IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case no: **185/2018**

In the matter between:

ELISA MATHABO MOGOROSI Plaintiff

and

ROAD ACCIDENT FUND Defendant

CORAM: PJJ ZIETSMAN AJ

HEARD ON: 21 and 22 NOVEMBER 2023

DELIVERED ON: 25 APRIL 2024

Introduction

[1] On 21 October 2016 the Plaintiff, a female registered nurse, was involved in a motor vehicle collision and suffered physical injuries and emotional damage.

[2] When the matter came before me the only outstanding head of damage was the Plaintiff's claim for loss of income[1].

[3] On the first day of the trial the legal representatives of the parties recorded that it is agreed that the expert summaries and medico-legal reports of Dr L.F.

[1] The merits of the Plaintiff's claim were conceded by the RAF.

Oelofse and Dr M.D. Deacon (orthopaedic surgeons), Dr H.P. Kloppers, (maxillo-facial and oral surgeon) and Dr D. Hoffmann (plastic, reconstructive and cosmetic surgeon) shall serve as evidence before court of both the factual recordings and medical opinions expressed by the various medical experts.

[4] The evidence of the Plaintiff, Mrs Alana Gouws (occupational therapist) and Mr Ben Moody (industrial psychologist) was presented to court.

[5] On the second day of the trial the legal representatives agreed that the expert summary and medico-legal report of Mrs Lindelwa Grootboom (clinical psychologist) shall likewise serve as evidence before court.

[6] Lastly, after the Plaintiff presented the evidence, the parties further agreed that the actuarial calculations of Mr Johan Sauer of Johan Sauer Actuaries and Consultants be handed in as evidence before court. Mr Sauer's actuarial calculations postulates five different scenarios which the parties presented to him for calculation. However, the parties reserved the right to argue which actuarial scenario, and the contingencies to be applied thereto, should be accepted by the court.

[7] The RAF closed its case without presenting any evidence.

The issues

[8] The only real issue in this case is the pre- and post accident career paths of the Plaintiff (as calculated by the actuary and postulated by the different scenarios) and the contingencies to be applied to the actuarial calculations.

Injuries sustained and discussion of the evidence

[9] The Plaintiff is currently 31 years old and working as a nurse at Lancet Laboratory in Bloemfontein.

[10] During 2014 she obtained a Diploma in Nursing from the Free State College of Nursing and at the time of the accident she was employed as a ward nurse at Welkom Medi Clinic.

[11] She testified that during 2022 she resigned from Medi Clinic because she could not cope with the physical demands of a ward nurse who was required to work a 12 hour shift of which at least 8 hours requires standing and/or walking and handling of patients, and only 4 hours are sedentary in nature.

[12] She explained that the critical job demands at Lancet Laboratories are almost similar than that of a ward nurse with one exception namely that is not required of her to handle patients and/or carry or lift heavy objects.

[13] The admitted expert report of Dr Oelofse, the orthopaedic surgeon, reveals that the Plaintiff suffered a facial injury, a chest injury, a right wrist injury, a left-hand injury, right elbow and a right knee injury. She has no current complaints in respect of her head, chest, right wrist and left-hand injuries but has long term sequelae of her right elbow and right knee.

[14] Dr Oelofse diagnosed the Plaintiff with a united right proximal ulna fracture with painful instrumentation, chronic elbow pain, mildly restricted range of movement of the elbow with loss of extension, post-traumatic osteoarthritis of the elbow joint and scaring. He further diagnosed a right lateral tibia plateau fracture with chronic knee pain, medial meniscus injury (possible tear), pseudo-lateral collateral ligament instability with post-traumatic osteoarthritis of the knee joint.

[15] The Plaintiff experiences pain in her right elbow and knee. The pain is described as throbbing in nature. Cold weather conditions, lifting heavy objects and preforming household chores are painful to endure. Her daily functioning is affected as she is right-hand dominant. She experiences pain her right knee when standing and walking for prolonged periods of time, squatting and climbing stairs aggravates the right knee pain. She continues to experience occasional stiffness and swelling of her right knee.

[16] The prognosis of her orthopaedic injuries are not good. Although she was only 28 years old at the time of assessment[2] there was already moderate advanced osteoarthritis of her right elbow and advanced right knee osteoarthritis and she has a high probability to require replacement surgeries for both her elbow and knee joints. According to Dr Oelofse the first replacement surgery is foreseen within 10 to 15 years i.e. by 2030 to 2035.

[17] In addition, Dr Oelofse is of the opinion that the Plaintiff must be accommodated in a permanent light duty and sedentary working environment, as determined by an occupational therapist and even if accommodated provision must be made for 5 to 10 years early retirement.

[18] Mrs Alana Gouws, the occupational therapist, categorised the Plaintiff's pre-accident work as light work with aspects of medium to heavy work when required to handle patients. She is of the opinion, given the Plaintiff's physical limitations of her right elbow and right knee, that the Plaintiff meets the physical

[2] Dr Oelofse assessed the Plaintiff on 26 March 2020.

demands for sedentary and light work but she will not be able to cope with medium to heavy load handling demands, like handling patients. The Plaintiff is thus only partially suited for her pre-accident work demands and is considered not to be an equal competitor in the open labour market.

[19] Mr Ben Moodie, the industrial physiologist, postulated two scenarios had the accident not occurred (the "but for" scenario). The first is that the Plaintiff would have continued working at a private health institution earning income on Paterson level C2 and progressing to the position of a nursing manager at Paterson level C3/C4by the age of 45 – 50. The second scenario is that the Plaintiff would have opted to search for employment at a public health facility, however, given that she was employed in the private sector prior to the accident it is unlikely that she would have moved from the private to the public sector.

[20] Having regard to the accident, Mr Moodie opined that the Plaintiff will most probably opt to work in the nursing sector which does not require physical demands like working with patients and she will probably have to re-align herself to obtain sedentary work as quickly as possible.

[21] However, during cross examination Mr Moodie conceded that given the Plaintiff's residual work capacity she will be able to work as a medical receptionist earning income in her injured state which is higher than that initially postulated by Mr Moodie in his expert report.

[22] Mr Moodie's concession gave rise to the postulated amended actuarial calculations.

[23] As mentioned, the actuary calculated five different scenarios. The post-accident scenario of all five the calculations are identical, save for contingencies to be applied, and is based on the concession made by Mr Moodie.

[24] The material difference between the pre-accident calculation of scenario 1 versus scenario 2 is that scenario 2 projects that the Plaintiff's income would increase linear until the age of 47.5 years, when she would have reached her career ceiling equal to the median of Paterson level C3/C4, whereas scenario 1 did not provide for projected salary increases.

[25] Scenario's 3 to 5 is premised on scenario 2 but with different contingency permutations.

[26] So the question is: But for the accident, would the Plaintiff, on a balance of probabilities, have progressed to Paterson level C3/C4 or, put differently, would she have reached the level of Unit Manager.

[27] The question was put to Mr Moodie during cross examination and he opined that the Plaintiff would have progressed to the level of Unit Manager. He *inter alia* based his opinion on the fact that the Plaintiff, before the accident, was recruited by the private sector and she is an individual with competency and ambition. It must also be remembered that the Plaintiff testified that she was already in charge of one staff nurse and two assistant nurses whilst in the employ of Medi Clinic.

[28] The RAF did not offer any evidence to dispute Mr Moodie's opinion and it follows that it is more probable that not, had the accident not occurred, that the Plaintiff would have progressed to Paterson level C3/C4.

[29] The only remaining issue is the contingencies to be applied. It is now well-settled that contingencies, whether negative or positive, are an important control mechanism to adjust the loss suffered to the circumstances of the individual case in order to achieve equity and fairness to the parties.

[30] Therefore, both favourable and adverse contingencies must be taken into account, as stated in *Southern Insurance Association v Bailey N.O.* 1984 (1) SA 98 (A) at 117C-D:

> *The generalisation that there must be a 'scaling down' for contingencies seems mistaken. All 'contingencies' are not adverse and all 'vicissitudes are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets, and ignore the rewards of fortune.*

[31] There is no hard and fast rule regarding contingency allowances. See Koch, *The Quantum Yearbook* (2011) at 104 where the following is stated:

> *"General contingencies cover a wide range of considerations which may vary from case to case and may include: taxation, early death, saved travel costs, loss of employment, promotion prospects, divorce, etc. There are no fixed rules as regards general contingencies.*

[32] In *Oosthuizen v Road Accident Fund* 2015 JDR 1717 (GJ) Wentzel AJ gave a useful summary of the various case law applicable to the application of contingencies and emphasise that:

> *[14] Matters which cannot otherwise be provided for or cannot be calculated exactly, but which may impact upon the damages claimed, are considered to be contingencies,*

and are usually provided for by deducting a stated percentage of the amount or specific claims. (De Jongh v Gunter 1975(4) SA 78 (W) 80F).

[15] Contingencies include any possible relevant future event which might cause damage or a part thereof or which may otherwise influence the extent of the plaintiff's damage. (Erdmann v SANTAM Insurance Co Ltd 1985 3 SA 402 (C) 404-405; Burns v National Employers General Insurance Co Ltd 1988 3 SA 355 (C) 365).

[16] In a wide sense contingencies are described as "the hazards that normally beset the lives and circumstances of ordinary people". (AA Mutual Insurance Association Ltd v Van Jaarsveld 1974 4 SA 729 (A); Van der Plaats v SA Mutual Fire & General Insurance Co Ltd 1980 3 SA 105 (A); Southern Insurance Association Ltd v Bailey 1984 1 SA 98 (A) 117). Contingencies have also been described as "unforeseen circumstances of life". (De Jongh v Gunther 1975 (4) SA 78 (W) 80F).

[17] The percentage of the contingency deduction depends upon a number of factors and ranges between 5% and 50%, depending upon the facts of the case. (AA Mutual Association Ltd v Magula 1978(1) SA 805 (A) 812; De Jongh v Gunther 1975(4) SA 78 (W) 81, 83, 84D; Goodall v President 1978(1) SA 389 (W) 393; Van der Plaats v SA Mutual Fire & General Insurance Co Ltd 1980(3) SA 105(A) 114-115A-D).

[18] Contingencies are usually taken into account over a particular period of time, generally until the retirement age of the plaintiff (Goodal v President Insurance Co Ltd 1978 1 SA 389 (W) 393; Rij NO v Employers' Liability Assurance 1964 (4) SA 737 (W); Sigournay v Gillbanks 1960 2 SA 552 (A) 569; Smith v SA Eagle Insurance Co Ltd 1986 2 SA 314 (SE) 319).

[19] Often, what is described as a "sliding scale" is used, under which it is allocated a "1/2% for year to retirement age, i.e 25% for a child, 20% for a youth and 10% in middle age". (Goodall v President Insurance Company Limited 1978(1) SA 398(W) and Road Accident Fund v Guedes 2006(5) SA 583(A) 588D-C. Likewise, see Nonwali v Road Accident Fund (771/2004) [2009] ZAECMHC 5 (21 May 2009) (para 23))

…

[21] …The advantage of applying actuarial calculations to assist in this task was emphasised in the leading case of Southern Insurance Association Ltd v Bailey1984 1 SA 98 (A) 113H-114E, where the Court stated:

> *Any enquiry into damages for loss of earning capacity is of its nature speculative*
>
> *…..*
>
> *All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable*

> *to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award.*
>
> ……..
>
> *In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an 'informed guess' it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's 'gut feeling' (to use the words of appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess."*
>
> *[23] But the Court emphasised that provision for contingencies falls squarely within the subjective discretion of the court as to what is reasonable and fair. This will depend upon the underlying assumptions made which are not the domain of the actuary. (Shield Insurance Co Ltd v Hall 1976 4 SA 431 (A) 444; Pringle v Administrator, Tvl 1990 2 SA 379 (W) 397-398).*
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> *[24] The Appellate Division has stressed in Legal Insurance Company Ltd v Botes 1963(1) SA 608(A) 614F-G that:*
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> *In assessing the compensation the trial judge has a large discretion to award what under the circumstances he considers right. He may be guided but is certainly not tied down by inexorable actuarial calculations.*

[33] Mr Marx who appeared for the Plaintiff contended for a contingency deduction of 5% to accrued (past) loss and 15% to prospective (future) loss in the uninjured scenario and 5% to accrued (past) loss and 35% to prospective (future) loss in the injured scenario.

[34] I am mindful that the prognosis of the Plaintiff's orthopaedic injuries are not good and that she will have to undergo replacement surgery within ten to fifteen years of both her elbow and knee joints but I also recognised that the injured scenario provides for seven and a half years early retirement and that the calculation is based on the premises that the Plaintiff will be employed in a sedentary environment. To apply a contingency deduction as high as 35% to the prospective future injured scenario, where early retirement is already foreseen would not be reasonable and fair to the RAF. I am of the view that a contingency deduction of 20 % should be applied to the future injured scenario.

[35] Accordingly the Plaintiff suffered a loss of income of R 7 630 280,00, as calculated by Mr Sauer in terms of actuarial scenario 3.

[36] Lastly, the issue of costs. Mr Marx contended for a special cost order on the basis that the RAF did not present any evidence and according to him Mrs Bornman, who appeared for the RAF, had an obligation not only to her client

but also to court, when taking instructions, to assist the court and to make concessions when concessions ought to be made. He further argued that it happens frequently in RAF cases that a case is being attacked on undisputed evidence and, according to him, an argument cannot trump undisputed evidence.

[37] I don't know why the RAF did not present any evidence but it would appear that Mr Marx lost sight of the fact that Mrs Bornman, on the instructions of the RAF, conceded various expert reports, after having heard the evidence she agreed to the various actuarial postulations which saved costs and court time and, most importantly, the concession she elicited during the cross examination of Mr Moodie reduced the Plaintiff's claim from more than R 9,2 million to R 7.6 million.

[38] Mr Marx's criticism of Mrs Bornman's conduct is both unnecessary and unfounded. There is thus no basis for a cost order on a punitive scale.

Order

[39] I make the following order.

1. The Defendant is liable for payment to the Plaintiff in the amount of R 7 630 280,00 ("the capital amount") in respect of the Plaintiff's claim for past and future loss of earning capacity from a motor vehicle collision that occurred on 21 October 2016.
2. The Defendant is liable to pay the Plaintiff's taxed or agreed party and party costs on the High Court scale, including but not limited to the costs set out hereunder:
    - 2.1 The reasonable preparation / qualifying and reservation fees (if any) of the following experts:
        - 2.1.1 Dr LF Oelofse and Dr MB Deacon (Orthopaedic surgeons);
        - 2.1.2 Dr H.P. Kloppers, (maxillo-facial and oral surgeon)
        - 2.1.3 Dr D. Hoffmann (plastic, reconstructive and cosmetic surgeon)
        - 2.1.4 Mrs L Grootboom (clinical psychologist)
        - 2.1.5 Mrs A Gouws of Rita van Biljon (occupational therapists);
        - 2.1.6 Mr B Moodie (industrial psychologist);
        - 2.1.7 Mr J Sauer of Johan Sauer Actuaries and Consultants Actuaries.

2.2. The payment provisions in respect of the aforegoing are ordered as follows:

2.2.1 Payment of the capital amount shall be made without set-off or deduction, within 180 (hundred and eighty) calendar days from date of the granting of this order; and

2.2.2 Payment of the taxed or agreed costs shall be made within 180 (hundred and eighty) days of taxation,

3. Interest shall accrue at 7,25% (the statutory rate per annum), compounded, in respect of:

3.1 The capital of the claim, calculated from 14 (fourteen) days from date of this order.

3.2 The taxed or agreed costs, calculated from 14 (fourteen) days from date of taxation, alternatively date of settlement of such costs.

PJJ ZIETSMAN AJ

Counsel for the Plaintiff — Adv Marx
Instructed by: — VZLR Attorneys

Counsel for the Defendant — Mrs Bornman
Instructed by: — The State Attorney