

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

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

67403/2013

14/2/2018

In the matter between:

SALMONS TL

Plaintiff

And

RAF

Defendant

Date heard: 2 February 2018

Date delivered: 14 February 2018

JUDGEMENT

STRIJDOM AJ:

[1] This is an action for damages in terms of the Road Accident Fund Act 56 of 1996 as amended (the Act) pursuant to a motor vehicle collision on 25 December 2012. The plaintiff, then 20 years old, was a passenger in a vehicle which collided with another.

[2] The plaintiff sustained the following injuries:

- 2.1 Head injury with frontoparietal haemorrhagic contusion to the brain.
- 2.2 Degloving laceration vault of skull.
- 2.3 Ten centimetres laceration frontal forehead.
- 2.4 Mandible fracture on the left requiring an open reduction internal fixation.
- 2.5 Loose teeth

[3] The key question for determination is whether the plaintiff would, but for the accident, attained a degree or diploma.

[4] The defendant has conceded full liability for the plaintiffs proven damages. The plaintiffs general damages have been agreed upon in the amount of R500 000. With regard to future medical expenses the defendant has agreed to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Act. Accordingly the only issue for determination is the quantum for loss of earnings or earning capacity and contingency deduction.

[5] The parties agreed to the submission s of a number of expert reports as the only evidence to be adduced for purpose of quantification of the plaintiff's damages. Argument before me was directed at whether the plaintiff would have obtained a degree or diploma but for the accident.

[6] The following expert reports were obtained by the plaintiff:

- 6.1 Dr TP Moja (Neurosurgeon)
- 6.2 DT Preininger (Neuropsychologist)
- 6.3 Prof Seabi (Educational Psychologist)
- 6.4 Dr Pienaar (Plastic Surgeon)
- 6.5 Dr Ivan Marx (Dentist)
- 6.6 M du Plooy (Audiologist)
- 6.7 ProfTshifularo (Ear Nose & Throat Specialist)
- 6.8 Prof FJ Jacobs (Maxilla Facial and Oral Surgeon)
- 6.9 Dr Fredericks (Disability and Impairment Assessor)

6.10 Dr Sissison (Clinical Psychologist)

6.11 Megan Spavins (Occupational Therapist)

6.12 Jacobson Talmud Counselling (Industrial Psychologist)

6.13 Gerhard Jacobson (Actuary)

[7] The following expert reports were obtained by the defendant:

7.1 Dr NEM (Occupational Therapist)

7.2 Dr E Tromp (Clinical Psychologist)

7.3 Caro Cilliers (Industrial Psychologist)

Common Cause Facts

[8] The plaintiff obtained her national senior certificate with an endorsement decided towards a diploma in 2010. She aspired to qualify as a teacher and was planning to apply to study at Pentech , Cape Town in 2013. Her uncle and cousin or teachers played a significant role in influencing her career aspiration. She would have studied full-time with support from her father and bursaries. She was a cashier at the time of the accident.

[9] Dr Preininger a Neuropsychologist concluded that pre-morbidly the plaintiff feared well academically and there were no adverse factors evident in a biographical history that would have had a negative effect on her functioning and but for the accident the plaintiff estimated potential fell within the average range. In terms of her academic and vocational functioning her noted difficulties with concentration and focus would have a negative impact on her ability to study at a tertiary level. Furthermore her problems with verbal memory functioning would influences and retrieve information learned in the classroom contact.

[10] In her current work context it appears that her performance has been affected negatively by her neurocognitive changes rendered a vulnerable employee as a consequence of the accident.

[11] The defendant's expert, E Tromph a Neuropsychologist also concluded that the plaintiff suffers from fluctuating attention below average memory and

concentration below average auditory narrative memory, below average learning abilities and slowed psychomotor speed abilities.

[12] Prof Seabi, an Educational Psychologist is of the opinion that as a result of the accident the plaintiff has been left with cognitive and academic difficulties which include borderline verbal cognitive functioning with difficulties to sustained focus and retrieval information as well as slow psychomotor speed. If she were to pursue post matric qualification, she wouldn't be able to cope with the demands of diploma or certificate. Given the accident, it is unlikely that the plaintiff will be able to cope with the demands of a diploma or high certificate. Although she aspires to be a teacher she won't be able to cope with the demands of post matric qualification. Grade 12 will remain the highest level of education.

[13] The occupational therapists in the joint minutes agree that the probability of the plaintiffs functional capacity been permanently compromised with regards to ability to study and work as a teacher is high.

[14] The Industrial Psychologist - T Talmud postulates the following pre-morbid scenario:

14.1 She would have followed the same post morbid career to date.

14.2 Within three to five years from October 2017 she would have commenced a part- time diploma which she would have completed in three years on a part-time basis. This time frame allows sufficient time for her to save funds to commence and complete a part-time diploma

14.3 Within one or two years from completion of the diploma she would have secured employment earning a basic monthly salary in time with the Patterson B-4 median level. In the following year she would have received additional benefits earning a total annual package in time with the B-4 median level.

14.4 She would have reached her career ceiling level between the ages of 45 and 50 at which stage she would have been earning a total annual package in line with the Paterson C4/C5 median level.

14.5 Thereafter she would have received inflationary increases until retirement at age 65.

[15] In the post morbid scenario the expert is of the view that:

15.1 She will continue to work in her current capacity

15.2 She will reach her career ceiling between the ages of 45 and 50, earning a total package in line with the Peterson B2/B3 median level.

15.3 Thereafter she will receive annual inflationary increases until normal retirement at the age of 65.

[16] The actuary - G Jacobson calculated the pre- and post morbid income of the plaintiff as set out in the postulation of the industrial psychologist supra. He applied a 20% contingency to the value of the plaintiff's income having regard to the accident.

[17] The legal position relating to a claim for diminished earning capacity is trite. In *Santam Versekeringsmaatskappy Bpk v Byleveldt*¹ Rumph JA states the principle as follows:

"Die vermoensvermindering moet wees ten opsigte van iets wat op geld waardeerbaar is en sou insluit die vermindering veroorsaak deur 'n besering as gevolg waarvan die benadeelde nie meer enige inkomste lean verdien nie of alleen maar 'n laer inkomste verdien. Die verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik gemeet aan die standaard van verwagte inkomste, is 'n verlies van geskiktheid en nie 'n verlies van inkomste nie. "

[18] It was stated in *Prinsloo v RAF*²that:

" A person all-round capacity to earn money consist, inter alia of individuals talents, skill including his/her present position and plans for the future, and of cause, external factors over which a person has no control ... "

[19] The defendant is not in agreement with the plaintiff that the plaintiff would have pursued her studies to become a teacher. In the present matter, the dispute

¹ 1973 (2) SA 146 (A) at 150 B - D

revolves around the plaintiff's probable career path before or after the accident.

[20] In my view having considered all the common cause facts and expert opinions, it is highly probable that the plaintiff would have progressed to become a teacher or would have reached her educational plateau at diploma level. In my view the plaintiff's disability giving rise to a diminished earning incapacity was proved and that her incapacity constituted a loss which diminished her estate.

[21] Both parties agreed at the outset of the trial that the contents of the expert reports should be admitted as evidence and that the contents of such reports be treated as being true and correct without a need of calling witnesses who had made those statements.

[22] I am prepared to treat the actuarial calculations and all statements relevant thereto which appear in the reports submitted to the court as true and correct.

[23] The locus classicus on contingency deductions is the judgment of Nicholas JA at 116 -117 of the Southern Insurance Association v Bailey NO :³

"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 Bates 1963 (J) 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 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

² 2009 (5) SA 406 (SE)

Judge's impression of the case."

[24] In the result, I find that the amount of damages to be paid by the defendant should be the following:

1. General damages: R500 000
2. The amount of loss of earnings will be calculated as follows:
 - (a) Value of income, but for the accident, R6 552 253 less 20%
 - (b) Value of income now that the accident occurred, R283 746 less 20%

Nett future loss: R3 070 805.

[25] The draft order marked " X" is made an order of this court.

J.J. STRIJDOM

ACTING JUDGE OF THE GAUTENG DIVISION
HIGH COURT OF SOUTH AFRICA

For the plaintiff: Adv. K. Strydom
Instructed by: Ehlers Attorneys

For the defendant: Adv. Bokaba
Instructed by: Mkhonto & Ngwenya Inc.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 67403/2013

On the 2nd day of February 2018 , before the Honourable Judge Strijdom (AJ) in Court 6D.

In the matter between:

TIFFANEY LEE-ANN SALMONS

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER

By Agreement between Parties:

IT IS ORDERED THAT:

1. **Merits** are settled at 100% in favour of the Plaintiff;

- 2.1 The Defendant to pay the Plaintiff an amount of R 3 070 805 (Three million seventy thousand and eight hundred and five RAND) the Plaintiff's claim for Loss of Earnings, payable within fourteen days into the Plaintiff's attorneys of record trust account with the following details:

Account Holder : Ehlers Attorneys

Bank Name : FNB
Branch Code : 261550
Account Number: [...]

- 2.2 The interim payment of R300 000.00 is to be deducted from the amount in paragraph 2.1, in the event that said interim payment has in fact been paid to the Plaintiff by the Defendant.
3. The Defendant to pay the Plaintiff an amount of R 500 000.00 (Five hundred thousand rand alone) the Plaintiff's claim for General Damages, payable within fourteen days into the Plaintiff's attorneys of record trust account with the following details:

Account Holder : Ehlers Attorneys
Bank Name : FNB
Branch Code: 261550
Account Number : [...]

4. The Defendant will not be liable for interest on the above mentioned amount, save in the event of failing to pay on the due date, in which event the Defendant will be liable to pay interest on the outstanding amount at a rate of 10,25%per annum.
5. The Defendant is ordered to pay the Plaintiffs taxed or agreed party and party costs, including wasted costs - **if any** on High Court scale, which costs will include, but will not be limited to the following, **subject to the discretion of the Taxing Master:**, whichever costs have not been paid yet in terms of the previous draft order.
- 5.1 The reasonable taxed fees for consultation with the experts mentioned below, together with delivery of expert bundles including travelling and time spent travelling to deliver such bundles, preparation for trial, qualifying and reservation fees **(if any and on proof thereof)**, as well as costs of the reports, addendum reports,

joint minutes and attendance fees of the following experts, and subject to the discretion of the Taxing Master:

5.1.2 Dr Moja - Neurosurgeon;

5.1.2 Dr Preininger - Neuropsychologist;

5.1.3 Prof Seabi - Educational Psychologist;

5.1.4. Dr Marx - Dentist;

5.1.5. Dr. Pienaar - Plastic and reconstructive surgeon;

5.1.6. M. Sissison - Clinical Psychologist;

5.1.7. M. Spavins - Occupational Therapist;

5.1.8. T. Talmud - Industrial Psychologist;

5.1.9. Gerard Jacobson - Actuary;

5.1.10. 5.1.10M Du Plooy -Audiologist;

5.1.11 Prof Tshifularo - ENT;

5.1.12 Prof Jacobs - Maxillo - Facial and Oral Surgeon; and

5.1.13 Dr Fredericks - Disability & Impairment Assessor.

5.2 The costs of accommodation and transporting the Plaintiff and a family member, with JT Transportation Services or any other transportation service provider, to the medical legal examination(s) arranged by Plaintiff and Defendant.

5.3 The costs of an Interpreter to the medical legal examination(s) arranged by Plaintiff and Defendant.

5.4 The costs of transport with JT Transportation Services or any other transportation service provider and accommodation for the Plaintiff and a family member, to attend Court on 2 February 2018.

5.5 The costs of an Interpreter to attend Court on 2 February 2018 (If

any).

- 5.6 The costs for the Plaintiffs attorney travelling to and spending time travelling to pre-trial conferences and attendance at pre-trial conferences by the Plaintiffs attorney.
 - 5.7 The costs for preparation of Plaintiffs bundles of documents for experts, as well as the travelling costs and time spent to deliver these bundles.
 - 5.8 The costs of Plaintiffs counsel, Advocate K Strydom, for the preparation and drafting and settling costs of common cause facts and heads of argument.
6. The Defendant is ordered to pay the Plaintiffs taxed and/or agreed party and party costs within 14 days from the date upon which the accounts are taxed by the Taxing master and/or agreed between the parties.
 7. Should payment of taxed costs not be effected timeously, Plaintiff will be entitled to recover interest at the rate of 10.25% on the taxed or agreed costs from date of allocator to date of payment.

Adv. for Plaintiff: Adv. K Strydom (076 096 7523)

For Defendant: Adv. M.H. BOKABA (082 506 0247)

BY ORDER - REGISTRAR