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

(1) REPORTABLE: ~~YES~~/NO  
(2) OF INTEREST TO OTHER JUDGE: ~~YES~~/NO  
(3) REVISED.  
2/5/2019

**CASE NO: 3708/2015**

In the matter between:

**JJ MATENTSHI**

PLAINTIFF

and

**THE ROAD ACCIDENT FUND**

DEFENDANT

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**JUDGMENT**

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**NEUKIRCHER J:**

1. On 7 April 2012 the plaintiff was a passenger at the back of an open bakkie when the driver lost control of the vehicle. The vehicle overturned and she was ejected from the back of the vehicle. She sustained a concussive head injury, facial injuries, arm contusions and bruises on her legs.
2. The plaintiff has sued the defendant for damages pursuant to the injuries

sustained by her in this accident and when the trial commenced, I was informed by both Mr Mhlanga (for plaintiff), and Mr Tshitaka (for defendant} that the merits have been settled a hundred percent in favour of the plaintiff, as well as the principal and quantum of the general damages to be awarded to her.

3. The only issue before me in this matter is the issue of the plaintiff's loss of earning capacity. It is the plaintiff's case that her injuries resulting from the collision have rendered her unable to function as she would have prior to the accident and that she is permanently unemployable.
4. The main issue in dispute was whether or not the plaintiff would be permanently employable as a result of her injuries.
5. It was common cause that:
  - 5.1. the plaintiff was 23 years old<sup>1</sup> at the time of the accident and attempting to pass Grade 11 for the third time;
  - 5.2. she had repeated Grade 4 once, Grade 8 twice, Grade 9 once and Grade 11 twice. She was trying to pass Grade 11 when the accident occurred;
  - 5.3. after the accident, a week later, she enrolled at the Zaaiplaas ABET Centre for L4 Classes (Grade 9 equivalent). She passed her course in Ancillary Healthcare but failed her Sepedi and Economics courses;
  - 5.4. she dropped out of school because she was pregnant and did not return;
  - 5.5. although she struggled in the mainstream school, she persisted and **was a** determined young woman.
6. The plaintiff called five expert witnesses and the defendant conceded

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<sup>1</sup> She is now 29 **years** old .

their expertise from the outset of each witness testimony:

- 6.1. Gladys Maluleke, a clinical psychologist;
  - 6.2. Zethu Gumede, an educational psychologist;
  - 6.3. Yvonne Raganya, an occupational therapist;
  - 6.4. Esther Sempene, an industrial psychologist; and
  - 6.5. Edward Joseph Theron, an actuary.
7. The defendant closed its case without calling any witnesses and thus this matter must be decided based on the evidence presented by the plaintiff.
8. **Mrs Maluleke**, the clinical psychologist conducted several tests to determine *inter alia* the plaintiff's cognitive functioning, her verbal abilities, her memory skills and her processing and learning skills.
9. She came to the conclusion that:
- 9.1. the plaintiff suffered from moderate depression and severe anxiety;
  - 9.2. that although her pre-morbid scholastic progress was problematic, there could have been a number of environmental and other issues that had impacted on her progress at school;
  - 9.3. that pre-morbid, the plaintiff was persistent with regard to her scholastic progress and this expert was of the view that she would eventually have completed Grade 12, even if she had had to repeat it and would do a certificate which would have improved her employability;
  - 9.4. post-morbid the evidence was that the plaintiff suffered from poor memory and behaviour changes, the former of which Mrs

Maluleke testified would only worsen as the plaintiff aged;

- 9.5. the evidence was further that sometimes a minor brain injury does not always recover in three months, which is the norm - Mrs Maluleke was of the opinion that the plaintiff's case was an example of this;
  - 9.6. as a result, she was of the opinion that although she eventually complete Grade 12, the plaintiff would never go on to receive a diploma or degree, and that she would be a vulnerable employee her entire life. Her employment prospects would minimise the older she gets as her problems will become more conspicuous;
  - 9.7. unfortunately, Mrs Maluleke did not apply the AMA guidelines in her testing, which would have given a more accurate picture of the post-morbid effect of the accident on the plaintiff, given her pre-morbid scholastic difficulties.
10. Mrs Maluleke was adamant that psycho-therapy would not reverse the plaintiff's condition.
  11. **Zethu Gumede**, the educational psychologist, assessed the plaintiff a year after Mrs Maluleke, i.e in 2016 and conducted more or less the same tests. She assessed her verbal function and her intellectual abilities. Apart from the vocabulary test, the plaintiff underperformed in all the other tests conducted by Mrs Gumede, and scored below average. In general, she performed at the level of an eight year old (Grade 2).
  12. Mrs Gumede opined that pre-morbid the plaintiff had to repeat several grades and that she would have passed Grade 12 after repeating it and be vocationally trained. However, the accident exacerbated her learning difficulties. As a result, she is unable to reach her pre-morbid level of functioning.

13. She was of the view that pre-morbid the plaintiff would have benefited by leaving school after Grade 10 and going for vocational training. However, had she continued to Grade 12, she would have eventually passed, but with low marks, and become a semi-skilled person. None of this is possible post-morbid. If the plaintiff does get employment it will be sympathetic employment.
14. She is of the view that the plaintiff is not a candidate for remedial intervention because of her low IQ.
15. She was also of the opinion that although the plaintiff had learning difficulties pre-morbid, the accident exacerbated those issues and as a result, she dropped out of school. It was put to her in cross-examination that other factors had led to the plaintiff dropping out of school: her pregnancy, her mother passing away and financial issues had prevented the plaintiff from returning to her studies. Mrs Gumede conceded that these were all factors to be considered and the reason plaintiff gave during the interview conducted, but her view was that the true reason for the plaintiff not returning to her studies was the fact that she would not have passed and this is solely attributable to the accident.
16. **Yvonne Raganya** the occupational therapist, examined the plaintiff during the course of an entire day and she was required to assess the plaintiff's fitness for the open labour market and to see how she would perform when she is working in a normal employment environment.
17. Her findings after performing various tests, including those aimed at cognitive function, physical capacity, psychological and perception tests and tolerance (endurance) tests were that:
  - 17.1. the plaintiff struggled with completing and performing most of the administrative tests;
  - 17.2. her physical tolerance for standing, sitting or doing light physical tasks (example packing shelves or filing) was

restricted and the plaintiff struggled with keeping pace and was easily fatigued performing her tasks;

- 17.3. the plaintiff complained of back pain, leg and arm fatigue and shoulder pain, all of which is directly attributable to the injuries sustained when she was ejected from the vehicle.
18. She testified that for a person to be employable within the open labour market, one looks at factors such as their ability to go to work every day, to take instructions and remember what those are without having to be prompted or reminded, the interaction with others in the work environment and to work without unnecessary errors or without causing unnecessary errors.
19. Her opinion was that given the tests she conducted, the results and her observations of the plaintiff, the plaintiff does not meet those criteria - for example she cannot carry out instructions without making numerous errors, so she would need to be supervised in all her tasks. She stated that an employer requires an employee to be productive, even one in the informal employment sector, which the plaintiff is not. Accordingly, only sympathetic employment would be an option for the plaintiff, but even there she has restrictions as she is unable to work a full day.
20. Under cross-examination she stated that generally with injuries such as those which the plaintiff suffered, she is given approximately two years to benefit from intervention. After this period, any therapy is rehabilitative to help the plaintiff cope as the brain will not adjust or improve much more after two years. Furthermore, any physical problems will only get worse over time and the plaintiff will experience more pain.
21. **Esther Sempene**, the industrial psychologist then testified that she had collated the reports and she was of the opinion that given these, the treatments and the sequelae of the injuries, the plaintiff would struggle with both sedentary and physical work and she was therefore

unemployable.

22. **As** regards the plaintiff's pre-morbid employability, Ms Sempene sketched two scenarios:

22.1. the first scenario was if she achieved her Grade 12 (with low marks) and continued with vocational training;

22.2. the second scenario was if she achieved her Grade 12 and was employed after approximately one year in the unskilled open labour market.

23. As regards each,<sup>2</sup> she stated:

23.1. in respect of scenario 1: with a one year post-matriculate certificate the plaintiff could have entered the open labour market at the B1 level and she may have reached the B5/C1 level and retired at age 65;

23.2. in respect of scenario 2: she would have remained unemployed for approximately a year before securing a job and could have started earning approximately R4 000.00 to R5 000.00 per month. She would have reached her career ceiling at the 83 level at age 45 and thereafter inflationary increases would have applied until she retired.

24. **Edward Joseph Theron**, is the actuary who compiled the report containing the calculations of the plaintiff's past and future loss of earnings. It was not placed in dispute that his report was based on the report of Ms Sempene and also took into account the joint minutes filed by her and the industrial psychologist appointed by the defendant, a Mrs Kheswa.

25. He postulated four scenarios in his report:

25.1. scenarios 1 and 2 were based on Mrs Sempene's report and scenarios 3 and 4 took into account Mrs Kheswa's views.<sup>3</sup>

25.2. Mr Tshitaka abandoned reliance on scenarios 3 and 4 and

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<sup>2</sup> And these were used by the actuary for purposes of his calculation

<sup>3</sup> She was of the view that the plaintiff was employable and therefore did not have any future loss of

therefore nothing further need be said regarding them.

26. As regards scenario 1, the following is relevant:

26.1. Uninjured earnings (gross):

- December 2013: completes Grade 12
- January 2014: no earnings for one year
- January 2015: R 4 500.00 to R 5 000.00 per month increasing to
- November 2034 (age 45): Paterson B3 at R242 000.00 per year (2019 terms), and her earnings would have increased with inflation until her retirement at age 65.

26.2. Uninjured earnings (gross):

She has not earned any income since the accident and will not earn an income in future

26.3. Contingencies were applied of:

Uninjured - 15% on future earnings

Injured - 25% on future earnings.

27. Thus, the plaintiffs total loss of earnings is:

Past Loss:	R 309 700.00
Future Loss:	R 3 871 300.00
Less Contingency 15% =	R 3 290 605.00
R 3 290 605.00 + R 309 700.00= R3 600 305.00	

28. As regards scenario 2, the following is relevant:

28.1. Uninjured earnings (gross):

- December 2013: completes Grade 12
- January 2014: completes Certificate
- January 2015: Paterson 81 at R 192 000.00 per annum

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earnings. As she was not called, her view is not relevant to these proceedings.



increases to

- November 2034 (age 45): Paterson 85/C1 at R366 000.00 per annum,  
and her earnings would have increased with inflation until her retirement at age 65.

28.2. Uninjured earnings (gross):

She has not earned any income since the accident and will not earn an income in future.

28.3. Contingencies were applied of:

Uninjured - 15% on future earnings

Injured - 25% on future earnings.

29. Thus, the plaintiff's total loss of earnings is:

Past Loss: R 684 900.00

Future Loss: R 5 883 900.00

Less Contingency 15% = R 5 001 315.00

R 5 001 315.00 + R 684 900.00= R5 686 215.00

**Summary of evidence:**

- 30. All five witnesses made a good impression. They presented their evidence in a clear and logical manner and were comprehensible and remained firm in their views under cross-examination. Mr Tshitaka argued Ms Raganya exaggerated slightly regarding the extent of the plaintiff's injuries post-morbid for example her back pain and the level of her fatigue in performing tasks. He argued that she also came across as a bit of a "know-it-all".
- 31. I must disagree - Ms Raganya was an impressive witness, she was clearly very thorough in her examination of the plaintiff and took care to spend time with her in conducting what she considered to be all the necessary and relevant tests in order to make a considered recommendation to this Court. She was clearly very well prepared and knew not only the content of her report, and why and how she reached her conclusions and

recommendations, but also knew the content of the report of her counterpart, Ms Kheswa and where they differed.

32. This being so, the defendant failing to present any expert witness to counter the evidence provided by any of the plaintiff's experts, and cross-examination not shaking any of the plaintiff's witnesses evidence, I must accept the plaintiff's version that she is unemployable post-morbid.
33. The only question that remains is whether the plaintiff would have eventually persisted in achieving Grade 12 had she had the financial means to continue with her studies and also, whether she would have then gone further to study for a certificate.
34. Mr Mhlangu has argued that although the plaintiff has experienced learning difficulties pre-morbid, the evidence shows that she was persistent and a determined person. This is also demonstrated by the fact that shortly after the accident, she enrolled at her ABET school. He argues that she probably would have passed Grade 12, enrolled for a certificate and secured employment and thus scenario 2's calculations are the most appropriate. He argues that were one to take into account the experts' opinions, scenario 1 would not put the plaintiff in a position she should have been in to adequately compensate her.
35. Mr Tshitaka argues that scenario 1 is the most appropriate in the present circumstances. He argues that given the Plaintiff's pre- morbid learning issues and the difficulty she had in passing her grades, the postulated scenario that she would not only have passed Grade 12, but received a one year certificate is unlikely and far-fetched.
36. He says that is even more unlikely when taking into account that the plaintiff not only failed two of her courses after the accident, but that she has yet to return to her studies.
37. It is my view that scenario 1 of Mr Theron's calculation is the most appropriate, given the pre-morbid issues the plaintiff suffered: although a

determined scholar, her academic performance was not without its severe setbacks: she was unable to pass Grades 4, 8, 9 and 11 on her first attempt, which clearly indicate that she had learning difficulties, whatever their cause, pre-morbid. I will accept that she was determined enough to eventually pass Grade 12 post-morbid, but in my view it is highly unlikely and improbable that she would have studied further. It is more probable that she would have entered the open unskilled labour market and my view is also strengthened by the fact that by then she would have been in her mid- to late twenties and she be competing in the same market with much younger people the longer it took her to complete her education. It would thus be important for her to secure employment as soon as possible.

38. Given the fact that I have found that Mr Theron to be a sound and reliable expert, I also have no reason not to accept the contingencies he has applied in his scenario 1 calculation.
39. Counsel agrees that costs of the action should follow the result.
40. A draft order leaving out the amount of the award was presented to me by both counsel and I will insert the amounts in that and make it an order of Court.

**Order:**

41. Thus, the order I make is the following:
  - 41.1. The draft, marked "X" as amended, is made an order of Court.

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**NEUKIRCHER J**

Date of hearing: 23-25 April 2019

Date of judgment: 29 April 2019

**“X”**

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

**ON 2 MAY 2019  
BEFORE HER LADYSHIP JUSTICE NEUKIRCHER  
COURT 8E**

CASE NO: 37508/15

In the matter between:

**JOHANNA JABULILE MATENTSHI**

**PLAINTIFF**

AND

**ROAD ACCIDENT FUND**

**DEFENDANT**

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**DRAFT ORDER**

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HAVING heard counsel of the parties, the following order is made an order of court:

1. The Defendant is ordered to pay the Plaintiff<sup>h</sup> a capital amount of **R 3 600 305 (three million six hundred thousand three hundred and five rand)** In respect of loss of earnings into the following bank account on or before the 28<sup>th</sup> May 2019:

ACCOUNT HOLDER	: J M MODIBA ATTORNEYS
BANK NAME	: STANDARD BANK
BRANCH CODE	: 010545

ACCOUNT NO : [...]  
TYPE OF ACCOUNT : TRUST ACCOUNT

2.1 Costs of Senior Junior Counsel.

2.2 And the Defendant is further ordered to pay Plaintiff's party and party costs on High Court Scale including costs of the 23<sup>rd</sup>, 24<sup>th</sup> and 25<sup>th</sup> April up to date of this order, such costs to include but not limited to the costs of the experts reports, namely:

- DR SELAHLE (Plastic & Reconstructive Surgeon)
- DR DIPPENAAR (Ophthalmic Surgeon)
- PROF MOKGOKONG (Neurosurgeon)
- GLADYS MALULEKE (Clinical Psychologist)
- ZETHU GUMEDE (Educational Psychologist)
- YVONNE RAGANYA (Occupational Therapist)
- ESTHER SEMPANE (Industrial Psychologist)
- MUNRO (Actuary)

2.3 The Defendant is ordered to pay the reasonable taxable costs of the Plaintiff incurred in respect of the attendance of medico legal examinations and accommodation.

2.4 And the preparation, reasonable travelling and subsistence fees and qualifying full appearance fees and reservation fees of the experts subject to the Taxing Master's discretion and upon proof thereof.

DATED AT PRETORIA ON THIS THE 23<sup>RD</sup> DAY OF APRIL 2019.

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**BY ORDER OF THE COURT**

**PLAINTIFF'S COUNSEL: ADVOCATE MHLANGA (079 235 6030)**

**DEFENDANT'S COUNSEL: ADV TAKALANI TSHIKAKA**

**073 731 6941**