

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 Number: 2007/20297

21/5/2018

In the matter between:

S B S

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MOKOSE AJ

- [1]** This is an action for delictual damages against the Road Accident Fund arising out of an accident which occurred on 19 April 2004 in which the plaintiff sustained serious injuries as a passenger on a trip which was being undertaken for her employer.
- [2]** The merits have already been settled at 80% of the plaintiff's proven damages which the plaintiff avers was incorrect as she was a passenger at the time of the accident. The general damages have also been settled and the defendant has undertaken to furnish the plaintiff with a certificate in terms of Section 17(4) of the

Road Accident Fund Act 56 of 1996.

- [3] The outstanding issue to be determined by this court is the plaintiff's claim for loss of earnings in the sum of R6 000 000,00 (six million rand) as per the amended particulars of claim.
- [4] The emphasis of the plaintiff's claim was in respect of the injuries sustained and the impact of the sequelae on her career prospects post-accident, compared to her anticipated career progression "but for the accident".
- [5] It is common cause that the plaintiff was a passenger in a motor vehicle collision on 19 April 2004 when she sustained the following injuries:
- (i) left femoral fracture;
 - (ii) left brachial plexus;
 - (iii) fracture to the diaphragm; and
 - (iv) head injury.
- [6] It is common cause that the plaintiff completed her matric and subsequently obtained a three-year diploma in Internal Auditing and a one-year diploma in Cost Accounting. She had also completed various other in-house courses.
- [7] The plaintiff had entered the labour market in 2001 as Assistant State Accountant at [...] in Pretoria. She then went on to work as a State Accountant for the [...] Department. She then accepted a job as Admin Manager at [...] in Mpumalanga, at which place she was employed at the time of the accident in 2004.
- [8] The plaintiff submits that after the accident, she returned to work at the [...] where she was largely accommodated by her employer. She then sought a job within the public sector as she was of the opinion that a move closer to her home would be better in view of the sequelae of her injuries. The plaintiff then obtained employment with the [...] in Mpumalanga with a long-term view of being transferred to the Eastern Cape, where she came from.
- [9] The plaintiff then obtained a job at the Northern Cape Treasury as a budget analyst where she worked until 2008 when she requested a transfer to her home town in the Eastern Cape.
- [10] After an incident and report of sexual harassment, disciplinary proceedings were brought against her for non-performance of her duties and she was duly dismissed.
- [11] The plaintiff testified that she had had an episode of depression during 1999

following the death of her mother. She had another episode of depression during 2008 following the case of sexual harassment in her employment in the Eastern Cape.

[12] After her dismissal from employment, the plaintiff worked for [...] in a small brokerage where she failed to pass the regulatory examinations to qualify as a financial advisor on four occasions. She then left the employment with [...] as she could not progress in and earn commission as a broker.

[13] The plaintiff testified further that during 2010 she had enrolled and attended a presentation for an MBA degree with the Nelson Mandela Metropolitan University. She decided not to pursue the studies taking into account the pain she endured following the accident and the pressure of the studies.

[14] The following witnesses testified on behalf of the plaintiff:

- (i) Ms A Grabler - educational psychologist;
- (v) Dr JFL Mureriwa - clinical psychologist;
- (iii) Mr L Roper - clinical psychologist;
- (iv) Ms S Vos - Industrial psychologist;

[15] The following witnesses testified on behalf of the defendant:

- (i) Dr PS Mazibuko – Psychiatrist;
- (ii) Ms S van den Heever - educational psychologist;
- (iii) Mr H van Blerk - Industrial psychologist.

[16] I will not delve into all the evidence presented by the parties but will highlight the common cause facts, corroborated evidence and discrepancies.

[17] Dr Okoli and Dr Chula, the neurosurgeons prepared a joint minute in which they agreed that the plaintiff had sustained a moderate head injury and suffers post concussive headaches. They agreed further that she has memory impairment and had developed behavioural problems in the form of aggression post the accident.

[18] Ms Grobler had prepared a report having assessed the plaintiff on 10th April 2014 and having had a follow up assessment on 6th June 2017. A joint report was also prepared with her counterpart, Ms van den Heever on 3rd and 6th November 2017. It was agreed by the educational therapists that the plaintiff

had been suffering from various symptoms of a Major Depressive Disorder as well as symptoms of a Post-Traumatic Stress Disorder which are likely related to some pre-morbid vulnerability that was further exacerbated by her involvement in the accident and the head injury she had sustained. Furthermore, they agreed that the experience of the physical pain as well as the significant psychological symptoms she had been suffering from are expected to pose an additional barrier to her ability to perform optimally within a context of education and training. They agreed that the plaintiff would probably have managed to obtain a tertiary qualification at an NQF6 (National Diploma).

[19] Dr Mureriwa's findings were that the plaintiff was slower than a normal person of her age in information processing and that this was attributable to the pain, discomfort and emotional distress as a result of the accident. His evidence remained unchallenged.

[20] Mr Roper found that the plaintiff had fluctuating attention and concentration issues. He found that she had an inability to focus and sustain attention and also had executive functioning vulnerabilities. In his opinion the plaintiff was suffering from post-traumatic stress disorder. He was of the opinion that she had been rendered psychologically more vulnerable by the accident. He concluded that the plaintiff's increased irritability, cognitive difficulties, lack of energy and motivation, reduced self esteem and an inability to make decisions will all impact negatively on her occupational functioning and career progression. He was of the view that she is unlikely to sustain employment. This is seen from her employment history post the accident and the fact that she failed to pass the regulatory examinations on four occasions. Mr Roper was of the view further that this behavior can be ascribed to a moderate head injury.

[21] Ms Vos, in her evidence provided two scenarios in the pre-morbid situation being the following:

- (i) where it was most likely that the plaintiff would complete an MBA degree where she was likely to move to the Patterson Scale reaching D3 in her mid-40's earning approximately R761 000 per annum and thereafter increasing in accordance with inflation;
- (ii) where the plaintiff would have followed a career as a financial advisor and that her earnings would have increased in a straight line until she reached her ultimate earnings of approximately R865 000 per annum.

[22] Ms Vos was of the view that whilst the accident has not rendered the plaintiff

unemployable, she is unlikely to reach her pre-morbid potential and would continue earning on par with her current income with annual increments. Given her irritability and tendency to anger easily, she may experience conflict in the workplace which would not be tolerated. Furthermore, she may have difficulty sustaining employment.

- [23] Dr Mazibuko, on behalf of the defendant, testified that the plaintiff had sustained a moderate head injury in the accident and that she suffered from post-traumatic stress disorder and Major Depressive Disorder which will continue affecting her day to day life.
- [24] Much of Mr van Blerk's evidence was speculative and he conceded in cross-examination that he failed to obtain collateral information in support of his evidence in chief that the plaintiff would achieve a ceiling of Patterson C2/C3 and that she had adjustment issues *in* her employment. He was of the **view** that the plaintiff maintained the ability to continue working in any occupation for which she is suitably qualified.

Thin Skull Rule

- [25] It has been accepted by expert witnesses for both the plaintiff and the defendant that the plaintiff was a vulnerable person who had a pre-existing condition of anxiety and depression. The experts agreed that the condition was further exacerbated by the accident.
- [26] Counsel for the plaintiff submitted that the defendant should not be availed of the defence that the plaintiff was an extraordinary vulnerable person. It is clear that the 'thin skull rule' applies to matters where a pre-existing condition is either aggravated or causes sequelae which may not necessarily have followed in other persons who suffered the same sequelae. This issue relates to the question of causation.
- [27] The court in the matter of **Prinsloo v Road Accident Fund**¹ held that the collision was not a *novus actus interveniens*. The pain was triggered by the collision. The plaintiff was psychologically frail and incapable of dealing with the results that the injury with normal fortitude did not change this. The thin-skull rule applied and the plaintiffs pre-existing condition could not be regarded as a supervening cause.
- [28] It is trite that the conduct of the defendant must have caused the loss suffered by

¹ 2015 (6) SA 91 ((WC

the plaintiff and the resulting harm must not be too remote.²The experts all agree that the plaintiff was a vulnerable person. The resultant harm to the plaintiff is not remote and as such, I hold the view that the defendant cannot use her extraordinary vulnerability as a defence.

- [29] Counsel for the defendant contended that the plaintiff was unable to sustain employment which is manifested in her change in employment prior to the accident. Evidence was led of the plaintiff's employment and in particular, changes in employment after 2001. I cannot agree with this contention. The plaintiff testified that she was employed as an Assistant State Accountant with Stats SA on contract, which contract lapsed in 2001. She was employed by the Land Affairs Department in 2002 on a one-year contract. She then obtained an opportunity in 2003 to work for the [...] in Nelspruit (now known as Mbombela) where she worked for three years. This is hardly evidence of the plaintiff's inability to sustain employment.
- [30] The plaintiff also testified that after the accident, she was accommodated by her employer at the [...]. She was further supported by her immediate superior when she worked for the [...] in Mbombela and when she moved to the Northern Cape. She testified that she did not have the support she had had in her previous positions when she worked in the Eastern Cape.

Quantification of the Plaintiff's Claim

- [31] The general approach to assessing loss of earnings was stated in the matter of **Southern Insurance Association Ltd v Bailey N0**³where the court acknowledged that any enquiry into damages for loss of earning capacity is of its nature speculative because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. The court can only make an estimate which is often a very rough one of the present value of the loss.
- [32] Matters which cannot otherwise be provided for or cannot be calculated exactly, but which may impact upon the damages claimed are contingencies and are usually provided for by deducting a stated percentage of the amount or specific claims.

² Coertze v RAF 2016 ZAGPPHC 558 at para [37]

³ 1984 (1) SA 98 (A) at p113G

De Jongh v Gunther⁴

- [33] A trial judge, in assessing compensation has a large discretion to award what he considers just and equitable. He may be guided by but not tied down by inexorable actuarial calculations.

Legal Insurance Company Ltd v Botes⁵

- [34] In the event of conflicting evidence from actuaries, a court is not bound to accept any evidence in its entirety. It can take any evidence and from the probabilities be assisted by them to arrive at a finding between the two extremes.
- [35] The actuarial report submitted by the plaintiff depicts two scenarios - one is based on the attainment of the MBA degree and the other is based on her earnings in her last job at [...].
- [36] Counsel for the defendant was of the view that the second scenario should not be followed as there is no proof of actual earnings to support the basis of the calculations. He supported the first scenario but with higher contingencies applied based on the following:
- (i) plaintiff's vulnerability prior to the accident; and
 - (ii) what he describes as "the plaintiff's job-hopping pattern".
- [37] As stated above, the thin-skull rule is applicable. The defendant cannot be availed of the plaintiff's extraordinary vulnerability as a defence. As such, the suggestion of the defendant that higher contingencies be applied will be disregarded. Secondly, there is no evidence that the plaintiff was unable to sustain employment prior to the accident. The defendant failed to interrogate the evidence before the court which indicates that the plaintiff had employment contracts prior to the accident which were not renewed. She subsequently worked for the [...] for a period of three years and for the Eastern Cape [...] for a period of four years. As such, the contingencies as suggested by the defendant are rejected.
- [38] In view of there being no contradictory evidence being furnished that the plaintiff would not have achieved an MBA degree, the evidence of the plaintiff's industrial psychologist remains uncontested. The court must accordingly do the best it can on the information before it to consider an award which it considers to be just and

⁴ 1975 (4) SA 78 (W) at p80F

⁵ 1963 (1) SA 608 (A) at p614F - G

fair in the circumstances.

[39] I am of the considered view that the calculation as submitted by the plaintiff is fair and just in the circumstances.

ORDER

[40] In the premises, the following order is made:

- (i) The defendant is liable for the plaintiff's proven damages to the extent of 80%.
- (ii) The defendant shall pay the plaintiff the sum of R? 602 995,00 (SEVEN MILLION SIX HUNDRED AND TWO THOUSAND, NINE HUNDRED AND NINETY-FIVE_RAND) in respect of the plaintiff's loss of earnings within 30 days of date hereof, which amount shall be paid into the attorney's trust account as follows:

GODI ATTORNEYS

STANDARD BANK OF SOUTH AFRICA LIMITED

BRANCH CODE: 010145

ACCOUNT NO: [...]

- (iii) The defendant must furnish the plaintiff with an undertaking in terms of Section 17(4)(a) limited to 80% in respect 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 him after the costs have been incurred and on proof thereof, resulting from the accident that occurred on 19 April 2004 within 30 days of date hereof;
- (iv) The defendant shall pay the plaintiff's taxed or agreed party and party costs up to and inclusive of the trial, including costs in respect of the 13th February, 14th February and 15th February 2018, as well as, reasonable travelling costs incurred in prosecution of this matter, which shall include the following:
 - (a) The cost of counsel
 - (b) The costs of obtaining medico-legal reports, which include travelling

and accommodation, as well as the reservation and qualifying fees, if any, for the following experts:

- Dr AP Olivier - Orthopaedic Surgeon
- Dr Okoli - Neurosurgeon
- Mr L Roper - Clinical Psychologist
- Dr JFL Mureriwa - Clinical Psychologist
- Dr A Grobler - Educational Psychologist
- Ms C Tsatsawane - Occupational Therapist
- Ms S Vos - Industrial Psychologist
- Munro Forensic Actuaries

- (v) The plaintiff shall serve the notice of taxation on the defendant's attorneys of record;
- (vi) The plaintiff shall allow the defendant 14 (FOURTEEN) days from the date of allocator to make payment of any taxed costs;
- (vii) Should the payment of the taxed costs not be effected timeously, the plaintiff shall be entitled to recover interest on the taxed costs *alternatively* agreed costs at the rate of 10% *per annum* from the date of allocator to the date of final payment.

MOKOSE AJ

Acting Judge of the High
Court of South Africa
Gauteng Division,
Pretoria

For the Plaintiff:

Adv N Mthembu instructed by
Godi Attorneys

For the Defendant:

Adv M Vimbi instructed by

Maponya Inc

Date of Hearing: 13, 14 and 15 February 2018

Date of Judgement: 21 May 2018