



IN THE HIGH COURT OF SOUTH AFRICA  
(REPUBLIC OF SOUTH AFRICA)  
PRETORIA

CASE NO: 11565/11

(1)	REPORTABLE: <del>YES</del> NO
(2)	OF INTEREST TO OTHER JUDGES: <del>YES</del> NO
(3)	REVISED <input checked="" type="checkbox"/>
1 OCTOBER 2014	
DATE	SIGNATURE

In the matter between:

**MAKOLA LEBOGANG ANNAH MOKGADI**

and

**THE ROAD ACCIDENT FUND**

2/10/2014

**PLAINTIFF**

**DEFENDANT**

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**JUDGMENT**

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**MSIMEKI J:**

**INTRODUCTION**

[1] The plaintiff, in terms of the Road Accident Fund Act, 56 of 1996, sued the defendant for delictual damages dealings she suffered resulting from injuries she sustained in a motor vehicle accident on 27 June 2008.

[2] On 16 May 2014, the merits were settled on an 80/20% apportionment basis in favour of the plaintiff.

- [3] The plaintiff decided not to pursue any claims loss in respect of past hospital and medical expenses as well as past loss of earnings.
- [4] General damages were settled in an amount of R500-000.00.
- [5] The defendant agreed to offer a Section 17 (4) (a) undertaking limited to 80% in settlement of the plaintiff's claim for her future medical expenses.
- [6] The plaintiff accepted the pre-morbid and post-morbid earnings that were calculated by the defendant's actuary, Liberty Actuaries on 30 April 2014. The calculation, however, do not include the contingency deductions percentages to be applied.

### **THE ISSUES**

- [7] The court, as it is now, clear is called upon to determine those contingency deductions percentages.
- [8] It is noteworthy that the parties agreed that 15% contingency deduction should be applied to the value of pre-morbid income of R10-262.78.
- [9] The defendant holds the view that 25% contingency deduction should be applied to the value of post-morbid income of R8-258.37. The plaintiff, on the contrary, regards 30% contingency deductions as appropriate. With the parties' agreement, the court only has to determine whether 25% or 30% contingency deduction is warranted in the circumstances of the plaintiff's case.

## **EXPERT REPORTS**

[10] Expert reports are key to the determination of the appropriate contingency deductions. The plaintiff appointed the following medico legal experts:

1. Dr Versfeld: Orthopaedic Surgeon;
2. Ms E Kruger: Occupational Therapist;
3. Dr W Pretorius: Industrial Psychologist; and
4. Munro Consulting: Actuaries.

The plaintiff abandoned her actuaries and preferred the defendant's.

[11] Save for Actuaries Liberty Corporate Consultants, (Liberty Actuaries) the defendant appointed no medico legal expert. The defendant, as a result, on 16 May 2014, admitted as evidence in respect of facts and opinions, the plaintiff's medico legal experts' reports. Further, the factual allegations recorded and the opinions formulated by Dr Versfeld and Ms E Kruger and Dr W Pretorius are uncontested and admitted as evidence by the defendant. The contents of their reports, as a result, are paramount in the determination of the plaintiff's future loss of earnings.

## **THE PLAINTIFF**

[12] She matriculated at the end of 1996 at Beverly Hills High School which is in Evaton. To date she has done numerous courses starting from 2002. These are contained in the Plaintiff's Expert Bundles especially Dr Pretorius's report. She is currently doing a diploma in Occupationally Directed Training and Development Practices (OD-ETDP) with Maccauvlei Learning Institution. She has also enrolled for a B-Tech Safety Management course with Unisa. The plaintiff's employment and earning history have appropriately been captured by Dr Pretorius. She, at the time

of the accident, was employed by PRASA as a Section Manager in the Training Department where she earned R14-107.50 with overtime and other benefits.

The plaintiff, after the accident, was off sick and off work for a period of 3 months.

Although she was paid her full basic salary she forfeited her overtime income. Back at work, she was started with light duty. She is still employed by PRASA but now at a basic salary of R25-045.46 with overtime and benefits.

### **PLAINTIFF'S INJURIES**

[13] Plaintiff, in the accident, sustained the following injuries:

1. Head injury with loss of consciousness;
2. major cervical spinal injury with subluxation of the C3/C4 vertebra;
3. significant right shoulder injury;
4. significant lumbar spinal injury; and
5. fracture of the right femur.

### **TREATMENT RECIEVED**

[14] Following the accident, the plaintiff was transported by ambulance to Jubilee Clinic at Pienaars River. From there she was taken to George Mukhari Hospital and to Johannesburg Hospital where:

1. A Halo was applied to her head with supports onto a jacket;
2. surgery was done to her right leg; and
3. the Halo removed and followed by a surgery to her neck.

She was discharged after three weeks. She then used crutches for another five months. She went to Johannesburg Hospital for check-up and X-rays over a period of six months. She thereafter saw her general practitioner who prescribed pain tablets for her. She does this to date.

- [15] The X-rays and Dr Celgow's findings give one a clear picture of the injuries that the plaintiff sustained in the accident.

### **CURRENT COMPLAINTS**

- [16] The plaintiff, currently, complains of what Dr Versfeld, Ms E Kruger and Dr Pretorius have captured in their reports. The complaints are numerous and serious. She often has problems when she breaths. She: has pains on the right side of her neck; right shoulder and upper back; sleeps with difficulty; cramps in her right leg when sitting for a long time; walks with pain in her right leg; has pain in her right hip; has a sore knee in winter; has difficulty in climbing stairs; carries a bag on her right hand with difficulty; has headaches almost every second day; is slower in her movement post-accident; has weak memory and has to wear glasses as her eyes are sometimes blurred.

### **SPORT AND SOCIAL AMENITIES**

- [17] The plaintiff, prior to the accident, went to gym three times a week. She did aerobics and jogged for about an hour at a time twice a week. This, she is now unable to do. She did her own cleaning and laundry and more house work on her own. She is now unable to do this and has to rely on someone to help her.

### **HER HEALTH PRIOR TO THE ACCIDENT**

- [18] She had a perfect health. Her neck, right hip, right leg, right knee, right shoulder, back and vision were all asymptomatic. The accident, according to her, and the reports, has changed her good health. She now struggles with a lower back pain which had developed after the accident.

## **EXAMINATION**

[19] Examination has revealed that:

1. She has decreased sensation over her right leg;
2. there was evidence of muscle spasm to the right of her lumbar spine;
3. extension of her lumbar spine resulted in pain;
4. there was evidence of muscle spasm and tenderness over the base of her neck on the right hand side;
5. there was evidence of impingement of her right shoulder;
6. there was evidence of a painful arc between 60% and 90 % degrees of her right shoulder;
7. there was tenderness to the right of her upper thoracic spine;
8. there was tenderness over the medial upper angle of her scapula on the right side
9. there was tenderness on the medial borders of her right scapula;
10. there was evidence of decreased power of extension of her right elbow;
11. there was evidence of decreased sensation over the outer arm and the outer forearm on the right side;
12. she had visible scars on her right leg;
13. the right thigh measured 2cm less circumference than did the left above the knee;

## **PROGRESS AND FUTURE MEDICAL COSTS**

[20] These are that:

1. The right femur remains symptomatic. This relates to the pain and discomfort when she turns and walks. The plaintiff needs treatment

which will require R96-000.00 and a period of disability of approximately 3 months; the internal fixation present in the right femur will need to be removed and a cost of approximately R50-000.00 will be required as well as a period of disability of approximately 4 weeks.

2. The right hip is symptomatic. Pain is also experienced when she: lies on her right side, walks a lot, sits for a long time and climbs stairs. Her trochanteric bursitis will need treatment. An amount of R2000.00 per annum is estimated.

3. Her lower back injury is symptomatic. She again experiences pain when: she bends to pick up something. The pain goes to her waist. Radiologically, there was evidence of early degenerative change at the L3/L4 level. The lower back requires treatment and an amount of R3-800.00 per annum should be allowed on an ongoing basis. There is a strong possibility that her lower back symptoms will deteriorate to the point where surgical intervention becomes indicated. Posterior spinal fusion may be required in which case R156-000.00 and a period of hospitalisation for a period of 10 days will be required. A further conservative treatment at a cost of approximately R3600.00 per annum may follow;

4. The plaintiff's neck remains symptomatic. There is a feeling that her air passages are being blocked at times. She gets pain when: she turns her neck to the left; lies down; she sits for a long time in front of a computer. Driving results in numbness and pins and needles in her

hand and she has headaches daily or every second day. Clinically, there was evidence of muscle spasm and tenderness over the back of her neck on the right side. There was evidence of a reduced range of cervical spinal movement accompanied by pain and discomfort, decreased muscle power of extension of the right elbow and decreased sensation over the outer arm and the outer forearm on the right side. Cervical spinal symptoms need treatment and a provision in the sum of R5800.00 per annum should be made. With her spinal symptoms deteriorating to the point where surgical intervention becomes indicated, a period of 6 days for hospitalisation and R148-000.00 and a period of disability of approximately 3 months may be required;

5. The plaintiff sustained a head injury with a period of loss of consciousness. She now suffers from poor memory and requires glasses as she sometimes has blurry visions. She never had the problem before the accident. She, indeed, as correctly submitted, has significant sequelae from her head injury;
6. she sustained an injury to her right shoulder with evident symptoms that have plagued her to date. I have already referred to the pain that she experiences as a result. Her right shoulder will require treatment and R2800.00 per annum should be allowed on an ongoing basis. It is believed that her shoulder symptoms will deteriorate to the point where surgical intervention becomes indicated. Such procedure may entail a period of hospitalisation of approximately 4 days at a cost of

R78-000.00 and a period of disability of approximately 8 weeks. Following such a procedure conservative treatment at a cost of approximately R2200.00 per annum may be required on an ongoing basis.

- [21] Resulting from the accident, the plaintiff has symptoms and disabilities that adversely affect her ability to do her work. It is said that with increasing symptoms which can be expected in future, the probability exists that she will become unfit for active training work when she is approximately 53 years of age and will probably become unfit for work, when she is approximately 60 years old. Dr Pretorius, the Industrial Psychologists, as a result, concludes by suggesting "that the loss of earning capacity has to be addressed by a) comparing the real as well as postulated pre and post-accident earnings postulations b) calculation of past loss of earnings c) application of approximate higher contingencies to take place to be agreed on by the parties, or determined by the court".

[22] **CONTINGENCY DEDUCTIONS APPLICABLE IN THIS CASE**

1. I have already alluded to the fact that the parties agreed that 15% contingency deduction be applied to the value of pre-morbid income of R10 262.78.
2. The parties could not agree on the contingency deduction that should be applied to the value of post-morbid income of R8 258.37. This should be 25% according to the defendant while the plaintiff is of the view that 30% in the circumstances of the plaintiff's case will be warranted.

[23] The condition of the plaintiff pre-accident and post-accident has been thoroughly dealt with by her medico legal experts. It is therefore clear that the plaintiff is now no longer the person she used to be in the past. She has now changed in many respects. This, the court has to consider when determining the contingency deductions applicable in the circumstances of her case.

[24] Dr Robert Koch, in his work, has helped us a great deal in the determination of plaintiff's normal contingency deduction percentage. His formula which is well known and accepted allows for half a percentage per annum for the remainder of the plaintiff's working life. The formula takes account of the normal life hazards of a claimant. X

[25] The parties agreed that the plaintiff, 33 years old at the time of the reports, would have retired at 65 years if the accident did not occur. It was further agreed that

1. the plaintiff did not suffer from any past medical condition and injuries and, at that stage, was completely symptom free.
2. she had a stable and proven education, employment and earning record and would not have been subjected to added risks/hazards in the work place.
3. she had passion for her studies and always wanted to further and improve her skills. This is borne out by the fact that she acquired numerous certificates from 2002 to date;

4. she managed to progress to an annual earnings of R352-079.00 at the age of 33 years.

[26] The starting contingency has been agreed upon between the parties and this is 15% and this will be applied to the plaintiff's pre-morbid earnings.

[27] The plaintiff, now a vulnerable employee in the workplace, should be entitled to an increased contingency deduction. This is the golden rule.

[28] Dr Versfeld and Ms Kruger agreed that the plaintiff will have to retire earlier than normal as a result of the deterioration of her condition and associated difficulties. They both have, in their reports, extensively dealt with the plaintiff's injuries sustained, treatment received, complainants relating to her difficulty in performing her employment duties pointing out that this will become worse as her condition will deteriorate overtime and her prognosis and future medical treatment.

[29] Advocate D D Grobbelaar (Mr Grobbelaar), plaintiff's counsel, submitted that if a conservative approach is followed in the case of the plaintiff, the contingency percentage to be applied in the post-morbid scenario must be increased to make provision for the possible anticipated difficulties. A substantially higher post-morbid contingency deduction, according to Dr Versfeld and Ms Kruger and Dr Pretorius, should be applied in order to cater for the physical and psychological difficulties that the plaintiff is experiencing which will further deteriorate in future.

[30] Counsel for the plaintiff referred me to the unreported case of Naudé Nina Yvonne v Road Accident Fund case number 09/35083 handed down on 19 February 2013. Mr

Grobbellar submitted that there, the plaintiff, a female attorney, had sustained soft tissue injuries to her neck, back, left shoulder, left ankle and left hand. She was attended to at a hospital that evening of the accident and discharged the same night after receiving conservative treatment and a neck brace. She thereafter was seen by several medical practitioners for further treatment. The experts anticipated that the condition of her neck was likely to deteriorate overtime. The symptoms of all the other injuries had completely subsided. It was agreed, however, without agreeing on the percentage of such loss, that the plaintiff was likely to suffer a loss of productivity. Weiner J, allowed an increased post-morbid contingency deduction of 10% after considering all the available evidence in the matter.

- [31] Mr Grobbellar, in the light of the plaintiff's condition as described by the experts, submitted that the court should allow a post-morbid contingency deduction of 30% in this matter. I agree. It must be borne in mind that the Naudé case (*supra*) did not have the injuries such as described in respect of the plaintiff. Mr Fhatuwani, for the defendant as already alluded to above, disagreed and maintained that the reasonable contingency deduction percentage post-morbid ought to be 25% at least.

The plaintiff's injuries are much more serious. Her condition has properly been dealt with in the reports. This is what led me to find on 25 June 2014, that the defendant on the basis of the 30% post-morbid contingency deduction, had to pay the plaintiff an amount of R2 754.003.20 in respect of her total claim for delictual damages. On this basis, the draft order marked "X" was made an order of the court. These are the reasons I promised to give when the draft order was made an order of the court.

## CALCULATIONS

[32] The calculations are therefore as follows:

1. Value of pre-morbid income: R 10 262.781
2. Less agreed 15% contingency deduction: R1 539.417
3. Net value of pre-morbid income: R8 723.364
4. Value of post-morbid income: R 8 258 371
5. Less 30% contingency deduction: R24 77 511
6. Net value of post-morbid income: R5780 860
7. Total future loss earnings: R2 942 594
8. General (agreed) damages: R500-000.00
9. **Subtotal = R3442.504**
10. Less 20% merits apportionment: R 688 501
11. **Total value of claim: R2 754.003**

This is how the amount of R2 752.003 is arrived at.

**M.W MSIMEKI**  
**JUDGE OF THE NORTH**  
**GAUTENG HIGH COURT, PRETORIA**

COUNSEL FOR THE PLAINTIFF:  
 INSTRUCTED BY:

COUNSEL FOR THE RESPONDENT:  
 INSTRUCTED BY:

DATE OF HEARING: 19 MAY 2014  
 DATE OF JUDGMENT:

**ADV D D GROBBELLAAR**  
 MILLS & GROENEWALT C/O WALTER NIEDINGER & ASS.

**MR FHATUWANI**  
 A P LEDWABA INC