**REPUBLIC OF SOUTH AFRICA**

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

**CASE NO: A5012/11**

**DATE:27/10/2011**

**NOT REPORTABLE**

In the matter between

**ANULA NIENABER** **APPELLANT**

and

**ROAD ACCIDENT FUND** **RESPONDENT**

*Appeal - against award of loss of future earning capacity in a claim against the Road Accident Fund – opinion of medical expert witness as to possible early retirement although agreed between the parties not binding on Court – opinion relevant only as a factor in consideration of contingency allowance - contingency allowances by Court a quo in "but for" scenario (15%) and "as a result of the accident" (25%) scenario confirmed on appeal – misdirection by Court a quo as to factual basis for actuarial calculations – fresh calculation based on appellant's actuarial calculations – higher amount awarded on appeal - appeal upheld in part.*

---

**J U D G M E N T**

---

**VAN OOSTEN J:**

[1] This is an appeal against an award made by Mayat J, in this Division, in respect of the appellant's future loss of earning capacity. The appeal is with leave of the Supreme Court of Appeal.

[2] The appellant's claim against the respondent arose from injuries she sustained in a motor vehicle collision. The learned Judge a quo was only required to assess the award in respect of the appellant's future loss of earning capacity as the merits and all other heads of damages had become settled between the parties. It was not in dispute that the appellant in fact suffers a loss of earning capacity. The issues under this head of damage in essence concerned firstly, the appellant's estimated age of retirement and secondly, the computation of the quantum.

[3] The appellant was 34 years old at the time of the trial and was employed as acting project manager at Transnet. It is common cause that she, in terms of her employment with Transnet, would have retired at the age of 63 years. Dr Marais, an orthopaedic surgeon for the plaintiff, in his medico-legal legal report, which was admitted and handed in by consent, introduced the notion of the appellant's possible early retirement. In this regard he opined that "common sense and reasonable justice dictates that [the appellant] should be allowed a period of decreased work life expectancy of five years" resulting in the appellant's retirement age being estimated at 58 years. The opinion was parroted by some of the respondent's expert witnesses and eventually served as the accepted foundation for the appellant's actuarial calculations. The learned Judge a quo however, on this aspect, concluded that the assumption made by Dr Marais was evenly balanced as against the possibility that the appellant might work beyond the age of 58 and accordingly held that this was one of the factors to be considered in the making of a contingency deduction. Contingency allowances of 15% but for the accident and 25% having regard to the accident were made only the last of which was attacked on appeal, to which I shall revert after having dealt with the actuarial calculations.

[4] Counsel for the appellant submitted that the opinion of Dr Marais, uncontested and admitted as it was, should be afforded the same weight as an admission and that it therefore, should have been accepted as such by the Court a quo. I do not agree. The Court is not bound by the admissions made by one party regarding

the expert evidence proposed to be tendered by another party. The evidence of expert witnesses cannot be allowed to usurp the function of the Court. It is for the Court to ultimately decide whether an expert's opinion is to be relied on or not and to determine what weight, if any, has to be afforded to it. The Court must not blindly accept expert testimony. It is obliged, even where expert evidence is so technical that the average judicial officer would not be able properly to reach an unassisted conclusion, still to decide whether it would be safe to accept the opinion or not (*see* Joubert (Ed) *LAWSA* Vol 9 para 713).

[5] The opinion of Dr Marais was essentially based on some statistical information, published in the United States of America, he had obtained concerning work life expectancy that he projected on the appellant's situation having regard to the degree of disability she suffers from. That of course did not elevate the opinion anywhere beyond mere speculation. The possibility of the appellant's early retirement, raised by Dr Marais, is but one of the vicissitudes of life, or as it has also been referred to, "*…hazards that normally beset the lives and circumstances of ordinary people*" (*AA Mutual Insurance v Van Jaarsveld* 1974 (4) SA 729 (A)) which is taken into account in the making of a contingency allowance (*Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) 116G-117A). For these reasons it cannot be said that Mayat J erred in the approach she adopted.

[6] This brings me to the different actuarial calculations handed in by way of agreement. Mayat J preferred and accepted the actuarial calculations made by the respondent's actuary. On appeal counsel or the appellant submitted that the respondent's actuarial calculation was flawed in its premise. The respondent's actuary, for one, ignored the appellant's promotion to project manager with the resultant salary increment a year prior to the date of accident having a cascading effect on the resultant calculations. The criticism is well-founded. The Court a quo accordingly misdirected itself in accepting the respondent's actuarial calculation. The basis for the appellant's actuarial calculations furnished to us by counsel for the appellant, in my view, properly accounts for the appellant's loss of future

earning capacity which accordingly, should have been accepted by the court a quo.

[7] The Court a quo awarded the sum of R739 470-20 in respect of the appellant's future loss of earning capacity. A fresh calculation must now follow in view of the misdirection I have referred to. On the appellant's actuarial calculations the value of the appellant's future income, uninjured, is R8 605 974.00. A contingency allowance of 15% (which was agreed is reasonable), brings the net value to R7 315 078.00. As for the value of the income as a result of the injury (R8 605 974.00) it is only necessary to determine the contingency deduction. As I have mentioned, the Court a quo applied a contingency deduction of 25%. The appellant contends for an allowance of 35%. In this regard counsel for the appellant highlighted the period of altogether 4½ months the appellant will be off work in respect of anticipated future medical treatment which is in excess of the paid sick leave allowed by her employer, and therefore is to be regarded as unpaid sick leave and the diminished prospects of the appellant progressing in her work situation as she was not as productive as prior to the accident. I am not persuaded that the court a quo in any way misdirected itself and a 25% contingency allowance in my view is both reasonable and proper (see *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA)). The allowance of a 25% contingency brings the total net value of the appellant's loss in the "having regard to" scenario, to R6 454 480.50. The total award, being the difference between the two values, accordingly is R860 597-50. To this extent the appeal must be upheld.

[8] The appellant has been substantially successful in this appeal and the costs should therefore follow the result.

[9] In the result the following order is made:

1. The appeal is upheld to the extent that the amount in paragraph 1.2 of the order of the Court a quo is substituted with the amount of R860 597-50.

2. The respondent is ordered to pay the costs of the appeal.

_____
**FHD VAN OOSTEN**
**JUDGE OF THE HIGH COURT**

I agree.

_____
**NF KGOMO**
**JUDGE OF THE HIGH COURT**

I agree.

_____
**VS NOTSHE**
**ACTING JUDGE OF THE HIGH COURT**

| | |
|---|---|
| ***COUNSEL FOR THE APPELLANT*** | ***ADV PJ VAN DER BERG*** |
| ***APPELLANT'S ATTORNEYS*** | ***SNYMAN LOTZ ATTORNEYS*** |
| ***COUNSEL FOR THE RESPONDENT*** | ***ADV TD MASHABANE*** |
| ***RESPONDENTS' ATTORNEYS*** | ***MABUNDA INC*** |
| ***DATE OF HEARING*** | ***12 SEPTEMBER 2011*** |
| ***DATE OF JUDGMENT*** | ***27 OCTOBER 2011*** |