



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 60234/2019

In the matter between:

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

FELICITY SUSAN BURTS

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

KHWINANA AJ

INTRODUCTION

- [1] The plaintiff instituted action proceedings in her personal capacity against the defendant for damages in terms of the Road Accident Fund Act 56 of 1996 pursuant to a motor vehicle Collision.
- [2] The matter has been settled amicably, regarding the merits.
- [3] I am only called upon to make a determination on the liability in this matter.

PLAINTIFF'S INJURIES

- [4] The Plaintiff, aged 48 (forty eight) years at the time of the accident, currently aged 52 (fifty two) years, sustained injuries on the 21st September 2017. The Plaintiff suffered the following injuries in the accident: -. Moderate to severe diffuse concussive head (brain) injury, base of skull fracture; severe deformity of the left orbit left zygoma fracture; left inferior blow out fracture; loss of dentition; cervical spine injury; bilateral hearing loss; left periorbital open fractures with lacerations of the forehead eyebrow and nose double Vision, large z shaped 11 cm scar on her face which is irregular hyper pigmented and unsightly; soft tissue injury both knees; soft tissue injury lumbar spine/pelvic region; left foot injury; post-traumatic stress disorder; post-traumatic anxiety and major depressive disorder.

TREATMENT RECEIVED

- [5] The plaintiff was admitted and stabilized at Katleho Windburg District Hospital. She was transferred to Pelonomi Provincial Hospital, and then

Metsimaholo Hospital in Sasolburg. She was given medication, X-rays and Suturing was also done. A CT Scan was also conducted. She was hospitalized for a total of 4 days. She returned for several follow-up sessions after discharge.

CURRENT COMPLAINTS

- [6] The Plaintiff's current complaints are the following her knees are painful, especially when climbing stairs. She experiences headaches on the left side of her head. She experiences hearing problems of the left ear. Her left eye is blurry. She experiences pelvis pain. She experiences lower back pain. She lost two teeth during the accident. Her nose bleeds when sleeping. She experiences pain in her knees and back when walking long distances. She is forgetful and her neck is painful at times.

SEQUELAE OF INJURIES

- [7] Constant pain and discomfort restrict range of motion had a Glasgow Coma Scale recorded as 12/15, 16 hours after the accident, had a dense phase of posttraumatic amnesia of \pm 24 hours, 8% chance of developing epilepsy in future, has a 30% chance of future cervical spine surgery, has a 30% chance of future lumbar spine surgery reduction in retirement age of five years can be expected, Neck pain and cervicogenic headaches, lumbar backache, pain in both ears with loss of hearing in the right ear and struggles with balance. She regularly feels off-balance and suffers from post-traumatic stress

disorder. She struggles with loss of short-term memory and with lack of concentration, executive mental problems, concentration difficulties and difficulty in making decisions.

FUTURE MEDICAL TREATMENT

[8] The medical practitioners opines that conservative treatment, surgical Treatment, consultations and examinations, physiotherapy and occupational therapy medication and cognitive behavioural therapy. It has further been opined that surgical scar revision left orbital reconstruction and cataract surgery in both eyes.

It is trite law that the defendant offers the undertaking certificate in terms of section 17(4) in relation to future medical expenses. The claim has been settled at 100% merits. It goes without saying that all injuries that were as a result of the supra mentioned motor collision will be dealt with in terms of the undertaking certificate.

MEDICO-LEGAL REPORTS

[9] The plaintiff relies on the medico-legal reports in order to prove her claim. Counsel for the plaintiff submits that their respective reports were served on the defendant and filed accordingly. The defendant did not serve and file any expert's reports to controvert the plaintiff's claim.

[10] They are Dr. H Sesenke (Orthopaedic surgeon), Dr H B Enslin (General Practitioner), P J Peinaar (Plastic Surgeon), Dr J H Kruger

(Neurosurgeon), Dr K D Rosman (Neurologist), Mariet Du Plooy (Audiologist), Dr L Van der Merwe (Ophthalmologist), Dr J W Callaghan (Ear Nose throat Specialist), Dr C F Hoogendikj (Maxilo facial and oral surgeon), Dr PJ Swart (Gynaecologist), Bester Putter (Occupational Therapist); S Van der Merwe/ Liza Prinsloo (Clinical Psychologist), Janene White (Industrial Psychologist) and Kobus Prinsloo (Actuary).

GENERAL DAMAGES

- [11] Counsel for the plaintiff submitted that given the multiple injuries and the sequelae which the Plaintiff sustained as mentioned in the aforementioned expert reports, the Plaintiff seeks an order of R1 500 000.00 in respect of General Damages, taking into account the serious injuries sustained and the resultant sequelae thereof specifically as outlined.
- [12] Counsel alluded to the legal principle that in considering the amount to be awarded for general damages it is acceptable to have regard to awards issued in comparative cases, although he conceded immediately that it is hardly impossible to find a case or cases that are on all fours with a particular set of facts. He further stated that the court in determining general damages a broad discretion must be exercised on what it considers fair and adequate compensation. The court will look at the nature, severity and permanency of the injuries sustained,

together with pain and suffering, disfigurement, permanent disability and the effect on the person's lifestyle. (my emphasis)

[13] Counsel referred me to a plethora of caselaw being ELIZABETH MAKUBERE LITSEO vs ROAD ACCIDENT FUND¹ and Road Accident Fund v Marunga ² the Supreme Court of Appeal confirmed the dictum of Broom DJP in Wright v Multilateral Motor vehicle Accident Fund where it was set out: "*I consider that when having regard to previous awards one must recognise that there is a tendency for awards now to be higher than they were in the past. I believe this to be a natural reflection of the changes in the society, the recognition of greater individual freedom and opportunity, rising standards of living and the recognition that our awards in the past have been significantly lower than those in most countries*".

[14] Counsel for the plaintiff also referred me to the matter of Bouwer NO obo NWS v Road Accident Fund³, who sustained multiple injuries and severe neurocognitive and neuropsychological sequelae. He also presents with significant symptoms of depression that can be attributed to a combination of factors including his ongoing pain and discomfort, sequelae arising from his injuries as a result of which he is forced to wear nappies, and the teasing from his peers in this regard. The court in the matter awarded an amount of R1 500 000.00 in 2019 its current value is R1 610 000.00 in 2021.

¹ 2019 (FSD) unreported Case number: 5637/2016, at para 25

² 2003 (5) SA 164 (SCA) 170FG

³ 2019 (7H3) QOD 1 (GNP)aaaaaaacccccccca

[15] In the case of *Fredericks v Union and Southwest Africa Insurance Co Ltd*⁴ the court awarded an amount of R23 000.00 in 1964 which translates to an amount R1 648 000.00 in 2021. In the case of *Zarrabi v The Road Accident Fund*⁵ the court awarded an amount of R800 000.00 in 2006 which translates to an amount of R1 828 000.00 in 2021. It is my submission that the Plaintiff has suffered a combination of injuries listed in different cases listed above. As such we submit that an amount of R1 500 000.00 will be fair and reasonable.

[16] In ***SOUTHERN INSURANCE ASSOCIATION LIMITED V BAILEY N.O. 1984(1) at 99H*** the following was stated:

"The AD has never attempted to lay down rules as to the way in which the problem of an award of general damages should be approached. The accepted approach is the flexible one described in Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 AT 199, namely: "The amount to be awarded as a compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain depending upon the Judge's view of what is fair in all the circumstances of the case".

[17] The injuries sustained and their sequelae warrants that the plaintiff be awarded the claim of general damages. The difficulty as alluded to by counsel is in finding a case with similar injuries and or circumstances. I

⁴ 1972 (2J2) QOD 335 (E)

⁵ 2006 (5B4) QOD 231 (T)

have taken into account the matters counsel for the plaintiff has alluded to. I have considered the cases that the plaintiff's counsel has referred me to and I am satisfied that in considering the plaintiff's claim and the said caselaw the award that is fair and reasonable in *casu* is the sum of R 1 500 000.00 (one comma five million rand).

LOSS OF INCOME AND/OR EARNING CAPACITY:

[18] Counsel for the plaintiff proceeded to allude to the personal circumstances of the plaintiff being that she completed grade 12 in 1988 which is her highest qualification. She was employed in various capacities in her work life, with a particular interest within the Medical aid sector at the admin and investigative level. ***At the time of her involvement in the accident in question, she was unemployed*** at the time of accident as a result of her business having failed.

PRE-ACCIDENT:

[19] Counsel further referred to the work history of the Plaintiff and informed how she worked as a non-disclosure medical aid scheme investigator. The general job requirements of a non-disclosure medical aid claims investigator fall under medium type of work. A normal retirement age at 65 years would have been expected for the Plaintiff.

PRE-MORBID CAREER POSTULATIONS:

[20] The industrial psychologist opined that but for the accident considering Ms Burts' educational level (Grade 12), her age at the time of the accident (47 years), her pre-accident work history and the collateral information obtained, Ms Burts probably would have returned to the open labour market in a capacity similar to her capacity before she bought the E-Travel franchise during approximately 2017 to 2018. Writer is of the opinion that her earnings probably would have been in line with her actual pre-accident earnings in these capacities, i.e. R15 000 per month in 2014 (adjusted to the relevant year) with normal increases thereafter. As an alternative basis for quantification purposes, writer is of the opinion that Ms Burts probably could have earned in line with a Paterson B4 median earnings and complexity level (i.e. R307 374 per annum, annual guaranteed package, April 2021 figure) with normal increases thereafter.

POST-MORBID CAREER POSTULATIONS:

[21] There Industrial Psychologist makes the following postulation for the Plaintiff's post morbid/accident earnings. Having regard for Ms Burts' reduced work capacity (both physically, cognitively and psychologically), the expert opinions referenced in the body of this report, Ms Burts' educational level (i.e. Grade 12), post accident deficits and post-accident work history (she has remained

unemployed to present date), writer is of the opinion that Ms Burts will probably find it extremely difficult to secure, but especially sustain suitable future employment on the open labour market. According to Ms Ward, the plaintiff is physically able to perform sedentary to medium type of work and therefore she will probably be able to comply with the physical requirements of a position such as Medical Investigator. However, considering her emotional and psychological deficits (including Post Traumatic Stress Disorder and Major Depressive Disorder with a lack of motivation and fatigue), avoidance of travel, decrease in vision, mild hearing loss, headaches, unsightly facial scarring, reduced cognitive efficiency and her current age (i.e. 52 years), she probably will not have the emotional resolve to search for, secure and especially sustain employment on the open labour market.

[22] Even if she was fortunate enough to secure employment, she will probably not be able to sustain employment and she will be left unemployed on the open labour market. As such, industrial psychologist has probably been rendered unemployable on the open labour market.

CASE LAW

[23] Counsel for the plaintiff relied on the famous case of Southern Association L.td v Bailey N0⁶, Nicholson JA held: Any enquiry into damages for loss of earning capacity is of its nature speculative,

⁶ 1984(1) at 99H

because it involves a prediction as to the; future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent.
(my emphasis)

[24] In the supra matter it was evident that the plaintiff had a loss of earnings and the question that remained was whether to rely on mathematical calculation or the judge had to come up with an amount. In casu I am battling to see the relevance of this matter as counsel for the plaintiff in the paragraph supra has alluded to the fact that as at the date of the accident the plaintiff was not employed which is indicative of the fact that she did not earn an income therefore there is no evidence of the actual loss. The plaintiff has been said to be physically able to perform sedentary to medium type of

work and therefore she will probably be able to comply with the physical requirements of a position such as a Medical Investigator.

[25] Counsel for the plaintiff proceeded to refer me to the, “But for principle that the Court cannot for this reason adopt a non-possums attitude and make no award. See *Hersman v A Shapiro & Co*⁷ per STRATFORD J: “Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the is little more than an estimate; but even so, if it is certain that pecuniary has been suffered, the Court is bound to award damage”

[26] Again even with this principle I am unable to see how same can be said to apply in casu as there is no evidence that the plaintiff was earning an income for a period over two years as she has kept her cards close to her heart. What is clear is that she resigned and took an early retirement package. She invested it in a failed business. It is imperative to mention that the plaintiff has not taken this court into confidence with the package she received. The actuary in calculating the loss of earnings has not taken the said package into consideration. Now, on what am I to assess the loss let alone to estimate it. The plaintiff is not approaching this court with open arms.

[27] The actuary in his calculations says he took into account the income of the plaintiff prior her resignation which fact has not been backed up by

⁷ 1926 TPD 367 at 379

any authority. The industrial psychologist says the plaintiff would have sought employment *sine qua non*. It is evident that we do not know when the funds were lost, how were they lost and how much was lost. There is also no evidence that the plaintiff prior the accident was already seeking employment.

[27] It is imperative to mention that it is *trite* that the plaintiff is put in the position she would have been in had it not been for the accident. In *casu* if an award is made whereas there was no income it will mean that the opposite is being done. On fairness of the award, Brand JA also cited, with approval the following passage from the judgment of Holmes J in the matter of *Pitt v Economic Insurance Co. Ltd*⁸ where he stated the following;

"The courts must take care to see that its award is fair to both sides-it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant' s expense."

[28] Counsel for the plaintiff alluded to the report by the actuary that mathematically done calculation which has been said to have been based on factual and medical evidenced. He says what remains is the question of the relevant contingencies to be applied, thus he referred to the matter of *In Road Accident Fund v Reynolds*⁹, the full court stated the following: "Contingencies may consist of a wide variety of factors. They include matters such as the possibility of error in the estimation of a person's life expectancy, the likelihood of illness,

⁸ [1957 \(3\) SA 284](#) (D)

⁹ (A5023/04) [2005] ZAGPHC 19 (18 February 2005)

accident or employment which in any event would have occurred and therefore affects a person's earning capacity (Minister of Defence and Another v Jackson¹⁰ *supra* at 34 FH; Boberg "*Deductions from Gross Damages in Actions for Wrongful Death*").

CONTINGENCIES

[29] Contingencies may be positive or negative. Not all contingencies are negative involving a reduction of the award. The Contingencies remain the prerogative of the court the industrial psychologist expert has already advised in that a higher than normal post- morbid contingency must be applied. However, I still do not find relevance in *casu* as articulated *supra*.

ANALYSIS

[30] I have considered the plethora of caselaw that counsel for the plaintiff has alluded to and the circumstances of the plaintiff in relation to her claim for loss of earnings. The first factor that I cannot close my eyes to is that as at the date of the accident the plaintiff had been out of employment for over a period two years. She had resigned in order to go into a business venture which failed. All questions to be asked of how much was received, did she receive an income have been left open by the plaintiff.

¹⁰ (1964) 81 SALJ 194 at 198)

[31] I have been called upon to determine the loss of earnings. The question is what informs loss of earnings? The plaintiff must have been working and due to the accident had to stop working and earning an income. It is *trite* law that the plaintiff must prove her case for loss of earnings prior the court making the award. Loss of earnings cannot be given simply because it has been requested, it is not just for the asking.

[32] In *casu* it is evident that as at the date of the accident she was not employed. She did not produce any proof of income for the period of two years as she had resigned and had taken a package. It was submitted that the plaintiff invested her funds into a failed business. The plaintiff did not tell me how much of the funds neither does she say how much did she receive and whether she drew a salary from the funds after she left her workplace. The actuarial report says that 10% of retirement package is taken into account however no amounts have been alluded to. It is important to remember that a claim for lost earnings will be for your lost 'take-home' pay only. This is the amount you would receive normally, after any tax and National Insurance etc, has been deducted. This is referred to as your 'net earnings'. Your income with all of those normal deductions still included is your 'gross earnings'. You can only claim lost net.

[33] The impression given is that she put all her eggs in one basket which yield no fruits and she was prepared to go back into the open market. The industrial psychologist recorded that the plaintiff worked for her

company from 2014 to 2016. The reason for leaving has been recorded as she sold the company. There is no evidence to suggest that she was already looking for employment regard being had to the business venture that had failed or sold. The actuary says that she would have gone back into the open market taking into account that she had worked in the said industry. We are not told that she was being head hunted or that a post of a person of her calibre was out which she would have qualified for. Even though same would have been true the fact would have remained is that as at the date of the accident she was not employed as per the report of industrial psychologist since 2016.

[36] It is so that there is no loss of earning that is evident under the circumstances. It is so that the actuary herein was speculating plunging into the unknown without any basis to qualify the guesswork. The plaintiff is 52 years of age and she left her employment at the age of 47 years. She was already at the stage in her life could be termed the evening of her work life. She says she would have returned to her previous job however no evidence exist to confirm same. The industrial psychologist alluded to collateral information from the plaintiff's previous employment which is not conclusive, what is worse is that the person at the former employment of the plaintiff could not assist with tangible information.

[37] This court has to consider all factors and consider to award the plaintiff an amount for loss of earnings, regard being had to the fact that she does not have any vocational training save for the in-house training by the medical aid scheme companies, her age, that she had put her undisclosed funds in a failed business or sold the business in an undisclosed amount, life expectancy and possibility that she might have been employed. When a plaintiff approaches a court it is imperative that she does so in confidence and the court is not forced to speculative. The non-disclosure of business details denies me to conclude that indeed there is a loss by the plaintiff in so far as the earnings are concerned. It is therefore on those basis that I dismiss the plaintiff's claim for loss of earnings.

[38] It is so that the injuries sustained will require future medical attention and therefore it is *trite* that an undertaking certificate in terms of section 17(4) be awarded by the defendant in relation to the injuries sustained as a result of the accident herein. The plaintiff has submitted a draft order which includes a trust. Counsel has not addressed me as to why the funds needs to be secured. I have considered the injuries sustained by the plaintiff and I do not find any reason why the funds should be paid into a trust. I therefore order that same be paid to her.

[36] Order:

The draft order, as amended, marked "X" is made an order of court.

ENB KHWINANA
ACTING JUDGE OF NORTH
GAUTENG HIGH COURT,
PRETORIA

APPEARANCES:

COUNSEL FOR THE PLAINTIFF: ADV A MASOMBUKA

FOR DEFENDANT: NO APPEARANCE

DATE OF HEARING: 02 DECEMBER 2021

DATE OF JUDGMENT: 01 FEBRUARY 2022

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

Case No: 60234/2019

BEFORE KHWINANA AJ

Via Videoconferencing Order granted electronically in accordance with the directives regarding special arrangements during the National State of Disaster

In the matter between:

FELICITY SUSAN BURTS

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

LINK NUMBER: 4417616

DRAFT ORDER

After having heard argument from the Plaintiff's counsel and having read the documents filed on record, the following order is made:

1. APPLICATION TO STRIKE THE DEFENDANT'S DEFENCE AND THE ISSUE OF LIABILITY

1.1 The Defendant's defence has been struck for non-compliance with the TIC court order granted by Flatela AJ on 15 November 2021.

1.2 The Defendant is liable to pay 100% (one hundred percent) of the Plaintiff's proven or agreed damages as per the discharge form signed by the Defendant and Plaintiff dated 3 September 2018.

2. General damages: R 1 500 000.00.

3. The Plaintiff claim for loss of earnings is dismissed.

4. In delictual damages for injuries sustained by the Plaintiff in a motor vehicle accident which occurred on 21 September 2017, which amount is payable by Defendant to Plaintiff within 180 days from date of court order by depositing same into Plaintiff's attorneys of record's trust account, the details of which are as follows:

ACCOUNT HOLDER: MACROBERT INC BANK:

STANDARD BANK TYPE OF ACCOUNT: TRUST

ACCOUNT NUMBER: [...]

BRANCH: PRETORIA

BRANCH CODE : 01-00-45

REFERENCE : V MBHELE/00031419

RAF LINK NUMBER : 4417616

3. INTEREST:

3.1 The Defendant will not be liable for interest on the outstanding amount;

3.2 Should the Defendant fail to make payment of the capital amount within 180 days from date of court order, Defendant will be liable for interest on the amount due to Plaintiff at the prescribed rate per annum as from the date of this order to date of final payment.

4. UNDERTAKING: The Defendant is ordered to deliver to Plaintiff, within reasonable time, an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996, wherein the Defendant undertakes to pay to Plaintiff the cost of future accommodation in a hospital or a nursing home or treatment of, or rendering of a service or supplying of goods to Plaintiff pursuant to the injuries she sustained in a motor vehicle accident which occurred on 21 September 2017, after the costs have been incurred and on proof thereof.

5. COSTS: The Defendant is ordered to pay the Plaintiff's instructing and correspondent attorneys taxed or agreed party and party costs on the High Court Scale,

5.1 Should the Defendant fail to make payment of the party and party costs within 14 (FOURTEEN) days after service of the taxed accounts on the Defendant's attorneys of record, Defendant will be liable for interest on the amount due to Plaintiff at the prescribed rate per annum as from the date of taxation to date of final payment.

7. The Plaintiff and the Plaintiff's attorneys of record did not enter into any contingency fee agreement.

SIGNED AT PRETORIA ON THIS THE ____ DAY OF _____ 2021

REGISTRAR

COUNSEL FOR PLAINTIFF: A MASOMBUKA

ATTORNEY FOR PLAINTIFF: MS V MBHELE

DATE: 01 FEBRUARY 2022