

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED.

CASE NO.: 68974/13

16/2/2018

In the matter between:

HEIDI CORNELIUS

Plaintiff

versus

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MPHAHLELE J

[1] The Plaintiff was injured in a motor-vehicle accident that took place on 22 February 2012. At the time of the accident the plaintiff was the driver of the motor-vehicle bearing the registration numbers and letters [....].

[2] The plaintiff was born on 14 April 1977. The plaintiff was 34 years old at the time of the accident.

[3] According to the available documentation, she sustained the following injuries:

Right subclavian artery injury with aneurism formation and resultant stent surgery with residual symptoms

Head injury (the neurologist diagnosed a severe brain injury with damage in both frontal lobes)

Pelvis fracture

Nasal fracture

Lung contusion

[4] The plaintiff has a grade 12 qualification as well as a National Tourism and Travel Diploma. At the time of the accident, the plaintiff was an owner and manager of a creche / nursery school.

[5] Regarding the post-accident employment, the plaintiff informed Ms. Meyer (the occupational therapist) that she did not return to the creche, although still owned by her, reportedly until May 2012. During this time, she hired additional helpers to continue with the classes and management of the creche and had no additional income (due to hiring additional help). She then returned to the creche, however only for one week - emotionally and physically this was too much for her to handle and she decided not to continue with the creche. She gave away the creche at the end of 2012.

[6] In 2013 she started working at her husband's company, viz Stone Library Flooring (Pty) Ltd. She reported to Ms. Meyer in the capacity of internet marketing and to Ms. van Wyk she reported that she worked in telephone sales.

[7] In 2013, she was sympathetically employed by Stone Library Flooring (Pty) Ltd, in which her spouse is a General Manager. Her spouse shares the profit in the company with one Mr de Beer.

[8] The parties have agreed that the defendant would be liable for 100% of the plaintiff's proven damages.

[9] The parties have further agreed that the defendant is liable for:-

- General damages in the sum of R900 000-00;

- Past medical expenses (to be separated); and
- An undertaking in terms of section 17(4)(a) of Act 56 of 1996 for payment 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 in relation to the injuries sustained by the plaintiff in the motor vehicle accident that occurred on 22 February 2012, to compensate the plaintiff in respect of the said costs after the costs have been incurred and upon proof thereof.

[10] The only outstanding issue is the past and future loss of income. The main issue is whether or not the income earned by the plaintiff from the company where her husband is employed and shares profit should be regarded as sympathetic employment and is to be disregarded for purposes of calculating the loss.

[11] The defendant admits the contents of the reports of the following expert reports of the plaintiff:

- Dr Callaghan, an ear nose and throat specialist;
- Dr Cremer, a vascular surgeon;
- Dr K D Rosman, a neurologist;
- C Hearn, a clinical psychologist; and
- P de Bruyn, an industrial psychologist (including the correctness of the collateral information save for the correctness of the income of R10 000-00 per month generated from the nursery school).

[12] The parties agree to the facts and opinions set out in the joint minute of the occupational therapists Ms H Meyer and Ms D van Wyk dated 12 January 2017.

[13] According to Ms van Wyk the plaintiff, is suited for sedentary, light and occasional medium work demands. she further notes that her general mobility and physical endurance will remain affected towards static postures, or activities

below waist level.

[14] According to her assessment findings, Ms Meyer is of the opinion that the plaintiff presents with the physical capacity for sedentary to light work. Note is however taken of her decreased tolerance for sitting. During the evaluation she shifted in her seat frequently and requested a standing break after 40 minutes of sitting - due to lower back symptoms. Therefore, sitting is restricted to occasional performance and within a work environment rest breaks to alternate postures should be allowed. She would further also benefit from ergonomic implementations. Ms van Wyk agrees with these findings.

[15] Ms Meyer and Ms van Wyk further agree that:-

- The plaintiff will not be able to compete fairly in the open labour market.
- The plaintiff's current work demands are mostly sedentary of nature and that she is accommodated and sympathetically employed by her husband. She can take regular breaks and determine her own work speed. She also does not work in a full day capacity. Therefore, she can cope with her current work demands.

[16] Jan Benjamin Cornelius, the husband to the plaintiff, testified that after the accident the plaintiff could not cope with the running of the creche. She used to derive an income of R10 000-00 from the creche. Plaintiff is now employed in his company in a marketing position. She is earning R28 000-00 which is ultimately deducted from his share of the profit. He shares profit in that company with one Mr de Beer. Any person holding such a position in marketing would be paid R5 000-00. Nevertheless, she does not possess the required skill for the position held. She cannot even prepare quotations on her own. She is doing very little for the company which is not even worth the R8 000-00. The value of the work she is performing can be estimated R2 000-00.

[17] Ms Karen Kotze, the industrial psychologist opines that the plaintiff's career prospects and associated likely earnings have been truncated to a profound degree by the *sequelae* of the injuries sustained in the accident. In future, should she forfeit her current sympathetic employment, her career

prospects would be nullified by the *sequelae* of the injuries sustained in the accident. In this case, a total loss of earnings is foreseen.

[18] In *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 (2) SA 146 (A) it was held that when an employee was paid purely on compassionate grounds at a time when he could contribute nothing to the business, such salary is not taken into account when dealing with the plaintiff's claim for loss of earnings.

[19] Accordingly, and on what is before me, I must conclude that the plaintiff is paid purely on the basis of sympathetic employment and the income earned by the plaintiff from the company where her husband is employed and shares profit is to be disregarded for purposes of calculating the loss.

[20] The defendant's second point was the failure by the plaintiff to produce any evidence of past earnings. This is brought about by the unavailability of any records pertaining to plaintiff's earnings. According to the industrial psychologist, for purposes of quantification of the claim, the plaintiff's likely pre-accident earnings potential should be used as a baseline. At the time of the accident, the plaintiff reportedly derived an income of R10 000-00 per month from the creche. The plaintiff and her husband (Cornelius) are the only source of information in this regard. Under the circumstances, the industrial psychologist opined that the most practical approach to project the plaintiff's potential earning capacity would be to follow a generic model, such as the Patterson Job Evaluation System. I agree with the approach adopted by the industrial psychologist moreover the plaintiff's qualifications are not placed in dispute. Given the plaintiff's age, the industrial psychologist opines that the plaintiff could probably have earned an income in line with Patterson Grade C1 / C2 (median, basic salary) and then advanced to Patterson Grade C3 / C4 (median, basic salary) upon reaching her career ceiling at 45. According to the industrial psychologist, in the absence of obvious and/or significant medical conditions, it can be reasonably accepted that the plaintiff would likely have worked until the normal retirement age of 65, depending on her employment conditions, state of health and personal circumstances. The industrial psychologist further opined that in this scenario, since a direct future loss of earnings cannot be expressed in monetary terms, for purposes of quantification of the claim, a significantly higher contingency

deduction should be applied in respect of the truncation of the plaintiff's future career prospects and likely earnings.

[21] In my view, the contingency that must be applied in the first instance should be in the sum of 5%. In relation to the income, having regard to the accident, I agree with the industrial psychologist that a significantly higher contingency deduction should be applied. I intend applying a 30% contingency in this regard. In arriving at this conclusion I have taken into consideration mainly the speculative aspect of these calculations.

[22] Accordingly, an order is made in terms of the draft marked " X" .

S S MPHAHLELE
JUDGE OF THE HIGH COURT,
PRETORIA

FOR THE APPLICANT: Adv. G J Scheepers
INSTRUCTED BY: VZLR Inc.
FOR THE RESPONDENTS: Adv H J Strauss
INSTRUCTED BY: TM Chauke Attorneys

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case num: 68974 / 2013

Before the Honourable Justice

In the matter between:

H CORNELIUS

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

ORDER

BY AGREEMENT BETWEEN THE PARTIES, IT IS ORDERED THAT:

1.

1.1 The Defendant is liable to pay 100% (Hundred percent) of the Plaintiff's proven or agreed damages;

1.2 The Defendant is to pay the Plaintiff's attorneys the sum of **R. 5 757 589, (Five Seven Five Seven Five Eight Nine)** made up as follow:

General damages: R900 000.00

Past Loss of income/ earning potential: **R1 209 548**

Future Loss of income / earning potential: **R3 648 041;**

The Plaintiff s Attorney's trust account details are as follows:

ACCOUNT HOLDER:	VZLR INC
BRANCH:	ABSA BUSINESS BANK HILLCREST
BRANCH CODE:	632005
TYPE OF ACCOUNT:	TRUST ACCOUNT
ACCOUNT NUMBER:	[....]

- 1.3 In the event of default on the above payment, interest shall accrue on such outstanding amount at 10.25% (at the mora rate of 3.5% above the repo rate on the date on this order, as per the Prescribe Rate of Interest Act, 55 of 1975, as amended) per annum calculated from due date, as per the Road Accident Fund Act, until the date of payment.

2.

- 2.1 The Defendant shall furnish the Plaintiff with an Undertaking, in terms of Section 17(4)(a) of Act 56 of 1996, in respect of future accommodation of the Plaintiff in a hospital or nursing home or treatment of or the rendering of a service or supplying of goods of a medical and non-medical nature to the Plaintiff (and after the costs have been incurred and upon submission of proof thereof) arising out of the injuries sustained in the collision which occurred on **22 February 2012**.
- 2.2 If the Defendant fails to furnish the undertaking to the Plaintiff within 30 (thirty) days of this order, the Defendant shall be held liable for the payment of the additional taxable party and party costs incurred to obtain the undertaking.

3.

The Defendant to pay the Plaintiff's taxed or agreed party and party cost, up to and including the trial dates of 30 January 2017 and 03 February 2017, in the above mentioned account, for the attorneys, which cost shall include, but not be limited to the following:

- 3.1 All reserved cost to be unreserved, if any;
- 3.2 The fees of Senior Junior Counsel;
- 3.3 The cost of obtaining all expert medico legal-, actuarial, and any other reports of an expert nature which were furnished to the Defendant and/or it's experts;
- 3.4 The reasonable taxable qualifying, preparation, reservation and attendance fees of all experts, including the cost of consultaiton fees with the legal teams, if any;
- 3.5 The reasonable traveling- and accommodation cost, if any, incurred in transporting the Plaintiff to all medico-legal appointments;
- 3.6 The reasonable cost for an interpreter's attendance at court and at the medico legal appointments for translation of information, if any.