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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 75878/2013

Date: 1/4/2016

In the matter between:

L A BATES

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

D S FOURIE, J:

[1] This is a claim for payment of damages for personal injuries suffered by the plaintiff in a motor vehicle accident which occurred on 8 July 2012. The merits have been conceded and it is common cause between the parties that the defendant is liable to pay 100% of the plaintiff's proven damages.

[2] Certain heads of damages have been agreed upon by the parties. Past hospital and medical expenses have been agreed upon in the amount of R14 491.14. For estimated future hospital and medical expenses the defendant will furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, No 56 of 1996. For general damages the amount agreed upon is R1 000 000.00 (one million Rand).

[3] The only remaining heads of damages which are in dispute between the parties relate to the claim for past loss of earnings and estimated future loss of earnings and/or earning capacity. The percentage contingency deduction to be applied to the *"but for"* and *"having regard to"* scenario is also in dispute.

MATTERS WHICH ARE COMMON CAUSE:

[4] The following facts are common cause between the parties:

- the plaintiff's date of birth, i.e. [...] 1981;
- the plaintiff had no neurological disorders prior to the collision;
- prior to the collision the plaintiff's health was generally good;
- the bodily injuries sustained by the plaintiff as well as their nature and extent which are:

- o a chest injury with fractured ribs;
- o pelvis fractures;
- o a torn diaphragm and liver tear;
- o a left hip injury;
- o a head injury with concussion and left-sided stroke;
- o a right index finger fracture;
- o generalised cuts and grazes;
- o injuries to both knees;
- o a neck injury;
- o a low back injury;

- o a fractured nose;
 - o soft tissue injuries to the left shoulder with possible brachial plexus injury; and
 - o a haematoma-seroma right thigh requiring aspiration.
- as a result of the injuries sustained, the plaintiff has suffered a significant loss of productivity;
- the plaintiff is likely to have difficulty obtaining employment in the open labour market, were she to lose her job;
- the problems that the plaintiff experiences are likely to worsen and she will probably become unfit for work by approximately 55 years of age;
- in terms of the plaintiff's future occupational prospects, these could be compromised due to a combination of factors, including ongoing symptoms associated with orthopaedic injuries and residual left-sided hemiparesis;
- the plaintiff sustained a significant brain injury consisting of a probable concussive brain injury complicated by focal injuries to the brain involving the right hemisphere;
- the plaintiff reports a mood disorder secondary to the tragic consequences of the collision, namely the death of her fiancé;
- the plaintiff's industrial psychologist, Mr Mallison applied a battery of neuropsychological tests and noted the plaintiff to have mild difficulty with auditory and visual attention, psychomotor slowing on clerical tasks and a high level of impulsivity;

- the neurocognitive, emotional and communication difficulties experienced by the plaintiff would have a negative impact on her work performance, efficiencies and productivity;
- the plaintiff is a vulnerable employee and her chances of securing suitable work are compromised;
- she will always need a sympathetic employer that allows for reasonable accommodations in the workplace;
- the plaintiff's employment career path both prior to and subsequent to the collision;
- the actuarial assumptions and calculations of the actuary (his calculations are correct based on what information was given); and
- the information supplied by the plaintiff's previous employers to Ms Donaldson is correctly reflected in her report.

[5] The parties have also agreed to admit as evidence the medico- legal reports of the following expert witnesses:

- Dr G Versfeld (orthopaedic surgeon);
- Mr L Grinker (psychiatrist); and
- Dr A Botha (specialist physician).

[6] The parties have also agreed to put before me as evidence the following joint minutes:

- Dr G Marus and Dr A Maharaj (neurosurgeons);
- Professor V Fritz and Dr M Pillay (neurologists);

- Mr B Mallison and Dr A G Pistorius (neuropsychologists);
- Dr P Peirce and Dr J J Nhlapo (ophthalmologists);
- Ms I Hattingh and Ms V Sewersad (speech pathologists);
- Ms S Murcott and Ms D van Wyk (occupational therapists).

[7] Ms Donaldson gave evidence for the plaintiff and the plaintiff also testified. The defendant closed its case without calling any witnesses.

DONALDSON

[8] Ms Donaldson is an industrial and counselling psychologist whose expertise is not in dispute. She prepared a medico-legal assessment of employability dated 29 June 2015 with regard to the plaintiff. She confirmed the contents of her report. The aim was to evaluate the plaintiff's work potential both prior to and having regard to the consequences of the accident. According to her report the plaintiff's employment history can be summarised as follows: In May 2006 she took up employment with Vector Logistics in Bedfordview where she worked her way up from the level of call centre operator to senior call centre operator and also acted as a customer care consultant on occasion. She worked until the end of February 2010 where she earned R6 000.00 per month. She then moved to Linvar where she was based in Linbro Park and began as a receptionist in May 2010. During the time she was employed by Linvar, she received three promotions, first to the level of customer care agent and then to the position of expeditor in which position she was still working at the time the accident in question had occurred. After the accident she was appointed to the level of senior expeditor but, given her injuries and their *sequelae* this promotion was cancelled after her first week as a senior expeditor. According to the plaintiff she also had prospects to eventually move to the level of warehouse manager.

[9] When the plaintiff was appointed to the position of expeditor she received a letter of appointment indicating that with effect from 1 April 2011 she would be employed at a total cost to company of R10 273. 11. Her particular job description as an expeditor, salary structure as well as contributions, are also set out in annexures to her letter of appointment.

[10] According to the witness the plaintiffs employment after the accident can be summarised as follows: she could only return to work at the beginning of October 2012. On her return to work the plaintiff was office bound and could no longer handle the mobility demands of an expeditor. Notwithstanding her physical condition, she was promoted to the position of senior expeditor in February 2013 where she had to do her own work as well as to supervise a subordinate. Shortly thereafter the promotion was withdrawn as it had been reported to the managing director that the plaintiff was forgetting things and was not doing her work properly. As a result of this, the plaintiff was told that she was to be demoted to her original position of receptionist. This was not acceptable to her whereafter she resigned with effect from the end of October 2013.

[11] In July 2013 the plaintiff was offered the position of branch manager of the new branch on the South Coast of Extreme Industrial Suppliers & Hygiene with effect from December 2013. Her net salary would be R10 000.00 per month with a three month probationary period. The witness pointed out in her report that according to the plaintiff she ordered stock, received and delivered it and had to canvas for new customers. The witness observed that, although she was the branch manager, this appears to be something of a misnomer since she was the only employee. However, by letter dated 26 May 2015 the plaintiff had been retrenched *"due to retrenchment and the closing of the Durban Branch"*.

[12] The witness also pointed out that the plaintiff was offered an alternative position as Durban sales representative commencing on 1 June 2015 with the first three months thereof

being probationary. According to the witness (as stated in her report) the plaintiff did not accept this alternative position and was with effect from the end of June 2015 without employment.

[13] Having regard to the injuries sustained by the plaintiff and her test results, the witness concluded, in summary, that it seems reasonable to accept that the plaintiff is demonstrating neurological, orthopaedic, neuropsychiatric and cognitive communication functional difficulties which are likely to have a significantly negative impact on her ability to apply her residual intellectual potential in a sustained, consistent and efficient manner. The witness further observed that, given the cumulative effect of all the deficits which had been measured, it is improbable that the plaintiff would ever be able to succeed in any further training of significance in order to enhance her marketability.

[14] With regard to the plaintiff's employment prospects but for the accident, the witness was of the view that the plaintiff would probably have continued to work within the logistics chain environment, working her way up from the level of expeditor to that of senior expeditor which is a position with a job complexity and levels of accountability graded at a Paterson Job Grade 83 level. According to the witness the further indications are that she would probably have continued to progress to a position as a logistics coordinator, graded at a Paterson Job Grade C1 level. She could also have been expected to continue to reach her earnings ceiling at the upper quartile levels of remuneration characteristic of the annual guaranteed package of a logistics coordinator position by the time she was 45 years of age, with only inflationary increases being relevant thereafter. She also pointed out that, in her view, the plaintiff would have continued working until the normal retirement age of 65 years.

[15] With regard to the plaintiff's employment prospects, having regard to her injuries and

the *sequelae* thereof, the witness was of the view that it would not be unreasonable to accept that she has been rendered unemployable on the open labour market and that she will probably be dependent on the offices of a sympathetic and accommodating employer in order to maintain employment. In this regard the results of the current assessment suggested that she would probably be best deployed in one of her previous positions (i.e. that of a receptionist), always providing that the work involved allows her to work with little work and/or time pressure and under circumstances where her limitations will be understood and tolerated. Having regard to the opinion of Dr Versfeld as expressed in his report dated 5 October 2013, the witness was of the view that the plaintiff would be unable to continue to work beyond the age of about 55 years. In the event that the plaintiff would be able to secure such a position, she would be entitled to a salary equal to a Paterson Job Grade B1.

[16] The actuarial calculation prepared by Mr Whittaker dated 7 July 2015 was then put to the witness. She confirmed that the contents thereof (pre-accident earnings at p 2 and post-accident earnings at p 3 of the report) accords substantially with her views. She also pointed out that, according to her view, the assumptions with regard the post-accident earning potential actually favours the defendant.

THE PLAINTIFF:

[17] When the plaintiff approached the witness stand she was walking slowly and was also limping. She testified that she still has pain in her left shoulder where her movements are restricted. She still experiences pain in her left leg and this negatively affects her ability to drive a motor vehicle. After the accident she returned during October 2012 to where she was previously employed. At that stage she was still recovering from her injuries and was only supposed to return during January 2013. Since February 2013 she realised that she

was unable to perform her duties as she did prior to the accident. She was unable to remember what she had to do and her relationship with other staff members deteriorated. She was desirous to work until the age of 65 had the accident not occurred. Presently she is unemployed.

DISCUSSION:

[18] Before considering the issues, it is not only appropriate, but also necessary to say something about the credibility and reliability of the witnesses. I have had the opportunity to observe the demeanour of the witnesses and to listen carefully to their evidence. I have no reason to conclude that any one of them was in any way biased or untruthful. There is, in my view, no reason to make any finding against them with regard to their reliability or credibility.

[19] It is trite that a plaintiff bears the burden ("*onus probandi*" or the overall onus) to prove the quantum of his or her claim. However, if a plaintiff has, in an attempt to do so, established a *prima facie* case an evidentiary burden will come into existence in terms whereof the defendant will have the duty to adduce evidence in rebuttal. If the defendant fails to do so, it runs the risk that the evidence for the plaintiff may become conclusive. When considering the issues I have to take into account not only the common cause facts agreed upon by the parties, but also the fact that no witness was called by the defendant. In my view it is clear, from a conspectus of the evidence and the facts which are common cause between the parties (including the medico-legal reports and joint minutes referred to above) that the plaintiff has established a *prima facie* case with regard to the pre- and post-career path scenarios as well as the figures which the actuary had to take into account in calculating the plaintiff's loss of earnings. Also taking into account the fact that the defendant has failed to adduce any evidence in rebuttal, I have to conclude that the *prima facie* case established

by the plaintiff has become conclusive.

[20] The actuarial calculation (scenario 1 which is the more conservative one of the two) performed by Mr Whittaker (7 July 2015) indicates the plaintiff's past loss of earnings (before taking into account any contingencies) to be as follows:

- Value of income uninjured R 468 738.00
- Value of income injured R 405 237.00
- Past loss R 63 501.00

[21] The plaintiff's future loss of earnings (before taking into account any contingencies) have been calculated to be as follows:

- Value of income uninjured R5 200 951.00
- Value of income injured R1 535 186.00
- Future loss R3 665 765.00

[22] When performing these calculations the actuary took into account, *inter alia*, the following: The plaintiff's date of birth; the date of accident; the plaintiff's pre-accident earnings as an expeditor by Linvar; the plaintiff's post accident earnings as well as the period(s) when the plaintiff had no income; the Paterson job grade levels as proposed by Ms Donaldson; the career path of the plaintiff, both having regard to the accident and had the accident not occurred as discussed by Ms Donaldson; the retirement age of the plaintiff having regard to the accident and had the accident not occurred. The total loss, before taking into account any contingencies, has therefore been calculated to be R3 729 266.00 (past loss of R63 510.00 plus future loss of R3 665 765.00). Having regard to the evidence and the common cause facts, I have no reason not to accept this figure.

[23] The final issue to be decided is what percentage contingency deduction should be applied to both the plaintiff's past loss and future loss of earnings. Contingencies are the hazards of life that normally beset the lives and circumstances of ordinary people (*AA Mutual Ins Co v Van Jaarsveld* reported in Corbett & Buchanan, *The Quantum of Damages*, Vol II 360 at 367) and should therefore, by its very nature, be a process of subjective impression or estimation rather than objective calculation (*Shield Ins Co Ltd v Booyesen* 1979 (3) SA 953 (A) at 965G-H). Contingencies for which allowance should be made, would usually include the following:

- The possibility of errors in the estimation of life expectation;
- The possibility of illness which would have occurred in any event;
- Inflation or deflation of the value of money in future; and
- other risks of life, such as accidents or even death, which would have become a reality, sooner or later, in any event. (Corbett, *The Quantum of Damages*, Vol I, 51.)

[24] In the present matter it is common cause that the plaintiff was born on [...] 1981 and, that she is therefore presently 35 years old. She was injured during July 2012 when she was 31 years old. She suffered serious injuries which included, *inter alia*, a significant brain injury consisting of a probable concussive brain injury complicated by focal injuries to the brain involving the right hemisphere; a chest injury with fractured ribs; pelvis fractures; a torn diaphragm and liver tear; injuries to both knees and a soft tissue injury to the left shoulder with possible brachial plexus injury.

[25] It is also common cause that: prior to the collision the plaintiffs health was generally good; the neurocognitive, emotional and communication difficulties experienced by the

plaintiff would have a negative impact on her work performance, efficiencies and productivity; the plaintiffs employment career path both prior to and subsequent to the collision; and the plaintiff is a vulnerable employee and her chances of securing suitable work are compromised. Furthermore, Ms Donaldson was of the view that it would not be unreasonable to accept that the plaintiff has been rendered unemployable on the open labour market and that she will probably be dependent on the offices of a sympathetic and accommodating employer in order to maintain employment.

[26] Having regard to the common cause facts and the evidence, I am of the view that with regard to past loss of earnings (injured as well as uninjured) a contingency deduction of 5% should be applied. With regard to future loss of earnings, one should distinguish between the uninjured (had the accident not occurred) and injured scenario (having regard to the accident). With regard to the uninjured scenario I am of the view that a 15% contingency deduction should be applied and with regard to the injured scenario a 40% deduction. The plaintiff's total net loss of earnings will therefore be the amount of R3 560 023.00 calculated as follows:

Past Loss

Value of income uninjured	R468 738.00
Less 5% contingency deduction	<u>R 23 437.00</u>
	R445310.00
Value of income injured	R405 237.00
Less 5% contingency deduction	<u>R 20 262.00</u>
	R384 975.00
Net past loss	<u>R 60 326.00</u>

Future Loss

Value of income uninjured R5 200 951.00

Less 15% contingency deduction R 780 143.00

R4 420

808.00

Value of income injured R1 535 186.00

Less 40% contingency deduction R614 074.00

R921

111.00

Net future loss **R3 499 697.00**

[27] To this amount of R3 560 023.00 should be added the agreed amounts of R14 491.14 for past hospital and medical expenses and R1 000 000.00 (one million Rand) for general damages. The total amount to be awarded to the plaintiff therefore amounts to R4 574 514.14 as well as an order for an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act.

ORDER: In the result I grant the following order: The draft order attached hereto and marked "X" is made an order of Court.

D S FOURIE

JUDGE OF THE HIGH COURT

PRETORIA

1/4/16

ANNEXURE "X"

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 75878/2013

ON THIS THE 1st DAY OF APRIL 2016 BEFORE THE HONOURABLE JUDGE D S
FOURIE

In the matter between:

BATES, LUCINDA ANGE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER

It is ordered that:

1. Defendant shall pay plaintiff delictual damages in the sum of R4 574 514.14;
2. The aforesaid capital amount and High Court party and party costs shall be payable to the plaintiff's attorney's trust account, the particulars of which are:

Joseph's Incorporated Trust Account

RMB Private Bank

Account Number: [5.....]

Branch Code: 261 251

3. Defendant shall furnish plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, No 56 of 1996, to pay 100% of the costs of the future accommodation of 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 she sustained in the motor vehicle collision on 8 July 2012, and the *sequelae* thereof, after such costs have been incurred and upon proof thereof.

4. Defendant shall pay plaintiff's taxed or agreed party and party costs on the High Court scale, such costs to include:

4.1. the costs attendant upon the obtaining of payment of the full amount referred to in paragraph 1 above; and

4.2. the costs of the medico-legal reports, the compilation of joint minutes and preparation fees if any of the following medical legal experts:-

4.2.1. 05.10.2013 Dr G A Versfeld (Orthopaedic Surgeon)

4.2.2. 29.10.2014 Dr G Marus (Neurosurgeon)

4.2.3. 05.02.2015 Professor U V Fritz (Neurologist)

4.2.4. 14.10.2014 Mr L Grinker (Psychiatrist)

4.2.5. 21.10.2014 Dr A P J Botha (Specialist Physician)

4.2.6. 04.11.2014 Dr Phil Pierce (Ophthalmologist)

4.2.7. 01.03.2015 Mr B Mallinson (Neuropsychologist)

4.2.8. 17.05.2012 Ms I M Hattingh (Speech/Language Pathologist and Audiologist)

4.2.9. 15.10.2014 Ms S Murcott (Occupational Therapist)

4.2.1 0. 29.06.2015 Ms B Donaldson (Industrial Psychologist)

4.2.11. 07.07.2015 Mr G Whittaker (Consulting Actuary)

4.3. the appearance fees of Ms Barbara Donaldson;

4.4. the taxed or agreed costs of senior counsel including counsel's fees in respect of the preparation of heads of argument;

4.5. the wasted costs occasioned by the postponement of the matter on Monday, 3 August 2015 such costs to include the costs of senior counsel;

4.6. the costs of the RAF4 Serious Injury Assessment Form completed by Dr G A Versfeld (Orthopaedic Surgeon), dated 5th October 2013; and

4.7. the reasonable and necessary travelling expenses of the plaintiff from Durban to Pretoria and back;

5. Interest on the aforesaid amount referred to in paragraph 1 above at the rate of 9.0% as from 14 days from date of this order until date of payment.

6. Plaintiff shall, in the event that costs are not agreed upon, serve the Notice of Taxation on Defendant's attorneys of record.

7. Plaintiff shall allow defendant fourteen (14) days to make payment of the taxed costs.

BY THE COURT

REGISTRAR

