REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 38660/2013

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

NORAH MAKANATLENG Plaintiff

and

ROAD ACCIDENT FUND Defendant

J U D G M E N T

VILAKAZI, AJ:

[1.] The plaintiff claims damages from the defendant for bodily injuries sustained on 29 October 2010 while she was a passenger in a motor vehicle registration number RRB 282 GP. The plaintiff was [….] years at the time of the accident and is now […..].

[2.] The matter is before me on quantum; the defendant having conceded the merits. The plaintiff claimed damages from the defendant under various heads, but they have all been disposed of by agreement. What has not been settled is the claim for future loss of earnings. I was asked to determine this aspect of the plaintiff's claim on the facts which were presented to me by way of the stated case.

[3.] The general approach of assessing damages for loss of earnings has been stated in *Southern Insurance Association v Bailey NO 1984(1) SA 98(A)* the court stated the following in this regard:-

"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future…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. This is entirely a matter of guesswork, a blind plunge into the unknown.

The other is to try 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---------. There are cases where the assessment by the court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the court is bound to award damages"

[4.] The plaintiff grew up in a stable family background. In 2005 she obtained her matric certificate at Nkgonyeletse Senior Secondary School. Thereafter she attended Winfield Security Training College and obtained Grade C, D, and E level of security. As a result of the aforesaid levels she is qualified to perform the undermentioned duties:

4.1 GRADE E: basic level security guard, patrol services in the area and goods.

4.2 GRADE D: access control, monitoring the movements of individuals and motor vehicles, persons and goods and restrain individuals posing threat.

4.3 GRADE C: transportation and supervision of security guards with a grade D and E level of security certificate.

[5.] According to the industrial psychologist the plaintiff informed him in 2008/2009 she worked as a packer for approximately 1 year. In 2010 she worked as a teaching assistant for 3 months. She left this job for personal reasons in September 2010. At the time of the accident she was unemployed and is presently unemployed.

[6.] As a result of the accident the plaintiff has sustained the following injuries:

6.1 Lacerations to the upper limb;

6.2 A fracture of the pelvis;

6.3 A dislocation of the right hip;

6.4 A fracture of the left femur.

[7.] After the accident the plaintiff was taken by ambulance to Kwa-Mhlanga hospital where she was admitted and treated. At the aforesaid hospital, the following treatment was administered, lacerations were cleaned and sutured, the fracture on the pelvis was treated conservatively, the dislocation of the right hip was reduced under sedation and the fracture on the left femur was treated by way of open

reduction and internal fixation. She was discharged from hospital on 2nd February 2011.

[8.] The *sequelae* of the injuries sustained include considerable pain and suffering as a result of symptoms emanating from her pelvis, right hip and left femur.

[9.] The plaintiff commissioned various expert reports dealing with the injuries she sustained and the *sequelae* thereof while the defendant did not commission any such reports. The parties agreed that the contents of the various expert reports would stand as evidence in respect of what such reports contained and the conclusions that flowed from such reports.

[10.] Dr Geoffrey Read, the orthopaedic surgeon, examined the plaintiff on 23 April 2013, and compiled a report. According to Dr Read, if the patient attends to the treatment recommended her future disability should be improved. Should she find employment in the future, she would be best suited to a sedentary or semi-sedentary type work. He opined that although the plaintiff has certificate courses in security training, this type of work will not be suitable for her in the future. The plaintiff will require a conservative treatment consisting of analgesics, anti-inflammatory and physiotherapy, and the removal of internal fixatives from the left femur. Dr Read concluded that although the plaintiff may suffer some degree of impairment, none of these

constitutes serious injury and therefore she does not qualify under the 5.1 Narrative Test. No permanent disability is indicated.

[11.] According to the reports compiled by Lance Marais, an industrial psychologist, on 24th March 2015 and an updated one prepared on 8th April 2015, the plaintiff will not be able to perform work as a security guard and is more suited for sedentary and semi-sedentary type employment. She will retire at the age of 60 years. He concluded that the plaintiff is rendered less competitive, due to a loss of occupational choices, in comparison to the choices available to the uninjured individuals of similar age and level of education. The plaintiff could have performed work as a security guard or another type of employment that fell within the semi-skilled occupational group, pre accident, whereas, post-accident, employment opportunities in this field has been negatively affected, especially in work as a security guard where it is explicitly indicated that no such employment will be possible.

[12.] According to Kirsten du Toit, an occupational therapist, the plaintiff informed her that she has no ambition of gaining employment within the security services cluster in the near future. Ms Du Toit, gave cognizance to the plaintiff's pre-morbid vocational spheres of work as a packer and assistant teacher. Her knowledge in the security field fall within light to medium duty work. She concludes that the plaintiff is not suited to carry out these previous occupations.

[13.] Mr Gregory Whittaker, an actuary, prepared actuarial calculation in respect of the plaintiff's claim for future loss of earnings. These calculations were formulated on the basis of the two reports prepared by an industrial psychologist.

[14.] He prepared his calculations using two scenarios which were both based on the assumptions that the plaintiff would have retired at the age 62½. For purposes of an exercise he had regard to these facts: Plaintiff was in the employ of Hansel and Gretal as a cleaner and assistant teacher from March 2010 to July 2010 at a salary of R1 200,00 per month(unconfirmed reports).

[15.] For the purpose of calculating her loss of earning capacity on basis I, the first scenario she used the information that prior to the accident, the plaintiff worked as a cleaner and assistant teacher, and that the plaintiff was unemployed as at the date of the accident. The plaintiff (if the accident did not occur) would have earned at the median age for an unskilled worker in the non-corporate sector i.e. R18 600 per annum. Her earning would have increased in line with inflation until retirement at the age of 62½. Her earnings would have increased in line with inflation only until retirement at age 62½. The pre-accident earning values were calculated at 4 year intervals from 11 January 2011 to 1 July 2015. A contingency deduction of 5% was factored into the computation. The net loss of income is R 68 262.00.

[16.] `The parties were agreed that the plaintiff did not suffer any past loss of earnings.

[17.] In respect of future loss of earning capacity, on Basis II, (pre-morbid) Whittaker calculated the plaintiff loss of earning capacity as follows:

Future loss	
Value of income uninjured:	R 391 090,00
Less contingency deduction 20%:	R 78 128,00
	R 312 872,00

[18.] For the purposes of calculating her loss of earning capacity on the basis of the second scenario, the following information was used:

Ms Makanatleng would have earned at the minimum wage for a Grade C Security Officer. It has been assumed that she would have recommenced working on 1 January 2011. The minimum wage for Grade C Officer has amounted to the following:

01.01.2011	R30 312 per annum
01.09.2011	R32 292 per annum
01.09.2012	R34 860 per annum
01.09.2013	R37 320 per annum
01.09.2014	R40 128 per annum
	increasing in line with headline inflation to:
01.06.2015	R40 633 per annum

Basis II: (pre-morbid) the plaintiff would have earned at a minimum wage for a Grade C security officer. Her earnings would have increased thereafter in line with inflation only until retirement at age 62½.

Future loss

Value of income uninjured:	R 854 362,00
Less contingency deduction 20%:	R 170 872,00
	R 683 490,00

[19.] The central dispute in regard to the calculation of the future loss of earnings related to the employment prospects which the plaintiff would have enjoyed but for the injury sustained. The question is whether the reports of the experts of the plaintiff have substantiated the latter contention.

[20.] The plaintiff's actuary calculated the value of future loss of earnings on the basis of scenario I after applying 20% contingency deduction (what the plaintiff would have earned at the median wage unskilled worker non-corporate sector) at R 381 872,00. On the basis of scenario II, Mr Whittaker calculated the future loss of earnings at R 830 507,00, less contingency deduction of 20%. In other words what the plaintiff would have earned at the minimum wage for a Grade C security officer.

[21.] The defendant submitted that the plaintiff's loss of earnings should not be calculated on the basis of a methodology in scenario II, in view of

the fact that she never worked in the security cluster, which is the basis on which the calculations in scenario II were made. She argued that although the plaintiff acquired a Grade C security certificate on 19 October 2007, she has not sought work in that field.

[22.] In this regard, she referred to the report of Ms Kirsten du Toit which stated that *"despite having studied within the security field of expertise, Ms Makanatleng has never gained experience within this line of work, she stated having studied as she wanted to expand her knowledge. Ms Makanatleng noted having no intention of working within the field of security in the near future".*

[23.] She argued that the actuarial calculations of scenario II were done on the basis of the plaintiff's past employment as a packer, cleaner and assistant teacher which are areas that fall within the median duty capacity. She contended that according to Ms du Toit, following future consecutive and surgical intervention the plaintiff should be able to perform duties which do not involve strenuous physical demands.

[24.] She further submitted that the plaintiff was furnished with a section 17(4) certificate which will enable her to attend to the treatment referred to in Dr Read's report and that according to the occupational therapist she would have continued working as an unskilled worker until retirement age.

She argued with reference to the occupational therapists report that the plaintiff, as an unskilled worker had reached career ceiling and earning potential prior to the reported accident. She accordingly argued that an amount of R381 131.00 is an appropriate award for future loss of income. For this submission she referred to *Heese obo Peters v Road Accident Fund 2012(6) SA 496(WCC).*

[25.] In my opinion the reference to *Heese obo Peters* is misconceived and that case does not provide authority for the propositions which counsel sought to advance. In *Heese obo Peters* the plaintiff, a 51 year old German national was injured in a motor vehicle accident in South Africa, as a result of which he was brain damaged and rendered completely unemployable. His claim for loss of earning capacity was refused on the ground that his earning capacity was kept alive through illegal conduct and public policy would not allow the benefit of compensation for such loss.

25.1 This is not the situation in this matter, there is no suggestion that the plaintiff's earning capacity was in any way illegal. She attended and successfully completed a course in security training. The fact that she never used her qualification as a security officer to earn an income was because of her choice to the other job opportunities available to her. It does not mean that she would never have used her qualification as a security officer to find employment in the security industry. After all this what she qualified for. As a result of her injuries she has been

rendered unfit to perform work she did before the accident and she can no longer work as a security guard which is the work for which she is qualified. In these circumstances her loss of earning capacity must be assessed on the basis of what she would have earned as a security guard but for the accident. I therefore agree with the plaintiff's counsel submissions. But because of the fact that it is not entirely certain whether the plaintiff would have worked as a security guard had she not been injured I would apply a higher contingency deduction.

[26.] Plaintiff's counsel submitted that the plaintiff's loss of earning capacity should be assessed on the basis of the figures set out in scenario II.

[27.] Both experts of the plaintiff, the industrial psychologist and the occupational therapist have certified her not suited to carry out work as a security guard. Both opined that the plaintiff is only suited to do work which would be deemed to fall within light to medium duty work, depending on the level of entry within this field of work. According to Dr Read, the orthopaedic surgeon the plaintiff's chances of earning as a security guard have been negated by the reported accident. Both orthopaedic surgeon and industrial psychologist are agreed that the plaintiff would work up to the normal retirement age of 60 years. The orthopaedic surgeon indicated that if the plaintiff takes conservative treatment consisting of analgesics and anti-inflammatory her symptoms will improve. According to Dr Read, although the plaintiff has acquired

certificates in security training he does not believe that this type of work will be suitable for the plaintiff in the future.

[28.] I have come to the conclusion that the appropriate amount to be awarded to the plaintiff in respect of future loss of earnings should be an amount of R500 000.00

[29.] In the result I make the following order:

1. The defendant is ordered to make payment to the plaintiff in respect of the plaintiff's loss of earning capacity in the amount of R 500 000.00

2. The defendant is ordered to pay plaintiff taxed or agreed party and party costs on the High Court scale such costs to include:

2.1 The costs of the medico-legal report of Dr Geoffrey Read;

2.2 The costs of actuarial report of Algorithm Consultants and Actuaries CC;

2.3 The costs of the medico-legal occupational therapy report of Alison Crosby Inc;

2.4 The costs of medico-legal industrial psychological report of Lance Marais;

2.5 The costs consequent upon the employment of counsel.

T D VILAKAZI
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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