

REPUBLIC OF SOUTH AFRICA



OFFICE OF THE CHIEF JUSTICE
(GAUTENG DIVISION, PRETORIA)

15/9/16
CASE NO: 69859/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

13.9.2016

DATE

SIGNATURE

In the matter between

MODJADJI ELIZABETH RAMAKGOPA

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

Fourie AJ

1. This is a claim for damages arising from a motor vehicle collision that occurred

on 6 August 2010 between two motor vehicles, one of which was driven by the plaintiff.

2. At the outset I was informed by counsel that the issue of liability had been settled and that the defendant had agreed to pay 100% of the plaintiff's proven or agreed damages.
3. I was further informed that agreement had been reached in respect of the following heads of damages:
 - 3.1. The defendant had accepted liability for the plaintiff's past medical expenses in the amount of R 9 767.00.
 - 3.2. The defendant had agreed to pay an amount of R 300 000.00 in respect of the plaintiff's claim for general damages.
 - 3.3. The defendant had given an undertaking to cover her claim for future hospital, medical and related expenses.
4. The plaintiff did not suffer a past loss of income and no past loss of income is claimed. The issue that remains in dispute is accordingly the plaintiff's loss of future earnings and/or loss of earning capacity.
5. The parties agreed to the submission of a number of expert reports as the only evidence to be adduced for purposes of quantification of the plaintiff's damages. Argument before me was directed at the contingency deductions that should be

made from the calculations of the actuary, G London of Human & Morris Consulting Actuaries.

6. In addition to the actuary, the plaintiff gave notice of her intention to adduce the evidence of the following experts:

6.1. Dr Theo Enslin, an independant medical examiner;

6.2. Dr Hans Enslin, an orthopaedic surgeon;

6.3. Dr Willie Pretorius, an industrial psychologist;

6.4. Ms Anneke Greeff, an occupational therapist; and

6.5. Dr Kobus Truter, a clinical psychologist.

7. During the pre-trial conference the defendant accepted the facts contained in the medical legal reports filed by the plaintiff, and the opinions therein contained are accordingly common cause. The defendant subsequently delivered a report by an orthopaedic surgeon, Dr MM Maine, to which the plaintiff did not object.

8. The plaintiff is a 59 year old woman who was 53 years old when the collision occurred in 2010. At the time of the collision, she was employed as a Chief Professional Nurse at the Modimolle Clinic, and in January 2011 she was promoted to the position of an Acting Assistant Manager.

9. The injuries sustained by the plaintiff include soft tissue injury to the neck, to the back, to both shoulders and to both knees. As a result of the injuries sustained, the plaintiff's diagnosis is cervical spondylosis with chronic pain, lumbar spondylosis with chronic pain, left shoulder acromioclavicular osteoarthritis with chronic pain and reduced range of motion and left knee osteoarthritis.
10. At the time of the collision, the plaintiff suffered from a pre-existing condition, due in part to her age and in part to injuries suffered in a prior motor vehicle collision during May 2010. It was submitted by the plaintiff's counsel that the pre-existing condition was either aggravated or rendered symptomatic by the collision in question.
11. I was referred to the main findings of the orthopaedic surgeon appointed by the defendant, namely the following:
 - 11.1. The plaintiff will continue to suffer worsening pain with the passage of time and may well be a candidate for surgery in the future.
 - 11.2. It is envisaged that she will start to experience pain related activity limitations and participation restrictions in the medium to long term.
 - 11.3. Based on the injuries sustained and her current state, the plaintiff will not be able to cope with the demands of her work for much longer.
 - 11.4. It is highly unlikely that the plaintiff will be able to continue with her

employment in its present form.

12. The plaintiff's orthopaedic surgeon assessed the plaintiff's disability for work, considering the pain in her back, neck, shoulders and knees, to be 15%. He apportioned 50% of this disability, as well as her early retirement, to her pre-existing condition, and 50% to the relevant collision.
13. I was also referred to the main findings in the report of the occupational therapist, which are the following:
 - 13.1. The demands of the plaintiff's work, both pre- and post accident, were found to be similar, falling into the sedentary-light ranges.
 - 13.2. The plaintiff requires a work environment that allows for regular change of posture between sitting, standing and walking.
 - 13.3. Should she require surgery prior to her retirement age, she will have difficulty in returning to her place of employment and coping with sustaining the required levels of efficacy.
 - 13.4. This is not only due to her physical disposition, but also due to her psychological and emotional disposition. (According to the report of the clinical psychologist, the plaintiff has symptoms of post-traumatic stress disorder and depression.)
14. Plaintiff's counsel emphasised the possibility of early retirement from age 60,

mentioned in the report of the industrial psychologist. It in fact appears from the report that it is more than a possibility, as according to Dr Pretorius, the plaintiff has already taken the decision to take early retirement in 2017, which retirement, I assume, will coincide with her 60th birthday in April 2017. It is undisputed that the normal retirement age for the plaintiff would otherwise have been the age of 65.

15. The actuary calculated the capitalised value of the plaintiff's pre-morbid future earning capacity to be the amount of R 5 331 302.00. Taking into account the early retirement at age 60, the capitalised value of the post-morbid earning capacity is R 4 234 078.00, a difference of R 1 097 224.00.
16. The aforesaid calculations have taken into account that she will receive a pension from age 60, which will contribute to her monthly income. Her counsel, Mr Botha, submitted that the pension that the plaintiff will receive from age 60 will be calculated with reference to the salary that she earned in the two years prior to that date, whereas had she retired at age 65, her pension would have been calculated with reference to a higher amount, accepting that her salary would have increased with the passage of time as it has been doing. On the other hand, Dr Pretorius noted in his report that the plaintiff has reached the maximum notch for an operational manager, and can expect only inflationary related increases until the time of her retirement.
17. The starting point of Mr Botha's argument was to deduct 50% from the

calculated loss of income, the reason being the opinion expressed by Dr H Enslin that 50% of her disability should be apportioned to this particular collision, and the other 50% to her pre-existing condition. Dr Maine did not express an opinion on this issue.

18. Mr Botha then submitted that with regards to the plaintiff's future earning capacity, a 10% contingency be deducted from her income but for the accident, and that a 20% contingency should be deducted from the income having regard to the accident. The latter contingency was based on the view of Dr H Enslin that the plaintiff had suffered a 15% reduction in her abilities to perform her work. This provided for a "spread" of 10%.
19. Mr Westebaar, who appeared for the defendant, emphasised the plaintiff's pre-existing conditions. He criticised the report of Dr H Enslin for failing to discuss the impact of the injuries sustained by the plaintiff in the prior collision, and for failing to specify the percentage that should be apportioned to the age of the plaintiff, which percentage to the prior collision and which to the relevant collision. The impact of the prior collision had not been properly investigated, or so he argued, and in his submission those injuries had a significant impact on the loss suffered by the plaintiff. He also submitted that, for these reasons, the assessment of a 15% reduction in work capacity, could have been much lower.
20. In my view, Mr Westebaar's submissions cannot be upheld. Apart from the fact that it is apparent from the report as a whole, that all factors, including the

previous collision, were considered and taken into account, the defendant did not dispute the content of Dr Enslin's report. The defendant had sufficient opportunity to interrogate the extent and impact of the plaintiff's injuries sustained in the collision during May 2010. It did not do so. The defendant did not undertake its own investigation into the impact of the previous collision, and in fact, its own expert did not express any opinion in this regard.

21. Defendant's counsel further submitted that there had been no decrease in the patrimony of the plaintiff's estate. She had still progressed in her career, she had returned to the same job and even assumed additional responsibility. The collision had evidently not impacted on her earning capacity.
22. However, not only the plaintiff's experts, but also the expert appointed by the defendant, accepted that some loss of productivity would be experienced and that an early retirement is anticipated, and that a contingency should be allowed in this regard.
23. Mr Westebaar proposed a 15% deduction on both pre- and post-morbid contingencies, due to the lack of insight into the impact of the prior collision on the plaintiff's claim. I have already stated that this approach cannot be upheld.
24. Although there are several factors mentioned by the parties' respective experts, which may well have impacted on the plaintiff's earning capacity, the eventuality of any of the factors materialising is significantly reduced by the short period remaining in the plaintiff's career, whether she takes an early retirement or not.

25. In determining the contingency to be applied to the income, but for the collision, the short period remaining until the plaintiff would have been required to retire in any event, being six and a half years, is decisive. A fair deduction, in my view, is 5%.
26. I am led to believe by the report of Dr Pretorius, that the plaintiff intends retiring in 2017, and if this coincides with her 60th birthday, is a date just 7 months from now (and 8 months after date of the calculation of the actuary). I will accept, in favour of the plaintiff, and only because her retirement in 2017 was not submitted as a fact by either counsel, that her retirement in 2017 is a probability and not a certainty. For this reason only I am inclined to provide for a small contingency, it otherwise being difficult to conceive on what basis, given the time from now until her retirement, provision should be made for contingencies. The actuary has already calculated the plaintiff's income to retirement age 65 and the actuary has also calculated the plaintiff's income to retirement age 60. The difference is R 1 097 227.
27. The plaintiff's claim for loss of earning capacity, taking into account a 5% deduction in respect of pre morbid earnings and a 2.5% deduction in respect of post morbid earnings, is an amount of R 936 510. From this amount, 50% must be deducted.
28. Accordingly, the following order is made:
- 28.1. The defendant is ordered to pay to the plaintiff an amount of R 468 255,

in respect of future loss of earning capacity.

28.2. The defendant is ordered to pay interest on the amount set out in paragraph 28.1 at 10.5% *per annum*, from 14 days after the date of this judgment to date of payment.

28.3. It is recorded that the defendant has agreed to pay an amount of R 9 767.00 in respect of the plaintiff's past medical expenses.

28.4. It is recorded that the defendant has undertaken to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 to compensate the plaintiff for 100% of the cost of future accommodation in a hospital or nursing home or treatment of or rendering of a service for supplying of goods to the plaintiff, due to injuries sustained by her in the collision and the *sequelae* thereof, after such costs have been incurred and upon proof thereof.

22.2 It is recorded that the defendant has agreed to pay an amount of R 300 000.00 in respect of general damages.

22.3 The defendant is ordered to pay the plaintiff's costs of suit, including the qualifying expenses of the following experts:

22.3.1 Dr TJ Enslin;

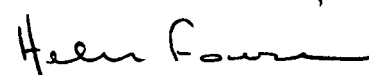
22.3.2 Dr HB Enslin, orthopaedic surgeon;

22.3.3 Dr Willie Pretorius, industrial psychologist;

22.3.4 Ms Anneke Greeff, occupational therapist; and

22.3.5 Dr Kobus Truter, clinical psychologist;

22.3.6 Human & Morris, actuaries.



H R FOURIE
ACTING JUDGE OF THE HIGH COURT

FOR THE PLAINTIFF

ADVOCATE: E BOTHA

ATTORNEYS: SAVAGE JOOSTE & ADAMS INC, PRETORIA

FOR THE DEFENDANT

ADVOCATE: DE WESTEBAAR

ATTORNEYS: TAU PHALANE INC, PRETORIA