REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **42880/2015**

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

5/6/17

Date: **WHG VAN DER LINDE**

In the matter between:

Moremoholo, Mamello Cecilia — **Plaintiff**

and

Road Accident Fund — **Defendant**

JUDGMENT

Van der Linde, J:

Introduction

[1] This is a trial action in which the 27 year old plaintiff seeks to recover damages from the defendant on the basis of its statutory liability. The plaintiff, then 22 years old,[1] was a passenger in a vehicle that was involved in a collision late Sunday afternoon, 29 April 2012. She was taken from the scene of the accident to the Sebokeng Hospital where she was discharged on 2 May 2012.

[2] The injuries suffered in the collision were, as reported by the plaintiff to a neurosurgeon, Dr Van Heerden, whose report was agreed between the parties, multiple abrasions and lacerations on her back, on the back of her neck, and on her right upper arm and left forearm. She also sustained a laceration of the right parieto-occipital region of the head. In the plaintiff's view, she also suffered a head injury with mild traumatic brain injury.

[3] The only issue that remained for determination by the court was whether the plaintiff has suffered a loss of income, both past and future. A subsidiary aspect of this issue was whether the plaintiff has proved only a loss of earning capacity, without the specificity required to be able to translate that loss into an arithmetically calculable amount representing a loss of earnings.

[4] In opening, plaintiff's counsel informed the court that the defendant had conceded liability for all of such damages as the plaintiff might prove; and further, that the parties had agreed to a separation of issues in terms of rule 33(4), requiring of this court to determine only the plaintiff's loss of earnings, if any.

[5] The question of general damages has been deferred pending the reference to the HPCSA for assessment of the injuries suffered by her, and the question of medical expenses has also, by agreement, been deferred. Having regard to the agreed views of the parties in this regard, I agreed to hear the evidence on the issue so isolated, and I make an appropriate order at the end of this judgment.

---

[1] She was born on 23 August 1989; see exh E p1.

[6] Plaintiff's counsel also informed the court that the plaintiff's case was that the injuries she had suffered resulted in both neuro-cognitive deficiencies and physical limitations. Plaintiff's counsel handed up without objection the following bundles of documents: the plaintiff's expert reports as exh A; the defendant's expert reports as exh B; the defendant's supplementary expert reports as exh C; the bundle of joint expert minutes as exh D,[2] and the plaintiff's quantum documents as exh E. These include the hospital records. At the argument stage the plaintiff's counsel also handed up as exh F an actuarial calculation by Mr Ivan Kramer, an actuary.

[7] All of the documents contained in these exhibits were agreed to be what they purported to be, except the following, in which case there is an additional agreement as to truth of contents. First, exh E was agreed as to truth of contents. Second, the expert reports of Dr L. Gordon, a plastic and reconstructive surgeon acting for the plaintiff, and Dr C Van Heerden, neurosurgeon acting for the defendant, were agreed as to truth of contents. Third, the parties agreed that although the experts' identified areas of dispute remained in dispute, their areas of agreement could be accepted as fact.

[8] Finally, before the plaintiff ultimately closed her case, the court was informed that the parties had agreed that the defendant's failure to call its expert occupational therapist to rebut the viva voce evidence of Ms Nape, the plaintiff's occupational therapist, would not justify an adverse inference against the defendant. The viva voce evidence comprised that of the plaintiff, and that of Ms Nape. Both were fully cross-examined on behalf of the defendant.

The uncontested facts

[9] Before referring to their evidence, it is necessary to say something about the agreed evidence of the two experts. Dr Gordon reported on the scarring suffered by the plaintiff to

[2] This bundle was adumbrated after the parties, mid-trial and after intervention by the Acting Deputy Judge President, held a further pre-trial conference and agreed further issues.

her scalp, left forearm, and right shoulder. He recorded that according to the medical records the plaintiff had suffered multiple scalp lacerations, lacerations of the left arm, and lacerations of the right trapezius and neck area.

[10]She was hospitalised for three days, received conservative treatment, and her wounds were cleaned and sutured. Having examined the scars, Dr Gordon considered that scar revision will involve some R50 500. He did not think that she suffered any disability due to the disfigurement, nor that her employability has been affected.

[11]Dr Van Heerden saw the plaintiff recently, on 18 March 3017. The plaintiff reported the injuries listed above. Dr Van Heerden found no record of neurological problems, with the plaintiff's Glascow Coma Scale always given as 15/15. To him, the plaintiff complained of pain in the upper thoracic region of the back, and some pain on the right side shoulder and neck. She said to him that the pain inhibits her from performing any form of employment; and it results in her having sleep difficulties and carrying any weight in the right arm.

[12]Dr Van Heerden reported that all the plaintiff's basic activities appeared within normal limits. He considered that as regards advanced activities, these all appeared normal for a woman of her age. She reported that she did her own shopping, cooking, and cleaning. Importantly, he accepted that physical or excessive physical activities may be hindered due to the pain she experiences in the right arm.

[13]On examination, the plaintiff presented as *"a small squat young woman, markedly overweight. She has a weight of 112.0kgs, and her BMI is greater than 40. This classifies her as being morbidly obese."* Dr Van Heerden could not define any motor weakness despite the plaintiff's complaint of weakness in the right upper limb. Her power was graded as 5/5 in all ranges of movement, and muscle bulk and tone was normal. There was no wasting, weakness or fasciculation of muscle in any of the upper or lower limbs.

[14]He noticed some degenerative narrowing of disc space between C5 and C6, but opined that it was unlikely to be related to the collision. The plaintiff did not raise any complaints

relating to her head injury, and in his view she has made a full and uneventful recovery. He also could not find any evidence of why the plaintiff complained of weakness of the right arm, unless this was related to the scarring. He considered that she has suffered no permanent disability from a neurological point of view.

[15]The two opposing orthopaedic surgeons, Drs Malan and Schepers, agreed that the plaintiff had sustained *"a mild head injury (lacerations), laceration to the back of her neck, upper part of her back, right shoulder and left forearm."* They deferred to the relevant experts regarding the head injury and the disfigurement. The former would then be Dr Van Heerden, neurosurgeon, and the latter Dr Gordon, plastic and reconstructive surgeon. The orthopaedic surgeons agreed too that no treatment was needed for the shoulder injury.

[16]In summary then, on the agreed medical expert evidence, the plaintiff had suffered a mild traumatic head injury, which has left her with no complaints as of 18 March 2017, and from which *"she has made a full and uneventful recovery."* Orthopedically, she has recovered and no further treatment is envisaged. It is accepted though that physical or excessive physical activity may be hindered due to the pain she experiences in the right arm.

[17]The disfigurement did not result in any disability, and has not affected her future employability. Surgical revision will improve the scars, but not remove them; the plaintiff will remain disfigured to that extent as a consequence of the accident and the injuries there sustained.

<u>The viva voce evidence</u>

[18]The plaintiff testified in her own cause. She was born on 23 August 1989, and lives in Orange Farm with her 12 year old son. She attended school up to grade 8, but did not complete that grade as she fell pregnant. She is not employed, and has no particular training. Having regard to the accident, her siblings – a brother and sister – assist her financially when they are able to do so.

[19]Before the accident she was employed by Ms Portia Samsam as a domestic worker. Before her employment with Ms Samsam, she sold school bags for her brother, and worked for a while in a fish and chips shop. She says she can no longer perform the work of a domestic worker to the extent she previously could.

[20]She used to be able to perform spring cleaning, washing, ironing, fetching water, and window cleaning. She cannot anymore, because she is using only one side. She can still iron, but only one item at a time. She can still wash dishes and mop the floor, but if she does more, she feels pain. She also feels that she is able to use only one side of her body. She buys pain blockers over the counter to assist her pain treatment.

[21]She lost consciousness, she says, in the accident, and only woke up in hospital. Her treatment consisted of the cuts being sutured and conservative treatment in the form of tablets. Some were what she called pain blockers, but she was not told what the others were for. After her discharge from hospital on the third day, she went home. For some two months she could not walk or visit the toilet properly.

[22]She continued to suffer from pain in her back, and could not move her right hand properly. Later, two months later, she went to the Stratford Clinic, where a piece of glass was removed from her shoulder. She did not return to her previous employment because she realised that she could no longer do what she did before. She went and told her previous employer that.

[23]She was asked in chief about her weight. She feels that she now weighs more than before, but does not know what she weighed then, or now. She did not do any particular exercises before the accident. She thinks she put on weight because she is sitting at home and not as active as she used to be. When she was asked about her weight, she cried, and said that her weight is "heavy".

[24]She earned R1500pm as a domestic worker during the period 2011 to 2012. She received a bonus of R2000 on her birthday on 23 August 2012. She has not since the accident earned any income. She has not been looking for employment.

[25]In cross-examination it was put to her that she was fully conscious at all times, and that the admitted hospital records reflected this. The GCS was reflected as 15/15 throughout.

[26]Concerning her pre-accident work history, she explained that she came to South Africa in 2003 with her mother. She was then in grade 7. In grade 8 she fell pregnant, and shortly thereafter her mother passed away. In 2007 she started working for her brother, and in 2008 she worked in the fish and chips shop. It closed down. During the period 2008 to 2011 she had no work.

[27]She goes to the clinic of she feels pain or if the weather is cloudy. She would ask for tablets, and explain to those attending on her that her bones are sore. Concerning her relationships with her son, and her siblings, she explained that these were as good now as they were before the collision.

[28]The second witness for the plaintiff was her expert occupational therapist, Ms Nape. She had examined the plaintiff and compiled a comprehensive report. She concluded ultimately that the plaintiff was capable of performing work of a light physical nature, but no longer of a medium physical nature. In her view, the work of a domestic worker fell within the band of work of a medium physical nature. In her view the plaintiff suffered from a moderate disability, at 34%. Thus she concluded that the plaintiff could not do the work that she previously did.

[29]She testified that pain was a common and recurring feature of the plaintiff's complaints. She complained particularly of her back. The witness so designed her tests that the pain issue would come to the fore. To her, the plaintiff said that the pain prevented her from doing anything but light duties.

[30]The witness said that the plaintiff is having problems with her emotions, and tended to get angry quickly with others. The witness considered too that the plaintiff was inclined to be forgetful, and she related this to the fact that the plaintiff had lost consciousness. She considered too that the plaintiff would have difficulty learning a new task, and she related this to the mild traumatic brain injury she had suffered.

[31]As regards the back pain, she related this to the narrowing between discs C5 and C6, and consequential possible post traumatic cervical spondylosis.

[32]In cross-examination it appeared that the witnesses had not before had sight of the defendant's orthopaedic surgeon's report, nor the now agreed report of neurosurgeon Dr C Van Heerden. These, particularly the report of Dr Van Heerden, would of course impact her conclusions. She was accordingly asked whether these very different findings concerning the plaintiff would change her view. She said that it might, if she were afforded the opportunity of reassessing the plaintiff in the light of these reports, and if her reassessment led to different conclusions.

[33]She was challenged on the complaint of forgetfulness that the plaintiff had raised with her, it being pointed out that no such complaint had been raised with Dr Van Heerden. She answered that what had been told to her, she had noted down in her report. It was pointed out that Dr Van Heerden noted no motor weakness, whereas her finding was different. It was pointed out that Dr Van Heerden concluded that the disc narrowing was probably unrelated to the collision; she said she would have to read his report, and reassess the plaintiff.

[34]It was put to her that according to Dr Van Heerden the plaintiff had made a full recovery from the head injury. She explained that she did not know the plaintiff before the accident; that she assessed the plaintiff as the plaintiff presented; and that in her assessment of the plaintiff she had therefore assumed that the plaintiff did not present with those deficiencies before the accident.

Assessment of witnesses

[35]The plaintiff was not an accurate witness. She told the court that she did not complete grade 8; she told some of the experts that she had. Her evidence of losing consciousness cannot be accepted, because the contemporaneous hospital records do not match that conclusion. There does not appear to be any orthopaedic basis for her asserted weakness on one side of the body. There is no evidence that she tried to find employment as a domestic worker after the accident.

[36]It can be accepted though that the scarring must have upset her, as a young woman. The scars are covered when she is in normal wear, but as the experts have noted, if she were to wear a bathing costume, they will show.

[37]Also, the plaintiff reported frequently that she suffers from pain. The veracity of that claim is difficult to assess, particularly since it cannot be related to an orthopaedic injury caused in the accident. There is the narrowing of disc space, and that could conceivably cause the back pain; but the common cause fact is that it is probably unrelated to the accident. The pain may also be psychosomatic, but this possibility was not explored in cross-examination.

[38]Before concluding on the injuries, it is necessary to comment also on the evidence of Ms Nape. I thought she was a good witness: to the point, on top of her field, and careful in her assessment of the patient and of the questions put to her. But it cannot be denied that the failure to have provided her with the essential orthopaedic report obtained on behalf of the defendant, nor the common cause report of Dr Van Heerden, rendered her evidence largely moot.

[39]The narrowing of the disc space; the mild traumatic brain injury; the agreed absence of a need for further treatment for the shoulder – these were all essential facts that she did not have as part of her assessment material. Add to that the fact that the hospital records, which are also common cause, do not suggest any loss of consciousness, and her concession that

she might have to reassess the plaintiff in view of the material she had not seen before, and the relevance of her evidence is greatly diminished.

[40]It should also be flagged that the "Dictionary of Occupational Titles" relied on by Ms Nape for the conclusion that because the plaintiff (on her view) was post-accident now limited to light physical work in the future, and that therefore she could no longer perform work as a domestic helper, has been criticised for relevance to the local condition, by Satchwell, J in Buma v Road Accident Fund (2010/17220) [2012] ZAGPJHC 258 (14 December 2012).

Conclusion on the injuries

[41]Ultimately, one must therefore conclude, as I do, that the plaintiff does experience pain, but the extent is not clearly established; and since it appears unrelated to an identifiable injury, one does not know what it duration into the future might be. One must accept that physical or excessive physical activity may be hindered due to the pain she experiences in the right arm.

[42]But apart from the pain, no other disability – apart from the visual effect of the scarring – has on a balance of probability been shown.

Assessment of quantum

[43]The law in relation to assessment of loss of earnings and earning capacity was recently referred to in Van Heerden v Road Accident Fund (6644/2011) [2014] ZAGPPHC 958 (8 December 2014). The following dicta from that judgment are of assistance.

" 70. Now, turning to the law in general on a claim for loss of future income. It is so that the mere fact of physical disability does not necessarily reduce the estate or patrimony of the person injured. Put differently, it does not follow from proof of a physical injury, which impaired the ability to earn an income, that there was in fact a diminution in earning capacity. See Union& National Insurance v Coetzee 1971 SA 295 (A) at 300 (A).
71. I had regard to a reported judgment by Makgoka J, Masilo D Motalalepule (2 March 2012) (GNP) that in recent times the clearest application of the principle set out above is to be found in two cases, namely Rudman v The Road Accident Fund 2003 (2) SA 234 (SCA) and Prinsioo v Road Accident Fund 2009 (5) SA 406 (SE). In Rudman the trial court dismissed the

claim on the ground that although the appellant had proved disabilities, which potentially at any rate could rise to a reduction of his earning capacity he had failed to prove that this had resulted in patrimonial loss since the loss of earnings and earning capacity he had suffered was a loss to the company and not to his private estate.

72. In Prinsloo a white female inspector in the South African Police had suffered soft tissue injury of the lumbar spine. The accident rendered her unsuitable to continue in her physical demanding situation at the SAPS. A sedentary type of work was recommended. The expert opinion was that notwithstanding her placement in a sedentary position, whatever the prospects she might have enjoyed for promotion were substantially reduced, if not entirely negated. The court rejected that supposition. The court reasoned that if relevant factors such as race, equity and structural requirements were taken into account the plaintiffs prospects for promotion as a white woman were negligible, even pre-accident as the evidence by the SAPS had established. The court therefore concluded that the claimant had failed to discharge the onus of proving that she suffered a loss or reduction of earning capacity as the pre- and postaccident promotion prospects were the same."

[44]In Deysel v Road Accident Fund (2483/09) [2011] ZAGPJHC 242 (24 June 2011) the court was at pains to point out that if a loss actually suffered cannot be shown, but an impairment actually suffered can be shown, it would be more appropriate to award a sum of money as general damages:

"24. This then raises the question of what is to be done if an actual patrimonial loss cannot be proven. I believe that there is a solution to this situation if the facts of the case show that the plaintiff is nevertheless required to put in more effort, and suffer hardship in his or her employment due to the accident (even though this will not affect the plaintiff's actual salary).

25. In the decisions of the Supreme Court of Appeal cited above, 1 must point out that damages for loss of earnings and/or loss of income were granted in cases where the plaintiff had in fact suffered a true patrimonial loss in that their employment situation had manifestly changed (which is not apparent or alleged by either party in casu).

26. However, in the unreported decision of De Kock v The Road Accident Fund 2009 9851/07, the High Court was faced with a set of facts similar to this case. The plaintiff, who was injured in a motor vehicle accident, suffered impairment but did not foresee early retirement or a change in his employment post morbid (as with the plaintiff in casu). Instead, the plaintiff foresaw an increased amount of effort that would be required to perform his duties. The joint minute of Drs Fleming and Marais (the latter of whom has provided a very helpful medico legal report in casu) confirmed this. Nevertheless, the court awarded patrimonial damages for loss of earning capacity. I am respectfully of the opinion that the court erred in making this award as no true patrimonial loss (as seen in the cited Supreme Court of Appeal cases) had been suffered. The plaintiff should instead have been awarded an additional amount of general damages for the pain and suffering of his added effort."[3]

---

[3] A judgment that collects very handily the cases on this issue is that by Wentzel, AJ in Oosthuizen v Road Accident Fund (2014/04972) [2015] ZAGPJHC 172 (15 July 2015).

[45]In my view this approach is applicable in the present matter, even though the question of general damages which is intended to compensate the plaintiff for loss of amenities of life, and pain and suffering generally, has been deferred. Put differently, it seems clear to me that a court is still free to award an amount as general damages for loss of earning capacity where the fact of an impairment has been shown on a balance of probabilities, but its quantification cannot realistically be done with any pretence at mathematical accuracy.[4]

[46]Turning then to an assessment of the quantum of the plaintiff's claim, the critical first conclusion is that it has not been shown on a balance of probability that the plaintiff can no longer actually perform the work she had previously performed as a result of the injuries sustained in the collision. Here is no permanent orthopaedic debilitation. There is the pain, as I have concluded, but its ambit or extent is unknown, and it appears it cannot be related to a specific injury suffered in the collision.

[47]On the other hand, the plaintiff's whole person, including especially her employability in the open labour market for unskilled work, is as a result of the pain not the same as it was before the accident. It was not suggested that she is feigning her condition, and she was not cross-examined on this score. Thus, even if the pain cannot related to a specific injury suffered in the collision, it was absent before the collision and is now present; its source must be the collision.

[48]The plaintiff's work scope is limited to unskilled physical work, as that of a domestic helper. But everyone knows that the work of a domestic helper exacts constant physical engagement and application. Suffering pain will likely impact her ability to perform in that milieu at her pre-accident level; it might translate into having to take more time off, or into a reduced work-rate. The insidious effect that this may have on her salary rate or bonus

---

[4] See generally Victor, J in Botha v Road Accident Fund (76278/09) [2013] ZAGPJHC 400; 2015 (2) SA 108 (GP) (16 April 2013).

entitlement cannot be denied; but cannot be accurately quantified either. In my view it follows that there has been an impairment of the whole person, on the facts of this case.

[49]An actuarial calculation of future loss of earnings is however not appropriate. Rather, the court must do the best it can to award an amount of money that compensates the plaintiff to the extent that the pain may in fact be collision related. This does involve some crystal ball–gazing,[5] but there is no other way of which I am aware to acknowledge the ill-defined sequelae of an injury. I believe in all the circumstances that R50 000 is a fair amount, having regard to her young age and the level at which she avails herself in the labour market.

[50]The plaintiff suffered debilitation immediately after the accident. I believe a period of two months is fair. In the result I award a globular amount of R53 000 to the plaintiff in respect of loss of earning capacity.

[51]There is the question of costs. The amount is small, and the injuries were never really serious. It seems to me that from the get-go this matter ought to have been tried in the regional court, and I agree with the submissions on behalf of the defendant in this regard. In the result I make the following order:

(a) The issue concerning the plaintiff's alleged past and future loss of earnings is separated from all other issues that arise between the parties on the pleadings, and the determination of those other issues are all deferred.

(b) The plaintiff is awarded the amount of R53 000 in respect of loss of earning capacity.

(c) The defendant is ordered to pay the plaintiff's costs of suit, on the regional court scale.

WHG van der Linde
Judge, High Court

---

[5] Of which Margo, J was so resentful in Goodwill v President Insurance Co Ltd 1978(1) SA 389 W at 392H: *"In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art of science of foretelling the future, so confidently practiced by ancient prophets and soothsayers, and by modern authors of a certain type of almanac, is not numbered among the qualifications for judicial office".*

Johannesburg

For the plaintiff: Adv. Mashishi
Instructed by: Mkwanazi Attorneys
94 Pritchard Street
Schreiner Chambers
Johannesburg
016 422 0457
Ref: Mr Mkwanazi/MVA/1763/12

For the defendant: Adv. Cadjee
Instructed by: Mayat Nutrick Langa Inc
62nd – 7th Avenue
Parktown North
Johannesburg
011 442 4250
Ref: Cronje/R12482/RC

Dates of trial: 22-24 May, 2017
Date of judgment: 5 June, 2017