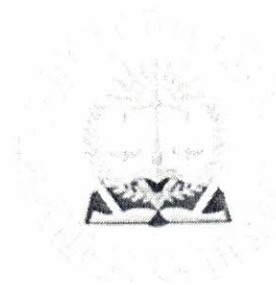


15/9/17.



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

CASE NO: 22090/13

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
15 September 2017	
DATE	SIGNATURE

In the matter between:

S.P. DUBA

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

J U D G M E N T

COLLIS AJ:

INTRODUCTION

[1] The plaintiff, an adult female, has instituted a damages action against the defendant for certain bodily injuries she sustained in a motor vehicle collision on 28 February 2010. At the time of the collision the plaintiff was a passenger in a motor vehicle bearing registration letters and numbers NUR 24325 which collided with a Nissan bakkie, referred to as the insured driver.

[2] In the amended particulars of claim at paragraphs 5 and 6 thereof the plaintiff alleged as follows in Afrikaans:

“5 Die voormelde botsing was uitsluitlik veroorsaak deur die nalatigheid van die bestuurder van die versekerde voertuig, wie nalatig was in almal, ‘n aantal of een van die volgende opsigte:

5.1 Deurdat die versekerde bestuurder onverskillig en sonder in agneming van ander padverbruikers bestuur deurdat hy versuim het om ‘n behoorlike uitkyk te hou.

5.2 Deurdat hy in die omstandighede te vining gery het.

5.3 Deurdat hy nie betyds, enigsins of voldoende gerem het nie.

5.4 Deurdat hy nie ten volle in beheer van sy voertuig was nie.

5.5 Deurdat hy versuim het om ‘n ongeluk te voorkom terwyl ‘n redelike bestuurder dit wel sou kon gedoen het.

6 Die Eiser het in die voormelde ongeluk liggamlike beserings opgedoen. Besonderhede van die beserings is uiteengesit in die mediese verslag aangeheg aan die MMF1 eisvorm met aanhegels, welke stukke reeds op die Verweerder gedien is.

Die Eiser her onder andere die volgende beserings opgedoen:

6.1 KOPBESERING

6.1.1 Kneus-en sagteweefselbesering van die kop behandel met die nodige pyn-en anti-inflammatoriese medikasie en mediese behandeling.

6.2 GESIGBESERING

6.2.1 Kneus-en sagteweefselbesering van die gesig behandel met die nodige pyn-en anti-inflammatoriese medikasie en mediese behandeling.

6.3 OORBESERING

6.3.1. Kneus-en sagteweefselbesering van die oor behandel met die nodige pyn-en anti-inflammatoriese medikasie en mediese behandeling.

6.4 RUGBESERING

6.4.1 Kneus-en sagteweefselbesering van die rug behandel met die nodige pyn-en anti-inflammatoriese medikasie en mediese behandeling.

6.5 Eiser het permanente liggamlike skending opgedoen in terme waarvan die eiser kwalifiseer vir algemene skadevergoeding in terme van die narratiewe toets.”

[3] In its plea the defendant denied the allegations and placed the plaintiff to proof thereof.

THE DISPUTE

[4] The matter comes before me for the determination of the contingency percentages to be applied in respect of the Plaintiffs past loss of income and her future loss of income. The issue of *liability* and general damages as informed by the parties, has already been settled between them, and the settlement agreement was sanctioned by the Court by way of a previous order of Court dated 12 June 2015.

[5] In respect of the *quantum* the court was as a result called upon to decide what the plaintiff's pre-morbid career path would have been had it not been for the collision and further what the plaintiff's post-morbid career and coupled to that her earning capacity would entail, now that the collision did occur.

[6] It is common cause that at the time of the collision the plaintiff, was in Grade 10 and absent from school after the collision for at least three (3) weeks. She did not attend school during 2011 as a result of her scarring and enrolled at another high school in 2012. She matriculated in 2013. At present she is unemployed.

[7] In respect of the *quantum*, the Plaintiff by agreement with the Defendant had handed into court various expert reports as exhibits. No expert reports were handed into court by the Defendant and counsel acting for the Defendant conceded that as at the hearing of the matter that his instructing attorney had not received adequate instructions from the Defendant.

[8] Report ¹ of the Orthopaedic Surgeon

¹ Exhibit A: Index Getuienis pages 2-19

Dr Hans Enslin, an orthopaedic surgeon upon his clinical findings from examining the patient and perusing documentation received had listed the plaintiff's injuries as follows:

8.1 Multiple lacerations on the face, right upper arm and upper back.

8.2 A soft tissue injury to the neck.

8.3 A soft tissue injury to the upper body.

8.4 A soft tissue injury to the right shoulder.

8.5 A concussive head injury.

He concluded that the plaintiff now presents with symptoms of a whiplash injury to her neck, mechanical back pain in the thoracic spine and tendonitis in the right acromioclavicular joint.

[9] Report ² of the Occupational Therapist

Ms Leazanne Toerien concluded upon her occupational therapy assessment that the plaintiff has the residual physical ability to do occupational light work. She concluded that following successful interventions the plaintiff should improve and she should be able to do at least low ranges of medium work, but it is expected that she would have difficulty working above shoulder height and manage heavier loads due to the pathology present in her left shoulder.

² Exhibit B Indeks Deskundige Getuienis pages 40-70

[10] In addition to the above the parties by agreement requested the court to mark as exhibits the following reports:

10.1 The report by the plaintiff's clinical psychologist Francien De Ridder, marked as exhibit C.³

10.2 The report by her Neurologist Dr Mika Mokabane, marked as exhibit D.⁴

10.3 The report prepared by her Industrial Psychologist Dr Willie Pretorius, marked as exhibit E and his addendum to his report marked as exhibit G.⁵

10.4 The report compiled by her Educational Psychologist Stephanie Rudenberg, marked as exhibit F.⁶

10.5 Exhibit H, the Actuarial report by Professor Du Plessis, dated 1 August 2017.⁷

[11] At the outset it should be mentioned that the plaintiff elected not to testify during these proceedings. The rationale thereof was not explained to the Court. The failure on the part of the plaintiff to take the stand deprived the Court of an opportunity to observe the plaintiff and her disposition as at date of commencement of the proceedings.

³ See Indeks Deskundige Getuienis pages 72-123

⁴ See Indeks Deskundige Getuienis pages 133-142

⁵ See Indeks Deskundige Getuienis pages 159-191 and 245-262

⁶ See Indeks Deskundige Getuienis pages 208-233

⁷ See Indeks Deskundige Getuienis pages 264- 277

[12] However, based on the views expressed by the experts in their reports, the pertinent question arose as to what award would be fair and adequate compensation for the plaintiff in respect of her loss of earnings and future loss of earnings.

[13] It is by now accepted, that in the assessment of these kind of damages which cannot be assessed with any amount of mathematical accuracy, the Court has a wide discretion.⁸

[14] Furthermore, with regard to expert evidence, it is trite as was stated in *Louwrens v Olwage* 2006 (2) SA 161 (SCA) that in applying a scientific criteria or reasoning the expert witness must satisfy the Court that the conclusions drawn by the expert in question are founded on logical reasoning and that these conclusions are based on facts proved by admissible evidence.

[15] In the decision of *S v Gouws* 1967 (4) SA 527 (EC) at 528D, Kotze J (as he then was) said the following:

'The prime function of an expert seems to me to be to guide the court to a correct decision on questions found within his specialised field. His own decision should not, however, displace that of the tribunal which has to determine the issue to be tried. The tendency to lead expert witnesses to attempt to influence a court with their "opinions" of the very issue which is to be determined, makes it difficult to distinguish facts from inferences and opinions. However, difficult it may be, I am called upon to sift through all the evidence and to place all admissible evidence on the scales and consider

⁸ *AA Insurance Association Ltd v Maqula* 1978 (1) SA 805 (A)

them. Inadmissible evidence, transgressing the rules regarding the admissibility of evidence of experts, will be disregarded.”

[16] In the decision *Southern Insurance Association v Bailey* NO 1984 (1) SA 98 (A) at 114C-D, Nicholas JA said:

‘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. (cf Goldie v City Council of Johannesburg 1948 (2) SA 913 (W) at 920.)’⁹

PRE-MORBID CAREER PATH

[17] The undisputed evidence in this regard is that prior to the collision, the plaintiff’s highest level of education was a Grade 9 qualification passed at school. Immediately following the collision, she was in hospital for a period of three weeks and did not complete school that year nor did she return to her school the following year. During 2012 she again enrolled at another high school where she ultimately completed her schooling.

⁹ *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at para [8]

[18] Pre-accident, as per the actuarial report, if the plaintiff had completed a diploma or degree, she would probably have found herself unemployed for about six months. On her entry into the open labour market, she would probably initially have functioned in a temporary capacity for about a year before securing employment in a permanent capacity in the open labour market. As an entry level in a temporary capacity her earnings would have been comparable to a Paterson B3/B4 job grade. As a permanent employee, her earnings could have been comparable to a Paterson B4/B5 and the pinnacle of her earnings on a level comparable to a Paterson C5/D1.

POST-MORBID CAREER PATH

[19] At present the plaintiff is unemployed and she has received no further post school education. The actuary in his report, had set out that it is postulated that her entry level earnings could be comparable to a Paterson A2/A3 job grade (basic salary, with earnings growth in more or less a straight line to a level comparable to a Paterson B3/B4 by the age of 50.

[20] On behalf of the plaintiff it was argued, that as the plaintiff was only 17 years old as at date of the collision, the court should consider applying a 5% (percentage) contingency pre-collision, as same would be considered as a fair and reasonable deduction in line with the various expert opinions expressed. In respect of her future loss of earnings, her attorney further submitted that the court should consider applying a 25% (percentage) contingency deduction to her future loss of earnings as this percentage deduction would be considered fair and reasonable post collision.

[21] Counsel appearing on behalf of the defendant was in agreement with this submission as to the percentages contingency deductions to be applied by the court pre and post collision.

[22] In the decision *Burger v Union National South British Insurance Company* [1975] 3 ALL SA 647 (W) at p 650 the following passage I find to be appropriate:

'A related aspect of the technique of assessing damages is this one; it is recognised as proper in an appropriate case, to have regard to relevant events which may occur, or relevant conditions which may arise in future. Even when it cannot be said to have been proved, on a preponderance of probability, that they will occur or arise, justice may require that what is called a contingency allowance be made for a possibility of that kind. If, for example, there is acceptable evidence that there is a 30 per cent chance that an injury to a leg will lead to an amputation, that possibility is not ignored because 30 per cent is less than 50 percent and there is therefore no proved preponderance of probability that there will be an amputation. The contingency is allowed for by building in the damages a figure representing a percentage of that which would have been included if amputation had been a certainty. That is not a very satisfactory way of dealing with such difficulties, but no better way exists under our procedure.'

[23] For the reasons outlined above, I consider as equitable that the plaintiff in regard to her loss of earnings and taking into account all the circumstances of the matter including the medical evidence, that it would be fair and just that a 5% (percent) contingency deduction be made in respect of her past loss of earnings and for the

same reasons a 25% (percent) contingency deduction be permitted in respect of her future loss of earnings.

ORDER

[24] In the result the following order is made:

24.1 The defendant shall pay the plaintiff the amount of R5 650 572,10 (Five Million Six Hundred and Fifty Thousand, Five Hundred and Seventy-Two Rand and Ten Cents only).

24.2 The defendant will not be liable for any interest on the instalment payment if payment is made on or before 15 October 2017. Interest shall be calculated on the above amount at a rate of 10.5% (percent) per annum from a date fourteen (14) days after 15 October 2017 to date of final payment.

24.3 Payment of the amount referred to in paragraph 24.1 *supra* be made directly into the trust account of PAS Attorneys. First National Bank, Account No 6222 6695 677, Branch Code 270 344, Ref: 1075A

24.4 The defendant will pay the plaintiff's taxed or agreed party and party costs on the applicable High Court scale subject to the following conditions:

(a) The plaintiff shall in the event that the costs are not agreed to serve a notice of taxation on the defendant's attorney of record; and

(b) The plaintiff shall allow the defendant 14 court days to make payment of the taxed or agreed costs.

24.5 The costs shall include the costs to the date of this order, which costs shall further include the costs of the attorney and correspondent attorney which includes necessary travelling costs and expenses, attendance at court, costs for pre-trial conferences and formulation of the pre-trial minutes and costs of actual attendances to pre-trial conferences and any costs previously reserved. It also includes the reasonable costs on consulting with the plaintiff on this order of court.

24.6 The plaintiff is also awarded the costs of obtaining all medico-legal, radiology, actuarial, addendum and joint reports as well as all other reports furnished to the defendant and/or to the knowledge of the defendant and/or its attorneys, as well as reports in their possession and all reports contained in the plaintiff's bundles.

24.7 Travelling costs and expenses for the plaintiff to attend all the medical legal specialist appointments.

24.8 Travelling costs and expenses for the plaintiff to attend the court as necessary witness on 1 August 2017 and 10 August 2017.

24.9 The costs of Lardo Eloff in his capacity as attorney with Right of Appearance in the High Court, which costs shall include the day fees for 1 August 2017 and 10 August 2017.



C.J. COLLIS

ACTING JUDGE OF THE HIGH COURT

Attorney for Plaintiff: Mr. L. Eloff

Attorney for Plaintiff: PAS Attorneys

Counsel for Defendant: Adv. H. Singo

Attorney for Defendant: Maluleke, Msimang Makume, Matlala

Date matter Heard: 10 August 2017

Date of Judgment: 15 September 2017