

IN THE HIGH COURT OF SOUTH AFRICA



(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
1. REPORTABLE : YES/ NO	/
2. OF INTEREST TO OTHER JUDGES: YES/NO	/
3. REVISED	
9/9/2016	<i>[Signature]</i>
DATE	SIGNATURE
GAUTENG DIVISION, PRETORIA	

9/9/16

CASE NO.:65774/12

In the matter between:

KLEYNGELD S

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

Hughes J:

[1] This is a short judgment to provide guidance to the parties as regards my finding on the applicable contingency to be applied on the future loss of earning capacity calculation agreed upon and provided by the actuary.

[2] Both Adv Du Plessis SC, for the plaintiff and Adv van Zyl, for the defendant, agree that the only issue for determination is that of the applicable contingency to be applied to the calculation already provided by the actuary, Johan Sauer.

[3] Dr A. Strydom and Ms Moipone Kheswa are the two industrial psychologists who were instructed by both the plaintiff's attorney and the defendant's attorney respectively. Dr. Strydom placed reliance on the joint minutes of the occupational therapists, Ms E van Zyl and Ms Ferreira. Whilst Ms Kheswa had not had sight of this joint minute, however, she had had sight of their individual reports.

[4] The industrial psychologists both agree that the plaintiff would have completed grade 12, would have studied towards a B-Ed Degree, which would take four years to complete. The plaintiff would progress from a teacher to Head of Department (HOD) by age 50 and would retire at the age of 65. This pre – accident scenario has not changed post-accident.

[5] Adv Du Plessis pointed out the following:

- i. The occupational therapists state that the plaintiff would be well suited for sedentary work having regard to the sequelae of her injuries arising from the collision.

- ii. They also agree that with the appropriate intervention and ergonomic principles this would improve the plaintiff's mobility would improve and her pain levels in the work environment would be reduced.
- iii. The plaintiff is able to work as a teacher as she would have done before the collision. However, she now needs to take rest periods during the course of the day though and if she works with young children on the floor she would require a low bench to assist with dynamic postures like prolonged kneeling and squatting.
- iv. The occupational therapists believe that it would be best for the plaintiff to work with grade 4 pupils and upwards, as this will not entail using dynamic postures. They agree that with the implementation of assistive devices she will be able to perform sedentary work despite the limitations until retirement age.
- v. The orthopaedic surgeons, Dr Oelofse, for the plaintiff and Dr Kumbirai, for the defendant, both opine that there has been a loss of amenities of life by the claimant as a result of the injuries she has sustained. As such her productivity has been affected and she will be an unfair competitor in the open labour market as well as only being able to work in a sedentary employment environment.
- vi. Lastly, the neuropsychologist, Dr Grootboom concluded that the plaintiff suffers from post-traumatic stress disorder (PTSD) and this would impede in her functioning at work. Added factors such as pain, irritability, anxiety related to the accident, low self-esteem and self-image and less physical activity are further contributors.

[6] Incidentally Adv van Zyl does not take issue with the submissions advanced in the preceding paragraph by Adv Du Plessis.

[7] It was pointed out by Adv Du Plessis that the actuarial calculation utilised a spread of 13% and this percentage was attained from the orthopaedic's conclusion that the plaintiff had suffered a 13% whole body impairment as a result of the injuries sustained. Both counsel are in agreement that this is not the correct way to determine the contingencies to be applied. However, Adv Du Plessis is of the view that the 13% spread is a viable figure taking into account his submissions made above and as such advocated for the court to apply that particular spread in the plaintiff's case.

[8] Adv van Zyl urged this court, to at the most, apply a spread of 10% with him advocating that in the plaintiff's circumstance a spread of 7% was to be applied. He argued that there was no change in the plaintiff's ability to still attain what she could have attained had the accident not taken place. The actual loss arises on the application of contingencies only.

[9] For the plaintiff to succeed with her claim for loss of earning capacity, it is trite law that the loss suffered must result in a diminution in her patrimony. See *SANTAM VERSEKERINGSMAATSKAPPY BPK v BYLEVELDT* 1973 (2) SA 146 (A); *DIPPENAAR v SHIELD INSURANCE CO LTD* 1979 (2) SA 904 (A) and *RUDMAN v ROAD ACCIDENT FUND* 2003 (2) SA 234 (SCA) paragraph [8]:

"The trial Judge dismissed the claims for past loss of earnings and loss of earning capacity for the following reasons:

'On the evidence before me I must conclude that the losses suffered as a result of the temporary decline in the income generated by the professional hunting and professional outfitter operations due to the incapacity of the plaintiff are losses suffered by the company and do not represent a diminution in the patrimony of the plaintiff. I may pause to remark that the fact that the plaintiff personally is registered as the professional outfitter does not change the situation. According to the evidence before me it must be held that he was employed by the company in order to conduct that section of the business. The same holds true of the costs of employing a professional hunter to stand in for the plaintiff as well as the employment of the repair and maintenance manager. . . . These persons are also employed by the company to take over functions performed by the plaintiff and they are paid by the

company. Any loss which may have occurred as a result thereof is a loss to the company and not to the plaintiff's private estate. It follows that in real terms the plaintiff's private estate was not diminished due to his incapacity.

In my judgment the plaintiff has failed to prove that his patrimony was diminished due to any loss of earning capacity past or future resulting from his injuries and consequently he has failed to prove any entitlement to be compensated in respect of these heads of damages.'

In other words, the learned Judge concludes that, although Rudman has proved physical disabilities which, potentially at any rate, could give rise to a reduction in his earning capacity, he has not proved that this has resulted in patrimonial loss. He has not proved that the reduction in earning capacity translates into loss in the sense that his patrimony after the delict was less than it would have been if the delict had not been committed."

[10] Turning to the issue of contingencies I take heed of what was stated in *Southern Insurance Association v Bailey* NO 1984(1) 98 AD about the two approaches that can be used to ascertain future loss of earnings are discussed on page 113 where the following is said by **Nicholas JA**:

"One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guess work, a blind plunge into the unknown. The other is to try to make an assessment by way of mathematical calculations, on the assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent."

Continues on page 114C-D to state:

"In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an "informal guess" it has the advantage of a logical basis". In addition refer to in *Smit NO v The Road Accident Fund, The Quantum of Damages, Corbett and Honey, Volume 5, B4-251*.

Robert J Kock in his book *"The Quantum Year book"* states that there are no fixed rules as regards general contingencies and one of his helpful guidelines is that of the sliding scale contingency theory:

"Sliding scale: ½ % per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in middle age".

[11] Taking into account that the plaintiff has been found to be a vulnerable employee, suffering a decrease in productivity and would be on an unequal footing as a competitor in the open labour market, restricting her in her career as a teacher to teach grade 4 and above and limiting her physical abilities as a teacher. It is my view that though there is no career change or vocation change that would come about as a result of the collision, there does exist a change in her circumstances that warrant the application of contingencies.

[12] The plaintiff has, in my view, managed to show that as a result of her injuries and their sequelae her patrimony would be diminished for the reasons I have highlighted in the previous paragraph. It is clear that she would be restricted in her capacity to earn and this translates into a diminution in her patrimony. The limitations highlighted are to thus not trivial and as such general spread of 5% is clearly not applicable in these circumstances.

[13] I agree with Adv van Zyl's argument that as a complete change in capacity to earn or vocation is not the case, in this scenario spread of 15% will be too high. Neither is it comparable to make a finding based on the plaintiff's whole body impairment as this is not an indicator of the plaintiff's compromised capacity to earn.

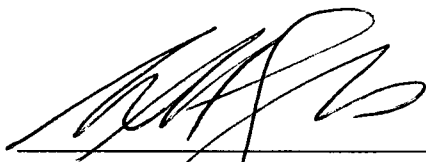
[14] In the circumstances I am in agreement with Adv van Zyl that in these circumstances a spread of 10% is applicable as it equates to a contingency which is

not in the general bracket but one which caters for the compromise that would be experienced by the plaintiff.

[15] In conclusion Adv Du Plessis has provided me with the amounts due to the plaintiff if a spread of 10% is applied. Thus the contingency deduction be applied to the calculation of actuary Johan Sauer is to be 10%/20% which results in a 10% spread. This then tallies to a total loss of **R789 618.00**.

[16] In the result, the plaintiff, Sunet Kleyngeld, is to be paid an amount of **R789 618.00** by the defendant, the Road Accident Fund, in respect of her claim for future loss of earning capacity.

[17] The order attached marked "X" is duly made an order of this court.



W. Hughes
Judge of the High Court

Appearances:

For the Plaintiff:
Instructed by:

Adv JPJ Du Plessis
Van Zyl Le Roux Inc

For the Defendant:

Instructed by:

Adv J van Zyl

T.M Chauke Incorporated

Date heard:

5 September 2016

Date delivered:

9 September 2016

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

X
09/09/2012

Case Number: 65774/2012

Before the Honourable Justice Hughes

In the, matter between:

KLEYNGELD S

Plaintiff

and

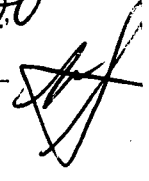
ROAD ACCIDENT FUND

Defendant

ORDER

AFTER HAVING HEARD COUNSEL, IT IS ORDERED THAT:

1.

- 1.1 The Defendant is to pay the Plaintiff's attorneys the sum of R 789 618.00
(Seven hundred and eighty nine thousand six
hundred and eighteen rands only —) 

The Plaintiff's Attorney's trust account details are as follows:

ACCOUNT HOLDER:	VZLR INC
BRANCH:	ABSA VAN DER WALT STREET
BRANCH CODE:	323345
TYPE OF ACCOUNT:	TRUST ACCOUNT
ACCOUNT NUMBER:	0030 147774

- 1.2 In the event of default on the above payment, interest shall accrue on such outstanding amount at 10.50% (at the mora rate of 3.5% above the repo rate on the date on this order, as per the Prescribe Rate of Interest Act, 55 of 1975, as amended) per annum calculated from due date, as per the Road Accident Fund Act, until the date of payment.

2.

The Defendant to pay the Plaintiff's taxed or agreed party and party cost, in the above mentioned account, for the instructing- and correspondent attorneys, which cost shall include, but not be limited to the following:

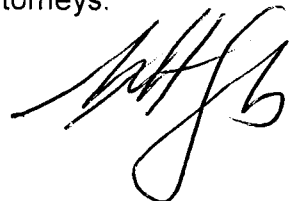
- 2.1 All reserved cost to be unreserved, if any;
- 2.2 The fees of Plaintiff's Counsel;



- 2.3 The cost of obtaining all expert medico legal-, actuarial, and any other reports of an expert nature which were furnished to the Defendant and/or its experts;
- 2.4 The reasonable taxable qualifying, preparation and reservation fees of all experts, including the cost of consultation fees with the legal teams, if any;
- 2.5 The reasonable traveling- and accommodation cost, if any, incurred in transporting the Plaintiff to all medico-legal appointments;
- 2.6 The reasonable cost for an interpreter's attendance at court and at the medico legal appointments for translation of information, if any;
- 2.7 The above-mentioned payment with regard to costs shall be subject to the following conditions:
 - 2.7.1 The Plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the Defendant's attorney of record; and
 - 2.7.2 The Plaintiff shall allow the Defendant 14 (fourteen) calendar days to make payment of the taxed costs;
 - 2.7.3 In the event of default on the above payment, interest shall accrue on such outstanding amount at the mora rate of 3.5% above the repo rate on the date of taxation / settlement of the bill of cost, as per the Prescribe Rate of Interest Act, 55 of 1975, as amended, per annum, calculated from due date until the date of payment.

3.

No contingency fee agreement exists between the Plaintiff and Plaintiff's attorneys.

A handwritten signature in black ink, appearing to be 'M. H. G.', is located in the bottom right corner of the page.

By Order of the Court

REGISTRAR

For the Plaintiff: VZLR Inc – 012 435 9444 Adv P du Plessis – 082 578 2424
For the Defendant: J van Zyl – 072 389 5223