



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

Case Number: **44430/2017**

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
 (2) OF INTEREST TO OTHER JUDGES: NO
 (3) REVISED: NO
 DATE: 9 May 2024
 SIGNATURE: **JANSE VAN NIEUWENHUIZEN J**

In the matter between:

BULELWA NDZIMAKHWE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

INTRODUCTION

- [1] The plaintiff, a 29 year old female at the date of the trial, suffered injuries as a result of a motor vehicle collision that occurred on 27 March 2016. The plaintiff was 21 years old at the time and a passenger. The plaintiff's claim for

damages that arises from the collision proceeded by default in respect of both merits and quantum.

MERITS

- [2] The plaintiff's affidavit was admitted into evidence in terms of rule 38(2) of the Uniform rules of court. In the affidavit the plaintiff stated that she was a passenger in a motor vehicle with registration number N[...] that travelled to Redoubt from Amampondo cultural play. When the vehicle reached Mzamba Bridge, the vehicle's brake system failed and "*went backwards from the bridge and lost control*".
- [3] In view of the aforesaid evidence, I am satisfied that the plaintiff has established that the defendant is liable for her proven damages.

DAMAGES

- [4] The plaintiff's claim for general damages have not been recognised by the defendant and is hereby separated from the remainder of the heads of damages and postpone *sine die*.
- [5] The remaining heads of damages pertain to future medical expenses and a loss of income / earning ability.

Facts and expert reports

- [6] The medico-legal reports filed on behalf of the plaintiff were confirmed under oath by the relevant medical experts and the reports were admitted, in terms of rule 38(2) into evidence.

[7] According to the report by the orthopaedic surgeons, Dr Oelofse and Dr Deacon who examined the plaintiff on 6 July 2022, the plaintiff suffered a left elbow injury with residual tennis elbow and a right knee injury with a possible medial meniscus injury. In respect of the effect the plaintiff's orthopaedic injuries had/ have on her productivity, the doctors opined as follows:

“16.2.2 I believe that the patient's injuries had an impact on her amenities of life, productivity and working ability and still do.

16.2.3 According to the plaintiff, she is currently unemployed and struggling to get work due to her injuries.

16.2.4 She finds most of her daily duties and tasks painful and very difficult to perform sitting/standing/walking for prolonged periods, working hunched over, carrying/lifting heavy weight, working with her arms in extension for prolonged periods, walking up/downstairs or inclines etc.

16.2.6 With timely and successful treatment of her orthopaedic injuries, she will probably do better.

16.2.7 However, in the possibility that her right knee indeed sustained a meniscus tear and/or the left elbow is resistant to conservative treatment, her productivity will be affected.”

[8] The plaintiff's work history contained in the report of Ben Moodie, an industrial psychologist, confirms the findings and opinions of the orthopaedic surgeons, to wit:

“4.3 She secured employment in July 2018 as a domestic worker at Ms Siphokazi. She reports that she worked for 3 weeks, earning a total of R 500.00 during this time, after which she left, as she was unable to cope with the pain she experienced.

4.5 *She reports that she secured employment as a domestic worker in May 2021 and continued working in this capacity until July 2021. She notes that she earned R 1 500 p. month (2021 terms) during this time. She states that again, as she was unable to cope with the inherent demand of her work, such as standing for long periods of time while washing dishes or ironing, kneeling while cleaning the floor, moving furniture, or lifting and carrying heavy baskets of laundry, she did not return after July 2021.*

[9] Dr Okoli, a specialist neurosurgeon, reported that the plaintiff sustained a mild traumatic brain injury during the collision. The neurological outcome is described as follows:

“The claimant has given reports of disturbances with his (sic) concentration. She also suffers from headaches, forgetfulness and irritability. Further evaluation by the clinical psychologist is recommended.”

[10] Dr Mureriwa, a clinical psychologist, examined the plaintiff on 19 October 2021. According to the report, the plaintiff’s mental status is intact. The summary of the neuropsychological test results revealed the following:

“Overall, very low (below average) test performance. Scores were widely dispersed (below average, low average, average & above average). Verbal memory above average, visual memory average. One test of speed was low average, others below average. Injuries sustained have given raise to significant slowing of motor and/or cognitive responses The education history suggest average pre-accident neurocognitive ability. The below average test information is a significant drop from estimated pre-accident capacity. Consistent with the mild traumatic brain injury diagnosed by Dr. Okoli, neurosurgeon. Non-brain injury factors which probably contributed to poor test performance: persistent pain & discomfort, fatigue, & accident-related stressful life events.”

[11] In respect of Quantitative EEG results, Dr Mureriwa opines that the plaintiff has mild to moderate slower than normal speed of information processing. The finding is consistent with the plaintiff's complaints about poor concentration and forgetfulness.

[12] Dr Laauwen conducted a psycho-educational evaluation and reported the following in respect of the plaintiff's pre-accident potential:

"When considering her low average, pre-accident potential, and the family's cognitive capital and, social circumstances, it is likely that Bulelwa most probably could have had the potential to pursue a Higher certificate or equivalent qualification at the TVET institution (N4-N6).

[13] Dr Laawen confirmed that as a result of the injuries the plaintiff sustained in the collision she will not be able to reach her pre-accident potential.

[14] Having failed grade 12, the plaintiff's highest educational qualification is a grade 11. Save for the two periods of employment as a domestic worker the plaintiff was unemployed and she remains unemployed.

[15] N Ndzungu, an occupational therapist, confirmed that the plaintiff's injuries preclude her from heavy to medium occupations. In respect of the plaintiff the following is stated:

"Her lack of training in sedentary skills disqualifies her from sedentary or light work; on the other hand, her physical limitations preclude her from medium to very heavy work. The accident has made her unemployable in the open labour market."

Pre-morbid earning potential

[16] Ben Moodie, had regard to the plaintiff's scholastic progression, being 45% in grade 8, 45% in grade 9, 37% in grade 10 and 35% in grade 11, and opined

that although low, the plaintiff's scores were close to the average for the respective grades. Thus, the plaintiff's low grades is not necessarily an indication of low cognitive capability but could be attributed to various other reasons.

- [17] Based on the aforesaid, Moodie postulated two scenarios, scenario 1: grade 12 NQF4 and Scenario 2: Grade 11 – NQF3. For calculation purposes both scenarios had two options, to wit a corporate and non-corporate basis.
- [18] The total loss of earnings in each scenario was calculated by the actuaries, W Boshooft, J Valentini and A van der Westhuizen.
- [19] On the corporate basis for scenario 1, Moodie postulated the plaintiff's entrance into the labour market at Paterson Level A3 and the pinnacle of her career at the median level of Paterson B3/B4, which equates to a total loss of earning of R 5 140 600, 00. The non-corporate basis placed the plaintiff on an ultimate career plateau at the median of B2/B3, which results in a total loss of earnings of R 3 985 200, 00.
- [20] The corporate basis for scenario 2 placed the plaintiff at the pinnacle of her career at the median level of Paterson Level B1/ B2 with a total loss of earnings of R 3 912 400, 00. The non-corporate basis placed the plaintiff at her ultimate career path on the median of A3/B1, which represents a total loss of R 3 175 700, 00.
- [21] A calculation on level A3 as being the plaintiff's ultimate career path level, resulted in a total loss of earnings of R 3 070 600, 00.
- [22] In respect of the different Patterson Scales, Moodie explained during his evidence that scale A1 to A3 applies to unskilled to semi-skilled persons and involves mostly employment of a physical nature.
- [23] Patterson scale B1 to B3 pertains to individuals that obtain further vocational training.

Post-morbid earning potential

- [24] Based on the opinions of the expert witnesses, I accept that the plaintiff's injuries have rendered her unemployable.

Basis for calculation

- [25] The postulation of a future career path of an injured person, is and remains speculative. More so when the injuries occurred whilst a plaintiff was still at school and a future career path had not been established. [*Southern Insurance v Bailey* 1984 (1) SA 98 A at 114]. In *casu* the plaintiff only had a grade 11 qualification at the time of the accident. The only career path that the plaintiff embarked on after the accident was of an unskilled physical nature in line with Patterson scale A1 – A3.
- [26] In venturing into the unknown, a court should have regard to the abilities and personal circumstances of a particular plaintiff and, with the assistance of the various experts, identify a career path that is suitable and probable in the circumstances.
- [27] In this regard, I take the plaintiff's below average performance at school into account and am of the view that a pinnacle career path on the median between Paterson Level A3/B1 will be the more probable scenario. The plaintiff's total loss of earnings prior to the deduction of contingencies therefore amounts to R 3 175 700, 00.

Contingencies

- [28] Ms Haskins submitted that a 25% contingency deduction for imponderables such as unemployment, lower life expectancy, labour unrest and economic conditions would be fair and reasonable.
- [29] Having regard to the high unemployment rate and unfavourable economic conditions in South Africa at present, I agree.

Future medical treatment

- [30] The orthopaedic surgeons opined that provision should be made for conservative and surgical treatment, as well as physiotherapeutic and biokinetic rehabilitation.
- [31] Dr Okoli envisages psychotherapy and analgesic for the treatment of headaches. Ms Ndzungu recommends occupational therapy and adaptive equipment.
- [32] In view of the aforesaid recommendations, an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 is justified.

ORDER

The following order is issued:

1. The defendant is 100% liable for the plaintiff proven damages.

2. The defendant is ordered to pay the amount of R 2 381 775, 00 to the plaintiff in respect of loss of income.
3. The defendant is ordered to pay interest on the aforesaid amount at the prevailing interest rate from the 15th day of date of this order to date of payment.
4. The defendant is ordered to issue an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act, 56 of 1996, to the plaintiff.
5. The defendant is ordered to pay the plaintiff's costs. The cost for counsel to be on scale B.

**JUDGE N JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT
DIVISION, PRETORIA**

DATES HEARD:

05 & 07 February 2024

JUDGMENT RESERVED ON:

07 February 2024

DATE DELIVERED:

9 May 2024

APPEARANCES

For the Plaintiff: Advocate Haskins

Instructed by: Godi Attorneys

For Defendant: No appearance