


REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2009/31674

(1)	REPORTABLE: YES / NO ✓
(2)	OF INTEREST TO OTHER JUDGES: YES / NO ✓
(3)	REVISED. ✓
15 December 2011 DATE	
 SIGNATURE	

In the matter between:

MITCHELL, KELLY ANN

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

MBHA, J:

[1] The plaintiff sues the defendant as statutory insurer in terms of the Road Accident Fund Act 56 of 1996 (*"the Act"*), for damages suffered as a result of personal injuries she sustained in a motor vehicle collision which occurred on 23 June 2008. The defendant has conceded the merits of the trial

and has accepted full liability for the plaintiff's damages sustained in the collision.

[2] The matter proceeded before me on the issue of quantum only. The parties have settled the plaintiff's claim for general damages in an amount of R120 000,00, and the defendant has undertaken to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Act in respect of the plaintiff's future medical costs which shall include the costs of the future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of a service or supplying of goods to her arising out of the injuries sustained by her in the motor vehicle collision which occurred on 23 June 2008. This is reflected in the order of court dated 9 September 2010 in terms of which the defendant also undertook to pay the plaintiff's costs including the costs of the plaintiff's experts.

[3] The remaining issue requiring determination is the plaintiff's loss of earnings and/or loss of any earning capacity allegedly suffered by the plaintiff.

[4] It is common cause that as a result of the accident, the plaintiff suffered a whiplash injury to the cervical spine.

[5] The body of evidence led at the trial consists of the medico-legal reports of experts on behalf of both parties, as well as the joint minutes of meetings held by the parties' respective orthopaedic surgeons, occupational therapists and industrial psychologists. In addition, the plaintiff testified on her

behalf and also led the evidence of Dr Volkersz, an orthopaedic surgeon, Ms Murcott, an occupational therapist and Dr R Wortley, an industrial psychologist. The defendant led the evidence of Dr Barlin, an orthopaedic surgeon, Mrs Nape an occupational therapist and Mr Marais, an industrial psychologist.

[6] In the pleadings the plaintiff claims an amount for future loss of earnings and/or earning capacity and avers that this amount constitutes an estimate based on an allowance for her loss of employment prospects and/or general loss of employability and/or loss of productivity and/or early retirement in conjunction with an allowance for the time she will be off work as a result of the *sequelae* and treatment of her injuries.

[7] The plaintiff was assessed by the parties' respective orthopaedic surgeons Drs Volkersz and C Barlin, who produced a joint minute dated 27 August 2010 wherein both experts state:

7.1 The plaintiff will require on-going physiotherapy combined with analgesics and anti-inflammatories.

7.2 There is a 1% to 2% possibility that she will require cervical spinal surgery.

- 7.3 They are agreed that the plaintiff is likely to be able to continue working in her current capacity as an HR Administrator until retirement age but that she will be restricted to professions in which extreme neck movements are not required.

[8] Dr Volkersz is of the opinion that the plaintiff's current disability is in the region of 15% but both experts defer to the opinions of an industrial psychologist and/or occupational therapist in this regard.

[9] Under cross-examination Dr Volkersz conceded that his estimate of the plaintiff's current disability in the region of 15% was a mere guesswork and that it is not within his expertise to determine the extent of percentage of the plaintiff's disability as it lies in the realm of the occupational therapist.

[10] Dr Volkersz confirmed that the plaintiff cannot sit for extended periods of time without developing headaches and neck pain which leads to concentration difficulties. Dr Volkersz was also of the opinion that the plaintiff's spine has aged by 15 years and that the plaintiff has been left with a painful and stiff neck and headaches, causing her a lot of pain and discomfort which negatively influences her psychologically and which will also in due course affect her career opportunities in the future. Dr Volkersz was however of the opinion that the plaintiff can continue working in her current career until her normal retirement age.

[11] Dr Barlin, the defendant's expert witness, conceded that the plaintiff sustained a whiplash injury and that she has pain and headaches. Furthermore, she was experiencing difficulty with neck rotation due to pain when he saw her a month after Dr Volkersz had seen her for the second assessment on 12 July 2010. He conceded that victims of whiplash injuries such as the plaintiff continue to have pain varying from mild to severe on an intermittent basis. However, this did not imply that the plaintiff will be required to stop working. He was adamant that the plaintiff can continue working in her current occupation which does not require extreme neck movements.

[12] Dr Barlin testified that Dr Volkersz's estimation of a 15% disability in respect of the plaintiff is a "*wild guess*", that this was an area outside the realm of Dr Volkersz's expertise and deferred to the opinion of the occupational therapist or an industrial psychologist in this regard. Dr Barlin is of the opinion that the plaintiff has not been compromised in respect of her earning capacity despite the pain and discomfort in her neck. He conceded that she will continue to experience pain when working on a black board should she succeed in the future in opening a school for disabled children. However, with assistive devices and pain medication she would be able to deal with the pain. Dr Barlin is also of the opinion that the plaintiff should be able to continue working in her current profession until retirement age and that her symptoms are likely to respond to physiotherapy combined with analgesics and anti-inflammatories. He was adamant that the plaintiff has not been compromised in respect of incapacity despite the pain and discomfort in her neck.

[13] The plaintiff was assessed by the occupational therapists, Ms Murcott and Ms T Nape on 23 June 2010 and 10 August 2010 respectively.

[14] In their joint minute dated 8 September 2010, these experts:

14.1 Agree that the physical demands of the plaintiff's work as an HR Administrator fall mainly into the sedentary work category and as reported to them, the plaintiff has been experiencing neck pain, neck stiffness and headaches in the course of carrying out her work while sitting in a position of sustained neck flexion when working on the computer and moving her head repeatedly between the computer screen and paper work on her desk.

14.2 They note that the orthopaedic surgeons, Dr Volkersz and Dr Barlin are agreed that the plaintiff is likely to be able to continue working in her current capacity as an HR Administrator until she reaches her normal retirement age. They also note that Dr Volkersz is of the opinion that the plaintiff's current disability is in the region of 15%. It is then recorded in the minute that *"From a functional perspective, this could translate in a reduction in work efficiencies and productivity in line with work specific demands, e.g. the reduction would be greater where physical demands include computer work for long hours without allowance for regular breaks and would be less in work positions where there*

is regular opportunities to change postures and relieve neck strain".

- 14.3 They agree that the plaintiff will benefit from applying the recommended ergonomic principles and back care regime as well as from using certain assistive devices.

[15] Ms Murcott testified that she agrees with Dr Volkersz's estimation of the plaintiff's current disability in the region of 15%. Applied to the plaintiff's work abilities, this would translate in a 15% reduction in work productivity and work efficiency. She testified that the plaintiff experiences aggravation of neck symptoms and headaches in the course of carrying out her work which has sedentary physical demands. Ms Murcott also testified that during the assessment, the plaintiff answered a pain questionnaire indicating that the pain has a mild to moderate impact on her life. The plaintiff also pointed out to her that she was currently doing the minimum expected of her at work and that her future career will be dictated by the progression of her condition. She said that although the plaintiff has a willingness to work, she was of the view that she will suffer a loss of productivity in the workplace over time. She agreed that physiotherapy and other assistive devices will assist and optimise the plaintiff's performance at the workplace but will not correct her problem entirely.

[16] Under cross-examination Ms Murcott conceded that she was not aware of the plaintiff's future career aspirations, specifically that the plaintiff intended

opening a high school for children with learning disabilities. She also conceded that the plaintiff has not suffered any loss of income in her current job.

[17] Ms Nape testified that the plaintiff has neck and back pain and headaches especially when working on the computer. She denied that the plaintiff's current disability is in the region of 15% as Dr Volkersz suggests. She said she erroneously omitted to have included in the joint minute with Ms Murcott that she disagreed with Dr Volkersz's assessment in this respect.

[18] Ms Nape was of the view that with the relevant assistive devices the plaintiff can continue in her career and will be able to continue with her future aims of opening a high school for children with learning difficulties. She did not believe that the injuries sustained by the plaintiff on 23 June 2008 have had any impact on her earning capacity.

[19] The joint minute by the industrial psychologists shows their divergent views whether or not the plaintiff's injuries have had any effect on her earning capacity:

19.1 Dr Wortley is of the view that the plaintiff's neck injury would probably translate into a 15% disability, which in turn would represent different degrees of work disability depending upon the work which she is called upon to do. He also noted that while conducting certain tests that the plaintiff would make "silly

mistakes” and in his view this shows that the plaintiff is already demonstrating deficits in concentration which are probably due to the pain arising from the neck injury.

19.2 On the other hand Mr Marais is of the view that the plaintiff has retained her pre-accident ability and employability and has not suffered a potential future loss of employment and earning capacity. Furthermore no loss of employment opportunities or earning capacity has occurred.

[20] During cross-examination Mr Wortley withdrew his estimation of a 15% disability as he could not advance any basis upon which this estimation was based. He was accordingly unable to put any percentage on the plaintiff's loss of earning capacity. He could not assist the court any further in this respect other than suggesting the application of appropriate contingencies to the plaintiff's pre- and post-morbid earnings.

[21] Mr Marais testified that in his view the plaintiff has retained her pre-accident ability and employability and has not suffered any potential future loss of employability and earning capacity. Furthermore, plaintiff's employment records clearly demonstrate that she has suffered no loss of employment opportunities or earning capacity and when told about the plaintiff's aims to open a high school for children with learning difficulties in the future, he stated that the neck pain will not deter her from following her future aspirations in this regard. Mr Marais also testified that the plaintiff obtained a

high average score on the Ravens Test which is indicative of high average ability. In his view, the plaintiff should be successful when required to learn additional and new tasks and she should have a high average successful rate in this respect and her future performance should be successful on condition that she has the desire and motivation to succeed.

THE PLAINTIFF'S EVIDENCE

[22] The plaintiff testified that she is presently 23 years old and that at the time of the collision she was employed as an au pair looking after her employer's children. At the time she was a student. In 2009 she obtained a Business Management Administration qualification with the University of Greenwich. In January 2009 she got a job as a personal assistant to a director in a company. In May 2010 she joined Net 1 Technologies as a Human Resources Administrator. She said that her job entails loading information into the payroll system, writing and filing letters and various correspondence relating to employees on the computer, answering the telephone and delivering documents to other offices within the company. She agreed that the physical requirements of the job are light to sedentary.

[23] She testified that working at a desk causes her to have neck pain and headaches which fluctuate depending on the workload. She said she experiences headaches at least twice a week and that she has since obtained a cushion from the chiropractor which assists to make her sitting easier.

[24] Her company, Net 1 Technologies is an IT based company which looks after many subsidiaries. Initially the plaintiff looked after two subsidiaries, namely, North West Cash Paymaster Services and First Holdings. Her duties in relation to these subsidiaries involved administering their payrolls, pensions and so forth. When she started at the company in May 2010 she worked with another lady and both of them were assigned to look after these two particular companies. However in September 2010 the other lady went on maternity leave and the plaintiff had to continue servicing these two subsidiaries all by herself. She testified that First Holdings was a particularly difficult company to deal with as there were always many queries to attend to. As a result her stress levels increased which in turn worsened her neck pain and caused her to see a chiropractor at least once a month. She said that as a result of the many queries, she started making simple mistakes while performing her duties. It became apparent that she could not cope all by herself and as a result, First Holdings was taken away from her. She stated that after First Holdings was taken away from her, she started coping adequately in her job. Furthermore, in June 2011 she was subjected to a job evaluation and assessment and obtained an "*average competent*" rating meaning that she was coping adequately in performing her job.

[25] The plaintiff testified that she would like to open a high school for children with learning difficulties and that in order for her to do so she would have to go back to study for a teaching qualification. She hoped to continue working in the Human Resources field for the next five years. The plaintiff confirmed that the neck pain would not deter her from following her dreams in

regard to opening a school. She said the neck pain never prevented her from obtaining her diploma in business management administration in 2009. Furthermore, in light of her future aspirations to open a high school for disabled children in the future, she intends undertaking business studies as well as obtaining a teaching degree. The plaintiff also confirmed that she is currently earning a gross salary of R10 000,00 per month. She confirmed that she received a salary increase in 2010. When she joined the company in May 2010, she earned a gross salary of approximately R9 000,00 per month.

[26] Counsel for the plaintiff submitted that the plaintiff has shown that she will be adversely affected in her future career and earnings as a result of the injuries sustained in the collision. He also conceded that having regard to the plaintiff's future plans of opening a school for disabled learners, it would at present be difficult to calculate her loss of earnings accurately as a result of the restrictions experienced by the plaintiff.

[27] I was presented with a variety of actuarial calculations and it was suggested that based on the plaintiff's present income levels, these would assist in arriving at a compensatory figure for the plaintiff's loss of earnings and/or earning capacity by applying a contingency differential which is higher post-accident than pre-accident. It was submitted that the contingency differential of between 5% to 15% would be appropriate having regard to the plaintiff's long career that lies ahead and the many uncertainties that come with it. In the alternative, it was contended that a globular amount could be made to compensate the plaintiff for her loss of earnings.

THE LEGAL POSITION

[28] The general principles underpinning the assessment of a claim for loss of earnings were summed up by Myburgh J in the case of *Radell v Multilateral Motor Vehicle Accident Fund (T), Corbett & Honey* “*The Quantum of Damages in Bodily and Fatal Injury Cases*” Volume IV B3-3 at B3-20 as follows:

“Under the lex Aquilia, the defendant must make good the difference between the value of the plaintiff’s estate after the commission of the delict and the values it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person’s estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate. The court must calculate, on the one hand, the present monetary value of all that the plaintiff would have brought into her estate had she not been injured, and, on the other hand, the total present monetary value of all that the plaintiff would be able to bring into her estate whilst incapacitated by her injuries ...”

[29] It is trite law that before there can be a quantification of a claim for loss of earning capacity a plaintiff must, as a first requirement, prove that the reduction in earning capacity gives rise to pecuniary loss. In *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) at 241H-242B, Jones AJA recognising this important principle, stated that:

“... A physical disability which impacts upon capacity to earn does not necessarily reduce the estate or patrimony of the person injured ... There must be proof that the reduction in earning capacity indeed gives rise to pecuniary loss ...”

[30] Chetty J in *Prinsloo v Road Accident Fund* 2009 (5) SA 406 (SE) at 410B-E succinctly explained the applicable general principle as follows:

- "5. *A person's all-round capacity to earn money consists, inter alia, of an individual's talents, skill, including his/her present position and plans for the future, and, of course, external factors over which a person has no control, for instance, in casu, considerations of equity. A court has to construct and compare two hypothetical models of the plaintiff's earnings after the date on which he/she sustained the injury. In casu, the court must calculate, on the one hand, the total present monetary value of all that the plaintiff would have been capable of bringing into her patrimony had she not been injured, and, on the other, the total present monetary value of all that the plaintiff would be able to bring into her patrimony whilst handicapped by her injury. When the two hypothetical totals have been compared, the shortfall in value (if any) is the extent of the patrimonial loss. ...*
6. ***At the same time the evidence may establish that an injury may in fact have no appreciable effect on earning capacity, in which event the damage under this head would be nil.***
(my emphasis)

[31] *In casu* I accept unreservedly that the *sequelae* of the plaintiff's injuries are that she suffers from neck pain and that she gets headaches at least twice a week which does result, somewhat, in the diminution of her ability to perform optimally at the workplace. But the enquiry, as reflected in the cases I referred to above, does not simply end there. The question that must be answered is whether or not as a result of the disability her earning capacity has been reduced and will cause her to suffer any pecuniary loss. It must be shown or established that the injury she sustained in the collision, does have any appreciable effect on her earning capacity.

[32] It must be recalled that in her particulars of claim, the plaintiff averred that the amount claimed for future loss of earnings and/or earning capacity was an estimate based on an allowance for her loss of employment prospects, loss of employability or productivity and/or early retirement in conjunction with an allowance for the time she will be off work as a result of the *sequelae* and treatment of her injuries.

[33] In my view there is no evidence that has been placed before this Court that supports the plaintiff's averment as stated aforesaid. The plaintiff stated in no uncertain terms that currently she is coping well in her job, that she intends remaining in her current occupation over the next five years and that in the future she intends embarking on a career change by opening a high school for children with learning abilities. To this end the plaintiff intends studying further to obtain relevant teaching and business qualifications. Both Mr Marais, the industrial psychologist and Ms Nape the occupational therapist, confirm that based on their assessment of the plaintiff, she is a well motivated individual and that despite the neck pain and headaches she is adequately coping in her current job – a fact confirmed by her latest job evaluation outcome – and that she would be able to realise her dreams in the future of starting a high school for children with learning disabilities.

[34] Post-accident the applicant managed to complete a degree or diploma in Business Management Administration. She then secured new employment with Net 1 Technologies as HR Administrator in May 2010. In 2011 she received a salary increment and she was also subjected to a job evaluation

around June 2011 and the outcome was that she was “*average competent*” which means that she is coping adequately in her job. Much was made by her counsel about the fact that she was removed from dealing with one of the subsidiaries called First Holdings. The plaintiff explained that this was due to the fact that this company was particularly difficult to deal with and there were always many queries emanating from this particular client. Furthermore, the plaintiff had initially worked with another lady when dealing with the same company, who unfortunately had to go away on maternity leave. In my view it was to be expected that given the short period of time the plaintiff had been employed at Net 1 Technologies, she would experience difficulties in coping with all the attendant queries relating to First Holdings.

[35] The evidence furnished by the plaintiff's experts, in particular Dr Volkersz, did not in my view advance the plaintiff's case in any significant manner. It will be recalled that Dr Volkersz conceded that his estimation of the plaintiff's alleged disability of 15% was “*guesswork*” and that this was outside of his realm of expertise. In the end Dr Volkersz and his counterpart Dr Barlin, deferred this aspect to the opinion of the occupational therapists. What is significant is that Ms Murcott, in her evaluation, in turn relied and referred back to Dr Volkersz's estimate of a 15% disability. Mrs Nape, for the defendant, was adamant that she never agreed to this estimate by Dr Volkersz. Her explanation that she erroneously omitted to mention this fact in her joint minute with Ms Murcott is quite reasonable.

[36] What is significant is that both Dr Volkersz and Dr Barlin are *ad idem* that although the plaintiff continues to suffer neck pain and intermittent headaches, she will be able to continue in her current work activity until her normal retirement age.

[37] The evaluations and assessments by the parties' respective industrial psychologists are significantly disparate. Whilst Dr Wortley found, as a result of the test he conducted, that the plaintiff tended to commit what he termed "*silly mistakes*", Mr Marais, on the other hand, found that based on the Ravens Test the applicant was "*of high average ability*" and that she should be successful when required to learn additional and new tasks. He further found that the plaintiff should have a high average success rate with regard to future performance and that she should be successful with her future ventures on condition that she has the necessary desire and motivation to succeed.

[38] The plaintiff stated in no uncertain terms that the headaches she is currently experiencing will be no bar to her achieving her future aims and plans. Furthermore, as I have pointed out already, she is coping well in her current job.

[39] It is undisputed that the plaintiff has not at any stage suffered any actual loss of income. Nor has it been shown that such loss is likely to occur in future. To the contrary, the parties' orthopaedic surgeons are unanimous in their view that the plaintiff will notwithstanding her physical impairment be able

to continue working in her current career in the field of Human Resources until she reaches her normal retirement age.

[40] In light of what I have stated above, I find that on a balance of probabilities, the plaintiff has failed to discharge the *onus* of proving that as her result of the injury she sustained in the collision on 23 June 2008, she will suffer loss of earnings and/or earning capacity.

[41] I accordingly make the following order:

The plaintiff's claim for future loss of earnings and/or earning capacity is dismissed with costs.


 B H MBHA
 JUDGE OF THE SOUTH GAUTENG
 HIGH COURT, JOHANNESBURG

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DATES OF HEARING	: 11-13 OCTOBER 2011
DATE OF JUDGMENT	: 15 DECEMBER 2011