IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 93954/2015

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
24 November 2022

In the matter between:

SAMANTHA MEYER **Plaintiff**

and

ROAD ACCIDENT FUND **Defendant**

DATE OF JUDGMENT: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 10h00 on **24 November 2022**.

JUDGMENT

KHASHANE MANAMELA, AJ

Introduction

[1] In the afternoon of 8 October 2014 at or near the intersection of 7th Avenue and 4th Avenue in Benoni a collision occurred between a motor vehicle driven by the plaintiff and another motor vehicle driven by an unidentified driver ('the insured driver'). The plaintiff sustained injuries to her body including the following: fractured pelvis; bilateral multiple fractured ribs; liver laceration; left pneumothorax; fractured left elbow; lacerated spleen; fractured coccyx bone; multiple flesh wounds; neck injury, and kidney injuries.

[2] On 23 November 2015, the plaintiff caused summons to be issued against the defendant, the Road Accident Fund, in terms of the provisions of the Road Accident Fund Act 56 of 1996 ('the Act'). The plaintiff claimed compensation, initially stated to be in the amount of just over R3,3 million, for the damages she allegedly suffered due to the injuries and/or *sequelae* from the accident. The defendant filed a plea on 19 January 2016 subsequently amended on 1 March 2016 denying liability for the damages suffered by the plaintiff. But on 15 November 2017, the parties amicably resolved the issues relating to merits or liability with the defendant making a partial (i.e. 50%) concession on those issues in favour of the plaintiff

[3] On 19 January 2021, the trials interlocutory court ordered that the plaintiff's actuary, Dr R J Koch, and the defendant's clinical psychologist, Ms S Moodley, be the single expert witnesses on their respective reports filed of record. On 2 August 2022 an order was granted in the trials interlocutory court striking out the defendant's defence in the action. Thenceforth, the matter proceeded towards default judgment at the instance of the plaintiff.

[4] This matter came before me on 7 October 2022 for a hearing through the mode of video- link. Mr R Goslett appeared on behalf of the plaintiff. There was no appearance on behalf of the defendant. I reserved this judgment after oral

submissions by plaintiff's counsel. Counsel, also, had gratefully filed detailed written submissions in terms of the practice directives of this Division. Counsel told the Court that the plaintiff's head of claims for past and future medical, hospital and related expenses, and for general damages were disposed of in terms of an order of this Court granted on 19 March 2021 in the trials settlement court. Consequently, the issues which remained for determination by the Court are those relating to the *quantum* of the plaintiff's claim for loss of earnings or the application of the contingencies to the calculations by Dr Koch of the plaintiff's loss of income, and costs of suit.

Evidence and submissions on behalf of the plaintiff

General

[5] The plaintiff filed medico-legal reports prepared by medical experts following assessment of the plaintiff's injuries and their *sequelae* by the experts. Further, the experts deposed to affidavits, subsequently filed, to confirm their respective opinions and other contents of their reports, according to the practice directives of this Division. This was also to qualify for an order in terms of Rule 38(2)[1] of the Uniform Rules of this Court. The reports accompanied by the affidavits were allowed to serve as evidence in terms of the aforementioned rule.

[6] As already stated above, the parties are bound by the previous order of this Court, referred to above, regarding the calculations in Dr Koch's report, save for the contingencies to be applied. The Court, thus, is required to use the calculations to arrive at a conclusion based on the information contained in Dr Koch's report, with the exception of the contingencies, which remains in the discretion of this Court. But a brief background of the facts of this matter is warranted before dealing with the issues relating to the award to be made.

[1] Uniform Rule 38(2) reads as follows: 'The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.'

[7] The plaintiff was born on 24 February 1984 and, therefore, she was nearly 31 years old when she was involved in the accident on 8 October 2014. Following the accident, the plaintiff was transported by ambulance to the hospital. Her treatment included surgical procedures performed to the fractured elbow and plastic surgery relating to the head wound. She was discharged from hospital at the end of October 2014.

[8] The work history of the plaintiff is briefly as follows. From 2006 to 2010 the plaintiff, reportedly, was self-employed as the owner of an entity involved in buying and selling industrial and corporate supplies. From 2011 to 2012, the plaintiff was in a rehabilitation facility. And from 2013 to January 2016, the plaintiff worked as an export administrator at JJ Maritz and Sons. She was dismissed from this job in January 2016. She has remained unemployed since.

Relevant expert opinion on the plaintiff's future prospects of employment

[9] As stated above, the plaintiff employed several experts in support of her various heads of claim against the defendant. The defendant had also obtained medico-legal reports, but due to the striking out of the defendant's defence and the fact that the contents of the reports obtained under oath by the defendant have not been confirmed by the respective experts by way of affidavits, their contents will not be considered. The same will apply to the joint minutes filed by the experts employed by both parties. Due to the narrow issues remaining for determination in the matter, I will only deal with the material aspects of some of these reports.

[10] The industrial psychologist retained by the plaintiff expressed, among others, the following opinions. The plaintiff, reportedly, did not have problems carrying out her duties prior to the accident in her work as export administrator at JJ Maritz and Sons. It is concluded that she would have been able to continue working in that job or a similar job commensurate with her education and training until she retired aged 65, her health permitting. Despite the plaintiff's dismissal from her last appointment, the industrial psychologist opined that, given the 'plethora' of medical opinion, the plaintiff is to be considered 'a far more vulnerable, unfair and disadvantaged competitor compared to her uninjured colleagues in the open labour market'. The

plaintiff is no longer well suited to sedentary work. She has reduced chances of securing permanent, long-term work in the future. Her low level of education are to be considered, as well. The plaintiff is unlikely to be able to secure and sustain any long-term employment in the future given her permanent *sequelae* from the accident until her retirement at the age of 65.

[11] Further, the industrial psychologist is of the opinion that had the accident not happened, given her level of education, the plaintiff would have reached a career ceiling with her level of income of R15 000 per month (and therefore R180 000 per annum) which she earned as at the time of her dismissal in January 2016. Thus, she would have benefited from inflationary increases until retirement at the age of 65.

[12] The amendment to her particulars of claim placed the plaintiff's claim for loss of earnings in the amount of just over R6.6 million. This amount, if granted, ought to be reduced by half or 50% due to the agreed apportionment, referred to above, to a total claim of just over R3.3 million.

[13] Counsel for the plaintiff's further submissions include the following. The general opinion of the experts is that the plaintiff would not be able to have gainful employment. Her reported neuro-cognitive deficits and mood swing would render challenging any employment in the open labour market. The same deficits, chronic pain and other conditions would negatively impact on the plaintiff's work performance. Further, counsel submits that in the opinion of the industrial psychologist the plaintiff as at January 2016 had reached her career ceiling and would only have benefited from inflationary increases on her salary until she retired at 65 years, means that there is no need, on the part of this Court to consider the likelihood of the plaintiff, but for her injuries, to have progressed career-wise or to have been promoted in her employment.

Actuarial calculations

[14] The actuary, namely Dr Koch, did some calculations of the postulated future earnings of the plaintiff or the quantum of her lost earning capacity. He effected general contingency deductions of 5% and 15% in respect of past and future loss of

earnings, respectively. Plaintiff's counsel submits that these are the so-called 'normal contingencies' widely accepted by the courts. Further that the 15% contingency deduction applied to the amount for future loss of earnings is within the normal range of deductions of this nature. Consequently, he urged the Court against departure from the suggested contingency deductions. In counsel's view there are no special circumstances necessitating a higher contingency deduction for the plaintiff's future loss of income.

[15] The actuarial calculations are based on the assumption that the plaintiff would have been employed until the normal retirement age of 65, had it not been for the accident. Also, the corollary of the fact that as at January 2016 the plaintiff had reached her career ceiling and, thereafter, was only supposed to benefit from inflationary increases until her retirement at 65 years of age, is that the Court does not have to make any further deductions in this regard, it is submitted by counsel for the plaintiff. Further, counsel submits that available evidence in this matter does not warrant any further deductions.

Further submissions and revised actuarial calculations

[16] On 11 November 2022, through my erstwhile registrar, I requested the plaintiff's legal representatives to furnish revised actuarial calculation reflecting suggested contingencies of 10% on the past income and 20% on the future income. I inadvertently stated some incorrect figures in this regard. I also informed the legal representatives that the main reason for the suggested contingencies was due to the fact that the plaintiff was able to return to her work following the accident; was able to continue working until she was dismissed in January 2016, and that her subsequent unemployment is only linked to the fact that the plaintiff was dismissed from her last employment on grounds that do not seem to relate to the accident deficits. The legal representatives were informed that they are welcome to accompany the revised actuarial calculation with whatever further submissions they deem fit under the circumstances.

[17] On 14 November, I received a response, through erstwhile registrar, from the plaintiff's legal representatives apparently furnished promptly on 11 November 2022.

Apart from their lamentation of ‘very badly (or wrongly) worded’ communication, which I hope is only limited to the incorrect figures included in the communication sent through to them by the registrar, they supplied the following calculation reflecting the suggested contingency deductions:

“Past income	1 812 564.00
less contingencies at 10%	181 256.40
	1 631 307.60
Future income	5 783 367.00
less contingencies at 20%	1 156 673.40
	4 626 693.60”

[18] The plaintiff legal representatives or, in fact the plaintiff’s counsel, advised that a further actuarial calculation wasn’t necessary as the above calculation constituted ‘simple arithmetic’. I am not too certain whether the communication between counsel and his instructing attorneys were meant for my eyes. But, be that it may, the communication received was further to the effect that the contingencies as reflected above were acceptable. The electronic mail by the attorney accompanying the communication by counsel also confirmed that, barring the ‘incorrect figures’, the suggested contingencies were acceptable to the plaintiff.

[19] For completeness, I also reflect that on 14 November 2022, I caused a further communication to be sent to the plaintiff’s legal representatives conveying my blushful apologies for the wrong figures and acknowledging the calculation stated above. I also agreed that if there is no implication of the so-called RAF cap and that no other accounting or actuarial principles are involved, there is no need for a revised actuarial calculation as indeed the exercise would only be ‘simple arithmetic’. Otherwise the Court would have applied ‘guesswork’ if it has simply calculated the figures of its own accord without actuarial expertise, against the theme of counsel’s cautionary submissions.

Conclusion

[20] Therefore, on the basis of the available evidence in this matter, some of which

is stated above, I find that the amount of R6 258 001.20 (i.e. R1 631 307.60 for past loss of income and R4 626 693.60 for future loss of income) constitutes an appropriate amount to award as compensation for the plaintiff's loss of income or an incapacity. Obviously, due to the 50%

agreed apportionment the aforementioned amount will be reduced by half to the sum of R3 129 000.60 to be paid to the plaintiff as fair and reasonable compensation for her loss of past and future income.

[21] Costs will follow the above mentioned outcome. Plaintiff's counsel also directed my particular attention to two aspects relating to costs in this matter. Firstly, that costs were reserved on the issue of quantum when the order granted in the settlement court on 19 March 2021 was made, in terms of which the issues relating to the plaintiff's claims for medical expenses and general damages were settled. Secondly, that Dr Koch and Mr Mendelowitz were in attendance at trial which was enrolled for 17 April 2019 when the action was postponed *sine die* at the instance of the defendant without prior notification to the plaintiff. Further, that it was incumbent for Dr Kock to be absent from his residence in Cape Town for longer than 24 hours and fly to Johannesburg on 16 April 2019 and, consequently, incurred travel, accommodation and subsistence expenses at Johannesburg and Pretoria until 17 April 2019. The qualifying costs or fees of Dr R J Koch and Mr B Mendelowitz including the costs of their attendance at trial on 17 April 2019 ought to be also included in the order made in this matter, counsel submissions conclude. I see no reason for disallowing the aforementioned costs, obviously subject to the role ordinarily played by the taxing master under the circumstances.

[22] The details or terms of the costs order reflected below substantially accord with the terms of the order contained in the draft order submitted by counsel in this matter, save for the amount granted in respect of the plaintiff's loss of earning capacity.

Order

[23] In the premises, I make the order, that:

a) the defendant shall in respect of the plaintiff's claim for loss of earnings or earning capacity pay to the plaintiff the amount of R3 129 000.60 (three million one hundred and twenty-nine thousand rand and sixty cents) within 180 (one hundred and eighty) days from the date of this order;

b) the defendant shall pay the plaintiff's costs of suit incurred in her claim for quantum, as taxed or agreed, which costs are to include the qualifying costs and the transport, travelling and subsistence costs of Dr R J Koch and Mr B Mendelowitz for their attendance at trial on 17 April 2019;

c) should the defendant fail to make payment of

i. the amount in a) within 180 (one hundred and eighty) days from the date hereof, the defendant shall be liable to pay interest at the prescribed rate per annum on the amount from the 15th (fifteenth) day of this order to the date of final payment, and

ii. the amount in b) hereof within 14 (fourteen) days from the date of taxation, alternatively date of settlement of such costs, the defendant shall be liable to pay interest at the prescribed rate per annum on the amount as from and including the date of taxation, alternatively the date of settlement of such costs up to and including the date of final payment thereof.

d) payment of the amounts payable in terms of a) to c) hereof shall be made into the following account:

W B D Jones Trust Account

Bank: Nedbank

Account number: [....]

e) it is recorded that the plaintiff has not concluded a contingency fee agreement with her attorney as contemplated in the Contingency Fees Act 66 of 1997.

Khashane La M. Manamela
Acting Judge of the High Court

Date of Hearing:	**7 October 2022**
Date of Further Submissions:	**11 November 2022**
Date of Judgment:	**24 November 2022**

Appearances:

For the Plaintiff:	Mr R Goslett
Instructed by:	WBD Jones Attorney, Johannesburg
For the Defendant:	No appearance