



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: 53659 / 2014

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

23 / 04 / 2020  
DATE

  
SIGNATURE

In the matter between:

VOLSHENK, LIEZL-MERI

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

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JUDGMENT

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Mavundla, J.

- [1] This is a third party claim, brought by the plaintiff Ms Liezl-Meri Volschenk, a major female general worker born on 15 January 1974, claiming damages from the defendant, a statutory insurer in terms of Act 56 of 1996, arising from the bodily injuries she sustained in a motor vehicle collision which occurred on 21 July 2014. The liability of the defendant has since been determined at 90% to 10% in favour of the plaintiff's proven damages, per court order dated 28 February 2018.
- [2] The only issue this court is called upon to determine is the future loss of income and general damages. The parties have further agreed that there would be no evidence led but the parties rely on the pleadings bundle 1, quantum documents in bundle 2, plaintiff's medico legal reports in bundle 3 and Plaintiff's medico legal reports in bundle 3A. It needs mentioning that the defendant did not file any expert report.
- [3] The plaintiff suffered the following injuries in the accident:
- 3.1 compound fracture of the right distal tibia and double fracture of fibula with involvement of tibia plafond on the lateral side;
  - 3.2 major depressive disorder and travel related anxiety symptoms;
  - 3.3 multiple scarring;
  - 3.4 severe recurrent sepsis in lower right leg.
- [4] Plaintiff claimed for:
- 4.1 loss of earnings estimated as per the actuarial calculation  
of I Kramer dated 5 February 2020 and marked annexure A'  
in the amount of R497 017. 00
  - 4.2 estimated future loss of earning capacity and interference  
with earning capacity R1 306 511. 00

4.3	general damages for pain and suffering, disfigurement inconvenience and loss of amenities of life	R 1 200 000. 00
	Total	<u>R3 004 528. 00</u>

with ancillary relief.

[5] According to:

5.1 Dr Kevin Scheepers a general practitioner has assessed on the narrative test the injuries of the plaintiff to be serious due to (i) serious long-terms injury or loss of a body function; (ii) permanent serious disfigurement.

5.1 Dr Naidoo a Psychiatrist, the plaintiff was diagnosed with stage 4 cervical cancer in December 2017 and she is on treatment in that regard. She revealed that she discovered that she was an adopted child and tried to commit suicide in 2015.; she presented with depressive and travel related anxiety; has symptoms of caffeine and other medications abuse.

Recommendation: Provision must be made for her to

be reviewed by a psychiatrist at least twenty sessions	R36 000. 00
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provision should be made for antidepressant

and other psychotropic	R60 000. 00
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Provision should be made for one admission

to Dual Diagnosis unit and one admission,	R90 000.00
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Provision should be made for Individual Therapy

with a Clinical Psychologist for at least thirty sessions.



- 5.2 Louise Schubert: the accident has truncated plaintiff's work and professional aspirations completely. **She has been subjected to a total loss of earnings from date of the accident (my emphasis),**
- 53 Clint Daglish a Biokinetics: the plaintiff remains disabled by her knee and ankle pain as a result of the injuries sustained in the accident. She is likely to continue having limited function of the right ankle and left knee. She faces a prospect of painful surgery and post-surgery recovery in the near future. Due to the extensive damage to the left knee and right ankle she is likely to experience ongoing limited mobility and ambulation.;
- 5.4 Dr Volkerzs an Orthopaedic surgeon opined that plaintiff sustained a compound fracture of the right distal tibia and a double fracture of the fibula. There was also involvement of the tibia plafond on the lateral side. This was treated, albeit delayed, with a debridement and external fixator. Needless to say that she ended up with a septic distal tibia. The fracture went on to unite and consolidate and both clinically and radiologically she has got evidence of post-traumatic osteoarthritis of the right ankle, there is pain and stiffness and narrowing of the joint on X-ray. She will only be able to do work of a sedentary nature, will not be able to do standing work or any work that involves walking; In her addendum dated 16 October 2017 Dr Volkerzs opined that for the time being the sepsis in the right distal tibia seems to have been cleared after numerous surgical procedures, however that is not a guarantee that there will not be a re-currency in future; she cannot see her earning an income in the foreseeable future, at least not until such time that her right ankle has been fixed.

Dr Volkerzs remarking on her hospital history stated that the plaintiff was taken from the scene of the accident and taken by ambulance to the Prince Mshiyeni Memorial Hospital near Umlazi. She was admitted to the ward and not operated on until a week later when the ankle was debrided and external fixator was applied and wires around her left knee cap put.

The following day a wound inspection was done and she was told that the doctor would have to amputate the right leg, below the knee. Needless to state that the plaintiff got a fright and signed herself out of hospital. She then spent three months with her husband consulting with various doctors in different hospitals and decided to leave it for the time being, and she had an infection as well. After three months she went back to Mshiyeni Memorial Hospital and came under the care of Dr Arnold. She then had ten more surgeries until February 2015.

The doctor in her follow up report of 4 December 2019 remarked that the plaintiff informed him that she is afraid to return to Dr. Marais in case he wants to further operate her. She was also diagnosed with cervical cancer in 2017.

#### Future medical expenses

Dr Volkerzs in respect of future medical expenses opined that:

for the so-called "conservative" treatment of her infected right distal tibia, i.e. the repetitive administration of antibiotics and occasional incision and drainage of an abscess pa	R30, 000
for the so-called "Lautenbach Procedure"	R250 000
for the formal ankle arthrodesis	R120 000
for arthroscopic debridement of the left knee	R60 000
a total knee replacement	R180 000

- 5.5 M Bell, Occupational Therapist, report of 5 / 10 / 2016 plaintiff worked for a company called Austen panel and paints but was contacted by Toyota. She worked 5 days a week, had lunch breaks. She had to drive to work., was a qualified controller in paint side. Every month she received a list of cars and what parts needed to be put on each car. Her work required her to walk a lot, never allowed to be seated. She often had to stoop, crouch or kneel as she checked the cars and



also carry parts. She now has difficulties in crouching and kneeling. Has difficulties in concentrating because of the pain after she had been walking too long. Her right leg is 1cm smaller than the left leg at knee level and shaft. The right ankle is swollen and larger than the left ankle. There is a small wound oozing with pus on the median area of the ankle. She is unable to move the right ankle properly. She can slightly flex and extend the ankle but she cannot invert or evert the ankle, *inter alia*, she is now unable to lift heavy objects;

- 5.6 A Stipp, Occupational Therapist: plaintiff is suffering from a depressed mood, she presented with hypertension; limitation related to her left knee and right ankle, it would seem that her pain in the left knee is becoming more problematic and this could be because of overuse; loading the affected joints could increase degeneration in the left knee and right ankle. In view of her injuries, her work should furthermore have the following characteristics: extended periods of standing or working in static positions should be limited to occasional; walking should be limited to occasional; prolonged, repetitive movements involving the lower limbs should be limited to kneeling, and crouching should be limited; excessive stair climbing should be limited to occasional; rest breaks and postural changes are recommended. Stipp opined that because of the sequelae of the accident related injuries of the plaintiff, she should be compensated for total loss of earnings until normal retirement age 60-65.

[6] From the quantum related documents in Bundle 2:

- 6.1 plaintiff was employed by Austin's Panel & Paint CC as a self-employed contractor/general contractor. Due to the nature of the accident on 21 July 2014 she was unable to attend work. She earned R1047.69 per week;
- 6.2 A further document titled Contract of Labour entered between the plaintiff and Austin Panel & Paint CC, with the commencement date on 1 February 2014 to 31 January 2015; her job description was a general worker with duties being general

worker and allied. Her remuneration is R847. 69 and work hours being from 7:15 to 4:30 pm Monday to Friday;

- 6.3 A letter dated 10 November 2014 from the same employer directed to the plaintiff stated as follows: "Due to the economic climate that we find ourselves in, and the shortage of work, which can be evidently seen and you are aware of, we have no option but to notify you that short time is eminent and you will be advised on which days to report for work by cell phone on a when required basis, Short time will be effective as of Tuesday, 11 November 2014 until further notice.

- [7] The actuarial report of Kramer dated 5 February 2020 provides as follows:

- 7.1 At the date of the accident the plaintiff was working at Austen's Panel & Paint as a Quality Controller. She commenced service in May 2013. At the accident date, she was earning R4,537 pm (R54, 444 pa)

But for the accident:

According to the Industrial Psychologist she would have been able to reach an income level of R73,000 pa to R160, 000 pa, taken as R116, 500 pa in 2018 money value (i.e. at date of the Industrial Psychologist's report.

It is assumed that she would have reached this level by February 2018.

It is assumed that she would thereafter have received inflationary increase and would now have earned R12, 878 pa.

She would have retired at age 60 to 65, taken as 62.5.

Her earnings at various points in time are shown below (values after the valuation date shown in current money terms) The rate of increase in income between the dates shown is also indicated ((nil" increase after the valuation date indicates no increase above inflation).

		R (pm)	R(pa)	increases
21 July	2014	4.573	54, 444	Level
01 February	2018	9,708	116,500	cpi
06 February	2020	10.573	126,878	nil

It is said she has not worked since the date of the accident and will remain unemployable in future.

## 7.2 PENSION FUND BENEFITS

No further benefits after retirement age have been taken in account.

## 7.3 METHOD AND CALCULATION ASSUMPTIONS

The principle used is to place Volschenk in the same financial position as she would have been, but for the accident. this is done by calculating the value of her income but for the accident and the value of her income having regard to the accident. The difference is the loss of income suffered. This loss of income calculated consists of two components:

**Accrued Loss** The loss of earnings for the period between the accident at date and the valuation date;

**Prospective Loss** The loss of earnings for the future period after the valuation date.

Value below are in Rands	But for the accident	regard to accident	Net loss
Gross accrued value of income	523 176	0	
Less contingency	<u>26 159</u>	<u>0</u>	
Net accrues value of income	<u>497 017</u>	<u>0</u>	<u>497 017</u>



Gross prospective value of income	1 537 072	0	
Less contingency	<u>230 561</u>	<u>0</u>	
Net prospective value income	<u>1 306 511</u>	0	<u>1 306 511</u>
Total value of income	<u>1 803 528</u>	0	<u>1 803 528</u>

#### Contingency %

Accrued	5%	n/a
prospective	15%	n/a

- [8] Counsel for the plaintiff submitted that with regard to the accrued past loss of income a 5% contingency deduction would be reasonable. In respect of the prospective future loss of income he submitted regard being had to the circumstances of the plaintiff, a high deduction of 20 % would be fair and reasonable. He further proposed that a 10 % deduction should be employed and the end result would be that an amount of R1 534 000 for future loss of income would be a fair and reasonable compensation for the plaintiff.
- [9] In respect of general damages, counsel for the plaintiff submitted that the parties were *ad idem* that plaintiff suffered serious and permanent injuries. In the circumstances, the court should award an amount of R126500. 00, relying in the matter of Bernell Schmidt v RAF Case no 2005/ 4834 where the plaintiff sustained numerous fractures to all the upper and lower limbs involving the left humerus; the left proximal radius and ulna at the elbow; the right midshaft radius and left tibia and fibula and an amount of R600.

00 (now almost R1 265 000. 00) for general damages was made on 23 June 2006. The total award to the plaintiff, over and above the future medical expenses to be covered through the s17 certificate should be, so it is submitted:

Past loss of earnings	R497 000. 00
Future loss of earnings	R 1 534 000. 00
General damages	<u>R 1 265 000. 00</u>
Total	<u>R 3 266 000. 00</u>

[10] Counsel for the defendant submitted that the court has a discretion to award what it deems to be a fair and reasonable compensation for the plaintiff. In this regard the court should bear in mind that the general public is contributing to through petrol levy. The amounts that are to be awarded, are nothing more than a *solatium* and therefore should be also fair to the defendant. He implored this court to be mindful of the fact that extraordinary awards running into millions in matters of this nature have a potential of adverse effects on the defendant in long terms, which might result in unintended consequences to the victims of motor vehicle accidents.

[11] It is trite that general damages are not capable of exact and mathematical calculation. The court will have regard to the circumstances of the particular case. In the matter of *A Mutual Insurance Ltd v Maqula*<sup>1</sup> the Appellate Court

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<sup>1</sup> 1978 (1) SA 805 (AD) at 810H

held that in principle there is no reason for distinguishing between general damages and loss of income for purposes of contingencies.

[12] In the matter of *Pitt v Economic Insurance Co Ltd*<sup>2</sup> cited with approval by the Constitutional Court in *De Jongh v Du Pisanie NO*<sup>3</sup> it was held that: "(T)he Court must take care to see that its award is fair to both sides—it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense."

[13] In the matter of *Legal Insurance Company Ltd v Botes*<sup>4</sup> Holmes J.A. held that the court 'In assessing the compensation the trial Judge has a large discretion to award what under the circumstances he considers right. He may be guided but is certainly not tied down by inexorable actuarial calculations."

[14] In the event of a large sum being paid to the plaintiff, properly invested in a high interest yield portfolio, this would place the plaintiff in a better position to enjoy, albeit not to the same extent as she would have had but for the accident, *vide Southern Insurance Association Ltd v Bailey NO*<sup>5</sup>.

[15] *In casu*, the plaintiff was prior to the accident already suicidal. She attempted on two occasions to take her life. She discharged herself from hospital while she was not fully recuperated. Her ankle eventually developed sepsis

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<sup>2</sup> 1957 (3) SA 284 (D) at 287E-F.

<sup>3</sup> 2005 (5) SA 457 CC at 476C.

<sup>4</sup> 1963 (1) SA 608 (AD) at 614 F.

<sup>5</sup> 1984 (1) SA 98 (AD) at 98E-G.



because of the delayed treatment. Her own premature discharge from hospital, coupled with delay in seeking medical attention, in my view, contributed significantly in the prolonged pain on her knee and or ankle and inability to walk longer. These factors, in my view, adversely contributed towards her in ability to walk longer, thereby curtailing her working life span. She also was subsequently diagnosed with cervical cancer; which might also militate against her ability to work up to her retirement age of 62 years. It also need to be noted that in the nature of her work, as a general labor, already prior to the accident her employer, due to economic climate, was obliged to down scale her working hours to a short-notice call on a "when required basis". The present economic climate, when regard is had to the notorious down-ward spiraling rand value, and the fact that her employer was already downscaling, are factors negative factors that place the prospect of sustainability of industries such as the one she was employed in. The adverse economic dynamics on the industry the plaintiff was employed in, coupled with her age of 46 and her physical infirmity (having been diagnosed with stage 4 cervical cancer, makes it unlikely that she would have been able to work up to retirement age even if the accident had not occurred.

[16] It is a notorious fact that the Road Accident Fund ("RAF"), for a myriad of reasons, is like a ship fast sailing in shallow waters towards the rocks. It is also a notorious fact that, not long ago the assets of RAF were attached by the Sheriff of the Court. Its sorry financial circumstances, in my view, warrants that the Courts, in awarding claims to litigants, should make moderate awards to avert the bankruptcy of the defendant, as I intend so doing in this matter.

[17] In the premises, taking into account the circumstances referred to in the last two preceding paragraphs, and in the exercise of my discretion, I am of the view that the awards set out herein below, would be fair and reasonable to both parties.

[18] Both parties engaged the services of senior counsel, deservedly so.

[19] Consequently the following order is made:

1. That the Defendant is ordered to pay plaintiff an amount of R2 497 000. 00 (Two million four hundred and ninety-seven rand);
2. That the Defendant is ordered to pay interest on the amount mentioned in order 1 herein above, at the rate of 9.5% per annum

calculated from 14 days of the date of this judgment to date of payment;

3. The defendant is ordered to furnish the plaintiff with an undertaking in terms of s17(a) of the Road Accident Fund Act 56 ~~06~~<sup>of</sup> 1996, for the costs of the future accommodation of Ms. Liezel-Meri Volschenk in a hospital or nursing home or treatment of or rendering of a service to her or supplying of goods to her, arising out of the injuries sustained by her in a motor vehicle collision which occurred on 21 July 2014;
4. The defendant is ordered to pay the plaintiff's costs of suit, such costs to include:
- 4.1 qualifying costs of experts witnesses;
  - 4.2 costs of employment of senior counsel

  
N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

HEARD ON THE : 06 /02 / 2020



DATE OF JUDGMENT : 23 / 04 /2020

APPLICANT'S ADV : ADV.ZIDEL SC

INSTRUCTED BY : DE BROGLIO ATTORNEYS INC

RESPONDENTS' ADV : ADV.BOTHA

INSTRUCTED BY : T.M. MAPONYA INCORPORATED