


REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 39869/10

(1)	REPORTABLE: YES <input checked="" type="radio"/> NO
(2)	OF INTEREST TO OTHER JUDGES: YES <input checked="" type="radio"/> NO
(3)	REVISED. <input checked="" type="checkbox"/>
<div style="display: flex; justify-content: space-between;"> <div> <u>15.8.13</u> DATE </div> <div>  SIGNATURE </div> </div>	

In the matter between:

Sithi: Ndanganeni Caroline

Plaintiff

and

Road Accident Fund

Defendant

Judgment

Wright J

1. The Plaintiff, Ms Sithi is an Assistant Director for Environmental Management in the Gauteng Provincial Government. In May 2006, when she was 25 years of age she was injured in a car accident. She sustained a whiplash injury to her neck. The Fund concedes its liability to compensate Ms Sithi. It has undertaken to provide Ms Sithi with a certificate to cover future medical expenses as envisaged in Section 17(4) of the Road Accident Fund Act, 56 of 1996. I need not decide a

claim for past medical expenses as this has been agreed at R8 500. By agreement, the only issues for me to decide are the amounts to be awarded as damages for past loss of earnings, future loss of earnings and general damages. It was agreed by the parties that if I am to make an award for either past loss of earnings or future loss of earnings or both, the sum to be awarded for general damages is R250 000. It is common cause that as the accident occurred before 1 August 2008, being the date of commencement of the Road Accident Fund Amendment Act, 19 of 2005 Ms Sithi's claims are not subject to any statutory limitation.

THE EVIDENCE

2. Ms Sithi testified. Her evidence and that of her husband establish that before the accident she suffered from no ailment or disability relevant to the issues in this case. She was involved in an accident after the one forming the subject matter of this case but she suffered only a minor injury unrelated to the present matter.
3. On the day of the relevant accident Ms Sithi consulted a General Practitioner. Her blood pressure was up and she had neck pain. A collar was prescribed but she could not afford one. The neck pain worsened over time and in December 2006 she wore a collar for about 30 days. The collar alleviated the pain substantially. After she stopped wearing it she did not feel pain for about a week.
4. Thereafter she needed painkillers. She was hospitalised for about 3 days for traction treatment in September 2008. Sometime later she needed the collar again. She finds that wearing a collar limits her ability to work. For example she can't look down properly when reading a file. To hold the file up when reading is difficult. With the collar she has mild pain. Without the collar the pain varies from moderate to very bad. The collar irritates her skin. She testified that the pain, as she sat in the witness box, was burning, from her shoulder down to her fingers. She often uses public transport rather than driving herself. This, in an attempt to keep the pain away.
5. She had a second session of traction in September 2012. She felt no long term benefit from either session of traction. She always has pain nowadays, she often has headaches, her concentration is affected and she works more slowly than before. She works more hours to get her work done and can't meet deadlines.
6. Ms Sithi, at the time of the accident was on a three month contract with the Provincial Government as an Environmental Officer. In October 2006, some five months after the accident she was appointed on a permanent basis. Post-accident but prior to this appointment, the pain was bearable. Thereafter it became unbearable.
7. Promotions in June 2007 to Senior Environment Officer, in March 2008 to Principal Environment Officer and in September 2009 to Assistant Director, her current position, were achieved. She has an application pending for promotion to Deputy Director. She believes that she has a chance of getting this post and will cope with its demands albeit with pain and difficulty. She told Dr Harmse, an Industrial Psychologist, in January 2012 that she hoped to be promoted to Deputy

Director by 2013, to Director three years later and to Chief Director three years after that. She was turned down for the post of Deputy Director in 2010, being told that she had not been Assistant Director for long enough.

8. Ms Sithi says that her pain and difficulty are getting worse. Interrupted sleep and an inability to carry her child compound matters. When it was suggested to her that she could have tried an intra-oral device which had been recommended by a doctor she said that she preferred to use the cheaper route of medication. She explained that she was only partially successful in alleviating pain.
9. Ms Sithi did state that she does not necessarily see herself spending her entire career in Government and that at some point in the future she may look to large corporate business as a source of employment. However this avenue was not explored further in evidence and in particular it was not used by her Actuary as a basis for calculating future loss of earnings. It cannot, in my judgment form the basis for any future loss of income award.
10. Ms Belot testified for Ms Sithi. The former was Ms Sithi's supervisor at the time of the accident. Ms Belot currently holds the rank of Deputy Director. She is of the view that Ms Sithi has not reached the ceiling of her career. The Provincial Government is an 'equal opportunity employer' and Ms Sithi will only be held back if she cannot function.
11. Ms Sithi's husband testified. He is a school principal. He confirmed his wife's difficulties post-accident, for example her inability to sleep properly, her dependence on painkillers, her difficulty cooking and her inability to carry their daughter. Her concentration has suffered as has her memory for things like cell-phone numbers and PIN numbers. She has become irritable and aggressive since the accident.
12. Ms Hassim, an Occupational Therapist testified that Ms Sithi will struggle if promoted. If left untreated, her injuries will deteriorate. Ergonomic adjustments to the workplace will benefit Ms Sithi. Ms Hassim readily conceded that she premised her evidence to some extent on the findings of Dr Schnaid, an Orthopaedic Surgeon who examined Ms Sithi and was of the view that a poor outcome is predicted. Ms Hassim confirmed reduced neck and shoulder mobility and pain resulting therefrom. She assessed flagging concentration by Ms Sithi towards the end of a three hour assessment. Ms Hassim stated that treatment will manage Ms Sithi's condition but will not cure it. Ms Hassim is of the view that if treatment does not help, Ms Sithi will not be able to continue in her present job.
13. On the morning of Monday 29 July 2013, the fourth day of the trial, Mr Louw made an in chambers application on behalf of Ms Sithi for the matter to stand for a day or possibly a bit longer so that Ms Sithi could undergo an MRI scan. This, I was told, would help determine in particular whether or not Ms Sithi suffered from an impinged nerve or tendon in her right shoulder. It would enable Ms Sithi's representatives to deal accurately with the view of Dr Swartz, an Orthopaedic Surgeon retained by the Fund, that Ms Sithi suffered from tennis elbow unrelated to the accident and which ailment was causing her inability to stir pap. I declined the request as Dr Swartz's report had been in the possession of Ms Sithi's

attorneys for over a year. In addition, the possibility of the Fund wanting to take action consequent upon the results of the scan loomed large, leading to the high risk of a partly heard trial.

14. Ms Prinsloo, a Clinical Psychologist was called on behalf of Ms Sithi. A three hour assessment was made of Ms Sithi in April 2013. To some extent Ms Sithi's promotion wishes are wishful thinking. She does not wish to disappoint those around her, especially at work and consequently she applied for promotion to Deputy Director. Ms Sithi told Ms Prinsloo that she does not want promotion as she feels that she will not be able to cope. Ms Prinsloo found that Ms Sithi is not depressive but does suffer from anxiety, represses her emotions and sometimes feels helpless. Ms Prinsloo is of the view that Ms Sithi is not expected to cope beyond another 5 to 10 years.
15. Ms Williams, an Industrial Psychologist testified next for Ms Sithi. She pointed out that Ms Sithi obtained an Honours Degree in Environmental Management in 2010, some 4 years after the accident. Ms Williams stated that but for the accident Ms Sithi would have attained Deputy Director level by September 2010. She stated that Ms Sithi would very probably have reached Director level between the ages of 40 and 45 but for the accident. She explained her written report to the effect that this level may have (rather than probably would have) been attained, as a language error by Ms Williams. I do not doubt Ms Williams' bona fides. Ms Williams diagnosed mild depression and said that Ms Sithi's injuries will worsen to the extent that she will be unable to cope without workplace adjustments. She is of the view that Ms Sithi may well be promoted but if so she will be overwhelmed by the difficulties of the higher job which will lead to resignation from the position. Ms Williams stressed that it is not only physical pain that causes Ms Sithi to struggle at work. Ms Williams is firmly of the view that Ms Sithi is less competitive in the job market than she was pre-accident. It was stated by Ms Williams that the State is less accommodating of people with injuries like those suffered by Ms Sithi than is the private sector.
16. The Fund's case, that with a neck collar and ergonomic aids paid for by the Fund, Ms Sithi's pain will largely disappear, enabling her to work efficiently, was met with some scepticism by Ms Williams. Ms Sithi will first have to buy the necessary equipment and be refunded later by the Fund. It is not just a question of pain management. Ms Sithi presently needs to work overtime to keep up. In a more responsible position she won't cope. She has already been criticized by senior staff for taking too much sick leave. She would need an accommodating manager, which she has at present. Future managers may take a different stance.
17. Ms Williams pointed out that Ms Sithi's performance level, as determined by her employer, dropped from excellent pre accident to adequate post- accident.
18. Ms Williams assessed Ms Sithi as poor in reading comprehension and memory but as extremely good at more clerical type work like reading figures off tables. Ms Williams did concede the possibility that Ms Sithi struggles with her present workload at least partially because of her lack of ability to comprehend what she reads. Ms Williams emphasised that conditions during the assessment are better

than in a normal working environment where an office worker is subjected to distractions.

19. Ms Williams suggested that a higher than usual percentage deduction for contingencies be applied to Ms Sithi's future estimated earnings taking into account the accident. She cited time required off work for treatment, possible early retirement, the progressive nature of the injuries, behavioural problems and an inability to find alternative work if Ms Sithi were to lose her job for any reason, for her view.
20. Dr Schnaid, an Orthopaedic Surgeon testified for Ms Sithi. He examined Ms Sithi three times, once in November 2009, then in November 2011 and again in March 2013. Ms Sithi shows a 30% decrease in her ability to place her right ear towards her right shoulder. Dr Schnaid regards this as a significant decrease in mobility. Ms Sithi's injury was to the C6/7 area of the neck. She cannot raise her right arm beyond just past the horizontal. She has a trapped tendon in the right shoulder caused by inflammation of the muscle. Her shoulder pain and inability to use her shoulder fully are getting worse over time to a significant extent. She may in the future lose all movement in her right shoulder. Surgery may provide a temporary respite from pain and stiffness but will not be a cure. At a minimum Ms Sithi requires physiotherapy and anti-inflammatory agents. Sooner or later Ms Sithi will become unable to do sedentary work.
21. When Dr Schnaid examined Ms Sithi she was not suffering from tennis elbow. The reason why Ms Sithi battles with tasks like stirring pap is because of her right shoulder injury. Ms Sithi is right handed. Tennis elbow is a condition that can go away without treatment. Injections and anti-inflammatories can help to get rid of tennis elbow.
22. Dr Schnaid testified that Ms Sithi should have gone for physiotherapy. He cannot recall if he told her so. X-rays called for by Dr Schnaid did not reveal abnormalities although the November 2009 X-rays showed a slight scoliosis of the neck. He noted Ms Sithi's decreasing neck manoeuvrability over time.
23. Dr Swartz, an Orthopaedic Surgeon testified for the Fund. He examined Ms Sithi in January 2012. He noted a normal range of neck movement but with pain referred from the neck to the right shoulder. He found no abnormality in the right shoulder. He did not examine Ms Sithi's right shoulder or arm for mobility. He diagnosed tennis elbow on the right side and found that this was the cause of Ms Sithi's difficulty in cooking. This he found was unrelated to the accident. Dr Swartz honestly and fairly conceded that tennis elbow can last between six weeks and nine months and that it could be that his diagnosis is valid for that period only. He could not say how soon after the onset of the tennis elbow his examination took place. He stated that if Ms Sithi presently experiences an inability to stir pap this would be caused by either another bout of tennis elbow or nerve irritation experienced in the right shoulder and originating in the neck. He conceded stiffness in the right shoulder caused by lack of use caused in turn by pain originating in the neck and referring to the right shoulder.

24. Dr Swartz stated that a person could suffer nerve irritation without any signs appearing on an X-ray. He stated further that it is possible that Ms Sithi was just having a good day on the day he examined her and found normal range of movement in the cervical spine. He could not recall if he examined for muscle wasting in the right upper limb. Accordingly he could not state if Ms Sithi used her right arm less now than she did before the accident. He strongly recommended that she undergo manipulation of the neck by an Orthopaedic Surgeon under general anaesthetic with injections at the same time. He said that he has experienced a 90% success rate with this technique. However, he did say that presently Medical Aid Societies do not pay for this treatment. The cost would be between R12 000 and R15 000. He added that as far as he knew only he and one other Orthopaedic Surgeon performed this procedure in South Africa. He said that injections to the neck, without anaesthetic are too painful to be a practical solution. He said that he cannot blame or criticise Ms Sithi for not having had more treatment than she has received. Regarding traction treatment, he finds that in most cases it is not properly administered. No traction treatment has been given at Milpark Hospital, where he works with about six other Orthopaedic Surgeons, for about 5 years.
25. It was put to Ms Sithi in cross-examination that she is at least partly to blame for her own predicament. It was suggested to her that she could and should have had more treatment from an early stage after the accident. This line of defence was abandoned in the light of Dr Swartz's testimony that Ms Sithi could not be criticised for not having undergone more treatment than she has received to date.

FINDINGS

26. In my view no act or omission by Ms Sithi operates to break the legal chain of causation which began with the accident. Her evidence of lack of funds went unchallenged. She gave me the distinct impression, when she testified, of an honest person trying her best to cope with her difficulties. Ms Hassim, the Occupational Therapist confirmed Ms Sithi's relative stoicism and determination to make the most of her situation.
27. In *Louwrens v Oldwage* 2006 (2) SA 161 SCA at para 27 Mthiyane JA, speaking for the Court held that what is required of a Trial Judge is to determine to what extent the opinions advanced by the experts are founded on logical reasoning and how the competing sets of evidence stood in relation to one another, viewed in the light of the probabilities. In *Louwrens* the Trial Judge was confronted with a battery of experts on both sides. In the present case, only Dr Swartz testified for the Fund. Nevertheless I feel it incumbent on me to view the evidence with the learned Judge of Appeal's words in mind.
28. The evidence shows that different ranks, for example Deputy Director and Director each have a number of different salary levels described as notches or bands. The rank of Deputy Director has 24 notches. It is possible to be promoted but to suffer a simultaneous reduction in salary. This could happen if one moved from a high notch at one level to a low notch on the next higher level. I find that

Ms Sithi would not apply for or accept a promotion to a higher level if that would cause a drop in income.

29. In my view Ms Sithi has failed to prove past loss of earnings. Although her promotions post-accident were quite rapid, they were to relatively low level posts. In Exh F, an actuary's report prepared by Mr Jacobson on behalf of Ms Sithi, he was asked by his client to assume a time lapse of 16 years from Deputy Director to Director. This confirms the steep rate at which the intervals between promotions increase over time as one seeks ever more senior posts. There is no firm evidence on which to base a finding that Ms Sithi, but for the accident, would by now have been promoted to a position higher than the one she currently holds. It was not suggested by Ms Sithi or her counsel, Mr Louw that her promotions post-accident happened at a slower rate than had there been no accident. The same considerations apply to salary notches.
30. On the question of future loss of earnings, I was persuaded by both counsel that if I was minded to make an award for future loss of earnings I should make certain specific, relevant findings. On the strength of these findings, fresh actuarial calculations would be made. I was assured by counsel that in all likelihood these calculations would be agreed between the parties and that these would form the basis of my award. I was told that this is the standard course taken in cases such as the present.
31. Ms Strydom, for the Fund submitted that Ms Sithi's career is unaffected by the accident. Ms Strydom suggested a promotion to Deputy Director on 1 December 2013 and suggested a further promotion to Director between the ages of 55 and 57. The former suggestion is, to my mind reasonably made and is in line with the evidence and the probabilities. Ms Sithi's Honours Degree, achieved in her field in 2010, some four years after the accident is a strong indication to me that she has both the intellectual ability and the necessary application to progress to Deputy Director and beyond. In my view a finding of probable promotion to Deputy Director on 1 December 2013 is warranted. It is not Ms Sithi's case that she would already, by the time of trial, have been promoted to Director either but for the accident or having regard to the accident.
32. On the question of reaching Director level, Ms Sithi's Honours Degree and her positive attitude together with the fact that she is a black woman in a country which needs to correct the past imbalance of wrongly holding back black women from their rightful career paths, are to my mind weighty evidence that she would, but for the accident have been promoted to Director. Ms Williams, the Industrial Psychologist was firmly of the view that Ms Sithi, but for the accident, would very probably have reached Director level between the ages of 40 and 45. This may be a little optimistic. There was no attempt in Ms Sithi's camp to reconcile Ms Williams' view with the instruction given by Ms Sithi or her legal team to Mr Jacobson to assume a 16 year interval between Deputy Director and Director. I hold that the level of Director would, but for the accident have been reached at age 48. I am not bound by Mr Jacobson's assumption but in my view it accords with the probabilities.

33. I hold that Ms Sithi will, having regard to the accident probably reach the level of Director at age 50. Ms Belot testified that Ms Sithi will only be held back if she is unable to function. Adding the 16 years used by Mr Jacobson on initial instruction from Ms Sithi as the interval between Deputy Director and Director takes Ms Sithi's age from its present 32 to 48. Adding another 2 years as a safe estimate of the additional time that it may take Ms Sithi to reach Director level because of her injury puts her at 50 years of age. I am to some extent fortified in my view by the submission made by Mr Louw that Ms Sithi will not retire, having regard to the accident, earlier than age 55. In my view Mr Louw's submission, in truth really a partial concession, accords with the probabilities. A further report, prepared by Mr Jacobson towards the end of the trial became Exhibit J by agreement. He assumed a 13 and a half year interval between Deputy Director and Director on the but for the accident scenario. The reason for reducing the 16 year period to 13 and a half years was not explained. He assumed a 16 year period in the having regard to the accident scenario.
34. I am in agreement with the evidence presented for Ms Sithi that Ms Sithi will not be able to continue working until normal retirement age. Determined as she is, she will be unable to cope beyond age 55 when she will be forced into retirement. Mr Louw did not suggest a probable lower retirement age even though Ms Prinsloo, the Clinical Psychologist was of the view that Ms Sithi is not expected to cope beyond another 5 to 10 years. To the extent that the Fund's case suggests retirement beyond age 55 having regard to the accident it does so only against the probabilities. Even though Ms Sithi does not suffer any bone injury in her neck the consequences of her injury are such that she is presently only just coping as she needs to work longer hours and is more or less constantly in pain. Ms Strydom argued that with proper future medical treatment Ms Sithi's career will be unaffected by the accident. I am of the view that it is probable that even assuming reasonable efforts by Ms Sithi to obtain recommended medical treatment, she will have her career shortened by the accident. Ms Sithi's fortitude will overcome her increasing debility only for a limited period of time.
35. Ms Sithi was injured while on duty but it is common cause that she has not received any compensation under the Compensation for Occupational Injuries and Diseases Act 130 of 1993.
36. The remaining question to be answered is what suitable deduction is to be made for contingencies from Ms Sithi's estimated future earnings both but for and having regard to the accident. Mr Louw did not contend for a retirement age but for the accident beyond age 62 and a half. Ms Strydom voiced no objection to this suggestion and in my view this age is reasonable and probable. Mr Louw suggested deducting half a percent per year for the remainder of Ms Sithi's working life both but for the accident and having regard to the accident. I agree. In his, *The Quantum Yearbook*, 2012 at page 102 the Actuary, Mr RJ Koch suggests this percentage per year. Zulman JA, in **RAF v Guedes 2006 (5) SA 583 SCA** at paragraphs 9, 10 and 17 appears tacitly to approve Mr Koch's suggestion. As Ms Sithi is presently 32 years old I would calculate the percentage deduction to be made from her estimated earnings but for the accident as follows. From 62.5 deduct 32, leaving a remainder of 30.5 which is to be divided by 2 (half a percent per year) giving 15.25 percent.

37. I calculate the corresponding percentage having regard to the accident and with a retirement age of 55 as follows. 55 less 32 is 23, which is to be divided by 2 leaving a quotient of 12.5.

38. To summarise:

38.1 Ms Sithi has suffered no past loss of earnings.

38.2 But for the accident Ms Sithi would have been promoted to Deputy Director on 1 December 2013. Thereafter she would have been promoted to Director at age 48. Thereafter she would not have been promoted. She would have retired at age 62 and a half.

38.3 Having regard to the accident Ms Sithi will be promoted to Deputy Director on 1 December 2013 and to Director at age 50 and thereafter she will not be promoted. She will be forced into early retirement at the age of 55.

38.4 Ms Sithi will be promoted at salary notches just sufficient to ensure that she does not suffer a reduction in salary as a result of her promotions.

38.5 A 15.25% deduction for contingencies is to be made from pre-accident future predicted income and a 12.5% deduction is to be made for contingencies from post-accident future predicted income.

38.6 Ms Sithi is entitled to R8 500 for past medical expenses and to R250 000 as general damages.

38.7 The parties are granted leave to approach me in chambers with fresh actuarial calculations.



GC WRIGHT J

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Hearing finalised:	6 August 2013
Date of Judgment:	15 August 2013