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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED
.....
DATE	SIGNATURE

CASE NO: 42070/14

In the matter between:

G.M. MAGWATANE

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

COLLIS J:

INTRODUCTION

1. This is an action wherein the Plaintiff claims damages arising from injuries sustained by her in a collision which occurred on 30 October 2009. At the time of the collision, the plaintiff was a passenger in motor vehicle bearing registration letters and numbers [....].
2. In the particulars of claim at paragraph 6 thereof, the Plaintiff alleges to have sustained the following injuries:
 - 2.1 A soft tissue injury to her left knee and ankle;
 - 2.2 A soft tissue injury to the lumbar spine and left hip and a concussive head injury;
 - 2.3 A laceration above her left eye.
3. Furthermore, at paragraph 8 of the particulars of claim, the plaintiff alleges as follows:

“As a result of the aforesaid injuries Plaintiff has suffered damage and is entitled to damages in the sum of R1 625 000, 00 made up as follows:

 - 3.1 Past medical/ Hospital expenses R5 000, 00
 - 3.2 Future medical expenses-Undertaking in terms of Section 17(4) (a) Act 56 of 1996
 - 3.3 Past and future loss of earning capacity R1 100 000, 00
 - 3.4 General Damages R 310 000, 00”
4. At the commencement of the proceedings and at the request of the parties, the court was requested to record the following:
 - 4.1 That the issue of liability has become settled on the basis that the Defendant shall pay 100% of the Plaintiff’s agreed or proven damages;
 - 4.2 That the Plaintiff’s claim in respect of general damages was rejected by the Defendant and is to be referred to the Health Professions Council of South Africa for adjudication;
 - 4.3 That the Defendant would provide the Plaintiff with an undertaking in terms of section 17(4)(a) of the Act, in settlement of the Plaintiff’s claim in respect of her future medical expenses;

- 4.4 By agreement between the parties the contents and correctness of the medical legal reports prepared by the experts, were handed in and marked as exhibit B;
 - 4.5 Furthermore, the joint minutes prepared by the various experts were marked as exhibit A.
 - 4.6 The parties by agreement also handed in the actuarial reports prepared by the defendant's actuary and the plaintiff agreed with the findings postulated in such reports. The reports were handed in as exhibits C and D respectively.
5. The Plaintiff elected to testify and the parties were further in agreement that they will merely argue the matter on the pleadings and the various expert reports filed of record without the need call such experts.

DISPUTED ISSUES

6. This court was called upon to determine the extent of the Plaintiff's future loss of earning capacity and the appropriate percentage contingency deductions to be applied.

EVIDENCE

7. Ms Magwatane testified that on the 30 October 2009, she was a passenger travelling in a taxi when she met with an accident. At the time of the collision, she was asleep when the taxi rolled before it came to a standstill. Immediately, thereafter all passengers alighted from the taxi through a broken window. Disorientated she decided to hike back in the direction of Rustenburg. During the commotion she lost both her shoes and spectacles. As she was waiting for a lift the police then arrived at the scene and an ambulance was summonsed. She was then taken to hospital, treated and discharged the same evening. Later that evening she was unable to sleep and still experienced some flashbacks of the collision. She further testified that at the time of the collision, she was attending a Nursing Training College and albeit that her examination was postponed by a week as a result of the

accident, she still managed to write her examination that same year. The following year she completed her studies although difficult as she by now experienced continuous headaches. Upon completing her studies, she first took up employment at a private hospital but was unable to meet the strenuous demands of the job. She thereafter resigned this position and took up employment at a public hospital a position she still holds today. It was also her testimony that following the collision, she now experiences constant headaches. She also intermittently suffers from a swollen left ankle and knee which gets aggravated when she stands for extended periods of time and also suffers from back pain from time to time. Following the collision she has become more forgetful and finds the experience of travelling in a taxi very anxious. As a result of the collision she now only work in the Children's ward at hospital as the work in that ward is less demanding given the constant pain which she experiences and even in this ward her work is somewhat constrained. By way of example she testified, that she is unable to lift up heavier patients like older children, as she experiences severe pain when doing so. As a result of her forgetfulness which was precipitated by the collision, she has received several warnings from her employer. As to her future career prospects she testified that she intends taking up full time studies during 2019 as she now wishes to obtain a Diploma in nursing. During cross-examination, Ms Magwatane once again confirmed that after the collision she was trying to hike in order to catch a lift but remained adamant that she was still disorientated. She also confirmed that had it not been for the collision, that she would have been able to write her examination as scheduled but as result of the collision, her examination was deferred. As to the demands of her job post collision, she re-iterated that she had found the demands of her job as very challenging given the pain which she constantly experienced and as she remains forgetful she regularly receive warnings from her supervisor. She testified that prior to the collision, that she occasionally suffered from headaches but following the collision, that she now experiences headaches at least three times a week. She once again confirmed that the reason that she left the private hospital, was not to merely seek better opportunities, but simply that she was unable to cope with the demands made on her within her work environment. This then concluded her evidence.

EXPERT EVIDENCE

8. In their joint minute, the Orthopaedic Surgeons recorded as follows:¹
- 8.1 That the Plaintiff remains symptomatic in respect of her lumbar spine, left ankle and left knee. Dr Ngobeni was also informed by the plaintiff that following the collision that she intermittently suffers from headaches.
 - 8.2 Both doctors were of the opinion, that the collision has not left the plaintiff with serious musculoskeletal impairment and as such she does not qualify under the Narrative Test. The experts both opined that the plaintiff sustained soft tissue injuries without serious complications, when she was involved in a motor vehicle collision on 30 October 2009.
 - 8.3 In as far as the plaintiff's future employment is concerned, Dr Enslin expressed as opinion, that the plaintiff will have difficulty in performing all the duties of an enrolled nurse until her normal retirement age. He further expressed an opinion that the plaintiff would be best suited to perform light work such as working in the Outpatient Department or in a Children's ward. As a result of her symptoms in her lower back she has been left with limitations to perform all the work tasks expected of a nurse. The expert further opined, that as a result of her injuries that the plaintiff has been left unable to freely compete in the open labour market.
 - 8.4 Dr Ngobeni however expressed an opinion, that the plaintiff at present has no difficulty in performing her duties as a nurse and is expected to continue working as a nurse until her expected retirement age.
9. The Neuropsychologists in their joint minute made the following observations:²

¹ Exhibit A p 1-2

² Exhibit p 3-5

- 9.1 The experts were in agreement that prior to the collision, that the plaintiff had not suffered from any serious illness and that during the collision, that she had not sustained any head injury.
- 9.2 They were further of the opinion that pre-accident that the plaintiff was not a psychological vulnerable individual.
- 9.3 Ms Jonker further noted that given the plaintiff's educational and occupational background as well as her best test performances conducted, that her results were expected to fall in the least averages ranges.³
- 9.4 They further both agreed that post accident that the plaintiff displayed difficulty across several domains on the neuropsychological tests conducted. In this regard each expert performed individual tests on the plaintiff. As to the results of such tests conducted, and a discussion thereon, same appears in Exhibit B pages 25-26, 56-58 and paragraph 66 respectively.
- 9.5 Both experts were of the opinion that the plaintiff has been left with pain to her left hip on an almost daily basis which pain is being aggravated by her sitting, standing or walking for long periods. The experts also agreed that the plaintiff experiences pain to her left knee and left ankle on a regular basis which is aggravated whenever she walks or stands for long periods or is participating in physical strenuous tasks. They further agreed that the plaintiff experiences left-sided headaches several times a week which is associated with pain to her eye, blurred vision and dizziness.
- 9.6 The expert further agreed that from a psychological point of view that the plaintiff has been suffering from symptoms of Major Depressive Disorder. Ms Jonker noted symptoms of a Posttraumatic Stress Disorder and Ms Mabobo noted symptoms of anxiety which is exacerbated by ongoing physical limitations and pain.⁴
- 9.7 As far as the plaintiff's employment prospects is concerned, the experts agreed that the plaintiff's performance in her workplace will be compromised by, amongst others her fluctuating attention, resulting in

³ Exhibit B p 58 para 10.3

⁴ Exhibit B para 8.2; 10.4.1.3 & 10.4.2 pa42-45; p59-61 & 66(para 23-24)

inconsistent work output. Given her psychological profile this is expected to result in a lack of psychological endurance and resilience.

9.8 As a result they were of the opinion, that the plaintiff will require additional support at work, an understanding working environment as well as difficulties in progressing to more lucrative or executive positions.

9.9 Ms Jonker further opined that the plaintiff given her cognitive fall-outs suggest that it will take her much longer and will require more effort on her part to complete her current Diploma in Nursing. She may furthermore, even abandon her studies, compromising her career trajectory.

9.10 The experts further agreed that the plaintiff will benefit, from supportive psychotherapy in order to address her psychological difficulties. Ms Jonker further noted that the plaintiff's prognosis is compromised by the lack of timeous psychotherapeutic intervention and the passage of time of eight years since date of accident. She was as a result of the opinion that the plaintiff's prognosis is poor.

10. The Occupational Therapists joint minute recorded the following:⁵ The experts agree that the plaintiff will need neurocognitive intervention to compensate for her cognitive difficulties, cognitive restraining and compensation for altered cognitive abilities, working with psychologists supporting their psychotherapeutic intervention of her mood disturbance. They further agree that the plaintiff will benefit from elements of vocational rehabilitation, supporting placement in a situation where she can be optimally functional and avoid discomfort to pain, due to postural and mobility difficulties. Ms De Vos in her report further expressed the opinion, that the plaintiff's tolerance and endurance level have been challenged by the *sequelae* of the injuries sustained. The expert further recorded that the plaintiff can no longer do her work as a nursing assistant as competitively as before and that she would require economic intervention.⁶ The experts were importantly in agreement that the plaintiff will benefit from supported and

⁵ Exhibit A p 6-15

⁶ Exhibit B p 79

moderately sheltered employment as an enrolled nurse, to avoid her being placed in situations where she can't meet the mobility, posture and strength demands, due to the injuries of her lower back, knee and ankle. As to the impact of the injuries to her work capacity, they were in agreement that the plaintiff would be able to perform a job demanding sedentary and light to moderate medium strength work but regular mobility. They opined that the plaintiff will still be able to perform her work as an enrolled nurse but that she would benefit from reasonable accommodations where she is placed in sympathetic and supportive placement in a hospital environment which will allow for rest, joint and back protection, energy conservation and the use of special devices where necessary. Following the accident, they further agreed that the plaintiff has been left vulnerable and limited as a job seeker and employee in the open labour market and that she will need sympathetic management and supervision. Ms Makuya further opined that based on the physical assessment findings, that the plaintiff has not regained full capacity to perform her nursing duties but as nursing duties at times require team work she should be able to call for assistance from her colleagues.

11. The Industrial Psychologists met on 18 November 2018 and recorded the following in their joint minute:⁷ The experts were in agreement as to the biological background obtained from the plaintiff as is reflected in their individual expert reports. They further agreed that the plaintiff in an uninjured state would have been able to progressed as a Professional Nurse Grade 1 and that she would pre-morbid have been able to progressed to Notch 6 by age 59 until she retired at age 60. The Industrial Psychologists further considered the opinions expressed by the other experts regarding the injuries sustained by the plaintiff and her prognosis and they concluded, post-morbidly that the plaintiff would continue working in her current position as a Staff Nurse. Ms Coetzee on behalf of the plaintiff further expressed an opinion that the plaintiff post-morbid has been more vulnerable and is an unequal participant in the open labour market. She further opined, that given her *sequelae* the plaintiff's reduced productivity and overall efficiency has left the

⁷ Exhibit B p 16-20

plaintiff at risk not to qualify for the bi-annual performance based notch increments. As a result she will be at further risk to experience slower income progression than what has been postulated in her pre-morbid scenario. Mr Sechudi on behalf of the defendant opined that the plaintiff post-morbid remains employable in the open labour market, albeit with reasonable accommodation. The expert further opined that the plaintiff is expected to recover from her current discomfort and pain if she receives the necessary support at work and will be able to continue with her activities at work and earn an income for herself.

12. The actuarial reports made reference to above, postulated the retirement age of the plaintiff to be 60 years of age. As to the plaintiff's pecuniary loss of her income, the actuary assessed the plaintiff's loss to be the difference between the value of her income but for the accident and the value of her income having regard to the accident. In calculating her loss the actuary took into account, her expectation of life. In his report he further opined that in determining the plaintiff's pecuniary loss of income this Court should make a deduction for unforeseen contingencies such as unemployment, life expectancy, early retirement, errors in estimation of future earnings and general hazards of life.

EVALUATION

13. Now in determining the plaintiff's future loss of earning and or earning capacity this court has to determine whether post-accident and as a result of the *sequelae* of the collision, she would have been able to reach her full career potential. Ms Magwatane is at present 47 years of age and is expected to retire at age 60 years. She as a result only have approximately 13 years left of her working life.
14. In *Bridgman NO v Road Accident Fund 2002 (1) ALLSA 1 (CPD)* the court held that "in order to claim compensation for patrimonial loss a Plaintiff must discharge the onus of proving on a balance of probabilities that such loss has indeed occurred. That does not necessarily mean that the Plaintiff is required to prove the loss with mathematical precision however the Plaintiff is required

to place before the court all evidence reasonably available to enable the court to qualify the damages and to make an appropriate award in his favour.”

15. In the decision *South Insurance Association v Bailey* 1984 (1) SA 98 AD it was held that a court is not bound by actuarial calculations of the parties. Furthermore, that a Court has a discretion to discount contingencies to cater for the uncertainties of life such as periods of unemployment, incapacity due to illness or adverse economic conditions.

16. As to the plaintiff's future loss of income but for the accident a 10% contingency deduction was proposed by the expert, which contingency this Court finds fair and reasonable under the circumstances. The plaintiff's net value of income but for the accident would therefore amount to R 3 363 634. As to the plaintiff's value of income having regard to the accident, the actuary proposed that a 45% contingency deduction should be applied. The proposed contingency deduction having regard to the accident *in casu* relates to the probabilities that the plaintiff will retain her current position as a Staff Nurse. This contingency deduction proposed by the actuary postulates a mere 55 % chance that the plaintiff will retain her position as a staff nurse until retirement age. This postulation however is not supported by the conspectus of evidence presented before this court, more so if one considers the evidence of the Industrial Psychologists that both expressed an opinion that the plaintiff would remain in her current position of that of a Staff Nurse and receive the yearly percentages increments until retirement age.

17. In my opinion, given the totality of the evidence presented before this Court, a 20% contingency deduction should apply leaving the plaintiff with a 90% chance of remaining employed until retirement age. The plaintiff's value of income having regard to the accident is therefore calculated to be the following:

R 3 363 634.00 – (R 2 772 920 minus 20%) = R 1 145 928.00. This contingency deduction this Court considers fair and reasonable under the

circumstances and I am satisfied that the plaintiff has discharged her *onus* of presenting reliable evidence in proving her loss of earning capacity.

18. Having regard further to the decision *Goodall v President Insurance* 1978 (1) SA 389 (W) and the sliding scale method laid down in this decision I am of the opinion that the percentages contingency deductions as alluded to above would be both fair and equitable and will serve to balance the interest of both parties under the circumstances.

ORDER

19. In the result, the following order is made:

- 19.1 The merits have been settled 100% in favour of the plaintiff;
- 19.2 The Defendant shall pay the Plaintiff the total amount of R 1 150 928 (One Million One Hundred and Fifty Thousand Nine Hundred and Twenty Eight Rand) in respect of both her future loss of income and earning capacity and Past Medical expenses.
- 19.3 The said amount to be paid into the Plaintiff's attorneys Trust Account.
Account Name: AM DELLOW t/a Dellow Attorneys No: [...] Absa Bank Woodlands;
- 19.4 Interest on the above amount at a rate of 10,25% per annum from a date 14 days after the date of judgment to date of payment;
- 19.5 The Defendant is ordered to furnish the Plaintiff with an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act 56 of 1996 in respect of future accommodation in a hospital or nursing home or treatment of and or rendering of a service or supplying of goods to her arising from injuries sustained by her in a collision which occurred on 30 October 2009 only after the costs have been incurred.

- 19.6 The Plaintiff is ordered to serve the Notice of Taxation of Plaintiff's party and party Bill of Costs on the Defendant's attorney of record.
- 19.7 The Defendant is ordered to pay the Plaintiff's taxed or agreed party and party costs within 14 (fourteen) days from the dates upon which the accounts are taxed by the Taxing Master and/or agreed between the parties.
- 19.8 The Defendant is ordered to pay the Plaintiff's taxed or agreed party and party costs, on a High Court scale, (including the costs for 21 February 2018, 21 November 2018, 20 December 2018 and 1 February 2019), which costs will include, but will not be limited to the following:
1. The costs of reports, joint minutes and/ or addendum reports by the following experts(including radiological reports and the RAF 4 report);
 - 1.1 Dr HB Enslin
 - 1.2 Dr TJ Enslin
 - 1.3 Dr L Van Wyk
 - 1.4 Dr J Pretorius
 - 1.5 Dr LF Segwapa
 - 1.6 Ms I. Jonker
 - 1.7 Ms H. Roos
 - 1.8 Mr. PC Diedericks
 - 1.9 Actuary
 - 1.10 Mr M. Mokgaladi-Interpreter
 2. The cost of senior-junior counsel, in respect of preparation, consultations, pre-trial conferences and a day fee for 21 February 2018, 21 November 2018, 20 December 2018 and 1 February 2019;
 3. The reasonable travelling, subsistence and transportation costs including e-toll fees incurred by and on behalf of the Plaintiff for attending the medico-legal examinations and attending court;

4. The costs of attending pre-trial conferences, and the costs of attending all minutes in respect of pre-trial conferences, as well as transport costs to and from pre-trial conferences and court;
5. The reasonable taxable costs of one consultation with the Plaintiff in order to consider the offer of the Defendant, the costs to accept it, have it made an order of court and to procure performance of the Defendant of its obligations in terms hereof;
6. The costs incurred in obtaining payment and/or execution of the capital amount mentioned in paragraph 18.2 above and/or delivery of the undertaking in terms of Section 17(4) (a) of Act 56 of 1996;
7. The costs consequent to all of the Plaintiff's trial bundles, expert reports, pleadings, notices, all indexes, document bundles and witnesses bundles, joint minutes, including the costs of 5(five) full copies thereof.

COLLIS J
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA

Appearances:

For the Plaintiff	: Adv. H. De Wet
Attorney for the Plaintiff	: Dellow Attorneys
For the Defendant	: Adv. M. Mametse
Attorney for the Defendant	: Tsebane Molaba Attorneys
Dates of Hearing	: 21 November 2018, 20 December 2018 and 01 February 2019
Date of Judgment	: 26 July 2019