IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case Number: **14406/2018**

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

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SIGNATURE DATE

In the matter between:

VAN GREUNEN, SUEMARI LINDI Plaintiff

and

ROAD ACCIDENT FUND Defendant

Coram: Horn AJ

Heard: 8 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 14h00 on 9 May 2024.

JUDGMENT

HORN AJ

[1] The plaintiff sustained injuries in a motor vehicle collision on 29 July 2016. The question of the defendant's liability has been resolved on appeal to a Full Court of this Division in a judgment dated 30 November 2021. In terms of the order handed down by the Full Court, the defendant is liable to compensate the plaintiff for all her agreed or proven damages.

[2] The trial was set down to commence on 30 April 2024. The matter stood down until 7 May 2024, when it was allocated to me to commence on 8 May 2024.

[3] At commencement of the trial, the parties informed me that they had reached a settlement in respect of the issue of general damages in the amount of R600 000. The defendant had also agreed to provide the plaintiff with an undertaking in respect of future medical and related costs as contemplated in section 17(4) of the Road Accident Fund Act 56 of 1996.

[4] The parties confirmed that the facts set out in the expert reports filed on behalf of the plaintiff are common cause. The defendant also indicated that the opinions expressed by the plaintiff's experts are not in issue. Having considered the opinions so expressed and the nature of the plaintiff's injuries (discussed below), there is no reason why I should not accept those opinions. The matter was therefore argued on the agreed facts and on the opinions of the plaintiff's experts.

[5] Mr Mdlovu, for the defendant, confirmed that the only issue for determination is the appropriate contingency deduction to be made from the plaintiff's postulated post-accident earnings. The figures prior to the application of contingencies are

undisputed. In order to determine the appropriate post-accident contingency to apply, it is necessary to have regard to the plaintiff's injuries and the sequelae thereof.

Orthopaedic surgeon

[6] Dr Williams, the orthopaedic surgeon retained by the plaintiff, confirms that the plaintiff sustained fractures of her right femur and her pelvis. The femur fracture was repaired surgically by internal fixation. X-ray imagining shows a pin the length of the femur, affixed with screws to either end. The femur has become infected and the infection remains active to this day. Dr Williams notes that the implants have loosened and that there is degeneration of the right hip joint.

[7] According to Dr Williams, the infection of the right femur will not resolve without surgery and may persist, even with appropriate treatment. The envisaged treatment will be complex, prolonged and associated with a high risk of failure or complications.

[8] The plaintiff will almost certainly have to undergo a hip replacement at a relatively young age. She is currently 34 years old. Given the plaintiff's history of bone infection (of the fractured femur), the risk of complications or outright failure of the hip replacement will be substantial. In that event, the plaintiff may have to undergo excision arthroplasty of the hip, which is associated with serious physical disability.

[9] Even with a successful hip replacement, Dr Williams is of opinion that the condition and function of the hip joint will not be restored to normal or near

normal. Given the plaintiff's young age she is likely to have to undergo a revision of the total hip replacement at least once, but possibly more.

Occupational therapist

[10] The plaintiff's most recent assessment by the occupational therapist appointed by her, Ms Hunter, was done on 19 January 2024. The initial assessment was done during 2019. Ms Hunter records that, prior to the accident, the plaintiff completed a three year apprenticeship as a hair stylist. Thereafter, she worked as a nail technician. At the time of the accident, the plaintiff was employed as a waitress, working 12 hour shifts and serving approximately 20 tables. Post-accident, the plaintiff has been unemployed until April 2023, when she secured a position as cashier. She resigned after a few months as she found it difficult to cope. As stated, these facts are common cause.

[11] Ms Hunter notes that there has been little to no improvement in the plaintiff's functional ability between 2019 and 2024. She retains the capacity to perform work within the light category, but displays functional disability across multiple major areas of testing, including dynamic strength, positional tolerance, mobility tolerance and balance. The underlying factors affecting her performance are pain in the right hip, thigh and knee, reduced active range of motion in the right hip and knee and reduced muscle strength of the right leg.

[12] Although the positions of waitress, hair stylist and nail technician fall in the light category of work, the plaintiff is no longer suited to these positions. This is so, says Ms Hunter, because of the mobility demands of these positions. They fall outside the plaintiff's positional and mobility tolerance, such as prolonged

standing, sitting and walking. This is also true of the position of cashier which the plaintiff occupied for a few months during 2023.

[13] Ms Hunter therefore concludes that the plaintiff's occupational choices have been significantly curtailed. She is limited to light work with reduced sitting and walking demands.

Industrial psychologist

[14] The industrial psychologist appointed by the plaintiff, Mr Oosthuizen, provided an updated report pursuant to a further assessment during February 2024. He confirms that he has been privy to the reports of Dr Williams and Ms Hunter. At the time of the accident, the plaintiff earned approximately R4 000 per month from gratuities. She did not earn a basic salary.

[15] Mr Oosthuizen records that the plaintiff's highest educational qualification is grade 10. He confirms the plaintiff's vocational history as set out by Ms Hunter.

[16] Considering the plaintiff's educational background, occupational experience and general skills and abilities, Mr Oosthuizen's view is that, but for the accident, the plaintiff would have continued working as a waitress or may have entered into employment in a position suited to her experience, such as hair stylist or nail technician. For purposes of calculating the plaintiff's pre-accident earnings, Mr Oosthuizen suggests that the plaintiff's actual earnings at the accident date be used as a starting point. Thereafter, it is suggested her career would have progressed evenly, until the age of 45, to somewhere between the median and

upper brackets for semi-skilled workers in the non-corporate sector. From that point on, inflationary increases are to apply until retirement at age 65.

[17] Post-accident, Mr Oosthuizen prognosticates a different picture, taking into account the plaintiff's accident related difficulties. She presents with significant, long-term disabilities and her career choices have been significantly curtailed. Mr Oosthuizen opines that the plaintiff will enter the open labour market in January 2025 at the median bracket for semi-skilled workers in the non-corporate sector. Thereafter, she will receive inflationary increases until retirement age at 65.

[18] In my view, it is hard to fault Mr Oosthuizen's approach. It is not overly generous and, in my view, in keeping with the facts. The suggested career progression, but for the accident is modest. The only difference post-accident is that the plaintiff will not progress from the median to upper brackets for semi-skilled workers in the non-corporate sector. This, in my view, is entirely realistic.

Actuarial calculation

[19] An actuarial calculation of the plaintiff's loss of earnings was prepared by Mr Human, a consulting actuary. He did so on the basis suggested in Mr Oosthuizen's most recent report.

[20] Mr Human applied a contingency deduction of 5% to past earnings before and after the accident. This is uncontroversial, as conceded by Mr Mdlovu for the defendant. The application of 15% to the plaintiff's uninjured future earnings is, considering her age, also appropriate.

[21] As recorded previously in this judgment, the only bone of contention is the contingency percentage to be applied to the plaintiff's future, injured earnings. Mr Mdlovu, contended for a 20% deduction on this score. Mr Naude, for the plaintiff, argued that the contingency deduction to post-accident future earnings should be significantly higher. He submitted that a 45% deduction is appropriate and more in line with the facts.

[22] When it comes to the assessment of future loss of earnings, a trial court has two options open to it. It can rely on actuarial calculations, which depends on the soundness of assumptions based on evidence. The other option is to make a round estimate of an amount that seems reasonable. The latter approach amounts to no more than guesswork.[1]

[23] Here, the facts on which the actuarial calculation is based are common cause. Pre-accident, the plaintiff had already progressed some way into a career path from which acceptable assumptions can be made, which shed some light on the future uncertainties. In my view, the former of the two approaches referred to above is preferable in the present case. In this regard, it has been held that:

"Where the method of actuarial computation is adopted, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations". He has "a large discretion to award what he considers right" (per HOLMES JA in *Legal Assurance Co Ltd v Botes* 1963 (1) SA 608 (A) at 614F). One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that 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 upon the circumstances of the case. See *Van der*

[1] *Southern Insurance Association Ltd v Bailey NO* 1984 91) SA 98 (A) at 113H

Plaats v South African Mutual Fire and General Insurance Co Ltd 1980 (3) SA 105 (A) at 114 - 5. The rate of the discount cannot 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] The reality is that the plaintiff's condition has not improved between 2019 and 2024, as reported by Ms Hunter. She has suffered serious, permanent disability. Unfortunately for the plaintiff, it may not end there. Dr Williams foresees complex treatment in future with a high risk of failure or complications. The plaintiff will be out of action for significant periods of time when she undergoes the envisaged treatment. She may well experience periods of unemployment, which she would not otherwise have had to endure. I therefore agree with Mr Nause's submission that 45% is an appropriate contingency deduction to be applied to the calculation of the plaintiff's post-accident future earnings.

[25] The amount to be awarded for loss of earnings, on the basis provided by Mr Oosthuizen as recorded above and calculated by Mr Human (applying a 45% contingency deduction to future post-accident earnings) amounts to R1 821 227.

Costs

[26] As noted earlier in this judgment, the matter was allocated for hearing on 30 April 2024. Due to the unavailability of judges to hear the matter, it was only allocated to me on the afternoon of 7 May 2024. I indicated to the parties that the hearing would commence on the morning of 8 May 2024. Plaintiff's counsel argued for costs on trial on the court days between 30 April 2024 and 7 May 2024, both days inclusive. In my view, making such an order will unduly interfere with the

[2] *Southern Insurance Association Ltd v Bailey NO supra* at 116G-H

taxing mater's discretion. I record that the parties had to keep themselves available on short notice to commence with the trial at any stage after 30 April 2024.

[27] Plaintiff's counsel did not argue for costs to be awarded on a scale higher than scale A, which is the default position under rule 67A(3)(c) of the Uniform Rules of Court.

[28] Mr Mdlovu has confirmed that the remainder of the draft order pertaining to costs has been agreed to by the parties.

Date of payment

[29] Mr Mdlovu submitted that I should order that the plaintiff's judgment debt in terms of this judgment should only be payable in 180 days from the date of the order. This was motivated by the defendant's internal processes to be followed before payment can be processed and made.

[30] I see no rational basis to accede to Mr Mdlovu's request. A judgment debt is payable on the date of the judgment.[3] This is also the case with the present defendant. Section 17(3)(a) of the Road Accident Fund Act, 1996 does not change this position. It merely provides that interest on the judgment debt shall not accrue unless 14 days have elapsed from the date of the court's relevant order. Mr Naude has indicated that the plaintiff has benevolently agreed to postpone the payment date by 30 days. It will be so ordered.

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[3] *Gereral Accident Versekeringsmaatskappy SA Bpk v Bailey NO* 1988 (4) SA 353 (A) at 357H

[31] I am aware of the order of Van Nieuwenhuizen J in the Gauteng Division, Pretoria, which was handed down on 17 August 2023 under case number 58145/2020 in the matter between *Road Accident Fund and The Legal Practice Council and Others*. In terms of that order, writs of execution were suspended in respect of judgments already granted not more than 180 days ago, until the judgments in question have reached a maturity date of 180 days. I was told from the bar the order had been extended until the hearing of a further application in due course.

[32] It is not necessary to decide whether the aforesaid order also applies to judgments granted against the defendant thereafter. This is so because the order merely safeguards the defendant from execution measures within the first 180 days after a judgment had been granted. It does not mean that the judgment debt is not payable.

Conclusion

[33] Mr Naude handed up a draft order and contended that I should make an order in those terms. Mr Mdlovu, for the defendant, took issue with the amount to be awarded in respect of future loss of earnings, the costs in respect of waiting time between 30 April 2024 and 8 May 2024 and the time when the judgment debt will become payable. The remainder of the draft order was by agreement between the parties. I have dealt with Mr Mdlovu's concerns in this judgment.

[34] The order that I make embodies what has been agreed to between the parties and my findings on the issues in dispute between them. In the result, I make the following order:

1. The Defendant shall pay to the Plaintiff the capital amount of R2 421 277, comprising R600 000 in respect of general damages and R 1 821 227 in respect of past and future loss of earnings.

2. The aforesaid amounts are payable with 30 days from date of this order into the trust account of Leon JJ van Rensburg Attorneys, namely:

Account Holder:	Leon J J van Rensburg
Bank:	ABSA
Branch:	President, Germiston
Account number:	250 492 219
Branch code:	334 542

3. The Defendant shall be liable for interest on the aforesaid amounts at the rate of 11,75% p.a. calculated from 15 calendar days of date of this order to date of payment, both days inclusive.

4. The Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, 96 of 1996, as amended for 100% of the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to her arising out of the injuries sustained by her in the motor vehicle collision which occurred on 29 July 2016 after such costs have been incurred and upon proof thereof.

5. The Defendant shall pay the Plaintiff’s taxed or agreed party costs on the High Court scale in accordance with the discretion of the Taxing Master, including, but not limited to:

5.1. The costs of counsel.

5.2. The costs of the attorney's consultations with the experts.

5.3. The costs of the experts *infra* in preparing their reports, addendum reports and statutory forms, in consulting with the attorney and/or counsel as well as their preparation, reservation and qualifying fees, if any:

5.3.1. Dr. W.E. Williams, Orthopaedic Surgeon;

5.3.2. Robyn Hunter, Occupational Therapist;

5.3.3. Bernard Oosthuizen, Industrial Psychologist; and

5.3.4. PG Human Actuaries

6. In the event that costs are not agreed, the Plaintiff shall serve a notice of taxation on the defendant. The plaintiff shall allow the defendant 14 calendar days to make payment of the taxed or agreed costs.

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N J HORN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 8 May 2024

Date of judgment: 9 May 2024

Counsel for the Plaintiff: W Naude

Instructed by Leon J J van Rensburg Attorneys

Counsel for the Defendant: E Mdlovu

Instructed by the State Attorney