintiff testified that at the time of the collision she was doing cake baking and decorating from which she earned approximately R200 per month. Initially this used to be a hobby which became an income generating business.

[50] When the plaintiff's claim was instituted against the defendant during January 2005 her claim for past and future loss of earnings was calculated at

²⁷ This actuarial report was handed in with the plaintiff's supplementary heads of argument and is marked Exhibit X.

²⁸ Exhibit X, Mr Jacobson, p 5-7

the rate of R200 per month.²⁹ It is her testimony that she earned this from her baking business. I am aware that this amount has not been quantified and no documentary proof has been submitted in this regard. It must be borne in mind that this was a home industry being conducted from home. Her clients included those who attended Ms Ward's salon. This was not a high income generating business, but a small home baking industry. It was a cake baking and decorating business informal in nature, which had been converted from a hobby to a home industry to generate an income, albeit a meagre one. The amount of R200 per month appears in these particular circumstances to be reasonable.

E. CONCLUSION

[51] I accept the plaintiff's evidence in regard to the income that she generated from the home industry baking activities prior to the collision. The possibility is remote that she would have taken up any other forms of employment on a large scale. Basis B³⁰ which is only in respect of cake baking until the time of age 67 appears to me to be the most reasonable aspect of the plaintiff's continued generation of income into her old age. Both Dr Pienaar and Dr Kruger are of the opinion that the plaintiff will not be able to continue with her home industry. According to Mr Jacobson this loss of income amounts to R16 432, 00. The state pension that the plaintiff is receiving has not been accounted for in calculating Basis B since, according to Mr Jacobson, the plaintiff in this instant would have been entitled to the state old age pension but for the accident as well. In view of all the

²⁹ Exhibit B, p5

³⁰ Exhibit X, Mr Jacobson's report, p 8

aforegoing, the plaintiff succeeds in her claim for past and future loss of income from her cake baking activities.

F. ORDER

In the result, I make the following order:

1. The defendant is ordered to pay compensation to the plaintiff in the following amounts:

Past Hospital and Medical Expenses	R30, 032,14
Past and Future Loss of Income	R16, 432,00
General Damages	R120 000, 00.
 TOTAL	 R166, 464, 14

2. The amount of R166, 464, 14 is to be paid into the trust account of the Plaintiff's attorney of record.

3. The defendant is to pay interest on the aforesaid amount of R166, 464, 14 at the rate of 15, 5% per annum calculated 14 days from the date of judgment to date of final payment.

4. The defendant is ordered to furnish to the Plaintiff with an Undertaking in terms of Section 17(4) (a) of the Road Accident Fund Act 56 of 1996, for the

future medical expenses, and to pay the costs of future accommodation of the plaintiff in a hospital or nursing home, or treatment or rendering of a service to her, or supplying of goods to her, arising out of the injuries the plaintiff sustained in the motor vehicle collision on 8 February 2000.

5. The defendant is ordered to pay the plaintiff's taxed costs on a party and party High Court scale, including the qualifying fees, if any, of the plaintiff's experts namely Dr P P Kruger and Mr Gerard Jacobson.

H SALDULKER
JUDGE OF THE HIGH COURT