

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: 37353/ 2012

DATE: 25 SEPTEMBER 2014

In the matter between:

NEL A.

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

Mavundla, J.

[1] The Plaintiff is Alma Nel an adult female born on the [...], presently 31 years old. She instituted action against the Defendant in terms of the Road Accident Fund Act 56 of 1996 ("the Act") for damages she suffered whilst she was a passenger in a motor vehicle with a registration number "D[...]", which collided with a white Nissan Hard body, light vehicle for delivery vehicle with registration number F[...] ("the insured vehicle") on the 17 August 2010 at approximately 10h00 on the N4 Highway at Brits off-ramp.

[2] The merits have since been conceded in favour of the Plaintiff on the basis of 100% liability on the part of the Defendant. The only issue remaining to be decided is the loss of earning capacity. The past medical expenses in the amount of R12 221.21 have been agreed upon. In

respect of future medical expenses an s17 certificate has been tendered and accepted. It is common cause that the Plaintiff does not qualify for general damages under the amended Act. General damages have not been claimed.

[3] In her particulars of claim, the Plaintiff claimed damages she has suffered as a result of serious whiplash injuries of the neck, the lumbar spine, ligament damage to her cervical spine and, bilateral soft tissue injury to the shoulder and emotional trauma and post-traumatic stress. She also continued to allege that as a result of the collision and injuries sustained, she was hospitalised at the Brits Medi-Clinic; received and will receive medical treatment in the future; is at risk of requiring lumbar and cervical surgery; received and will in future receive conservative treatment; suffered from and will in future suffer from pain and suffer loss of work capacity; suffer and will in future suffer from loss of earning capacity and suffer from loss of amenities of life.

[4] She claimed damages and /or sequelae damages in the amount of R1 212 321.00 calculated as follows:

Past medical expenses	R12 321. 90
Future medical expenses estimated	R200 000. 00
Estimated past loss of earnings	R200 000.00
Estimated future loss of earnings/	
Alternatively loss of earning capacity	<u>R800 000. 00</u>
Total	<u>R1 212 321. 00</u>

[5] At the beginning of the matter, by agreement "exhibit A" was handed. This is a bundle of documents, namely all the pleadings containing the following: merits documents; quantum documents; claim form in respect of motor vehicle with registration letter as reflected herein above; Plaintiff's salary advice slips (Eastern Chrome Mine and Ferro Mines; clinical notes by Ms Claire Hugo; Roux Physiotherapy; hospital records; medical accounts; Plaintiff's expert

reports; Defendant's two industrial psychologists' reports; the joint minutes between W J Wessels and Dr A C Strydom (Industrial Psychologists) dated 29 August 2014 and an Actuarial report.

[6] The Plaintiff has prepared an actuarial report. If it is found that there is loss of earning and future earning capacity, the parties have agreed that, the average claim amount to be awarded to the Plaintiff would be R773 858. 00.

[7] The injuries and sequelae referred to in Dr Birrel's reports are common cause. Dr Birrel examined Plaintiff on the 8 August 2010. In terms of this report, the Plaintiff sustained tenderness of C2, 3 and 4 whiplashes of the neck and general bruising, soft tissue injuries. The Plaintiff would have experienced moderately acute pain for 5 to 7 days followed by moderate pain for 7 to 10 days. She has residual chronic neck pain worsened by having neck in one position for some time as well as in inclement weather and also complains of headaches. Dr Birrel examined the plaintiff on the 8th April 2014. According to Dr. Birrel the plaintiff returned to her work a week after the accident. Dr Birrel recommended that Plaintiff return to work after a week, justifying the Medi-clinic sick note. Amongst other things, he opined that Plaintiff has 5% chance of requiring surgery and loss of work capacity of 6% to 7% due to the accident and neck surgery would cost R150 000. 00 and require 8 weeks of sick leave.

[8] The Plaintiff was called to the stand. She testified that she was involved in a motor vehicle collision that occurred on the 17 August 2010. She had whiplash injuries that were followed by headaches and spasms. She was employed in the mining industry as a personal assistant to the general manager. Her normal job involved travelling to various meetings, filing; general office work and lot of typing and computer work. Travelling was at least once a month depending on meetings.

[9] She testified that the injuries have affected her work rate especially her driving and standing as she experiences a lot of headaches, and general spasms. For two to three years she had to take pain killers. On a scale of 10 she experienced headaches about 9 times. She discontinued physiotherapy as it interfered with her work hours. She has since changed her employment and was now working for African Sun Mining as a site administration clerk. Her new job does not involve travelling but just general office work as a secretary and to attend to safety on the office

site and to prepare procedures and medical booking of the employees. She still experiences pain which she treats with pain medication but the effect is temporary; this depresses her and also gets her agitated.

[10] Under cross examination by Mr Myburgh, Plaintiff said that she used to get 25 days in a year for leave. She stopped attending physiotherapy because the nature of her work demanded that she travels a great deal. She however did not make use of her leave days to attend the physiotherapy sessions. The reason for doing was because she used these days for travelling with her family. She did not deem it necessary to utilise her sick leave days. Under re-examination she said that she gets about 25 leave days per annum. At this stage both parties closed their respective cases.

[11] The court was addressed by Mr Nel, who handed a bundle of authorities. He referred to Dr Birrel's report at page 8; the Plaintiffs complaints; 6% to 8% work capacity due to the accident; page 9 neck spasms; page 12; 15; 17 and page 41. He reported the endurance the Plaintiff has to shift frequently. She has reduced her travelling but her work rate has been reduced as a result of the collision. Mr Strydom and Dr Wessels' combined report does not foresee early retirement but there is always a possibility that she might lose her current job in future and if that happens it would be difficult for her to get another job.

[12] Mr Myburgh submitted that there is a big discrepancy *vide* at page 77 of her report "it would thus be not be uncommon for a person to hide..." There is no evidence that she is hiding her discomfort. She never said that she was hiding it. Her employer is aware of the accident. There are no bases for presumptions. He further submitted that her symptoms will not get worse as she excelled at her current job. She was good and in demand and there is no evidence that she is going to lose her job. It was submitted by Mr Myburgh that Plaintiff does not qualify for a loss of earning capacity *vide* Chetty judgment. It was submitted that she is not entitled to a future loss neither is there any pecuniary loss proven.

[13] Mr Nel in reply submitted that the Defendant argued, contrary to its own expert witnesses that a high contingency should be employed. He further submitted that the Plaintiff should utilise her leave days, but this means that she must lose her other benefits. He also contended that

Plaintiff is not an ordinary secretary who is office bound. She drives long distances though she is presently coping well with her work. She hides her symptoms through taking medication. At one or other stage she would encounter problems and urged the court to look into the crystal ball and look at her situation realistically. He submitted that a higher post contingency should be used.

[14] According to the Plaintiff, she left her previous employment at *Ferro* as a result of the discomfort and the headaches that she endured because of 900km long distance travelling. Under cross examination she conceded that the travelling was actually 600km. She is now with *African Sun Mining* and she still complains of headaches.

[15] Has the Plaintiff proved any loss of earning or future loss? The answer to this question is, no. My reasoning stems from the following: According to the plaintiff, she has never lost earnings since the collision occurred. She was given a week's leave off work, and subsequent to that she has been working and earning an income. At the time of the accident her monthly gross salary was R32 916. 00 and annual package being R394 992. 00. Her IRP for the period 2012 shows that her monthly income at *African Sun Mining* was R29 258. 00 and annual package R37462. 00. Her basic monthly salary at the same company as on the 31st May 2014 was R66 785. 83 gross and net R47 152. 26. From the above, the irresistible conclusion is , and I conclude that the plaintiffs salary has increased a great deal since the accident and therefore there was no diminution in her past or future earning capacity; *vide Rudman v Road Accident Fund* 2003(2) SA 234 (SCA) at 239G-240A.

[16] The Plaintiff conceded that she did not perceive herself as disadvantaged by the accident. In as far as the discomfort is concerned; she admitted that she desisted attending the physiotherapy sessions because the dates (appointments) did not suit her. She also conceded that were she to be provided with all the recommended gadgets, her health would improve. Considering the above, where a person, as *in casu*, for her own convenience, decided not to attend physiotherapy sessions which would be beneficial to her health, can therefore not burden the Defendant with a claim that her earning capacity has been adversely affected by the collision. *In casu*, in any event, I find that there is neither loss of earnings nor future loss of earning capacity.

[17] I am therefore of the view that the Plaintiffs claim for future loss of earnings and earning

capacity must fail. The only claims the Plaintiff is entitled to are in respect of (i) the proven Past medical expenses in the amount of R12 321.90; (ii) the section 17(4)(a) certificated in respect of 100% of the costs of future accommodation of Plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying to her after the costs have been incurred and on proof thereof, resulting from the accident that occurred on 17 August 2010; (iii) The parties have also agreed, *inter alia*, that the defendant will pay the costs of the High Court scale which costs shall include, the fees of Senior-Junior counsel on the High Court scale, inclusive of the Counsel's fees for the preparation of the heads of argument, if any, justifiably so in my view; (iv) reasonable taxable costs of obtaining all medicolegal/expert, RAF4 Serious injury Assessment and actuarial reports from the plaintiffs experts, reasonable taxable preparation, qualification and reservation fees, if any, of five specific experts; (v) costs of consultation between the plaintiff and her attorney to discuss the terms of this order; reasonable taxable accommodation and transportation costs (including Toll gates and E-Toll) incurred by the plaintiff in attending medico- legal consultations with the parties' experts, consultations with her legal representatives and the court proceedings, subject to the Taxing Master. In this regard the parties have prepared and provided this court with a draft order along the lines tabulated herein above; (vi) the draft order also provides for the costs to be borne by the defendant, including the costs of the expert witnesses and reservation costs, which are in my view, justified. The parties have also agreed that the defendant will, *inter alia*, pay the costs that the plaintiff was en

[18] In the premises the draft order marked **X dated 01 September 2014** is made the order of the court.

NM MAVUNDLA

DATE OF HEARING: 01/09/2014

DATE OF JUDGMENT: 25/09/2014

PLAINTIFF'S ADVOCATE : ADV. NEL

INSTRUCTING ATTORNEY: ADAMS & ADAMS

DEFENDANT'S ADVOCATE: ADV. MYBURGH

INSTRUCTING ATTORNEY: MOTHLE JOOMA SABADIA INC.

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

**HELD AT PRETORIA ON THIS THE 1ST DAY OF SEPTEMBER 2014 AT COURT 6B
BEFORE THE HONOURABLE JUSTICE MAVUNDLA (J)**

CASE NO: 37353/2012

In the matter between

NEL.

ALMA

aintiff

Pl

and

**THE
FUND**

ROAD

ACCIDENT

Defendant

ORDER OF COURT

HAVING HEARD COUNSEL for the Plaintiff and the Defendant;

THE COURT GRANTS JUDGEMENT in favour of the Plaintiff against the Defendant in the following terms:-

1. The Defendant shall pay an amount of **R12,221,91 [TWELVE THOUSAND, TWO HUNDRED AND TWENTY ONE RANDS AND NINETY ONE CENTS ONLY]** to the Plaintiff's attorneys, Adams & Adams, in settlement of the Plaintiff's claim, which amount shall be payable by direct transfer into their trust account, details of which are as follows:

Account holder : Adams & Adams Trust Account

Bank : Nedbank

Branch : Pretoria

Branch code : 198765

Account number : 1[...]

Reference : DBS/SVDB/S963/10

2. The Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) in respect of 100% of 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 after the costs have been incurred and on proof thereof, resulting from the accident that occurred on 17 August 2010.

3. The Defendant must make payment of the Plaintiff's taxed or agreed party and party costs on the High Court scale which costs shall include the following:-

3.1 The fees of Senior - Junior Counsel on the High Court Scale, inclusive of Counsel's fees for the preparation of heads of argument, if any;

3.2 The reasonable taxable costs of obtaining all medicolegal/expert, RAF4 Serious Injury Assessment and actuarial reports from the Plaintiff's experts which were furnished

to the Defendant;

3.3 The reasonable taxable preparation, qualification and reservation fees, if any, of the following experts of whom notice have been given, being:-

3.3.1 Dr Birred;

3.3.2 Ms Havenga;

3.3.3 Ms Brown;

3.3.4 MrWessels;

3.3.5 Mr G Whittaker.

3.4 The costs of a consultation between the Plaintiff and her attorney to discuss the terms of this order;

3.5 The reasonable taxable accommodation and transportation costs (including Toll gates and E-Toll) incurred by the Plaintiff in attending medico-legal consultations with the parties' experts, consultations with her legal representatives and the court proceedings, subject to the discretion of the Taxing Master;

3.6 The above costs will also be paid into the aforementioned trust account.

4. It is recorded that Adams and Adams Attorneys do not act on a contingency basis in this matter.

5. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:-

5.1 The Plaintiff shall serve the notice of taxation on the Defendant's attorney of record;

5.2 The Plaintiff shall allow the Defendant 7 (SEVEN) court days to make payment of the taxed costs from date of settlement or taxation thereof;

5.3 Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 9% on the taxed or agreed costs from date of allocatur to date of final payment.

BY ORDER OF THE COURT

DBS/SVDB/S963/10