IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

18 August 2021

DATE SIGNATURE

CASE NO: 67739/2019

In the matter between:

PHUNGWAYO, MIRRIAM MASERAME Plaintiff

and

ROAD ACCIDENT FUND
Defendant

JUDGMENT

KHWINANA AJ

Introduction

[1] This matter came before me on the 09th of June 2021 by default judgment via virtual hearing.

[2] According to the summons and particulars of claim issued by the Plaintiff pursuant to a motor collision that occurred on the 14th of December 2018 the plaintiff seeks the following order:

1. Future Medical and hospital expenses
2. Payment in the sum of R 1775 467.00 being:
    a. Past and future loss of earnings R 1 175 467.00
    b. General Damages R 600 000.00
3. Interest at 8.75 % *tempore morae*
4. Costs of Suit

The parties

[3] The plaintiff is **MIRRIAM MASERAME PHUNGWAYO, a 45 year old** adult female person residing at [….], Gauteng Province.

[4] The defendant is the Road Accident Fund, a schedule 3A public entity, established in terms of section 2(1) of the Road Accident Fund Act 56 of 1996, with its service office situated at 38 Ida Street, Menlo Park, Pretoria, Gauteng Province.

[5] The issue of liability has been conceded by the defendant at 100 % in their letter dated 16 July 2019 and I am ceased to decide on quantum only.

Legal principle

[6] The four stages are imperative to determine the issue of liability. Fisher J[1] has outlined them as follows:-

First: Did the negligence of the third party driver cause the accident? if both plaintiff and the third party driver were negligent blame may be apportioned on the basis of a percentage allocation in terms of the Apportionment of Damages Act. (I shall call this first phase the Merits Inquiry).

Second: Did the plaintiff sustain the pleaded injuries in the accident? (This is the First Causation Inquiry).

Third: How have these proven injuries have affected the plaintiff? (this is the Second Causation Inquiry).

Fourth: How should the plaintiff be remunerated for the effects of such injuries on the plaintiff. (this is the Quantum Determination stage).

[7] The merits concession by the RAF is enough to have an order. *In casu* the defendant has conceded the merits. The plaintiff was a passenger in the insured motor vehicle. The second enquiry relates to the personal injury being confirmed by the medical experts safe for the information that will be received from the plaintiff.

[8] The third stage is in relation to the sequelae of the injuries. The test can be explained as (*sine qua non*) but for the accident the plaintiff would not have sustained the following injuries therefore suffered the loss. The matter of ***Minister of Safety and Security v Van Duivenboden***[2] is apposite here. *"A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the*

[1] *M S v Road Accident Fund* (10133/2019) [2019] ZAGPJHC 84; [2019] 3 All SA 626 (GJ) (25 March 2019)
[2] (209/2001) [2002] ZASCA 79; [2002] 3 All SA 741 (SCA) (22 August 2002)

ordinary course of human affairs rather than an exercise in metaphysics" as stated by Nugent JA was reiterated by Fisher J.[3]

[9] In ***S v Mthethwa***[4] the court, in dealing with the limitations of the opinions of experts stated as follows:

> *"The weight attached to the testimony of the psychiatric expert witness is inextricably linked to the reliability of the subject in question. Where the subject is discredited the evidence of the expert witness who had relied on what he was told by the subject would be of no value."*

[10] The evaluation of the amount to be awarded for the loss does not involve proof on a balance of probabilities. It is a matter of estimation. Where a court is dealing with damages which are dependent upon uncertain future events - which is generally the case in claims for loss of earning capacity - the plaintiff does not have to provide proof on a balance of probabilities (by contrast with questions of causation) and is entitled to rely on the court's assessment of how he should be compensated for his loss.

[11] The *locus classicus* as to the value of actuarial expert opinion in assessing damages is ***Southern Insurance Association Ltd v Bailey NO***[5] where Nicholas JA said the following:

> "*Where the method of actuarial computation is adopted in assessing damages for loss of earning capacity, it does not mean that the trial Judge is 'tied down by inexorable actuarial calculations'. He has 'a large discretion to award what he considers right'. One of the elements in exercising that discretion is the making of a discount for 'contingencies' or the 'vicissitudes of life'. These include such matters as the possibility that the plaintiff may in the result have less than a 'normal' expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to*

[3] Ibid
[4] (CC03/2014) [2017] ZAWCHC 28 (16 March 2017)
[5] 1984 (1) SA 98 (A)

labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case".

[12] Zulman JA, with reference to various authorities including ***Southern Assurance supra*** said as follows in ***Road Accident Fund v Guedes*****:**

"The calculation of the quantum of a future amount, such as *loss of earning capacity*, *is not, as I have already indicated*, a *matter of exact mathematical calculation. By its nature, such an enquiry* is *speculative and* a *court can therefore only make an estimate of the present value of the loss that* is *often* a *very rough estimate (see, for example, Southern Insurance Association Ltd v Bailey NO) Courts have adopted the approach that, in order to assist in such* a *calculation, an actuarial computation is a useful basis for establishing the quantum of damages*"[6]

[13] *The amount of any discount may vary, depending upon the circumstances of the case*. See ***Van der Plaats v South African Mutual Fire & General Insurance Company Limited*** **1980 (3) SA 105 (A)** at 114-5. *"The rate of the discount cannot of course be assessed on any logical basis: The assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case."* (My emphasis)

General damages

[14] It is trite law that general damages are decided by the tribunal which decision is governed by PAJA.[7] In ***Road Accident Fund v Duma and Three Similar***

[6] Ibid

[7] *Mphahla v Road Accident Fund* (698/16) [2017] ZASCA 76 (1 June 2017) Mathopo JA writing on behalf of the majority stated at paragraph 11:*"If the Fund is not satisfied that the injury is serious, the plaintiff cannot continue with its claim for general damages in court. The court simply has no jurisdiction to entertain the claim. The plaintiff's remedy is to take the rejection on appeal in terms of regulation 3(4)."*

***Cases* 2013 (6) SA 9 (SCA)** at paragraph [19] the Supreme Court of Appeal decided:

> *"… Stated somewhat differently, in order for the court to consider a claim for general damages,* ***the third party must satisfy the Fund, not the court, that his or her injury was serious.*** *Appreciation of this basic principle, I think, leads one to the following conclusions:*
>
> *(a) Since the Fund is an organ of state as defined in s 239 of the Constitution and is performing a public function in terms of legislation, its decision in terms of regs 3(3)(c) and 3(3)(d), whether or not the RAF 4 form correctly assessed the claimant's injury as 'serious' constitutes 'administrative action' as contemplated by the Promotion of Administrative Justice Act 3 of 2000 (PAJA). (A 'decision is defined in PAJA to include the making of a determination). The position is therefore governed by the provisions of PAJA.*
>
> *(b) If the Fund should fail to take a decision within reasonable time, the plaintiff's remedy is under PAJA.*
>
> *(c) If the Fund should take a decision against the plaintiff, that decision cannot be ignored simply because it was not taken within reasonable time or because no legal or medical basis is provided for the decision, or because the court does not agree with the reasons given.*
>
> *(d) A decision by the Fund is subject to an internal administrative appeal to an appeal tribunal.*
>
> *(e) Neither the decision of the Fund nor the decision of the appeal tribunal is subject to an appeal to the court. The court's control over these decisions is by means of the review proceedings under PAJA."*

[15] The criteria for assessing the seriousness of an injury are set out in Regulation 3(1)(b)(ii) and (iii) as set out above.

Regulation 3(11) provides:

> *"(11) The appeal tribunal shall have the following powers:*
>
> *(a) Direct that the third party submit himself or herself, at the cost of the Fund or an agent, to a further assessment to ascertain whether the injury is serious, in terms of the method set out in these Regulations, by a medical practitioner designated by the appeal tribunal.*
>
> *(b) Direct, on no less than five days written notice, that the third party present himself or herself in person to the appeal tribunal at a place and time indicated in the said notice and examine the third party's injury and assess whether the injury is serious in terms of the method set out in these Regulations.*
>
> *(c) Direct that further medical reports be obtained and placed before the appeal tribunal by one or more of the parties.*
>
> *(d) Direct that relevant pre- and post-accident medical, health and treatment records pertaining to the third party be obtained and made available to the appeal tribunal.*
>
> *(e) Direct that further submissions be made by one or more of the parties and stipulate the time frame within which such further submissions must be placed before the appeal tribunal.*
>
> *(f) Refuse to decide a dispute until a party has complied with any direction in paragraphs (a) to (e) above.*

(g) Determine whether in its majority view the injury concerned is serious in terms of the method set out in these Regulations.

(h) Confirm the assessment of the medical practitioner or substitute its own assessment for the disputed assessment performed by the medical practitioner, if the majority of the members of the appeal tribunal consider it appropriate to substitute.

(i) Confirm the rejection of the serious injury assessment report by the Fund or an agent or accept the report, if the majority of the members of the appeal tribunal consider it appropriate to accept the serious injury assessment report."

Background

[16] The plaintiff has secured six experts who have submitted their medico-legal reports and affidavits whereas the defendant filed none.

[17] The Plaintiff's orthopaedic surgeon qualified the Plaintiff as a serious injury in terms of paragraph 5.1 of the narrative test, i.e. serious long-term impairment or loss of a body function. The Plaintiff's plastic and reconstructive surgeon also qualified the Plaintiff as a serious injury in terms of paragraph 5.2 of the narrative test, i.e. permanent serious disfigurement. WPI is 12 %. The plaintiff does not automatically qualify for general damages.

Injuries

[18] The Plaintiff suffered the following injuries:

* Non-union midshaft fracture of the left clavicle with residual pain;

* Rib fractures with residual anterior left chest wall pain;

* T12 fracture with residual symptoms of chronic pain and muscle spasms and * spondylosis of adjacent levels;

* Laceration above the left eye;

* Abrasion on the left arm.

* Emotional shock and trauma.

Treatment

[19] The Plaintiff was transported by ambulance to Tshwane District Hospital where her Glasgow Coma Scale was recorded at 15/15. Following her examination, she was sent for X-rays, whereafter her wounds were sutured and she was admitted to the surgical ward for further management.

[20] A collar and cuff sling was applied on her left arm. The Plaintiff was discharged on 18 December 2018 with a prescription for analgesics and attended follow up appointments as an out-patient until June 2019. She makes use of Painblok, Betagesic, Tramadol and Brufen to relieve the pain.

Symptoms and sequelae

[21] The Plaintiff informed the expert that she suffers from pressure pain which she rates as 7/10 on the pain scale. She complains of stiffness and cramps in her shoulder. Her left arm is weaker in comparison to her right arm. As a result of the weakness in her arm, she is unable to lift and carry heavy objects.

[22] The experts opines that the Plaintiff will require future medical and hospital treatment. This will include but is not limited to an internal fixation of the left clavicle with bone grafting, conservative treatment with doctors and

orthopaedic surgeon consultations, NSAIDs (non-steroidal anti-inflammatory drugs), analgesics, physiotherapy and biokinetics. It is further opined that the plaintiff will require to be admitted to the hospital for five days for intensive conservative treatment and rhizotomy in theatre. Twenty sessions of psychotherapeutic treatment are recommended and consultation with a practitioner who has undergone clinical training in pain management.

Loss of earnings and earning capacity

Personal background

[23] The issue of diminished earning capacity is trite. The mere fact of physical disability does not necessarily reduce the estate or patrimony of the person injured. Put differently, it does not follow from proof of a physical injury which impaired the ability to earn an income that there was in fact a diminution in earning capacity.

[24] The Plaintiff is married with three children and they reside in Soshanguve. The Plaintiff has a Grade 12 level of education which she obtained during 1995. She then enrolled at Kempton Park Technical College and completed an N4 and N5 certificate in Business Management. Although she completed the N5 qualification, she was unable to pay the fees and her certificate was subsequently not issued.

[25] The Plaintiff commenced her career at Mathe's Construction (Metro Rail) as an access controller, nipping and issuing tickets during January 2000 until her contract ended in January 2004. She then worked as a marketing survey researcher with Coca-Cola (ABI-Midrand) on a one-year contract, earning a salary of R500 per week.

[26] From January 2005 until June 2005, she was employed as an administrative clerk on a volunteer basis at ODI Hospital in Ga-Rankuwa. During December

2008 she started working as a supervisor cleaner at Reakhona Cleaning Services. Her contract expired during 2012. She earned a salary of R2 500 per month.

[27] On 1 May 2012, the Plaintiff obtained permanent employment as a cleaner at Marena Naledi Business Enterprise. She was then promoted to the post of supervisor during 2016 and placed at the Department of International Relations earning a salary of R4 634.85 per month together with a provident fund and annual bonus. Her job is indicated as supervisor until September 2018 when it changed to cleaner, as such, she was employed as a cleaner supervisor. She was in this position when the accident intervened.

[28] Post-accident, the Plaintiff was absent from work for a period of one and a half month and she returned to work on 5 May 2019. An amount of R2 525.23 was deducted from her salary for days absent.

Pre-morbid work capacity

[29] The Plaintiff's orthopaedic surgeon indicated that the Plaintiff would have been able to work to the normal retirement age of 65 years, if not for the accident and injuries sustained, retirement at her current employer is then also set at age 65, but accepted age 64.

Post morbid work capacity

[30] The Plaintiff returned to her pre-morbid job where she was placed on light duty for a period of four months, only giving instructions to the site supervisors. The injuries impacted on her amenities of life, productivity and working ability and will continue to do so in future as. The expert opines that with successful treatment, her productivity will improve however, as her thoraco-lumbar spine progresses, her productivity will decrease again. Regardless of successful treatment, she will always have a permanent

deficit. Therefore, the injuries she sustained make her an unfair competitor in the open labour market as she will regularly be absent from work for conservative and surgical treatment.

[31] The orthopaedic surgeon further opines that the Plaintiff must be accommodated in a permanent light duty/back friendly environment. If accommodated in a permanent light duty environment, provision must be made for 5 years early retirement. The Plaintiff has multiple scars and feels that the scars are unsightly and that she feels emotional about the scars. According to the Plaintiff's plastic and reconstructive surgeon, her scarring is not amenable to improvement with surgical treatment and will always be present and that the disfigurement can be regarded as severe.

[32] In considering a possible head injury, the Plaintiff's counselling psychologist opined that she sustained, at most, a mild head injury as a result of the accident. She opined that her neurocognitive profile probably mainly reflects her pre-morbid reported difficulties with mastering scholastic skills and her low-level marks during Grade 12. She acknowledged that psychological factors and her subjective experience of pain probably contribute to the neurocognitive profile as it is well known that the body's reaction to depression, stress and anxiety has important implications. It can change activity in the brain which impacts on attention abilities, information processing and memory abilities. This should be addressed by means of a higher post-morbid contingency deduction.

[33] It is accepted that the Plaintiff would continue working in her current capacity, on par with her current income plus annual inflationary increases until the indicated date of early retirement, provided that she is able to sustain her current employment until then. It is furthermore suggested that a higher than normal post-morbid contingency deduction be applied to cater for the risks

posed towards her future employability, especially should her current employment not be reappointed in the current contract.

Analysis

[34] Counsel for the plaintiff has referred to a plethora of cases however having regard to the case referred to supra and the WPI herein I am of the view that in relation to the general damages same has not been rejected by the defendant and also the medical practitioner has indicated that she qualifies on the narrative. I have considered the different case law and I opine that same be referred accordingly.

[35] It is evident that the motor collision has affected the quality of life for the plaintiff. The plaintiff has been fortunate that she has retained her current employment and she is able to get help therein. If the plaintiff seeks employment there are no guarantees that she will be afforded same help and that she will retain the same position. The accident has affected the type of work that she will do however she can still work until the age of sixty-five.

[36] I accept, that in a claim for past loss of earnings it is necessary for the Plaintiff to establish on the evidence that the injuries sustained did prevent the earning of a living in the normal way and what the earnings would have been but for the injury.[8] In respect of loss of earning capacity and the future inability to earn a living temporarily or permanently, this being reduced capacity over the period of impairment, is a species of general damage as referred to above. Also as referred to a court should not rely purely on strict mathematical calculation and even annuity calculations have on occasions been disapproved.

[37] In ***Bailey (supra)*** the court emphasized that any inquiry into damages for loss of earning capacity is of its nature speculative involving a prediction as

[8] *Prince v Road Accident Fund* (CA143/2017) [2018] ZAECGHC 20 (20 March 2018)

to the future. The Court said that all that could be done was to make an estimate, which was often a very rough estimate, of the present value of the loss. The Court discussed two possible approaches, the one to make a round estimate of an amount which seemed to the Judge fair and reasonable, a matter of guesswork, the second to make an assessment by mathematical calculation on the basis of assumptions resting on the evidence which might vary from probable to speculative. The Court said that either involved guesswork to a greater or lesser extent but that the Court could not for that reason adopt a *non possumus* approach or make no award.

[38] I have considered the actuary's report on and the fact that the plaintiff will not be competitive to her peers but had it not been for the accident. I must agree that higher contingencies must be applied.

[39] In result I award the sum of R500 000.00 as fair and reasonable damages for loss of past and future earnings and section 17(4) Certificate is granted. General Damages are postponed sine die. I have considered the draft order filed on CaseLines and I have amended same. The amended draft order marked "X" is made an order of court.

_____

E.N.B. KHWINANA

ACTING JUDGE OF THE HIGH COURT

HEARD ON: 09 June 2021

FOR THE PLAINTIFF: ADV. R FERGUSON

Attorney for Plaintiff: Wehmeyers Attorneys

DATE OF JUDGMENT: 18 August 2021

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 67739/19

HELD AT PRETORIA ON THIS THE 18th DAY OF AUGUST 2021 BEFORE THE HONOURABLE JUSTICE KHWINANA AJ

ORDER GRANTED ELECTRONICALLY IN TERMS OF DIRECTIVES REGARDING SPECIAL ARRANGEMENTS TO ADDRESS COVID-19 IMPLICATIONS FOR ALL LITIGATION AND MANAGEMENT OF COURTS DURING THE NATIONAL STATE OF DISASTER

In the matter between:

PHUNGWAYO, M M **PLAINTIFF**

Claim number: 560/12775381/312/34

Link number: 4729820

and

ROAD ACCIDENT FUND **DEFENDANT**

DRAFT ORDER OF COURT

AFTER HAVING HEARD COUNSEL FOR THE PLAINTIFF the following order is made:

1. Defendant shall pay an amount of R 500 000.00 for the Plaintiff's claim which is computed as follows:-

   Past- and Future loss of earnings: R 500 000.00

   payable within 180 days of this order failing which interest shall be charged at the prescribed rate, the above amount shall be paid to the Plaintiff's attorneys, Wehmeyers Attorneys, in settlement of the Plaintiff's claim, by direct transfer into their trust account, details of which are as follows:

Bank	**: First National Bank**
Branch code	**: 252345**
Account holder	**: Wehmeyers Attorneys**
Account number	**: [….]**
Reference	**: J WEHMEYER/WP104**

2. The Defendant must furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) in respect of 100% of the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to her after the costs have been incurred and on proof thereof, resulting from the accident that occurred on 14 December 2018.

3. The Defendant shall make payment of the Plaintiff's taxed or agreed party and party costs to date hereof on the High Court scale.

   3.1. The above costs will also be paid into the aforementioned trust account.

4. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:-

   4.1 The Plaintiff shall serve the notice of taxation on the Defendant's attorney of record;

   4.2 The Plaintiff shall allow the Defendant 7 (SEVEN) court days to make payment of the taxed costs from date of settlement or taxation thereof;

5. Should payment not be effected timeously, Plaintiff will be entitled to recover interest at the rate of 7 % on the taxed or agreed costs from date of allocatur to date of final payment.

6. The plaintiff will be entitled to recover interest at the rate of 7% per annum on the capital from 14 days of this order to date of final payment in the vent the defendant fails to pay the plaintiff within 180 days of this order.

7. General damages are postponed sine die.

REGISTRAR OF THE HIGH COURT

Counsel for Plaintiff:

Adv. Adv R Ferguson

Tel.: 082 770 0775