

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 50010/07

DATE:30 June 2017

J P

Plaintiff

v

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

MABUSE J:

[1] This is an action by the plaintiff against the defendant for payment of damages.

[2] By the combined summons issued on 29 October 2007 the plaintiff, an adult female born on [...] February 1958, then residing at [...], Westonaria, claims from the defendant, a juristic person established as such in terms of the provisions of s 2 of the Road Accident Fund Act 56 of 1996 ("the Act"), payment of damages she sustained as a consequence of her having been involved in a motor collision that took place on 29 November 2004 on the N12.

[3] On that particular day, a collision took place between a motor vehicle with

registration number HRK[...]GP which was driven by the plaintiff at all material times and a truck with registration number LFG[...]GP which was at all relevant times driven by a certain Mr. Tshangase .

[4] It is alleged by the plaintiff that the collision in question was caused by the negligence of the driver, of a blue minibus, whose particulars she could not establish, although the blue minibus was not involved in the said collision. As a consequence of the said collision, the plaintiff sustained the following injuries:

- 4.1 a fracture of the posterior column of her acetabulum;
- 4.2 a soft tissue injury to her neck;
- 4.3 soft tissue injuries to her anterior chest wall; and,
- 4.4 deep lacerations to her right leg.

[5] Following the aforementioned injuries, the plaintiff:

- 5.1 was taken to the Lenmed Clinic for medical treatment where she was hospitalised from 29 November 2004 to 18 December 2004;
- 5.2 underwent an operation during the course of her hospitalisation in which a debridement was performed and skin grafts were applied to her right leg;
- 5.3 was unable to work from 29 November 2004 to 1 February 2005;
- 5.4 sustained pain, suffering, discomfort, emotional shock and trauma, loss of enjoyment and amenities of life and disfigurement, and will continue to do so in future;
- 5.5 incurred and will still incur medical expenses.

It is for the foregoing reasons that the plaintiff claims damages from the defendant. Although the plaintiff has not made the allegations, it is not in dispute that in terms of the provisions of the Act the defendant is obliged to compensate her for the injuries that she sustained by virtue of the fact that they arose out of a collision of motor vehicles that were driven at the time in a public road.

[6] With the plaintiff having to prove negligence on the part of the driver of the minibus and also her damages ,the court was told the following at the commencement of trial that:

6.1 a number of issues were dealt with and determined by a number of courts.

This culminated in the judgment of Tuchten J which decided that the defendant was liable for the plaintiffs damages. Accordingly, the merits of the matter were decided by the judgment of Tuchten which determined that the defendant was liable for the damages occasioned by the collision in question to the plaintiff;

6.2 the parties themselves had settled some of the issues;

6.3 the plaintiff's claim for future medical expenses was settled by and between the parties on the basis that the defendant will provide the plaintiff with an undertaking in terms of s 17(4)(b) of the Act;

6.4 the past medical expenses were settled at R16,000.00;

6.5 general damages were settled at R400,000.00;

6.6 the remaining issues consisted of past and future loss of earnings. That these issues have now been narrowed to an extent;

6.6.1. that it is not in dispute that but for the collision in question the plaintiff would have earned income or salary;

6.6.2. the dispute between the parties was what her earnings should now be that the accident has occurred.

[7] The Court was at this stage referred to a bundle C2 page 262 which was the third page of the actuarial calculations by Johan Potgieter, a fellow of the Actuarial Society of South Africa; a fellow of the Institute and Faculty of Actuaries on behalf of DRS Actuarial Consulting compiled on 17 January 2012. With regard to these calculations which are shown below, Mr. Botha told the Court, firstly, that the first two calculations under the column "Income If Accident Did Not Occur", are not in dispute and, secondly, that the parties cannot agree on loss of income because they are unable to agree what the plaintiff's earnings should be now that the accident has occurred.

[8] The following reports were admitted:

8.1 the neurologist report by Dr. TT Townsend ;

8.2 the orthopaedic surgeon's report by Dr. FA Booyse;

8.3 the plastic surgeon's report by Dr. J Potgieter;

8.4 the biokinetics report by Kobus Venter; and

8.5 the psychiatrist report by Dr. I Chetty.

It will be noted that all of the abovementioned reports were prepared by the said experts on the plaintiff at the behest of the plaintiff's attorneys. The defendant had no similar reports of its own. The defendant though had an issue with the actuarial calculations by Johan Potgieter, had not commissioned any report by its own actuary.

[9] In his turn, Mr. Legong, counsel for the defendant, informed the Court that the reports of the following witnesses were in dispute:

9.1 occupational therapist by Gretchen Sasson;

9.2 clinical psychologist, Dr. Elton Bloye; and

9.3 industrial psychologist, Barbara Donaldson.

[10] The dispute between the parties is what the plaintiff's earnings should be now that the accident has taken place. In an effort to establish this aspect, the plaintiff herself testified and led over and above the evidence of several other witnesses. The evidence of such witnesses will be dealt with singly and in the order in which they testified.

THE PLAINTIFF

[11] Most of the facts placed by the plaintiff on the record in her evidence are common cause between the parties. The collision in which she was involved on 29 November 2004 is not in dispute nor is it in dispute that following the said collision she sustained certain bodily injuries. Finally, it is not in dispute that at the time of the collision the plaintiff was employed as a creditor's clerk and therefore that she was earning income. According to her evidence, at the time of the collision she was in an employment contract with African Labour Outsourcing Services ("ALOS") which had in turn deployed her to ABB at ABB's Alraod Premises. ABB was at the time a manufacturer of electrical components.

[12] Her office was situated on the first floor of the building. After the collision in

question she did not go back to work until on 2 February 2005 . After she had gone back to work , it was difficult for her to walk up and down the stairs. The ladies bathrooms and other offices were on the ground floor. It became increasingly difficult for her to walk between the two floors. Besides the difficulties presented by the situation of the ladies bathroom and other offices on the ground floor, while she sat on the first floor she was faced with another hurdle. Injured as she had been she also had to carry arch lever files to other offices. If she did not walk up and down she had to be at the computer.

[13] She approached the management of ABB and asked them to move her office to the ground floor. She was told that that could not happen as all the offices that dealt with finances had to be located on the same floor. She was furthermore told that her request could not be accommodated. The work situation became difficult for her. Apart from the problems I already have set out she could not sit for a protracted time. Following these difficulties she served her resignation notice in May 2005.

[14] At the end of her contract with ALOS, she did not immediately look for work. Instead she decided to assist her husband in his business. He was running at the time a waterproofing company. She assisted her husband for a number of years.

[15] According to her testimony, if the accident in question had not taken place, she would have continued to work for ABB and other companies.

[16] In 2006, she went to do a diploma in Landscaping which she completed in February of 2007. But she realised that she could not continue doing the work she had obtained a diploma for. It was the walking, the kneeling, the sitting and other related things that gave her a problem. As a consequence towards the end of December 2008 she stopped working in the landscaping business and re-joined her husband.

[17] In 2006 she stopped working for her husband following his institution of divorce action against her. From that point she worked for her daughter where

she earned R5000.00 per month if the money was available. Because of the economic situation at times she received no salary.

[18] But for the collision she would not be in this situation. She could not walk a long distance. When she sat, she could not do so for a long time. She was unable to handle the situation. She could not work in her own garden. Her husband told her that he wanted to divorce her because she was not longer the woman he had married initially. They ended up divorcing in December 2015. She was advised to reduce her weight.

[19] She underwent three operations, one in March 2006, the second in 2009 around November or December and the third early in the year in 2013. She was aware that she would have to undergo further medical treatment.

ELTON J BLOYE

[20] This witness was regarded as an expert and this was not in dispute. He had completed a medico-legal report on the neuro-psychological assessment of the plaintiff. In doing so he relied on the following documents:

- 20.1 MMF1 - the claim form which incorporated a medico-legal report by Dr. YM Cassim;
- 20.2 the plaintiffs clinical record from Lenmed Hospital dated 27 November 2004 ;
- 20.3 a medico-legal report completed by orthopaedic surgeon, Dr. C Barlin** on 18 November 2008; and
- 20.4 information gathered from the plaintiff.

The purpose of the exercise or assessment was to establish whether the plaintiff had had any neuro-psychological *sequelae* resulting from the injuries she sustained during the motor vehicle accident in question. Although it was pointed out in Bloye's report that in his report Dr. C Barlin had stated that:

The plaintiff was *"fit to return to her previous sedentary occupation and that she was unlikely to continue working beyond the age of approximately 63"* Bloye

himself reported that there were three main complaints that would rule her out from doing the same type of work again and these were:

- 20.5 the pain;
- 20.6 the psychological effects; and
- 20.7 the depression arising from the loss of mobility.

[21] According to Bloye, although the first one was accident related, he attributed all the three components to the motor vehicle accident. The plaintiff would, according to her, have a problem in doing the same kind of work that she did before the accident. The pain has affected her motivation to work and her relationship with other people. The divorce came about because her husband did not want to accept her new condition. Bloye reported that the plaintiff told him with during the interview that her contract ended in 2006 and that when it ended it was not renewed. She also informed him furthermore that the contract was not renewed due to a restructure of the company.

[22] In his report Bloye had stated as follows in paragraph 6.5 (a) at page 24:

"(a) Ms. P was primarily involved in an administrative and bookkeeping role prior to the accident, and the results of her cognitive assessment would suggest that she would be able to fulfil these functions in the future. There does not appear to be any indication that she has sustained a brain injury, and her depression and chronic pain is not affecting her cognition to the extent that she is unemployable in the open labour market."

In paragraph 6.5 (b) at page 24 the following was reported:

"... the dissolution of her marriage almost certainly creates problems in workplace satisfaction, as she needs to deal with her ex-husband, who is also her business partner. " During cross-examination he testified that the motor vehicle accident played no role in the plaintiffs divorce.

ALICE NIEUWOUDT

[23] Alice Nieuwoudt ("Alice"), the occupation therapist, testified that at the time of the collision or before the collision the plaintiff was working at the place where

60% she would be sitting down and 40% would be walking. Her view was that the type of work the plaintiff wanted to pursue was more strenuous than the work she did before the accident and that she would not have been able to do it again.

BARBARA DONALDSON

[24] This witness is an industrial psychologist. She had also compiled a report on the plaintiff after she had consulted with her. At the time she interviewed the plaintiff she had at her disposal most of the reports, according to her testimony. The purpose of her evaluation was to assess the plaintiff's work potential or her employability in the wake of the motor accident in question. She testified that there was a difference between employability and her ability to do work. The employer has to factor in that the employee, the plaintiff in this case, will not be at work for a considerable length of time while she has gone to receive medical treatment. Donaldson repeated that the plaintiff was experiencing pain. She added that pain caused her to lose concentration. She testified furthermore that being employed by a labour broker meant that the plaintiff had very little potential of progressing.

[25] In her report Donaldson had quoted certain paragraphs from the reports of other experts.

She quoted from the following expert reports. She stated as follows:

"With respect to any attempts that Ms. P may make to secure employment in the future, the opinions of the following experts would be relevant in a determination of her realistic prospects in that regard:

- Dr. Barlin observed that "Ms. P sustained injuries to both knees aggravating pre- existent but previously asymptomatic Osteoarthritis of the knees causing severe constant bilateral knee pain. Her symptoms are likely to worsen with the passage of time requiring increasing doses of analgesics and anti-inflammatories. She is almost certain to require Total Knee Replacements within 10 years of the date of this interview ... In my*

opinion she is employable in a sedentary occupation but should be employed where climbing stairs is unnecessary. Worsening of her symptoms is likely to render her unable to continue working in any capacity beyond the age of approximately 63. "

- *Dr. Pienaar is also of the opinion that: '... Ms. P may have to take time off work from time to time to undergo and recover from various modalities of treatment. The sequelae of injuries sustained ... would not prevent her from working in an office position until at least age 65."*
- *Dr. Booyse is of the opinion that: "Mrs. P's work ability was detrimentally influenced by her injuries and ... their ... sequelae. It is unlikely that the claimant would be able to return to her pre-accident level of activities and work capabilities as a result of the pain and symptoms arising from the injuries as described. Surgery will ameliorate some of these changes and improve her pain. Because of the loss of her functional work ability, the claimant is an unequal competitor on the open labour market Her injuries will result in increasing signs and symptoms of disability and will deteriorate with advancing age. "*

[26] Notwithstanding the opinion of other experts she testified that she would not recommend the plaintiff for any work because of her health problems.

[27] The plaintiff closed her case and Mr. Legong, counsel for the defendant informed the Court immediately thereafter that he was also closing the defendant's case. It will be noted that "the defendant closed its case without having led any evidence whatsoever."

[28] After the parties have told the Court that they would lead no evidence or no evidence at all Mr. Botha handed in what he called the new actuarial calculations dated 1 February 2017 compiled by Potgieter which the Court accepted without any objection from the defendant and marked as Exhibit 'D'. Paragraph 1.1 headed "*Income had accident not occurred* " stated as follows :

"I was instructed to assume that, had the accident not occurred, Ms. P's income would have been as follows:

- *R105,600 per year (R8,800 x 12) at the time of the accident*
- *Increasing with inflation until 31 December 2005*
- *From 1 January 2006, an income of R270,000 per year (average of median and upper quartile guaranteed packages of a Specialised Clerk, Paterson 84; in July 2016 terms)*
- *Thereafter, increasing with inflation until retirement at age 65. "*

In paragraph 2.3 under the subheading "*Method of calculation*" he stated that:

"I calculated the present value of income, had the accident not occurred, by discounting the net projected income discussed in 1. 1 above, allowing for interest and Ms P's probability of survival. The present value of income, having regard to the accident, was similarly calculated by discounting the net projected income discussed in 1.2 above."

Paragraph 3 under the heading "*RESULTS OF CALCULATIONS*" states that:

"I calculated the present value of the loss of income to be as follows as at 3110112017:

	Past Income	Future Income	Total Income
Income if accident did not occur	1,978,219	1,256 ,275	3,234,494
Less contingency deduction	98,911	37,688	136,599
	1,879,308	1,218,587	3,097,895
Income given accident did occur	173,895	225,352	399,247
Less contingency deduction	8,695	22,535	31,230
	165,200	202,817	368,017
Loss of Income	1,714,108	1,015,770	2,729,878

[29] Having done so he indicated, once more, that the only amount that was in dispute was the amount in the second column under "*Income given accident did occur*". It is so that the defendant has not placed any version before the Court. Mr. Botha submitted that, for that reason, the Court will have to make a

determination on the basis of the plaintiff's evidence. While it is correct that the Court must make a determination on the basis of the evidence tendered by the plaintiff and her witnesses, the Court does not necessarily have to accept it. In this regard the Court is guided by the case of *Shenker Brothers v Bester* 1952 (3) SA 664 (A) at page 670 F-G where Greenberg J, as he then was, had the following to say:

"Similarly the circumstances that evidence is uncontradicted are no justification for shutting one's eyes to the fact, if it be fact, that it is vague and contradictory to serve as proof of the question in issue. n

Therefore it does not follow, not even by any stretch of imagination, that because the evidence of the plaintiff is uncontradicted; that the defendant has led no evidence to contradict it; that the defendant has not put forward any version that therefore the version of the plaintiff is true. See also in this regard *Siffman v Kriel* 1909 TS 538; *Katz v Bloemfield and Keith* 1914 TPD 379 at page 381.

[30] Whether or not the evidence of the plaintiff and her witnesses is accepted will depend entirely on the quality of such evidence. It is incumbent upon this Court to properly assess the evidence in the light of its deficiencies and criticisms in order to establish whether it measures up to the standard of acceptability. If it does not, it will not avail Mr. Botha to submit that the defendant has not tendered any version. While the fact that the defendant has not testified is a factor that this Court will take into account in making a determination, that fact alone is not sufficient for the purposes of enabling the plaintiff to discharge her onus.

[31] Thus the starting point is that the onus lies on the plaintiff to satisfy this Court that "given that the accident did not occur" she is entitled to be compensated. Mr. Botha argued that there are no factual disputes before the Court; that there is only one version before the Court; that that version cannot lead to any other conclusion because of the accident in which the plaintiff sustained the damages set out in the actuarial calculations. The fact that Ms. P left work because of the collision is backed up by a number of reports by highly qualified people, so he

developed his argument. Accordingly the duty is on the plaintiff to prove that she left work because of the collision in question.

[32] On the other hand, and arguing on the basis of the plaintiff's and her witnesses' evidence, Mr. Legong submitted that, considering the entire evidence, it was still unclear as to why the plaintiff lost her employment. He argued that the plaintiff did not lose her job because of the collision in question.

[33] In her evidence in chief, the plaintiff testified that if the accident had not taken place she would have continued working for ABB and other companies. Still at the same stage of the proceedings she testified that:

"I served my notice in May 2005."

Still in the same breath, she said *"at the end of the contract I did not immediately look for work."* Under cross-examination Mr. Legong asked the plaintiff why she left ABB. She answered by saying that her contract had been terminated. Mr. Legong referred her to page 197, paragraph 7 of the report by Kobus Venter where, referring to the plaintiff he had reported that:

"she resigned in 2006."

She stated in reply that she did not resign but her contract was terminated.

33.1. Barbara Donaldson reported as follows at paragraph 3.5 page 11 of her report: *"Although she returned to work at the beginning of April 2006, she had in the meantime being given notification of the pending termination of her Contract of Employment with ALOS."*

According to this report, the Court knows now that she left work not because of the collision in question but because her contract of employment was terminated.

33.2. In paragraph 6.1 at page 26 of the same report Barbara Donaldson stated that:

"Ms. P reports that she was very happy in her job and believed that she stood a strong chance of being appointed permanently by ABB itself. She knows that about a year after her own contract was terminated in March 2006, all of the ABB offices were amalgamated and centralised in Meadowdale where the head office is."

That her contract was terminated was borne out by the contents of a letter dated 7 March 2006 from Co Brokers Holdings (Pty) Ltd to the plaintiff. The letter states as follows:

:"RE NOTIFICATION OF IMPENDING TERMINATION OF LIMITED DURATION CONTRACT OF EMPLOYMENT

You are hereby given one month's notice that your employment with African Labour Outsourcing Services will be terminated with effect from 7 April 2006.

All money due to you will be paid in accordance with relevant legislation.

We thank you for your loyal service and wish you the best for future endeavours.

Kind regards

The plaintiff received this letter on 16 March 2006.

33.3. Two things emerged from this paragraph. Her contract was terminated and secondly, there was going to be a restructuring of ABB's offices.

33.4. At paragraph 6.2 page 28 of the report this is what the report by Barbara Donaldson stated:

"Post Accident

Full details in respect of Ms. P's absence from work after the incident in question, her remuneration in terms of employment conditions, or otherwise, her loss of sick and/or vacation leave, if any, her loss of annual bonuses/overtime, if any, as well as a subsequent employment by ALOS until her employment was terminated should all be a matter of record."

33.5. Finally, Bloye reported as follows in paragraph 4.3(b) on page 4 of her report:

"There was also dissatisfaction with regard to Ms. P's work performance. Her contract was ended in 2006 and was not renewed, although she indicated that it was also due to a restructure in that company 11

Quite clearly there are basically two major reasons why the plaintiff left her employment. The first reason, according to her own evidence, is the collision in question. The second reason is, according to the reports she made to the experts, that her contract was terminated. On the basis of these two reasons I am

unable to make a determination. I have pointed out earlier that according to the expert reports of Dr. Barlin, Dr. Pienaar, Dr. Bloye and Ms. Smith the plaintiff could still work. Accordingly I make the following order:

1. No determination is made by this Court in respect of the following:
 - 1.1 "Income given the accident did occur."
2. An order incorporating the terms of the draft order marked "XPS" hereto attached is hereby granted.

P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

<i>Counsel for the plaintiff:</i>	<i>Adv. E Botha</i>
<i>Instructed by:</i>	<i>Gildenhuis Malatji Inc.</i>
<i>Counsel for the defendant:</i>	<i>Adv. A Legong</i>
<i>Instructed by:</i>	<i>Moche Attorneys</i>
<i>Date Heard:</i>	<i>31 January - 2 February 2017</i>
<i>Date of Judgment:</i>	<i>30 June 2017</i>