

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

Case No: 6468/2017

In the matter between:

MANDISA BEVERLY GWIBA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

CORAM: MPAMA AJ

HEARD ON: 11 OCTOBER 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 11:00 on 03 March 2023.

[1] The plaintiff was on 29 March 2015 involved in a motor vehicle accident at Reitz when a motor vehicle collided with her at work in a road construction site. As a result of the accident she sustained some bodily injuries and instituted this claim under the following heads:

- (i) Future medical expenses

- (ii) Past and future loss of earnings
- (iii) General damages

- [2] The RAF conceded liability for 100% of plaintiff's proven damages.
- [3] The parties have settled general damages at an amount of R 400 000.00 and the defendant further made an undertaking for future medical expenses in terms of section 17(4) of Act 56 of 1996. The issues which remained unresolved between the parties are that of plaintiff's past and future loss of income.
- [4] By agreement between the parties experts' reports were presented by way of affidavits in terms of Rule 38(2) of the Uniform Rules. In addition the plaintiff testified in support of her claim and the defendant led no evidence.
- [5] The plaintiff's evidence is as follows: She is 36 years old, married and a mother of two children. Her highest level of education is Grade 12 obtained in 2007 at Thabo Thokoza Secondary School. She furthered her studies and obtained a certificate in computer studies. On 20 February 2015 she was hired by Robs Investment Holdings as a traffic controller in a roadwork site at Reitz earning a monthly salary of R 5 476.65. As a traffic controller she was required to stand, walk and bend a lot whilst performing her duties. She was involved in an accident on 29 March 2015, taken to hospital and detained for one day. The plaintiff sustained some injuries on the spinal cord. As a result of the accident she did not return back to work as she felt that she would not be able to cope with her physical duties. She is currently unemployed; however for a living she braids hair and charges R 80.00 per client. On average she braids three clients a week. Before the job at Robs Holdings she was employed as a seasonal farm worker for six months in 2013, general assistant at a local municipality, a cook at school and a domestic worker. She still experiences some back pain and treats such with painkillers.

[6] During cross examination the plaintiff testified that she did not pass Grade 12. She admitted that she did not disclose to any of the doctors who examined her that she once worked as a domestic worker. Her reasons for doing so were that this was a casual job, her services were only required once a week and she was only employed from December 2012 to November 2013. She explained that it was in 2010 when she was employed as a seasonal worker at a farm in Bethlehem, in 2011 as a cook at a local school, in 2012 volunteered at a local municipality for 5 months, in 2012 - 2013 as a domestic worker and in 2014 - 2015 as a traffic controller. She further testified that she assumed duties in February 2015 at Robs Holdings and got involved in an accident in March 2015. Her employment contract there was for a year. When she was questioned on why she did not go back to work after the accident she said there was someone already employed in her position. The plaintiff later said she did not return to work because of her injuries. It also transpired during cross examination that Robs Holdings closed down the construction site few months after the accident. She conceded that she would be without employment even if she was not involved in an accident.

EXPERT REPORTS

[7] There were a number of medico-legal experts who assessed the plaintiff and prepared some reports. The following reports were handed in on behalf of the plaintiff and they form part of evidence before this court. I will now refer to certain salient features of these reports.

i) Dr. J.J. Schutte: Independent Medical Examiner

He completed a RAF 4. He noted that the plaintiff sustained injuries with a potential of causing serious long-term impairment or loss of a body function.

ii) Dr. L.F. Oelofetse: Orthopaedic Surgeon

He examined the plaintiff on 15 February 2017. The plaintiff at the time of examination reported that she was experiencing discomfort and pain in her mid and lower spine. This resulted in a difficulty to perform tasks

requiring bending forward like putting on socks and shoes, driving for long distances and sitting or walking over long periods of time. He opined that there is radiological evidence of thoracic spine – profound local kyphosis with involvement of adjacent level discs and lumbar spine-early asymmetry of L 1-2 disc. He further opined that the plaintiff's condition may require surgery in future and that she will never be able to do physical labour. His conclusions were that the plaintiff ought to be accommodated in a strict sedentary/light duty position as determined by the occupational therapist and must not be allowed to do physical labour.

iii) Ms. K. van den Bergh: Occupational Therapist

Ms van der Bergh examined the plaintiff on 8 May 2018. She commented that the plaintiff had difficulty in dynamic positions like crouching and kneeling due to pain, stiffness and discomfort in her back. She opined that the plaintiff has the ability to handle weight associated with sedentary work only with frequent breaks being allowed from sitting.

iv) Dr. E.J. Jacobs: Industrial Psychologist

He examined the plaintiff on 8 May 2018. The plaintiff disclosed to him her work experience as follows: She was a packer at Maluti Apple Farm on a contract of 6 months, a chef at a primary school from 2011 - 2012, an apple picker in 2013 and a traffic controller at Robs Holdings and has never worked after the accident. He opined that the plaintiff will not be able to work in any job exceeding sedentary demands, she is not fully suited for physical work as she has sitting capacity restrictions and can only work limited hours. He concluded that since the plaintiff is unemployed she will struggle to find any form of employment due to limitations caused by the accident.

v) Actuarial report by Munro Forensic Actuaries

The actuary did actuarial calculations for past and future loss of income. On his executive summary he mentioned that the information

provided indicated that the claimant was unable to return to work and expected to remain unemployable in future. He based his calculations on the fact that the plaintiff earned R 5 477.00 a month at the time of the accident and would have earned until the retirement age of 65. Since the accident the plaintiff had earned no income. According to the calculations the plaintiff suffered a loss of R 1 931 190.00 having applied 25% contingency deductions.

- [8] Both parties are in agreement that the plaintiff did suffer some past and future loss of income but strongly disagree over contingency deductions to be applied.
- [9] The plaintiff's counsel referred the court to the case of **COOTZEE V THE ROAD ACCIDENT FUND** [2021] ZAFSHC 193. It was submitted that in consideration of the age of the plaintiff, a 5% deduction in past loss of earnings and a 20% deduction should be applied for future loss of earnings.
- [10] The defendant's attorney argued that a higher contingency deduction should be applied. The court was referred to the following judgments; **AA MUTUAL INSURANCE ASSOCIATION LTD V MAQULA** 1978(1) SA 805(A), **GWAXULA V RAF** (09/41896) [2013] ZAGPJHC 240. It was submitted that due to the nature of the plaintiff's employment (sporadic) it will be proper and correct to provide for a contingency deduction of 50% in respect of past and future loss of income.
- [11] It is trite that the plaintiff must prove the extent of her loss and damages on a balance of probabilities. With regard to loss of income the plaintiff must adduce evidence of her income in order to enable the court to assess her loss of past and future earnings. In addition the plaintiff must prove the amount of income she will reasonably lose in the future as a result of the injury. The following was stated in **MVUNDLE V RAF** (63500/2009) [2012] ZAGPPHC 57(17 April 2012) an unreported North Gauteng High Court judgment case:

“It is trite that the damages for loss of income can be granted where a person has in fact suffered or will suffer a true patrimonial loss in that his or her employment situation has manifestly changed. The plaintiff’s performance can also influence his or her current job and /or be limited in a number and quality of his or her choices should he or she decides to find other employment”.

- [12] In order to determine a plaintiff’s claim for future loss of income the court must compare what the plaintiff would have earned if it was not for the accident with what she would likely have earned after the accident. In **SOUTHERN INSURANCE ASSOCIATION LTD V BAILEY NO 1984(1) SA 98 AD** it was said:

“Any enquiry into damages for loss of earning capacity is to its nature speculative, because it involves a prediction as to the future without the benefit of crystal balls, soothsayers, augers 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 a loss”.

- [13] The plaintiff testified in support of her claim. She gave contradicting versions as to why she did not return to work after the accident. She conceded that at times she would be without employment. The company that she was working for at the time of the accident closed down shortly after the accident and she rightfully so, conceded that she would find herself unemployed even if she was not involved in an accident. The plaintiff had only worked for a month when she was involved in an accident. It is not clear whether she was employed or not shortly before assuming duties at Robs Holdings as she contradicted herself regarding when she was employed at Robs Holdings.

- [14] When the plaintiff was quizzed on why she did not return to work after the accident she provided different reasons for not returning back to work. The plaintiff was asked to explain why she did not disclose to any of the doctors who examined her that she had worked as a domestic worker. She could not provide any valid reason for her failure to disclose this information. The evidence of the complainant reveals that she was doing sporadic work and she has never been hired permanently in her lifetime.

- [15] When making an order for future losses, it is expected from the court to make use of contingency deductions to provide for any future circumstances which may occur but cannot be predicted with precision.
- [16] Our courts have accepted that the extent of the period over which a plaintiff's income has to be established has a direct influence on the extent to which contingencies have to be accounted for. The longer the period over which unforeseen contingencies can have an influence over the accuracy of the amount deemed to be the probable income of the plaintiff, the higher the contingencies have to be applied.
- [17] The actuarial calculations are not binding to this court as the court has a wide discretion to award what it considers to be fair and reasonable compensation.
- [18] The actuarial calculations as they stand are based on a scenario that the plaintiff will be unemployable and without any form of income. It will be incorrect to postulate a zero income for the plaintiff as the plaintiff can do less heavy duties and currently she is able to earn some income braiding hair. Generally hair braiding involves a lot of physical movement, one is expected to scrunch or crouch or stand up when braiding hair. The plaintiff can afford to braid three clients a week, an indication that she can still perform some physical duties.
- [19] The company she worked for at the time of the accident was closed just few months after the accident. The plaintiff would have found herself without a job even if she was not involved in an accident. The kind of work that the plaintiff did before her employment at Robs Holdings is unclear. There is uncontroverted evidence that the plaintiff at certain periods was without any form of employment.
- [20] Having considered the evidence and submissions made by both parties I am in agreement with the defendant's attorney that the application of a 50% contingency is appropriate in the circumstances of the plaintiff after

consideration of plaintiff's precarious employment. It is a known factor that our country has experienced an economic meltdown which was exacerbated by COVID 19. This would definitely impact on plaintiff's chances of finding another job as she would be rendered unemployed when Robs Holdings closed down.

[21] I accordingly make the following order:

1. The defendant shall pay to the plaintiff the amount of R 400 000.00 in respect of general damages.
2. The defendant shall pay to the plaintiff the amount of R 999 280.00 in relation to the plaintiff's past and future loss of earnings.
3. The payments shall be made by the defendant to the plaintiff within 180 days from the date of this order into the trust account of the plaintiff's attorneys failing which the defendant shall become liable to pay interest a tempore morae on the capital amount aforesaid at a rate of 7% per annum from the date of this order to date of final payment.
4. The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4) of Act 56 of 1996 for payment of 100% of the for the future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of a service or supply of goods to her, arising from the injuries sustained by her in the motor vehicle collision on 29 March 2015.
5. The defendant shall pay the plaintiff's taxed or agreed party and party costs until the date of this order including costs of a counsel. Such costs shall include the following:
 - 5.1 the reasonable qualifying fees of the following experts:
 - 5.1.1 Dr. J.J. Schutte
 - 5.1.2 Dr. L.F. Oelofse

- 5.1.3 Drs. Van Dyk and Partners
- 5.1.4 Ms. K. van der Berg
- 5.1.5 Dr. E.J. Jacobs
- 5.1.6 Munro Forensic Actuaries

6. The payments are to be made into the following account:
HONEY ATTORNEYS TRUST ACCOUNT
NEDBANK MAITLAND STREET BRANCH, BLOEMFONTEIN
ACCOUNT NUMBER: [...]
BRANCH CODE: 11023400
REFERENCE: Y VOSLOO/I26237

MPAMA, AJ

On behalf of the plaintiff: Adv. H.E. de La Rey
Instructed by: Messrs Honey Attorneys
Bloemfontein

On behalf of the defendant: Ms J. Gouws
Instructed by: Office of the State Attorneys
Bloemfontein