IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

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

....

DATE SIGNATURE

CASE NO.: 15323/2012

In the matter between:

M A Plaintiff

And

ROAD ACCIDENT FUND Defendant

JUDGMENT

CANCA AJ

INTRODUCTION

[1] The plaintiff sues the defendant for damages arising from the diffuse brain injury ("head injury") she sustained in a motor vehicle collision which occurred on 10 July 2010 in Bergvliet, Cape Town ("the collision").

[2] The merits of the matter have been settled on the basis that the defendant is liable for 50 percent of the plaintiff's proven damages. A court order to that effect was granted on 23 May 2016.

[3] Regarding the quantum of the claim, the defendant has, *inter alia*, agreed to:

3.1. Pay the plaintiff general damages in the sum of R 750 000.00;

3.2. Furnish the plaintiff with an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act, 56 of 1996 for 50 percent of her future medical expenses;

3.3. Accept as correct the actuarial methodologies set out in paragraphs A to J of the Annexure to the report prepared by Munro Forensic Actuaries ("Munro" or "the Munro Report"). The defendant also agrees that the actuarial assumptions set out in paragraph 5.2 of the Munro Report are appropriate;

3.4. The correctness of the following factual assumptions in the Munro Report, namely that:

3.4.1 The plaintiff earned no income from September 2010 to March 2011 i.e. 7 months;

3.4.2 The plaintiff's basic salary and travel allowance at the time of the accident as reflected in paragraph 3 of the Munro Report;

3.4.3 The plaintiff earned no income as from June 2016 to the date of the trial;

3.4.4 The application to Discovery Life for the medical boarding of the plaintiff was unsuccessful;

3.4.5 The plaintiff's income from May 2015 included a monthly pension contribution to the value of R 2 630.00, which was equivalent to 8.22 percent of her salary package;

3.4.6 The 8.22 percent portion of the plaintiff's total earnings from May 2015 consisted of non – taxable benefits;

3.4.7 The plaintiff's actual injured income from the date of the accident to the end of May 2016 is correctly reflected in the Munro Report.

[4] The parties agreed that the court should adjudicate the disputed factual assumptions and determine the contingencies to be deducted by Munro when calculating the plaintiff's past and future loss of income.

[5] There was no agreement on (a) the plaintiff's future injured earning capacity and (b) certain past hospital and medical expenses.

The contents of paragraphs, 2, 3, 4 and 5 above are contained in a minute concluded by the parties on 15 November 2016.

[6] As I understand the issues, I have to determine, not only the contingency factors to be applied, but also the assumptions to be used in determining what the plaintiff's future income would have been, had it not been for the head injury and what her future income will probably be, having regard to that injury.

BACKGROUND

[7] The plaintiff was born on the […] 1978 and completed Grade 12 at Wynberg Girl's High School in […]. She was involved in a previous accident in 1995, whilst in Grade […], which required surgery to insert a facial plate. It is agreed that this injury did not contribute to the *sequelae* caused by the head injury the plaintiff sustained in the collision. The plaintiff completed a course in business printing, another one in computers and also obtained two certificates in Hills Pet Nutrition, after Grade 12.

[8] The plaintiff lost consciousness at the time of the collision, was hospitalised as an in-patient for approximately 6 days, spent time at a facility for rehabilitation and was off from work from the date of the collision until April 2011. During this period, the plaintiff continued to be seen by various medical practitioners.

[9] The plaintiff worked as a practice manager of a veterinary clinic ("the practice") in the Southern Suburbs of Cape Town at the time of the collision, having started there as a receptionist. The plaintiff's prospects of further advancement at the practice were limited, unless she qualified as a veterinarian nurse or a veterinarian surgeon. The owner of the practice, Dr Siegfried, testified for the plaintiff and described her pre-collision work in glowing terms. According to him, she was not the same person after the collision and also did not return to her previous position as practice manager. He kept her on as an employee mostly out of sympathy, so his evidence continued. His further testimony was that on her return to work, the plaintiff

initially only worked limited hours, re-integrated slowly, made various mistakes and interacted poorly with her fellow employees. However, by the time she eventually resigned from the practice, some 5 years later, the plaintiff was working normal hours, the testimony continued.

[10] Upon her retirement from the practice, the plaintiff took up employment on 1 May 2015 as a sales representative in the animal products division of an international pharmaceutical company ("the company"). The plaintiff's reasons for her resignation from the practice were placed in issue by the defendant. The defendant contended that her resignation was a calculated upward career move which entailed a 50 percent salary increase. The plaintiff, on the other hand, submitted that she resigned, *inter alia*, because she felt that, given her inability to execute her duties with the same high standard she did before the collision, she was letting both Dr Siegfried and her fellow employees down. In addition, she thought that a new work environment would be beneficial to her, so her submission continued.

[11] The plaintiff also testified that she had difficulty coping with the demands of her new work and could not meet the various sales targets set by her employer. According to her, the main cause for this was her physical and mental deficits which involved fatigue, persistent migraines, irritability, mood disorder and sensitivity to light and sound, all of which required her to take long periods of rest during the latter part of the day. Her immediate superior at the company, Mr Wright, confirmed that the plaintiff appeared to fatigue as the day wore on and that she struggled to meet her sales targets. However, Wright also testified that the company was, as a general rule, not too strict in holding new employees to their targets during their first year of employment. The plaintiff's employment at the company was, on the advice of her treating neurologist, Dr Frost, eventually terminated on medical grounds in April 2016.

[12] There was agreement among the medical experts and the lay witnesses that, following the collision and her subsequent treatment, the plaintiff was a different person to the one she was before the collision. What is placed in

issue is the plaintiff's contention that her brain injury and its various *sequelae* has rendered her unemployable.

[13] I do not consider it necessary to furnish a detailed account of the various consequences of the head injury sustained by the plaintiff. The neurosurgical and neuropsychological experts, as appears hereunder, are at one that the plaintiff's said injury left her with residual neuropsychological deficits which will have a permanent impact on her personal and work life. The industrial psychologists are also agreed that she was likely to suffer future loss of earnings.

MEDICAL EVIDENCE

[14] In support of her claim, the plaintiff presented the evidence of various medico – legal experts, medical practitioners and lay persons, including her father. The experts were: Dr Domingo (neurosurgeon); Dr Suttle (ophthalmic surgeon); Dr Madden (clinical neuro and educational psychologist); Dr Ogilvy (speech therapist); Dr Hunter (industrial psychologist); Munro; Ms Bester (occupational therapist) and Mr Lewis (clinical psychologist).

[15] The defendant admitted the medico-legal reports of Dr Suttle and Mr Lewis. The expert reports of Drs Domingo, Madden, Hunter and Ogilvie as well as the one prepared by Ms Bester were in contention. These experts testified at the trial in support of the plaintiff and their evidence is dealt with hereunder.

[16] The defendant presented the court with expert reports from Dr Kieck (neurosurgeon); Dr Hemp (neuropsychologist) and Mr Crous (industrial psychologist). The plaintiff admitted the medico-legal report of Dr Kieck but contested those of Dr Hemp and Mr Crous, who then testified in support of the defendant. The defendant also relied on the testimonies of two medical practitioners, Dr Frost, the plaintiff's treating neurologist and Dr Wegner, the plaintiff's treating general practitioner.

[17] Dr Domingo, for the plaintiff, and Dr Kieck, for the defendant, in a joint minute, agreed *inter alia* that (a) the plaintiff's brain injury was severe, (b) her neuropsychological deficits were permanent and (c) that she would continue to suffer serious long-term impairment in respect of her work and personal life.

[18] The neuropsychologists, Drs Madden and Hemp, in summary, agreed in a joint minute that: 1, physically, the plaintiff has difficulties with vision and integration of what she sees and with visual motor coordination; 2, cognitively, she has difficulties with the executive functions of her working memory and sustaining her concentration which becomes more marked as she fatigues; 3, the plaintiff's emotionality and irritability has increased due to the head injury; 4, the plaintiff's fatigue limits the number of hours she is able to work and that she suffers from headaches, noise and light sensitivity, motion sickness and reduced coordination; 5, the plaintiff's migraines should be managed by a neurologist and 6, the plaintiff should undergo psychotherapy as that would help her to cope with the problems caused by her injuries. The recommendation that the plaintiff undergo psychotherapy was supported by Lewis, who conducted a psychological assessment of her.

[19] The industrial psychologists, Dr Hunter and Mr Crous, also concluded a joint minute from which it appears that the only areas of agreement between them were that the plaintiff suffered past loss of earnings as a result of the collision for which she should be compensated and that she was likely to suffer future loss of earnings.

[20] In his report and during his evidence at the trial, Dr Hunter, who at the time of compiling his report in July 2015 predicted that the plaintiff would not be able to sustain her employment at the company for longer than 6 to 18 months, was of the view that (a) the plaintiff's employment prospects in the open labour market had been adversely affected by her head injury, (b) she would drift in and out of employment, developing a scattered career path with poor employment references. This would in his opinion probability render her

unemployable or marginally employable in the open labour market. Dr Hunter also testified that the plaintiff could over a period of 5 years work intermittently for about 3 years, (c) prior to the collision, the plaintiff would have progressed to a Paterson Job Grade band C4 to C5 which refers to skilled to middle management. According to him, her injured state denied her such an upward career move as she would not cope with the demands that came with greater responsibility and more pressure, so the report continued. In his view, the plaintiff might be able to assist in a kennel by, for example, helping with feeding and giving medication to the animals. His further testimony was that the plaintiff could work in the non- governmental sector, given that, as a general rule, that sector was more tolerant to their employees than was the case in the open labour market.

[21] Mr Crous, who conceded that he had not considered Dr Madden and Bester's reports, agreed that the plaintiff's future earning capacity had been negatively affected by the injuries sustained as a result of the collision. However, notwithstanding that concession, he was of the opinion that the plaintiff was capable of some form of future employment. He recommended that the plaintiff's injured future income capacity be addressed by way of contingencies.

[22] The occupational therapist, Ms Bester, also concluded that the plaintiff's occupational capacity has been impaired and that she would only physically cope with light work with low mobility demands. The plaintiff would, in her view, be significantly compromised in work that had high behavioural and cognitive demands. Therefore she recommended that the plaintiff be considered unemployable in the open labour market. Doing menial work with low physical, behavioural and cognitive demands would lead to dissatisfaction and frustration, resulting in further deterioration in the plaintiff's health, so her testimony continued. Ms Bester suggested that the plaintiff consider home-based work done on a part-time and flexible basis, alternatively, work in the non-profit sector possibly involving animals. She also made certain recommendations which would be beneficial to the plaintiff, including future occupational therapy, assistive devices and home assistance in the form of, for

example, a domestic worker. I agree that the plaintiff would benefit from the services of a full time domestic helper. However, the expense of such a domestic worker was not quantified and as there is no evidence as to what this might be, I cannot give an order on this aspect of the matter.

[23] Dr Hemp's report essentially confirms Dr Madden's findings that the collision had a permanent and severe impact on the plaintiff's interpersonal and social life. She also agreed that the plaintiff's career prospects were compromised given that she, *inter alia,* fatigues easily and suffers from migraines which would impact her coping with a full day's activities. Dr Hemp was, however, of the opinion that the plaintiff's injury did not render her totally unemployable. An opinion which, in her view, was borne out by the fact that, despite her limitations, Dr Siegfried, kept her in his employ for approximately 5 years post the collision. It is also worth noting that the plaintiff, who earned bonuses during this period, conceded during cross examination, that she would have remained with Dr Siegfried for possibly 10 years on her return to work.

[24] Dr Wegner, who suggested during his evidence that some of the plaintiff's medical complaints were baseless, conceded during cross examination that, firstly, as the plaintiff's treating general practitioner, he could not testify about her collision related neurological and neuropsychological *sequelae*, secondly, in assessing the plaintiff, he had not considered collateral information. He had also not assessed the plaintiff from a medico-legal perspective and, finally, having initially questioned whether the plaintiff suffered from migraines, conceded that her headaches were in fact migraines. As a result, his testimony was of little assistance to me in reaching the conclusions that I have in this matter.

[25] Dr Frost's evidence was that his relationship with the plaintiff had been "*a therapeutic inventive"* one and that he had not *"assessed her from a medico-legal perspective which requires a degree of objectivity and "clinical distance".* Consequently, he felt that his opinion regarding the plaintiff's management was "*biased*." In the light of that testimony, I find Dr Frost's evidence as to

whether the plaintiff could work in the future also of no value. In any event, Dr Frost conceded during cross-examination that he would defer to the views of the medico-legal experts on whether or not the plaintiff was capable of working in the future.

[26] The plaintiff's father and certain personnel, including Wright, from the company also testified. The gist of their respective testimonies was confirmation that the plaintiff struggled to cope in the social and work environments.

[27] I was, as a general proposition, impressed with the evidence given by the witnesses in this case. Their accounts of the areas which they were asked to canvass were, on the whole, given rationally and in a balanced manner. Concessions were made where appropriate. Although I do not think that there was obfuscation on the part of the witnesses, I got the sense that there might have been a measure of exaggeration by the plaintiff and some of her witnesses when it came to the plaintiff's alleged inability to work, earn an income and cope with the challenges one normally encounters on a daily basis.

[28] For instance, I am not convinced that the defendant should be burdened with the costs of some of the treatments and articles recommendations by Dr Madden and Ms Bester to help the plaintiff cope with her condition. In particular, the costs of (1) a massage therapist or a reflexologist, (2) a life coach, (3) mindfulness training, (4) a black or whiteboard, and (5) electrical appliances such as an electrical tin opener, juicer, food processor and the like. In my view, the costs of the aforementioned treatments and articles ought to be borne by the plaintiff herself as same appear to be luxuries which, put colloquially, would be *"nice to have* but not essential." There must be a measure of fairness to the defendant.

[29] It necessary to make a few remarks on certain aspects of the plaintiff and Dr Frost's testimonies. During cross examination the plaintiff directed an unfortunate tirade, which included an expletive, towards counsel for the defendant. This required me to inform her, rather sternly, that her behaviour

amounted to contempt of court. I then directed the plaintiff's counsel, Mr Van Der Merwe, to impress upon her, during a short adjournment, the consequences of being found to be in contempt of court and the wisdom of giving the rest of her evidence in a restrained manner. Dr Madden, who was present in court when the outburst occurred, testified that the plaintiff's behaviour was a symptom of her condition. No adverse inference is drawn from this incident. I consider it a slight aberration, in otherwise satisfactory testimony given, her condition. I do, however, make a negative finding on one aspect of the plaintiff's testimony in paragraph 37 below.

[30] Considerable court time was spent interrogating certain aspects of Dr Frost's evidence. These included, initially recommending that the plaintiff initiate "procedures for medical boarding" and, approximately 2 months later, recommending to her employer's Group Risk Disability Insurer that she be permanently boarded due to her medical incapacity. However, he contradicted this on 20 September 2016 when he, *inter alia*, stated that he did not "*believe that she (the plaintiff)* [was] *necessarily "permanently incapacitated".* He was now of the opinion that *"she may well be able to return to work in the future."* In a further letter written on 29 September 2016, in response to a subpoena served on him by the defendant, Dr Frost states that his recommendation that the plaintiff be permanently medically boarded was at the suggestion of her employer's Human Resources Consultant. That statement was, however, withdrawn during cross-examination, when Dr Frost conceded that the aforesaid recommendation was made as a result of his advice to the plaintiff.

ACTUARIAL EVIDENCE

[31] As set out in paragraph 3 above, a number of the assumptions and methodology adopted by Munro were uncontested.

[32] The defendant, however, disputed a number of the factual assumptions in Munro Report, including (a) that the plaintiff's future injured income should be calculated on her May 2015 earnings of R32 000.00 per month, plus commission and bonus; (b) that her career would have peaked in 2021 with

earnings of approximately R527 500.00. This income was equivalent to that earned by persons falling within the Paterson job band of Grade C4 or C5; and (c) that, in the event that the plaintiff had children, she would, as suggested by Dr Madden, in addition to a domestic worker, require the services of either a day, night or full-time nurse. The defendant also did not agree with the assumption that the plaintiff was unemployable and would receive no income as from 2018. This aspect of the matter is dealt with more fully in the paragraphs that follow hereunder.

THE PLAINTIFF'S INJURED FUTURE EARNING CAPACITY.

[33] It is now convenient for me to determine whether, in the light of the evidence of the various experts, the plaintiff is employable.

[34] It is not disputed that the plaintiff's head injury has had negative *sequelae* that are permanent. The defendant's contention that the plaintiff was employable is based on the fact that, although she worked limited hours on her return to work, post the collision, she had resumed working normal office hours by March 2012. And, Dr Siegfried had retained her services for approximately 5 years on her return to work, despite her limitations. Also, although he might have reprimanded her for some mistakes, he had not subjected the plaintiff to any form of disciplinary enquiry nor did he put her on notice or terminate her services. On the contrary, the plaintiff resigned on her own accord to take up employment, which not only paid significantly more than that she was earning at the time, but also appeared to be less structured and thus, would be a less stressful working environment.

[35] The defendant also contended that the termination of the plaintiff's employment by the company was not initiated by it but rather was as a result of a recommendation by her treating neurologist. A neurologist who had testified that he had not been independent and neutral in his assessment and treatment of the plaintiff due to the empathy a treating practitioner develops for his or her patient.

[36] In reaching the conclusions I have in this case, I also took into account the testimony of the plaintiff's superiors at the company, including that of its Human Resources Consultant, regarding the events that led to the termination of her employment. In brief summary, their testimony was that (1) no pressure is put on new employees to meet sales targets during their first 6 to 12 months of employment (the plaintiff testified that she struggled to cope after 5 months into her new employment); (2) the plaintiff interviewed well and was considered to be the best of those who had applied for the position given that she had worked for approximately 13 years in a veterinary practice; (3) she was made aware of the demands of the job, which included approximately 60 percent travelling and little desk work; (4) she had approximately 130 outlets to cover in her area, namely, the Southern Suburbs of Cape Town; (5) the nature of her collision related injuries were known to them; (6) she informed the company that her treating neurologist had recommended that she stops working as continuing to do so would "kill her"; (7) Dr Frost was the one who recommended that she be boarded due to medical incapacity and (8) they followed Dr Frost's recommendation after he had booked her off sick for extended periods.

[37] What is apparent from this evidence is that during the period that she was employed by the company, no steps were taken or contemplated to discipline the plaintiff for failing to meet her targets. It is also clear that Dr Frost's suggestion that the plaintiff stop working on the grounds of medical incapacity did not emanate from the company, which at that stage had no plans to terminate her services on the grounds of non-performance. The plaintiff, in my view, also appears to have over dramatized the consequences of her continuing to work by informing the company's senior representatives that Dr Frost had told her that to continue working would "kill her". There is no evidence to support this assertion. The company, like Dr Siegfried, appears to have been sympathetic to her condition. However, I am alive to the fact that, unlike the practice, the company is part of a large international organisation whose commercial imperatives probably dictate that the leniency shown by Dr Siegfried would have been of limited duration.

[38] Moreover, the evidence of the plaintiff's superiors suggests that the plaintiff put undue pressure on herself to excel. This could possibly have contributed to her fatigue and migraines. Also, her position as a sales representative was an entirely new role for the plaintiff. This role, unlike the mostly administrative one she had performed for approximately 13 years, involved a large amount of travel, required her to meet targets and convince customers to purchase the company's wares. This required skills which are not easily acquired. And, a person without such skills would, in my view, have found such work stressful.

[39] The views expressed above must also be looked at in the light of the testimony of some of the plaintiff's own experts. Dr Hunter's evidence was that the plaintiff was only "marginally employable" in the open labour market and could, over a period of 5 years, work intermittently for 3 years. Also, in her joint minute with Dr Hemp, referred to in paragraph 18 above, Dr Madden states that the plaintiff's full-time employability was compromised by her fatigue and would deteriorate as she grew older and has a family. This indicates that there was a possibility that the plaintiff could be employed. She also states that the plaintiff's migraines could be managed by a neurologist and that sessions with a psychologist could help her cope. Ms Bester suggested part-time home based work or work in the non-profit sector.

[40] On all the evidence, it seems to me that the possibility of the plaintiff finding employment in a sympathetic work environment exists. I am fortified in this view by the evidence of Dr Madden and Ms Bester that, if the plaintiff underwent regular sessions with neurologist, a psychologist and an occupational therapist, such sessions would help her cope. Undergoing sessions with those practitioners could, in my view, assist the plaintiff in holding down an appropriate form of employment. Occupational therapy is important and should form part of the plaintiff's future medical expenses which will be borne by the defendant on a 50 percent basis.

[41] In the light of the above, it is hard to sustain the contention that the plaintiff's head injury has rendered her unemployable and that she is not in a position to earn an income in the future. The plaintiff should be able to perform work that is not as stressful as the one she did whilst at the company (travel, meeting targets and the like).

[42] I therefore find that the plaintiff can earn injured income and should be able to continue to do so until retirement at age 65. Consequently, there is merit to the defendant's submission that Munro is wrong to assume that the plaintiff would not earn income as from January 2018.

[43] During argument, Mr Van Der Merwe submitted that, in the event I found that the plaintiff could earn injured income, then such income should be on the basis that she would only have worked intermittently for a period of 3 years during the next 5 years. During this period the plaintiff would, according to Dr Hunter, earn a monthly income of approximately R2 000.00 per month at an animal shelter, so the submission continued. In the alternative, Mr Van Der Merwe argued that should she find work in a non- governmental organisation during the three year period, then the plaintiff's salary should be pegged at the Patterson Grade A1 level which is applied to determine the salaries of unskilled employees.

[44] I am not convinced that these arguments are sound. Firstly, although Dr Hunter testified that the plaintiff would have scattered employment of 3 years in a 5 year cycle, this does not necessarily mean that, upon the expiry of that cycle, she could not, after an interval of perhaps a few months, a year or possibly longer, return to some form of employment for another 5 year cycle and so forth, until she reached retirement age. Consequently, in determining her injured future income, it would be incorrect to calculate same on the basis that she would only have worked a total of 3 years. I am also unpersuaded that the plaintiff could only have found employment in an animal shelter with the resultant reduction in remuneration. There is nothing in the evidence to suggest that the plaintiff's intelligence quotient has been compromised by her head injury or if it has, she is now only capable of unskilled work. The plaintiff's duties, at both the practice, post the collision, and at the company were certainly not the type of work done by unskilled persons.

[45] The approximately 130 outlets serviced by the plaintiff, during her short stint at the company, ranged from veterinary practices, shops, wholesalers and some equine outlets. It is conceivable that during this period the plaintiff formed relationships with the management or staff at these outlets. It is therefore probably that the plaintiff can obtain some form of employment at one of these or similar type of outlets. Given her long experience as an administrator, the plaintiff would probably cope with light secretarial work.

Should the plaintiff's future injured earning capacity be calculated on the basis of her May 2015 or 2016 earnings?

[46] Munro has based its computation of the plaintiff's future injured income on her May 2015 earnings. The defendant argued that this assumption is ill-founded as reliance therefor was based on (a) Dr Hunter's contested opinion that the plaintiff would be employable for only 3 years and (b) Dr Frost's flawed recommendation that she be medically boarded.

[47] I agree with Ms Pillay's submission that Munro incorrectly computed the plaintiff's future injured earning capacity on her May 2015 earnings. The computation should have been based on the plaintiff's earnings as at the date of her resignation from the company in May 2016 as the termination of her employment on medical incapacity, was based on Dr Frost's flawed recommendation.

Is a contingency deduction is appropriate when calculating the plaintiff's future injured earnings?

[48] Munro assumed that there would be no future injured income. Munro correctly, in my view, did not make a contingency deduction in respect of actual past injured income earned. The defendant submitted that a deduction in respect of future injured earnings was appropriate in this matter. I agree. Although I have found that the plaintiff is employable, I must, in determining

an appropriate contingency factor, take into account the possibility that the plaintiff might, as she advances in age, lose her employment due to illness-given her current compromised health – or that her employer could go out of business particularly if such employment is in the small to medium size business sector or is in the non-governmental sector. It being assumed that such businesses are more likely to fail than larger ones. This, to my mind, would than justify the application of the contingency factor proposed by the defendant. In the circumstances, I find that a contingency deduction of 15 percent would be fair and just in determining the plaintiff's future injured earning prospects.

THE PLAINTIFF'S FUTURE UNINJURED INCOME.

[49] The defendant did not address this issue in its Heads of Argument. As a consequence, I caused correspondence to be addressed to the parties' legal representatives in order to obtain certainty that the defendant no longer contested Munro's assumption underlying the plaintiff's future uninjured career path. Ms Pillay then furnished me with written submissions to which Mr Van Der Merwe responded.

[50] It is evident from the respective submissions that the parties agree that the plaintiff:

50.1 as at the date of the collision in July 2010, earned R17 924.00 per month, which salary increased to R 32 000.00 per month from 1 May 2015; and

50.2 would have earned a 10 percent annual bonus as from 1 May 2016.

[51] There was no agreement on the plaintiff's earnings as from 1 May 2016. Although the defendant's suggested monthly salary as from 1 May 2016 is in line with the R 33 750.00 assumed by Munro, it contended that the plaintiff would only earn a commission of R 7 500.00 per quarter from that date as well

as the 10% annual bonus. The defendant did not believe that the plaintiff would have earned the quarterly commission of R20 000.00 Munro factored in the calculation of the earnings under this heading.

[52] I have already found that being a sales representative, irrespective of having been a good employee before the collision, did not match the plaintiff's acquired skill set. The differences in the skills required for being an administrator, which she was at the practice, and those of a sales representative, are marked. Therefore, the probability of the plaintiff meeting or surpassing the targets required to earn the additional commissions are at best marginal. I would, in the light of the above, peg the plaintiff's commission to the quarterly incentive bonus of R 10 000.00 and the 10 percent annual bonus agreed referred to paragraph 10.2 above.

[53] There was also no agreement as to whether, as proposed by the defendant, a higher contingency factor than that suggested by Munro, should be applied. Munro applied a factor of 13 percent on the plaintiff's future uninjured income. The defendant has not presented any persuasive evidence as to why the 13 percent contingency factor applied by Munro is unreasonable nor has it suggested what that higher contingency factor should be. I therefore see no reason to deviate from the contingency factor of 13 percent applied by Munro.

PAST LOSS OF EARNINGS

[54] The defendant has not presented evidence which contradicted Munro's factual assumptions and its application of a 5 percent contingency deduction in calculating the plaintiff's past uninjured income. There is only a bald submission in the defendant's Heads of Argument that a 10 percent contingency deduction should be applied. This stance, which is not supported by evidence, is untenable and therefore stands to be rejected. In the result I cannot fault the contingency deduction of 5 percent applied by Munro in this regard.

PAST HOSPITAL AND MEDICAL EXPENSES

[55] Prior to the conclusion of the trial, the parties agreed past hospital and medical expenses in the sum of R105 869.93. Consequently, it is only an amount of R16 757.63 that remains in issue.

[56] Argument in respect of the disputed past hospital and medical expenses was presented by the parties during the trial. However, I reserve announcing my decision on same until receipt of Munro's adjusted figures calculated on the basis of the determinations set out in this judgment.

CONCLUSION

[57] My order, at this stage of the proceedings, is limited to directives on the disputed assumptions and the deductions made by Munro. The plaintiff must arrange for Munro to re- do its report in accordance with the directives set forth in my Order hereunder. When the report has been re-done and delivered to the parties, the plaintiff may re-enrol the matter for determination by me of all outstanding issues (including costs), on a date to be arranged with the defendant and the Registrar.

[58] In the result, I make the following order:

1. The following determinations are made for the purpose of calculating the plaintiff's claim for past and future loss of earnings:

    1.1 Past Uninjured Income
    The contingency factor of 5 percent assumed by Munro in its calculation of this portion of the quantum is confirmed.

    1.2 Future Uninjured Income

I find that the commission the plaintiff would have earned is R10 000.00 per quarter (and not the R20 000.00 per quarter assumed by the actuaries) and that she would have earned an annual bonus of 10 percent of her salary. Both amounts would have increased with earnings inflation until her retirement at age 65. The rest of the assumptions adopted by Munro in calculating the plaintiff's future uninjured income are hereby confirmed.

1.3 Future Injured Income

1.3.1 It shall be assumed that the plaintiff is employable as from the date of this judgment until she reaches the retirement age of 65 years.

1.3.2 It shall be assumed that the plaintiff shall be employed as a secretary on a half day basis. Such employment, it is assumed, would be in a sympathetic work environment, in either a veterinary practice or in an outlet which sells animal products.

1.3.3 Munro is directed to select a suitable income in their calculation of the plaintiff's future injured earning capacity taking into account the assumption that the plaintiff will be employed as a secretary, on a half day basis, in either a veterinary practice or in an outlet which sells animal products.

1.3.4 A contingency factor of 15 percent shall be applied to the plaintiff's future injured income.

2 When the actuarial report has been re- done and delivered, the plaintiff may re-enrol the matter for determination of all outstanding issues (including the final determination of the plaintiff's damages and costs), on a date to be arranged with the defendant and the Registrar.

3 The parties may, if necessary, approach the court, before the resumption of the trial, for clarification or additional directives, on any aspect of this judgment.

4 The matter stands adjourned *sine die*.

_____

MP CANCA
Acting Judge of the High Court

Heard on : 12, 13, 14, 15 and 23 September 2016;
14, 15, 16 and 17 November 2016;
14 December 2016.

Judgment delivered on : 5 April 2017

APPEARANCES

For the Plaintiff : Adv. JA van der Merwe SC

Instructed by : Sohn and Wood Attorneys, Cape Town.

For the Defendant : Adv. D Pillay

Instructed by : Mayats Attorneys, Claremont.