

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**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: 2867/2013

In the matter between:

CHANTEL VAN ZYL

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

HEARD ON:

23 & 26 MAY 2023

JUDGMENT BY:

DANISO, J

DELIVERED ON:

This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 25 August 2023 at 14H00.

- [1] On 03 January 2010 the plaintiff was a passenger in a motor vehicle with registration numbers and letters [...] **216** [...] when it collided with a vehicle with registration numbers and letters [...] **840** [...]. She sustained a head injury, fractures of the left femur and the right acetabulum with face and shoulder lacerations.
- [2] On 17 July 2023 the plaintiff issued summons against the defendant for damages the plaintiff sustained as a result of being injured in the said collision. In the particulars of claim (as amended) the plaintiff claimed an amount of R5 289 497.91 made up as follows:
- | | | |
|------|-------------------------------------|---------------|
| 2.1. | Past medical and hospital expenses: | R235 582.91 |
| 2.2. | Future medical expenses: | R100 000.00 |
| 2.3. | Past and future loss of income: | R4 203 915.00 |
| 2.4. | General damages: | R750 000.00 |
- [3] The injuries sustained by the plaintiff including the sequelae thereof is not in dispute. The defendant has since conceded the merits 100% in favour of the plaintiff and thereafter agreed to pay R700 000.00 (seven hundred thousand rand) in settlement of the plaintiff's general damages and to also undertake to furnish the plaintiff with the statutory undertaking in respect of her future medical and hospital expenses in terms of section 17(4) (a) of the Road Accident Fund Act 56 of 1996 ("The Act").
- [4] By agreement between the parties the claim relating to past medical and hospital expenses was postponed for later determination and the only issue that I have to determine is the contingency deductions to be applied to the award relating to past and future loss of income.

- [5] According to the plaintiff, that she would have followed the same career path in the uninjured scenario up to retirement age of 65 years but due to the injuries she had to resign from her employment to work in a sedentary job and will have to retire ten (10) years earlier. Based on those reasons, a 5% contingency deduction should be applied with regard to the determination of the plaintiff's pre-morbid past loss, 15% for pre-morbid future loss and 30% post-morbid future loss as per the actuarial calculations.
- [6] The defendant disagrees and submits that there is no justifiable reason why the plaintiff would no longer be able to follow her uninjured career path post-morbid until retirement otherwise, the defendant suggests that contingencies of 5% in respect of pre-morbid past loss of earnings, 35% pre-morbid future loss of earnings and 20% post-morbid loss of earnings should be applied.
- [7] The plaintiff testified in support of her case and also called Dr Everd Jacobs as a witness. What follows hereunder is the summary of the evidence led in that regard.
- [8] The plaintiff is a qualified teacher. She grew up and also went to school in Bloemfontein. During her school years she also lived in Vryburg in the North West Province and later Aliwal-North in the Eastern Cape Province where her parents operated Wimpy businesses. Her family ultimately left South Africa and relocated Guernsey in the United Kingdom where the plaintiff obtained her Teaching Diploma in Child Care.
- [9] She began her employment career in 2004 Guernsey where she worked as a pre-school teacher until her Visa expired in 2006. She then returned to South Africa and continued to work as a pre-school teacher from 2006 to 2007 thereafter she worked as a Nanny taking care of a disabled seven-year old child until she met her accident in January 2010. She was 23 years old at that time.

- [10] As a result of the injuries, she was hospitalized and underwent various surgeries to repair the fractures and debridement of the lacerated wounds. She only returned to her work after three (3) months but she subsequently resigned and went to work at a pre-school Tjokkertjie Paradys as a teacher. About a year and two months later she bought the business (Tjokkertjie Paradys) with her then husband.
- [11] In 2015 she relocated to Jeffreys Bay after suffering a miscarriage followed by a divorce. Whilst in Jeffreys Bay she decided to return to Guernsey to be with her parents who owned a restaurant, Blue Diamond / Fruit Export Company Ltd (Blue Diamond).
- [12] In order to obtain a working Visa in Guernsey she was required to have a qualification or experience and a job offer from a prospective employer in Guernsey as a result, she decided to pursue a career in hospitality. She also obtained a job as a waitress at Nina's restaurant with effect March 2016. A year later she was promoted to manager and during February 2019 she resigned and relocated to Guernsey where she was promptly hired by her parents as a waitress at their Blue Diamond restaurant from April 2019. Five months later she was promoted to manager.
- [13] It was her testimony that Blue Diamond restaurant was a busy restaurant. She worked very long hours from 8am to 5pm, mostly six (6) days a week and by the end of the day she would be in severe pain emanating from the injured hip and the knee. The hip pain was constant and became worse when lying down and her feet swelled up as she spent long hours on her feet as a result, she resigned from Blue Diamond in July 2021. She was immediately offered a job as a trainee client executive at an insurance company Artex Risk Solutions.

- [14] She has been employed at Artex Risk Solutions since 02 August 2021. Her duties are mainly deskbound and this has helped in managing the pain. Sitting for long hours still poses a challenge for her back issues but her employers were generous and have provided her with a special chair to counter the adverse effects.
- [15] Dr Jacobs is an industrial psychologist. His initial and addendum reports dated 15 May 2015 and 14 March 2022 respectively are based on the information he received from the plaintiff and the other relative experts namely: the orthopaedic surgeon Dr LF Oelofse, the occupational therapist Ms H. Meyer and the forensic accountant Mr N. du Plessis.
- [16] The salient parts of his evidence is: at the time the information was collated the plaintiff was still self-employed as manager of her pre-school business Tjokkertjie Paradys and earning about R10 000.00 per month. The plaintiff did not inform the experts that she intended to deviate from her career as an educator and venture into hospitality. She had explained that her duties then involved amongst others, observing and monitoring the children's play activities, reading and playing games with the children, preparing and serving their meals, cleaning for and after them, driving to pick them up from school, shopping for school supplies and also management of the business which includes supervising the teachers, domestic workers and attending the businesses finances and all these responsibilities are physically demanding.
- [17] It was his testimony that based on the afore-mentioned information, all the experts opined that had the accident not occurred the plaintiff would have probably continued to work as a pre-school teacher/ manager until the age of 65. Pursuant to the accident, the plaintiff can still participate in the labour market however due to the injuries her ability to perform all the physical tasks that her careers demand has been curtailed. In addition to the physical deficits, the plaintiff has also been left with psychological distress as she now has a fear of driving. The experts agree that the plaintiff "must not be allowed

to do physical labour again” but rather be accommodated in a more sedentary working environment.

- [18] He concluded by stating that the plaintiff’s claim loss of income only materialized in August 2021 when she changed to a sedentary working environment at Artex Risk Solutions. She has sustained a loss of income in the sum of R7 600.00 after tax which represents the current monthly loss in Rand and it must be calculated monthly from August 2021 to 14 September 2014 which represents a 10 years’ early retirement duly adjusted for inflation and contingencies.
- [19] Under cross-examination it was put to the plaintiff that the main reason for selling her business and move to Jeffreys Bay was because of the miscarriage and the divorce. Her response was that those factors played a “small part.” She was also questioned about her former spouse’ financial contributions into their erstwhile business whilst Dr Jacobs was criticized for having modified his findings in the addendum. His explanation was that he was entitled to amend his initial report as and when new facts came to light.
- [20] That was in short the plaintiff’s evidence, in addition to the viva voce evidence, documentary evidence was handed in by concurrence of both parties and marked as Exhibits: the plaintiff’s proof employment (payslips) and qualifications (**Exhibit “A”**). The reports by the orthopaedic surgeon (**Exhibit “B”**), the occupational therapist (**Exhibit “C”**), the forensic accountant (**Exhibit “D”**) and the industrial psychologist (**Exhibit “E”**).
- [21] The defendant closed its case without calling any witnesses.

[22] On the facts germane to this matter, the fact that the plaintiff's disability has resulted in patrimonial loss as envisaged in *Rudman v Road Accident Fund*¹ is indisputable.

[23] Contingencies deductions are assessed at the discretion of the court taking into consideration that each case must be treated on its own unique facts including a wide range of factors which:

*"...include such matters as the possibility the plaintiff may in the result have less than a normal expectation of life; ...and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending on the circumstances of each case... The rate of discount account of course be assessed on any logical basis: The assessment must be largely arbitrary and must depend upon the trial judge's impression of the case."*²

[24] In this matter, no evidence has been tendered by the defendant to gainsay the plaintiff's version regarding the calculations of her loss of earnings as well the income for early retirement as postulated by her forensic accountant in concurrence with Dr Jacobs.

[25] Having regard to the facts of this matter and the entirety of the plaintiff's undisputed evidence I am satisfied that the contingencies suggested by the plaintiff would fair and equitable under these circumstances.

[26] It was argued by counsel for the plaintiff that upon the determination of the contingencies the matter must be referred back to the actuary for recalculation. Relying on *Bain & Others v the D'Ambrosi*,³ counsel averred

¹2003(2) SA 234 (SCA); *Road Accident Fund v Kerridge* 2019(2) SA 233 (SCA).

² *Southern Insurance Association v Bailey* NO 1984 (1) SA 98 AD page 99E-G.

³ 2010 (2) SA 539 (SCA).

that that since the loss of earnings accrued in Guernsey in the United Kingdom, the conversion of those earnings ought to be calculated based on the rate of her Guernsey income. I agree.

[27] In the circumstances, I make the following order:

1. The plaintiff's claim for past and future loss of income is referred to Munro Forensic Actuaries to be calculated within twenty (20) days of the date of this order using the latest exchange rate and applying the following contingency deductions:
 - 1.1. Pre-morbid past loss of earnings: 5%
 - 1.2. Pre-morbid future loss of earnings: 15. %
 - 1.3. Post-morbid future loss of earnings: 30%
2. Upon receipt of the actuarial calculations the parties are to approach the court for the actuarial calculation to be made an order of court.
3. The defendant shall pay the costs including the reasonable qualifying and reservation fees and expenses (**if any**) of the following experts:
 - 3.1. Dr JJ Schutte (general practitioner)
 - 3.2. Dr FP du Plessis (orthopaedic surgeon)
 - 3.3. Drs LF Oelofse and MB Deacon (orthopaedic surgeons)

- 3.4. Van Dyk & Partners (diagnostic radiologist)
- 3.5. Burger Radiologist (diagnostic radiologist)
- 3.6. M Joubert (occupational therapist)
- 3.7. H Meyer (occupational therapist)
- 3.8. N du Plessis (forensic accountant)
- 3.9. Dr EJ Jacobs (industrial psychologist)
- 3.10. Munro Forensic Actuaries

4. Payment of the taxed or agreed costs shall be made within 180 days of taxation into the trust account of the plaintiff's attorney:

Honey Attorneys	-	Trust Account
Bank	-	Nedbank, Maitland street BLOEMFONTEIN
Branch code	-	110 234 00
Account No.	-	[...]
Reference	-	HL Buchner/vch/J02670

5. The plaintiff's claim for past medical and hospital expenses is postponed to the pre-trial roll of **27 November 2023**.

N.S. DANISO, J

APPEARANCES:

Counsel on behalf of the plaintiff:

Adv. P.J.J. Zietsman SC

Instructed by:

HONEY ATTORNEYS

BLOEMFONTEIN

Counsel on behalf of the defendant:
Instructed by:

Ms. C. Bornman
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