IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 48224/12

REPORTABLE: NO

Of INTEREST TO OTHER JUDGES: NO

DATE: 01/11/19

SIGNATURE:

In the matter between:

ZAMA DORIS HADEBE Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

JUDGMENT

MAKHUBELE J

Introduction

[1] The defendant's liability, general damages and past medical expenses were settled on 19 June 2019. In this regard, and by agreement between the

parties, Deputy Judge President Ledwaba issued an order that provides for amongst others; that the defendant:

[1.1] is liable for the plaintiff's proven damages to the extent of 100%.

[1.2] pay the plaintiff the sum of R550 000.00 (Five Hundred and Fifty Thousand Rand) in respect of General Damages; and

[1.3] furnish the plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996.

[2] The only issue before me was loss of income, past and future.

[3] It is common cause that the plaintiff suffered sustained head, cervical spine, lumbar spine and right ankle injuries.

[4] When the matter came before me, Counsel for the plaintiff asked me to make a ruling, in accordance with the pre-trial minute, that the matter should proceed as a stated case. In the alternative, and in the event that I would not make a ruling as requested, he indicated that he was going to call the Occupational Therapist only on one issue, namely, whether the plaintiff was employable in the open labour market. The request for the matter to proceed as a stated case was opposed by counsel for the defendant who was of the view that there was a need for the Clinical and Industrial Psychologists to testify to clarify certain aspects in their reports pertaining to what he referred to as the plaintiff's learning difficulties before the accident.

[5] Counsel for the plaintiff referred me to the minutes of the pre-trial conference that was held on 13 August 2019, from which it appears that the defendant admitted that it had filed experts reports of the Occupational Therapist (Ms B Kekana) and Industrial Psychologist (Ms Moipone Kheswa), which had since lapsed and that it had failed to revert with regard to specific questions pertaining to factual allegations and opinions of the plaintiff's expert reports by 15 August 2019. It was also indicated and agreed that if no disputes are raised, the matter was going to proceed as a stated case.

[6] The defendant provided the same answer on all questions regarding the factual allegations and expert opinion of the plaintiff's experts, namely, that it was going to revert on 15 August 2019. The submissions before me though were confined to issues arising from the reports of the Occupational and Industrial Psychologists because the only remaining dispute relates to loss of income, and even there the only issue is whether the plaintiff is totally unemployable in the open labour market.

[7] Having regard to the answers in the pre-trial minute, the only issue arising from the expert report of the Industrial Psychologist, Ben Moodie, that was not admitted (as opposed to the standard answer that the defendant was going to revert by 15 August), is recorded in paragraph 8.2 where the question was whether the plaintiff *"has for all practical purposes been rendered functionally unemployable as a result of her accident related injuries and sequelae, inter alia"*.

[8] In paragraph 9.2, the defendant did not admit the opinion of the Occupational Therapist, Ms Mahlokweng, that the plaintiff *'is best suited for sedentary category of work with additional restrictions to the positional tolerance'*, however, in the next paragraph (9.3), it undertook to revert by 15 August 2019 on whether the plaintiff *'can be able to cope with sedentary to occasional light physical parameters of work'*. It did not revert as I have indicated above.

[9] The defendant's counsel objection that the matter proceed as a stated case is based on his reading of the factual allegations that informed the plaintiff's expert reports, particularly what he (counsel) contended as prior learning difficulties that should be inferred from the reports.

[10] Having regard to the questions in the pre-trial minute regarding the factual allegations, opinions, and specifically whether the defendant had any evidence or intended to procure such in order to rebut those allegations and opinions, as well as the undertakings made to revert by 15 August 2019, and failure to do so, I do not think that the defendant, through its counsel should be allowed to argue against the effect of the pre-trial concessions from the bar.

[11] After hearing both counsel, I made a ruling that the matter should proceed as a stated case as contemplated in the pre-trial minute. The basis thereof has already been explained above.

[12] I may add that it has become common practice for parties (plaintiffs) in Road Accident Fund matters to formulate pre-trial questions in the manner in which the questions in this matter have been formulated, particularly the paragraph that requires the defendant to answer the questions by a particular date and time, failing which the answers would be deemed as positive. In this matter, the words 'stated case' were used. A stated case means that the facts that parties agree on are recorded and as such, there would be no need to prove them.

[13] In the matter of *Spammer v Road Accident Fund*[1], the trial court has raised concerns about such admissions, which came about as a result of the defendant's failure to answer specific questions by a certain time, failing which it was deemed to have admitted them. The trial court went on to analyze the expert reports and made findings that are contrary to the deemed admissions and gave reasons for doing so.

On appeal[2], the court, per Molopa Sethosa had this to say:

> *"[30] Admissions made during a pre-trial conference (as recorded in the pre-trial minute) have the same effect as admissions made by a party in the pleadings, and the party who makes the admissions, is bound by them. No further evidence need to be adduced by the other party in respect of those facts admitted and the Court can (and should) make an order purely based on those admissions; refer Unreported judgment by Khumalo J in this Division in Adv R Ferguson obo De Ridder LA v Road Accident Fund Case No A592/13. Admissions of facts made at a*

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[1] (47122/2012) [2015] ZAGPPHC 263 (13 March 2015)

[2] (A665/2015) [2018] ZAGPPHC 608 (20 April 2018)

Rule 37 conference, constitute sufficient proof of those facts; refer Price NO v Allied JBS Building Society 1980 (3) SA 874 (A) at 882D-E.MEC for Economic Affairs, Environment and Tourism v Kruizenga 2010 (4) SA 122 (SCA) at 126.

[31] The effect of the above principle is that a party (the plaintiff/appellant in this case) should, and must conduct his case accordingly. The decision what evidence to adduce at the trial, has to take into account, and must be based on the aforesaid principle. As clearly stated above, the effect of this principle is that it is not necessary to adduce evidence to prove admitted facts. Where the salient facts necessary to prove a claim have been admitted, a plaintiff's claim cannot fail because no further evidence (or purportedly insufficient evidence) was adduced in respect of the admitted facts. The Court a quo erred in this regard by holding that the appellant's claim for loss of earnings and/or earning capacity failed due to this reason.

[32] In the circumstances the learned Judge a quo erred on a matter of law, by not taking cognisance of the trite evidentiary principles referred to above, and by not applying those principles correctly or at all; she misdirected herself in not finding that based on the undisputed facts in plaintiffs expert reports, the plaintiff did in fact prove that he will suffer a loss of earning capacity in future; see Kleinhans v RAF 2016 JDR 1274 GP.

[33] Counsel for the respondent conceded that the respondent's attorney signed the pre-trial minute and confirmed to the court that the only issue to be decided at trial was the post-accident contingency. He confirmed admissions made on behalf of the respondent pertaining to the evidence in the expert reports. In essence, the respondent's counsel conceded that the learned judge a quo went beyond the scope of what she was required to do at the trial [without even warning the appellant's counsel of her intended approach/view, so as to allow the appellant to present appropriate evidence in the circumstances, like

calling his employer; though his difficulties post-accident were articulated to Grove by Niewoudt].

[14] Counsel for the defendant's arguments that the plaintiff appear to have prior learning difficulties, which he intended to argue and did in fact argue, are misplaced because these, if correct, should have formed part of the evidence that any expert should have placed in their report. The admitted factual allegations and opinions are as contained in the plaintiff's expert reports, particularly the Occupational and Industrial Psychologists. I do not know what was contained in the reports of the defendant's counter experts because their reports have lapsed and they are not before me. The defendant was at liberty to obtain new reports, which it did not.

[15] On whether the trial court should have analyzed the plaintiff's reports to determine whether there is a nexus between the facts and the conclusions reached, the appeal court had this to say:

> *"[40] The trial court is not precluded from scrutinising the expert reports that were expressly admitted by the respondent expressly, as per paragraph 3.2 of the relevant pre-trial minute, to ascertain whether there is a logical nexus between the facts and the conclusions reached. The appellant, correctly so, submitted that the trial court is nevertheless bound by any agreement reached between the parties, be it in the form of admissions or otherwise, and the trial court could not, and should not, descend into the arena, and interfere with such agreements/admissions, or create a dispute where it does not exist.*
>
> *[41] In the present matter, the plaintiff was reassured into, what later transpired to be a false sense of security, by the admission of his*

expert reports, the further specific admissions in paragraphs 5.4 to 5.6 of the pre- trial minute and the confirmation by the defendant's attorney at the trial that the only issue was the post-accident contingency deduction as well as his argument in this regard that 18% should be deducted post-accident [My emphasis]

[42] Against this background it is understandable that the appellant contended that the learned Judge a quo erred in finding, particularly in view of the admissions made in paragraphs 5.4, 5.5 and 5.6 of the pre-trial minute, that the 4% to 5% loss of work capacity contended for by Dr Birrell has not been shown to translate into a lessening of the appellant's patrimony because there was no evidence to suggest that what he would earn post-morbid has been compromised.

[43] On the facts, and having regard to all the circumstances of this case, namely the contents of the expert reports that were admitted, the further admissions by the respondent and the legal principles referred to above, I am of a considered view that on a balance of probabilities the appellant has suffered a loss of earning capacity due to the sequelae of the injuries he sustained in the collision. The learned Judge a quo erred in not allowing an award in respect of loss of earnings/earning capacity.

[16] The plaintiff will be prejudiced if I were to allow the defendant's counsel in the matter before me to argue against the factual allegations that have already been admitted because such argument or inferences has not been placed before the plaintiff's experts to enable them to adjust their opinion if they agree or disagree.

[17] Therefore, the only question for adjudication before me is whether the plaintiff is unemployable and the quantification of the loss. I will proceed to summarize the expert evidence in the various reports.

The expert reports

[18] The admitted injuries and sequelae appear from the reports of the plaintiff's experts and may be summarized as follows:

[18.1] According to the Orthopaedic Surgeon, Dr Oelofse, the plaintiff sustained head, cervical spine, lumbar spine and right ankle injuries. Amongst others, the sequelae from the cervical spine injury is that the plaintiff has pain and spasms in her neck and finds it difficult to look up and down from the side. She experiences pain in her ankle every day, which is aggravated by standing, walking and running. It is difficult and painful for her to squat or go down on her haunches. On employment, Dr Oelofse is of the opinion that the injuries have affected her amenities of life, productivity and working ability. He recommended that she finds work of a light nature, taking into account her neck problems. He deferred to the opinion of the Occupational Therapist and Industrial Psychologist.

[18.2] The Specialist neurosurgeon, Dr. Okoli, confirmed the injuries indicated in the orthopaedic surgeon's report. On employment, he opined that the chronic ankle pain might limit the type of job that she can perform and also deferred to the opinion of the Occupational Therapist. He also is of the opinion that her cognitive complaints relating to her memory will disadvantage her in the open labour market.

[18.3] The Clinical Psychologist, Dr. Mureriwa, conducted neuropsychological tests on the plaintiff. Her performance was below average. Her best score was on verbal memory. According to him, *'the below average overall performance on these tests appears to be a significant drop from the estimated normal pre-accident drop from the estimated normal pre-accident neurocognitive capacity suggested by the academic record'.*

[18.4] The Educational Psychologist, Masindi Nethavhani, compiled two reports, one in 2014 and the other one in 2018. In the first report, the psychologist expressed a view that *'had she not been involved in the accident and given her general background she would have passed grade 12 and tertiary qualification preferably at the certificate level of education given her adequate intellect. After the accident and even with the correct remedial and psychological help she may have great difficulty in passing on a certificate level'.* From a reading of the addendum and submissions made, it is clear that the report (addendum) was intended to address the fact that she was able to pass grade 12 after the accident, thereby qualifying for admission to higher certificate studies. The conclusion in the second report is that the difficulties expressed in the first report are borne out by the fact that she has not progressed beyond grade 12 after four years.

The report is concluded with a remark that *"The new information made available does not alter our original findings and opinions materially".*

[18.5] In addition to theoretical assessment through questions and studying other experts' reports, the Occupational Therapist, Tebogo Mhlokweng (JT Matsape Occupational Therapist (Pty) Ltd), conducted tests to evaluate the plaintiff's physical components such as range of motion and muscle strength, pain, physical endurance, mobility and lifting capacity. The conclusion, based on the results was that the plaintiff should be able to undertake sedentary to occasional light type of work.

The overall conclusion on her future work ability is that the plaintiff *'has limited employment prospects. These will impact on her occupational functioning and would not compete fairly in the open labour market'*.

[18.6] It was also placed on record that the accident happened whilst she was a Grade 11 learner. She failed in that year, but passed the grade as well as Grade 12 in subsequent years. After Grade 12, she worked as a cleaner at the High School she matriculated from 2013 to 2016. She left this employment because it *'required prolonged standing, squatting, kneeling, frequent movements and pushing the trolley'*. She could not cope with these tasks due to sequelae of the injuries she sustained from the accident.

[18.7] According to Ben Moodie (Industrial Psychologist), after completing Grade 12 and had the accident not happened, the plaintiff, *'would have in all likelihood taken in the region of 36 to 48 months of actively pursuing employment in order to secure a permanent post,*

earning a sporadic income in the region of R2 000.00 to R2 200.00 per month during periods that she was able to secure such posts. After obtaining employment she would have been able to enter the labour market on the lower level of Patterson level A3 basic salaries plus a 13th cheque; progressing in a straight line until around the age of 30; at which time she would have in all likelihood been able to complete a 1 year certificate (NQF Level 5), or similar type studies. After completing these studies, it would have in all likelihood taken her in the region of 12 to 18 months to secure employment earning on par with Annual Guaranteed Packages. After which, she would have in all likelihood continued to progress in a straight line, reaching her career ceiling at the age of 40 to 45, earning on par with the Median of Patterson Level C1 Annual Guaranteed Packages (the salaries are below), at around the age of 40 to 45. On reaching this level, she would have received only annual inflationary increases until she reached the retirement age of 65.

[18.8] On the post-accident scenario, Ben Moodie, after taking into account all expert opinions, concludes that *'Ms Radebe has for all practical purposes been rendered functionally unemployable as a result of the accident under review and sequelae thereof'.*

[18.9] The actuarial calculations done by Munro Forensic Actuaries amongst others, the report of Ben Moodie, and in particular the Patterson figures set out in the PE Corporate Survey dated April 2018.

The calculations of the uninjured state took into account the fact that she completed Grade 12 in 2012, worked as a cleaner from 2013 to July 2016 earning a salary of R2 200.00 per month and that on a Patterson scale, of A3 lower level; it would have increased to R105 564 per year in 2020. By year 2031, at age 42 ½ she would have been on Patterson level C1 at R291 998.00 per year and subject to inflationary increases.

[18.10] In her injured state, the plaintiff has no further earnings after 2013, as she is unemployable.

[18.11] No contingencies were applied and the claim is not affected by the RAF cap.

[178.12] The past loss of income is RR410 000.00, less what she earned (R85 300.00). The total is R324 700.00.

[18.13] The future loss of income is R4 916 800.00.

[19] On the contingencies that the court should apply, Mr. Leoperis suggested 5%. This would translate to R308 465.00. He acknowledged that the normal contingency on future loss of income is 10%, however, he aligned himself with the opinion of Robert Koch that it should be 20%. The total loss would be R3 933 440.00.

[20] Finally, to address the issue of alleged learning difficulties before the accident, it was submitted on behalf of the plaintiff that indeed she failed Grade 10 in 2007. She also failed Grade 11 in 2009 and 2010.
The grade 11 failure, according to the reports was due to the accident in question. Other than this explanation, there are no indications that it could have been due to some learning difficulties.

[21] This was the evidence of the plaintiff.

[22] The defendant's counsel, Mr. Westebaar, argued that the fact that she failed Grade 10 and then Grade 11 twice is indicative of 'pre-accident learning difficulties'. He went on to challenge the findings and opinions in some of the filed expert reports, for example, where the plaintiff had complained of blurred vision, the objection is that there is no report of an Ophthalmologist. He also objected to a claim for past loss of income because when the accident occurred the plaintiff was still a scholar. He also objected to a claim for future loss of income because according to the collateral information in the plaintiff's reports, she was accommodated in her employment and she resigned on her own.

[23] In reply, Mr. Leopeng addressed the issues raised in the defendant's counsel submissions. He argued that the objections were clearly caused by a misunderstanding of the basis of the plaintiff's claim or failure on the part of the defendant's counsel to read the expert reports.

[24] In his own defence, counsel for the defendant indicated that he was only briefed a day before the commencement of the trial. This was disputed by Mr. Leopeng, who submitted that counsel for the defendant was also on brief when the matter was postponed on 19 June 2018, the day that the merits were settled. It is the same expert reports.

[25] Mr. Leopeng handed up three judgments to address the law on pre-existing difficulties and employment on an 'accommodating' basis or sympathetic employment. For the reasons indicated whilst addressing the application for the matter to proceed as a stated case, it is not necessary for me to consider whether the plaintiff had some pre-existing learning difficulties or not. If the defendant wanted to rely on this as a defence to mitigate the extent of damages due to her, it should have investigated the cause for the failure in grade 10 and the first one in Grade 11. The second failure was explained. Furthermore, the plaintiff passed Grade 12, an exit exam (as postulated by the Occupational Therapist) with a certificate symbol. She did not proceed to tertiary. This is what was opined. In fact, she only obtained a post matric computer certificate, which is not even graded in terms of the national qualifications systems.

Analysis and findings

[26] I have already addressed the defendant's submissions throughout this judgment, and I do not intend to repeat myself. The fact of the matter is that no persuasive or well thought defence was presented before me. It is either due to defendant's unwillingness to properly brief counsel or the latter's lack

of preparations. However, judging from the answers in the pre-trial minute, it is a combination of both because on his part, and as an officer of court, he should not have insisted on filling-up on issues that were left open in the pre-trial minute, which, as I have stated, translated into binding concessions when the defendant failed to provide answers as it had undertaken.

[27] The question for my consideration is whether on the facts before me, the plaintiff has been rendered unemployable. I am mindful of the sentiments expressed by the appeal court in the *Spammer* judgment. I have to look at what has been presented with a view to establishing the answer.

[28] I cannot fault the basis for the actuarial calculations, nor the Industrial Psychologist's opinion because it is based on facts, which, from the factual allegations before me do not appear to be exaggerated.

[29] I am satisfied that the suggested contingency deductions of 5% and 20% in respect of past and future loss are reasonable under the circumstances. The past loss after contingency deduction is R309 465.00. The future loss after 20% contingency deduction is R3 933 440.00.

[30] **Costs**: I have considered the order that was granted on 19 June 2018 where issues pertaining to liability, general damages and future medical expenses were settled. The order, issued by Deputy Judge President Ledwaba also made provision in paragraph 2.5.2 for the costs of obtaining medico-legal reports, including traveling, accommodation and subsistence

fees as well as reservation and qualifying fees (if any) of the plaintiff's experts listed thereunder.

[31] The trial before me proceeded as a stated case as indicated above. Counsel for the plaintiff also made a submission, when addressing the preparedness of counsel for the defendant, that the same expert reports were already filed when the matter came to court on 18 June 2018, and that there is nothing further that has been filed.

[32] Consequently, the only costs that should be payable for the trial before me is costs of preparation by the plaintiff's legal representatives from that date to the date of trial before me, as well as the plaintiff's reasonable expenses to attend trial.

[33] Therefore, I make the following order;

[33.1] The Defendant shall pay the plaintiff an amount of R4 241 905.00 (Four Million Two Hundred Fourty One Thousand Nine Hundred and Five Rand), which is made up of the amounts indicated in paragraph [29] above for past and future loss of earnings.

[33.2] Interest shall be charged on the judgment amount at the rate of 10% per annum, calculated 14 (fourteen) days from date of this order to date of payment.

[33.3] The amount shall be paid into the **Trust Account** of the plaintiff's attorneys of record. The banking details are as follows:

Name of Bank: Standard Bank

Account Holder: Godi Attorneys

Account Number: 411076655

Branch Number and Name: 010145, Van Der Walt Street, Pretoria

[33.4] The defendant shall pay the plaintiff taxed or agreed party and party costs, as well as reasonable traveling costs incurred in the preparation of the trial for loss of earnings, which shall include the costs of counsel.

[33.5] The plaintiff shall serve the notice of taxation on the defendant's attorneys of record, and after the costs have been duly taxed, allow the defendant 14 (fourteen) court days to effect payment.

[33.6] There is no contingency fee agreement.

TAN MAKHUBELE J

Judge of the High Court, Gauteng Division

APPEARANCES:

PLAINTIFF:	**ADVOCATE M. LEOPENG**
Instructed by:	Godi Attorneys Room407, 4th Floor Bank Towers 190 Andries Street Pretoria
DEFENDANT:	**ADVOCATE WESTEBAAR**
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Heard on:	27 September 2019
Judgment delivered on:	01 November 2019