

## REPUBLIC OF SOUTH AFRICA



## IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

25/01/2016

CASE NO: 41365/2008

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
25/1/2016	
DATE	SIGNATURE

In the matter between:

YVONNE KHOLEKA DUMBISA

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

---

JUDGMENT

---

KUBUSHI, J

[1] The plaintiff's claim against the defendant is for bodily injuries sustained when a collision occurred between two motor vehicles. At the time of the said collision the plaintiff was a passenger in one of the motor vehicles. It is alleged in the plaintiff's particulars of claim that the collision was caused solely by the negligent driving of the insured driver, hence the claim against the Road Accident Fund.

[2] When the parties appeared before me the merits part of the claim had already been settled 100% in favour of the plaintiff. Before me only damages were in issue, then, only in respect of damages for loss of earnings. The claim for general damages which was also at issue was postponed *sine die*.

[3] Two witnesses gave evidence on behalf of the plaintiff, namely, the plaintiff personally and Dr W. Pretorius, the industrial psychologist. The defendant led no evidence and closed its case without calling any witness.

[4] I was at the hearing provided with two Bundles of expert witnesses, one for the plaintiff and the other for the defendant. The Bundle of plaintiff's expert witnesses consisted of the reports of the orthopaedic surgeon, the occupational therapist, the industrial psychologist and the actuary. The Bundle of defendant's expert witnesses consisted of the reports of the orthopaedic surgeon and the occupational therapist. All the reports in the Bundles were not disputed, however, none of the defendant's reports were referred to during the trial.

[5] During cross examination and in argument before me, the defendant's counsel placed the plaintiff's experts' reports at issue on the basis that they were dated.

[6] At the commencement of the hearing the plaintiff's counsel introduced an amendment to the value of the amounts of damages claimed in the particulars of claim based on the actuarial report. There being no objection from the defendant's counsel I granted the amendment.

#### THE PLAINTIFF'S EVIDENCE

[7] According to the plaintiff when giving evidence, she suffered injuries on her right arm from the shoulder to the elbow, the wrist, the right side of the face as well as the head. The arm sustained a fracture and it was put in a plaster cast. She has not yet completely healed as she still feels pains around the right shoulder and sometimes experiences dizzy spells.

[8] At the time of the collision she was still attending school doing Grade 12. She has since that time never worked as she is still at school. She attended a six months auxiliary nursing course in 2006 at Promise Health Care. Because of her injuries she struggled to do her practical work which was a requirement for her to pass the course.

[9] In May 2015 she enrolled for a twelve months auxiliary nursing course. She is still struggling with her practical work. The practical work requires her to lift, move and push patients who are sometimes heavy. At times she has to move heavy equipment. She has to rely on her colleagues to assist her to move heavy patients and equipment. In order to progress in her career she still has to do an enrolled nursing course after she completes the twelve months course. As proof that she struggles with her practical work, the plaintiff cited an incident where her supervisor received a written complaint from one of the institutions where she was doing practical work. The complaint was in regard to having been found sitting down during the time she should have been working – although in the complaint it was alleged that she was found asleep. The plaintiff's testimony is that she had to sit down because her arm was tired. She also testified that she is not certain whether she will be able to complete and pass her practical work.

#### THE EVIDENCE OF THE INDUSTRIAL PSYCHOLOGIST (DR W L PRETORIUS)

[10] The industrial psychologist's qualifications and experience were not in dispute. His evidence is that he evaluated the plaintiff on 5 July 2012. At the time of the assessment the plaintiff struggled to pick up heavy objects with her right arm due to the problem with her arm. According to him, the plaintiff will not easily cope as a nurse because of the injuries to her shoulder. The industrial psychologist confirmed that what the plaintiff testified to about her painful arm was in line with the findings of the occupational therapist. His testimony is that the plaintiff will continue to struggle with any other employment where she has to lift heavy objects and will require to be

assisted or be accommodated. And, she will always have to choose carefully the type of work she will have to do.

[11] The industrial psychologist referred to the two employment scenarios postulated in the actuarial report. The first scenario is based on the plaintiff's employment as a call centre agent where she worked for a short period of five to six months. The second scenario, which the industrial psychologist recommended for my consideration, is postulated on the plaintiff's employment as a nurse. She has always wanted to be a nurse. If the collision had not happened she would have worked as a nurse. The industrial psychologist's findings are that, because of her injuries, the plaintiff is compromised. She will have difficulty finding work as a nurse and will result in her experiencing financial difficulties. If she does find employment as a nurse she will not be productive or her productivity will be negatively impacted. That is, she will struggle with her practical work and may take longer than others to complete it. She will as a result end up looking for sedentary work with a reduced income. She will, thus, not be able to earn at the same level as a nurse.

#### ARGUMENT BY THE PLAINTIFF'S COUNSEL

[12] The submission by the plaintiff's counsel is that the plaintiff's evidence should be accepted by the court because it was not contested in any way by the defendant and no version of the defendant was put to her. Her evidence as regards her career progression is not in dispute and the court should therefore accept her evidence that

due to her injuries she struggles with her practical work and can thus not easily pick up heavy objects.

[13] Her injuries are common cause and the court should accept that the injury to her arm is still hindering her even now. She has already received warnings at work because she does not cope with her practical work. Indications are also that she may not pass her practical work. It will be difficult for her to find alternative employment, so it is argued.

[14] Counsel's contention is that the industrial psychologist's report should be accepted as it is because there is no evidence before court to show what the lifespan of a medico-legal report should be. The argument being that the assertion of the defendant's counsel that the report is dated has no foundation and is unsubstantiated.

[15] Counsel argued for the court to accept scenario 2 in the actuarial report. The court should consider that somewhere in her life, the plaintiff might have to change her career and opt for lighter/easier work. The actuary has also postulated that she will have to retire five years earlier than if she was not injured. This, counsel asserts, should be covered by higher contingencies. His suggestion is that contingencies of 10% pre-accident and 30% post-accident, which allows for a 20% spread, should be considered fair and reasonable.

[16] As regards costs, the plaintiff's counsel informed me that the matter was on the roll a day before the hearing that is, on 30 November 2015. The parties had already negotiated a settlement but the plaintiff was asked to provide proof of registration at the nursing school. The matter could not be finalised then because the defendant reneged on a settlement proposal at the last hour. The submission is that the matter was delayed by the defendant and as such the defendant should be settled with the costs of 30 November 2015 and 1<sup>st</sup> December 2015 on a party and party scale, such costs to include the costs of the experts' reports, the attendance of the industrial psychologist in court and that of the orthopaedic surgeon. According to counsel, the orthopaedic surgeon had been in court on 30 November 2015 to give evidence but was not available on 1 December 2015.

#### ARGUMENT BY THE DEFENDANT'S COUNSEL

[17] The main contention by the defendant's counsel is that I should not consider the plaintiff's experts' reports because they were compiled in 2012, which is three years ago, and are, therefore, out dated. The argument is that within a period of three years a lot could have changed in respect of the injuries sustained by the plaintiff. The plaintiff should have provided addenda to the reports.

[18] The other submission is that the plaintiff failed to put up a proper case before me and her claim should, as such, be dismissed. The submission is based on the plaintiff's failure to provide documentary proof that she is enrolled for the auxiliary

nursing and that there were complaints made against her. The submission is also based on the fact that at the time the industrial psychologist assessed the plaintiff, she did not provide him with documentary proof of her qualification. The plaintiff's evidence that she is working is, according to the defendant's counsel, just an assumption since there is no documentary proof before me that she is indeed working and the evidence should be rejected.

[19] As regards the costs, the defendant's counsel submits that the plaintiff caused the postponement of 30 November 2015 because she failed to file proof of her registration at the nursing school. The *onus*, according to the defendant's counsel, was on the plaintiff. Counsel further denied that the orthopaedic surgeon was at court on 30 November 2015 as alleged by the plaintiff's counsel. His submission is that if the orthopaedic surgeon was present in court same could have been brought to the court at roll call.

## ANALYSIS OF EVIDENCE

[20] It is common cause that the plaintiff was injured in a motor vehicle collision. It is not in dispute that she suffered the injuries as testified in her evidence in court. The defendant, however, denies the *sequelae* of the injuries in that according to its counsel the plaintiff should have been assessed again to determine the extent of her injuries since the reports relied upon by the plaintiff were completed three years ago. Counsel's assertion is that a lot could have happened in a period of three years. The



industrial psychologist also conceded in evidence that if the occupational therapist had reassessed the plaintiff and found changes to her condition, such changes could have affected his findings as contained in his report that he presented in court.

[21] It is my view that in order for me to reject the medico-legal reports of the plaintiff as dated, there must be evidence that proves that they are indeed out dated. The submission of the defendant's counsel in this respect is therefore unsubstantiated. To the contrary there is evidence of Dr Pretorius, the industrial psychologist who testified that in his opinion the reports are not out dated. He further gave evidence that in his opinion, when the occupational therapist and the orthopaedic surgeon completed their reports the plaintiff's injuries had stabilised. I tend to agree with him in this regard. The evidence shows that the collision occurred on 9 September 2004 and the assessment was done in 2012, that is, eight years after the collision. The orthopaedic surgeon describes the injury as serious long-term impairment with permanent serious disfigurement.

[22] Even if it can be said that the medico-legal reports are dated, there is still the uncontested evidence of the plaintiff which requires my consideration. There being no other evidence, I have to accept the plaintiff's evidence that she struggles with her practical work. This evidence is in line with the findings of the occupational therapist that 'As a nurse she will require to lift patients and push patient on stretchers. Task requires good muscle strength as they are physical in nature.'

[23] The further submission by the defendant's counsel that there is no documentary proof that the plaintiff is registered as a nurse, or that there were complaints against her during her practical work or that the industrial psychologist had no proof of her qualification, is, in my opinion, ousted by the oral evidence of the plaintiff. This evidence cannot be rejected out of hand. At the very least it should be countenanced by applying higher than normal contingencies.

[24] It is, therefore, my view that the plaintiff has made out a strong case for a claim for damages for loss of earnings. The plaintiff is compromised by the injuries and will find it difficult to cope in the nursing career which she chose to follow. The experts are also agreed that for her to work for a longer period she must look for sedentary work which is going to pay her less than she will earn as a nurse. Otherwise if she persists in following nursing as a career she will have to retire at the age of 55 years.

#### CALCULATIONS:

[25] As is trite, contingencies are within the discretion of the court. As already stated earlier on in this judgment, higher than normal contingencies, should find application in the circumstances of this case. I am therefore of the view that the contingencies suggested by the plaintiff's counsel, 10% pre-morbid and 30% post-morbid, should be applied.

[26] Based on the following calculations, I consider the following amount as a fair and reasonable amount for the loss of earnings suffered by the plaintiff:

Item of loss	Future Income	Contingency deduction	Total Income
Pre-morbid Income	3 044 364 - 00	10%	2 739 927 - 60
Post-Morbid Income	2 836 046 - 00	30%	1 985 232 - 20
<b>Total Loss</b>			<b>754 695 - 40</b>

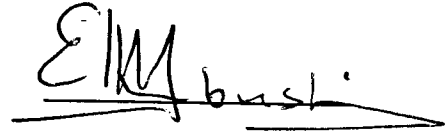
## COSTS

[27] Costs are also in the discretion of the court and normally, costs follow the successful party. Costs in this matter should be granted to the plaintiff as the successful party. The costs should also be inclusive of the expenses incurred in the drafting of the experts' reports and for the attendance in court of the industrial psychologist and the occupational therapist.

## ORDER

[28] In the premises I make the following order:

- [1] The plaintiff's claim for loss of earnings succeeds in the amount of R754 695, 40.
- [2] The defendant is ordered to pay the plaintiff's costs of suit which costs shall include the costs of –
  - a. Dr S. Sombili the orthopaedic surgeon (medico-legal report);
  - b. Dineo Thupae the occupational therapist (medico-legal report and attendance in court on 30 November 2015);
  - c. Dr W Pretorius the industrial psychologist (medico-legal report and attendance in court); and
  - d. George Schwalb the actuary (actuarial report).
- [3] The costs of suit shall include the wasted costs occasioned by the postponement of 30 November 2015.
- [4] The claim for general damages is postponed *sine die*.

A handwritten signature in black ink, appearing to read 'E.M. Kubushi', with a long horizontal stroke extending to the right.

E.M. KUBUSHI

JUDGE OF THE HIGH COURT

**APPEARANCES**

HEARD ON THE	: 01 December 2015
DATE OF JUDGMENT	: 25 January 2016
PLAINTIFF'S COUNSEL	: Adv T. C. Maphelela
PLAINTIFF'S ATTORNEY	: A. O. Ndala Incorporated
DEFENDANT'S COUNSEL	: Adv H. Mhlongo
DEFENDANT'S ATTORNEY	: Gildenhuys Lessing Malatji Inc