IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 3423/2019

In the matter between:

REFILWE DIBUSENG MABALEKA Plaintiff

and

ROAD ACCIDENT FUND Defendant

HEARD ON: 25 & 26 OCTOBER 2022

JUDGEMENT BY: LOUBSER, J

DELIVERED ON: 17 NOVEMBER 2022

---

[1] In the late afternoon of 16 March 2018 the Plaintiff was travelling as a fare paying passenger in a vehicle which collided with another vehicle in the vicinity of Kroonstad. She sustained injuries to her neck, left hip and lower back in the collision, and she was transported to hospital in Kroonstad, where she received treatment for a week. Since her discharge from hospital, and up to the present day, she is unable to walk without the assistance of crutches. On the day of the collision, the Plaintiff was only 20 years old.

[2] In the summons, an amount of R6 519 139.10 is claimed by the Plaintiff, which amount is calculated as follows: R 5000.00 for past medical and hospital expenses, R45 000.00 for future medical treatment, R183 573.00 for past loss of income, R5 535 566.00 for future loss of income and R750 000.00 for

general damages. At a Rule 37 pre-trial conference held between the parties on 7 April 2022, the Defendant conceded the merits of the Plaintiffs claim, and it was agreed that the only issue in dispute was the extent of the damages suffered by the Plaintiff.

[3] At the commencement of the trial proceedings the Court was informed that the Defendant had rejected the claim for general damages on the ground that the Plaintiff did not suffer serious injuries, but that this decision will be taken on review to the relevant Council. In addition, the Court was informed that the Defendant had agreed to furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of Act 56 of 1996 in respect of future medical costs. The only issues to be determined by the Court are the past and future loss of income and the contingencies to be applied.

[4] In the course of the trial proceedings, the Plaintiff presented the evidence of three expert witnesses in support of her claims. The Defendant called no witnesses to testify, and choose to rely only on the cross-examination and closing submissions made by its counsel. It soon transpired during cross-examination of the Plaintiff's witnesses that the Defendant’s case turned on the diagnosis recorded in the Plaintiff's hospital records that she only had a soft tissue injury and that no obvious fractures were found.

[5] The first witness who testified for the Plaintiff, was ms Luna Stehle, an occupational therapist. Before her marriage and at the time she compiled her report, her surname was Greyling. She testified that she qualified at the Stellenbosch University, and that she thereafter worked in hospitals for a period of 6 years. During this time she worked in spinal units as well.

[6] Ms Stehle saw the Plaintiff on 23 March 2020 for an evaluation. She reported that the Plaintiff was a student for a diploma in human resources management at the time of the accident. Since the accident, she remained unemployed with highest level of education grade 12. She further reported that the Plaintiff is suffering from chronic pain in her lower back and left hip since the accident. This pain resulted in her becoming physically deconditioned with general muscle weakness, reduced standing balance, restricted mobility, reliant on

mobility aids for walking, poor physical endurance and exercise tolerance. In summary, ms. Stehle reported that the Plaintiff's postural abilities, mobility and weight handling abilities does meet the downwards requirement to perform sedentary work with work modifications (no load handling) in the open labour market. However, the Plaintiff will find it difficult to go out and seek employment. On a question by the Court, ms. Stehle responded that the chances of the Plaintiff finding any suitable employment are not good without treatment. But even with treatment, she will still suffer from the chronic pain. Treatment will only have a limited effect on her pain.

[7] Dr. Louis Oelofse, a spinal surgeon, testified next. He examined the Plaintiff on 10 June 2020, and found a C1-C2 disc injury, and probable C2 and C3 fractures which resulted in C1-C2 ligamentous instability, chronic pain and spasms, residual headaches and a high probability of developing higher neck spondylosis. He also diagnosed a thoracolumbar spine injury resulting in mechanical back pain. He is of the opinion that the Plaintiff can only be accommodated in a permanent light duty and spine friendly working environment. That being said, she will most probably have chronic pain for the rest of her life, regardless of treatment she receives. This makes her an unfair competitor in the open labour market, dr. Oelofse testified.

[8] He further testified that the Plaintiff's upper neck injury qualifies as a serious injury, because the ligaments in that area are torn. She will most probably need a vertebrae fusion, and will probably find herself in a much worse situation in 10 to 20 years time. Surgery may again be needed then. She will also not work until age 65, and will have to retire 5 to 10 years earlier. He testified that the hospital missed the damage to the C2 and C3 vertebrae and the neck. The Plaintiff should not have been discharged from hospital on crutches, he testified.

[9] In cross-examination, dr. Oelofse opined that the hospital missed the C2 and C3 fracture because an MRI and CT scan was not done. He was able to detect injury to the ligaments in the neck and probable C2 and C3 fractures from a normal X-ray he had done. A fusion of the C1 to C2 vertebrae will stop the abnormal movement between the levels, he testified.

[10] Mr Ben Moodie, an industrial psychologist of some 30 years experience, was the last witness called by the Plaintiff. He testified with reference to the testimony of the other expert witnesses that if the condition of the Plaintiff does not improve by means of treatment, then she would not be able to enter the open labour market. Presently she is suffering from post-traumatic stress, depression and chronic pain. Therefore the chances are not good that she will be able to complete her studies, and in turn that will impede her chances of finding employment. In her present condition, there is no possibility that the Plaintiff will find employment. It may be possible if she improves, but that does not sound very likely he testified. In cross-examination, mr. Moodie reiterated that even with treatment, the chances are not good that the Plaintiff will improve significantly to work.

[11] With this the case for the Plaintiff was closed. As mentioned earlier, the Defendant did not call any witnesses to testify. Now all the witnesses called by the Plaintiff made a good impression on the Court, and there is no reason why their testimony should not be accepted as reliable and trustworthy. I find that there is no substance in the defense of the Defendant that the Plaintiff only suffered from a soft tissue injury and that no obvious fractures were found.

[12] The Court accepts without reservation that the Plaintiff is a young woman who sustained a serious injury in the accident. The ligaments in her neck are torn, causing instability of movement. A fusion of the C1 and C2 vertebrae is needed for stability, and there is a possibility that the C2 and C3 vertebrae are fractured. She needs crutches to walk, and she will suffer from chronic pain for the rest of her life. Although she will be able to do sedentary work, her chances of finding employment are not good, even if her condition improves with treatment. On top of it all, she will need to undergo surgery in the future, and she will not be able to work until age 65.

[13] This brings me to the issue of contingencies. Ms Mkhwanazi appearing for the Defendant, suggested that a pre-accident contingency of 25% should be applied, because the Plaintiff was unemployed at the time of the accident. A contingency of 35% should be applied for the post-accident scenario, she

suggested. According to her, the Defendant would then be liable to pay the amount of R986 871.00 to the Plaintiff for past and future loss of earnings.

[14] On the other hand, Mr Marx, appearing for the Plaintiff, stated that he is not asking that the Plaintiff be found totally unemployable, because of the probable scenario that her condition will improve with treatment. He suggested a pre-accident contingency of 20% and a post-accident contingency deduction of 70%. This would leave a 50% differential, reflecting the probability that she will be unemployed for 50% of the time, the argument went.

[15] As far as the assessment of contingencies is concerned, a court has a wide discretion[1]. The Court nevertheless requested on 26 October 2022 that the actuary re-calculate the loss of earnings by applying the contingencies proposed by mr. Marx, and allowed him time until 28 October 2022 to do so. The Court also requested mr. Marx to submit a draft order on that date.

[16] On 28 October 2022 the required re-calculation and the draft order were duly submitted by e-mail. In the re-calculation the actuary applied a 5% contingency deduction for past losses (pre- and post-morbid) and a 20% deduction for future losses (pre-morbid) and a 70% total deduction for post-morbid future losses. He then arrived at a total loss of earnings of R8 190 693.00, having taken into account the effect of the RAF cap. At the same time, the Plaintiff served a notice to amend her particulars of claim to bring it in line with the re-calculations of the actuary. This notice intimated that the application for such amendment would be made on 28 October 2022 at the hearing, but the application was never made because the trial did not proceed to 28 October 2022. The initial summons therefore still stands.

[17] In any event, in his initial calculation the actuary applied a 20% / 40% contingency deduction for the Plaintiff's future earnings, and he then arrived at a total loss of earnings in the amount of R5 719 139.00. In doing so, he worked on the basis of a 5 years early retirement. In my view, nothing much has changed from the initial calculation to the re-calculation submitted on 28 October 2022. The same reports that formed the basis for the initial particulars

[1] **Southern Insurance Association v Baily NO 1984 (1) 98 SA at 116 G**

of claim served before this Court during the trial proceedings. There is nothing in the evidence tendered in Court that could justify the increase in contingencies from 40% to 70%, as mr. Marx had suggested. I am therefore satisfied that the initial calculation of the actuary should prevail. Having regard to the fact that the condition of the Plaintiff may improve with treatment and that she will then be able to complete her studies and find employment, however slim the chances are, the initial approach of the actuary in respect of contingencies was probably correct. Even if her condition improves with treatment, the chronic pain will remain to have a negative effect on her prospects of finding work and to retain such employment.

[18] In the premises, the following order is made:

1. The Draft Order, as amended, is made an order of Court.

_____

P. J. LOUBSER, J

For the Plaintiff:	Adv. D. Marx
Instructed by:	VZLR Incorporated, Pretoria
	c/o Du Plooy Attorneys, Bloemfontein
For the Defendant:	Adv. K. Mkwanazi
Instructed by:	The Road Accident Fund
	Bloemfontein

/roosthuizen