

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

- (1) NOT REPOTABLE**
- (2) NOT OF INTEREST TO OTHER JUDGES**
- (3) REVISED**

CASE NO.: 73517/2015

Heard on 21 August 2017

Delivered on 24 August 2017

In the matter between:

CLEARANCE NKOSINGIPHILE ZWANE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

SWANEPOEL AJ:

1. Plaintiff, a 38 year old woman, has instituted action against Defendant (the RAF) for damages pursuant to a motor vehicle accident that occurred on 1 April 2012, when Plaintiff was one month shy of 33 years of age.
2. Defendant has conceded the merits of the claim. The only issue before me

is the *quantum* of Plaintiff's damages resulting from the loss of past and future earning capacity.

3. At the outset I was advised that the parties did not intend to call any witnesses, and that I was required to consider the matter on the papers before me. I was specifically referred to certain joint minutes by:
 - 3.1 The respective occupational therapists, Narishca Thandrand and Given Mathala;
 - 3.2 The respective industrial psychologists, Meryll Shein and Cecile Nel;
 - 3.3 The respective orthopaedic surgeons, Drs. Oelofse and Blignaut.
4. I was also referred to an actuarial report by one Namir Waisberg.
5. On 1 April 2012 Plaintiff was a passenger in a taxi on the N 17 freeway, when the driver lost control of the vehicle, resulting in the vehicle overturning. Plaintiff suffered an injury to her right shoulder, described by the orthopaedic surgeons as soft tissue injury with rotator cup tendinitis, and disfigurement as a result of multiple lacerations.
6. The result of the injury is that Plaintiff has restricted movement, weakness, and pain in her right upper limb. She has reduced endurance in elevated work and load handling due to the impairments present in the right upper limb.
7. The occupational therapists agree that the injury has caused Plaintiff to be limited to sedentary load handling due to limitations in the right upper limb, and that she is compromised in her ability to handle light to medium load, and to perform elevated work.
8. Plaintiff attained Grade 11, but left school when she was unable to pass Grade 12. I point out, that a number of reports state that she attained Grade 12, but counsel submitted that this was in fact not correct. Plaintiff's work record shows that she was employed as a cashier in a tavern for a brief period, before relocating to Johannesburg during 2007. From 2009 to 2012 she was employed as a domestic worker.
9. After the accident, Plaintiff returned to work for a brief period, but was unable to fulfil her duties. Her employment terminated by mutual consent

with her employer. There is little doubt that, as a result of her injury, Plaintiff cannot fulfil the duties of a domestic worker. Plaintiff has been unemployed since her resignation in 2012.

10. The occupational therapists are in agreement that due to the limitations presenting in her right upper limb, she is considered an unfair competitor in the open labour market, when compared to uninjured counterparts. Any potential employment would preclude work requiring resisted upper limb demands, elevated work and handling of loads exceeding sedentary load. Plaintiff has, as a result of the injury, been rendered a vulnerable employee in the open labour market.
11. The industrial psychologists are in agreement regarding Plaintiff's biographical details. They agree that Plaintiff was employed as a domestic worker earning between the lower quartile and the median of the non-corporate sector for semi-skilled workers.
12. The basic philosophical difference between the industrial psychologists, Shein for Plaintiff, and Nel for Defendant, is simple. Shein is of the view that as a result of the fact that Plaintiff did not attain her matric certificate, she is limited to semi-skilled or unskilled work that is largely physical in nature. Shein believes that Plaintiff may experience greater pain over time and that her performance may deteriorate. Shein is of the view that Plaintiff is an extremely disadvantaged job seeker when compared to able-bodied applicants. Her view is that most likely Plaintiff will face extended periods of unemployment, and when she does secure work, it will be for short periods at an insignificant earnings level.
13. Nel is of the view that pre-accident Plaintiff could enter have entered the retail sector. She views Plaintiff as an attractive well-presented individual, who could have secured low-level, semi-skilled, retail work, as a cashier, sales assistant, merchandiser, or receptionist. However, she concedes that pre-accident the most likely outcome would have been that Plaintiff would have remained employed as a domestic worker. Nel is of the view that post-accident, Plaintiff is still capable of securing employment in the retail sector.

14. The actuarial report by Waisberg reflects the basic difference between Nel and Shein. The contingencies applied to the calculations are the same in both Shein's scenario, and in Nel's scenario. The only difference is that as regards future loss of income, the contingency in the Nel scenario relating to the loss, having regard to the accident, is 25% as opposed to 20% in the Shein scenario.
15. The basic difference in the calculations lies in the fact that in the Nel scenario, Waisberg calculated that Plaintiff has a future earning capacity of R 856 259.00. A slighter higher contingency (25%) is applied to the figures having regard to the accident, than to the 'but for' calculation. The result is an estimated loss of income (after deduction of contingencies) of R 85 626.00.
16. In the Shein scenario, Waisberg calculated that Plaintiff had a future earning capacity (having regard to the accident) of R 239 546.00, as opposed to R 984 894.00, but for the accident. In this scenario the estimated loss of income (after contingencies), is R 654 523.00.
17. In *Southern Insurance Association v Bailey* NO¹ it was pointed out that any enquiry into damages for loss of earning capacity is of its nature speculative. All a Court can do is to make an estimate of the present value of the loss. It is helpful to take note of the actuarial calculations, but a Court still has a large discretion to award what is considered to be right.²
18. In assessing the Plaintiffs loss of earning capacity, a Court must consider what Plaintiff probably would have made of her earning capacity, not what she might have earned³.
19. Plaintiff clearly has limited options. She is currently 38 years old. She does not have a matric qualification, which is often seen as a minimum requirement for entry into the formal sector. Her previous work experience was as a cashier in a tavern, which likely did not result in her developing marketable qualities, which would qualify her for entry into the retail environment. She clearly cannot fulfil the duties of a domestic worker. She

¹ 1984 (1) 98 (AD) at 113 G

² *Southern Insurance Association Supra* at 116 G

has been unemployed for five years which puts her at a further disadvantage when seeking employment. In short, her prospects of obtaining long-term employment, given the disadvantage from which she suffers, as opposed to able bodied persons, are not good.

20. Plaintiff falls within a segment of society that is more severely affected by economic ups and downs. Whereas a skilled person has more options open to him or her, an unskilled or semi-skilled person will experience greater difficulty in finding employment. Plaintiff's injuries further limit her employment options.
21. On the other hand, Plaintiff's injury may respond somewhat to treatment. She is not completely incapable of working, and may well obtain some form of employment. However, the most likely scenario is the one sketched by Shein. I am of the view that Nel is too optimistic regarding Plaintiff's prospects. Shein, on the other hand, may be too pessimistic. I believe that, in respect of future loss of income, a compromise approach would be appropriate.
22. As regards past loss of income, there is no reason to doubt the value of the past loss of income as calculated on Shein's scenario. There is little difference between that figure and the figure calculated on Nel's scenario, R 217 623.00 as opposed to R 173 954.00. I therefore accept the value placed on past loss of income at R 217 623.00.
23. As far as future loss of income is concerned, I am of the view that a compromise between the figures calculated on the respective scenarios is appropriate. Taking Plaintiff's specific circumstances into account, the amount awarded must lean towards the higher figure.
24. Plaintiff has suggested that an award of R 645 523.00 should be awarded in respect of future loss of income. Defendant has submitted that R 85 626.00 is more appropriate.
25. I am of the view that Defendant's suggestion, that Plaintiff can obtain employment in the retail sector is unlikely to materialize. She is virtually

³ Carstens N.O. v Southern Insurance Association Ltd 1 985 (3) SA 1010 (C) at 1020 G

unskilled and suffers from the disadvantage of not being able-bodied.
Shein more accurately reflects Plaintiff's probable employment future.

26. I therefore come to the conclusion that a more appropriate award in respect of future loss of income would be the sum of R 450 000.00. To this must be added the past loss of income of R 217 623.00.

27. In the result I make the following order:

27.1 Judgment is granted in the sum of R 667 623.00;

27.2 Defendant shall pay interest on the aforesaid sum of R 667 623.00, at the rate of 9% (nine percent) per annum from date of judgment to date of payment;

27.3 Defendant shall pay Plaintiff's costs.

J.J.C. SWANEPOEL

Acting Judge of the High Court