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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE Number: 37332/2011

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED: YES/NO

2024/11/22

In the matter between: -

ISABELLA PAULINA SIBIYA

Plaintiff

AND

THE ROAD ACCIDENT FUND

Defendant

LINK NO: 2828605

CLAIM NO: 560/16088/1081/0

JUDGMENT

The judgment and order are published and distributed electronically.

N VAN NIEKERK AJ:

Introduction:

- [1] This matter came before me on 30 August 2024 on the trial roll.
- [2] The parties agreed in a joint practice note, filed on 27 August 2024, that:
- 2.1 A motor collision took place on 25 April 2010 in Winterveld, during which collision the Plaintiff was a pedestrian;
 - 2.2 The Defendant is liable for the plaintiff's damages;
 - 2.3 An order of 20 June 2018, provided that the Defendant should pay R400 000.00 for general damages and provide the Plaintiff with an undertaking for future medical expenses;
 - 2.4 The only issue in dispute for determination by this Court was the Plaintiff's past and future loss of earnings;
 - 2.5 The merits of the matter were settled between the parties.
- [3] In respect of the claim for past and future loss of earnings the Plaintiff was claiming an estimated past loss of earnings in the amount of R1 117 891.00 and estimated future loss of earnings in the amount of R6 020 760.00.
- [4] On behalf of the Plaintiff, heads of argument was filed by Adv Da Silva SC on 28 August 2024, but no heads of argument was filed on behalf of the Defendant. At the time of the hearing of this matter Mr Francois Mostert, the state attorney assigned by the Defendant, appeared on behalf of the Defendant and Adv CA Da Silva SC appeared on behalf of the Plaintiff.
- [5] At the hearing of the matter application was made by the Plaintiff that, in terms of Rule 38(2) of the uniform rules of Court, permission be granted to

the Plaintiff that the expert evidence be tendered on affidavit. This application was not opposed by the Defendant. The application was granted.

[6] The Plaintiff served notices of expert witnesses which *inter alia* included the following experts:

7.1 Dr S Sombili, an orthopaedic surgeon;

7.2 Dr JT Matsape, an occupational therapist;

7.3 Mrs Nomalanga Ntuli, an education psychologist;

7.4 Mrs Sandra Moses, an industrial psychologist;

7.5 GRS Actuaries (Mr Potgieter).

[7] The Defendant did not appoint any experts to examine the Plaintiff and/or calculate the loss. No expert reports were submitted on behalf of the Defendant.

On behalf of the Plaintiff, the following submissions were made:

[8] The Court's attention was drawn to the fact that two addendum reports were filed, *inter alia* by Ms Sandra Moses (the industrial psychologist) and Mr Johan Potgieter (the actuary), during July to August 2024. The first reports were already obtained in 2014/2015.

[9] Mr Mostert came on record on behalf of the Defendant in October 2023 and a pre-trial conference was held on 11 July 2024, during which pre-trial conference several questions were posed to the Defendant in respect of the reports filed by the experts and the Defendant's answer was that it will revert, but to date of the trial it has not reverted.

[10] The Defendant previously conceded the merits of the matter and conceded the injuries sustained by the Plaintiff, paid general damages and gave an undertaking for the Plaintiff's medical expenses.

[11] The evidence of the expert witnesses of the Plaintiff is crucial in the determination of the injuries suffered by the Plaintiff and the *sequelae* thereof and as a result the damages already suffered and to be suffered in the future by the Plaintiff.

[12] In light of the fact that no contradictory findings have been made by other experts appointed by the Defendant, the expert evidence of the expert witnesses of the Plaintiff stand uncontested. The Plaintiff has an impaired cognitive position as a result of the accident.

On behalf of the Defendant, the following submissions were made:

[13] Mr Mostert recorded that he has no instructions to settle and no offer to the Plaintiff;

[14] He submitted that it was a serious injury to the head, left hip and hip disfigurement, but that the injury was 14 years old and there was no report indicating that the injuries were still the same. The orthopaedic surgeon's report was 10 years old.

Summary of expert evidence:

[15] **Dr S Sombile: Orthopaedic surgeon**

15.1 His report is dated 30 June 2014. He examined the Plaintiff on 14 March 2014, almost 4 years after the accident;

15.2 At the time of the accident, the Plaintiff was in Grade 9 and as a result of the accident she repeated Grade 9;

- 15.3 At the time of the examination, she was in Grade 10, seemingly for the third year. It was difficult for her to attend school because she had to walk to school every day and she was struggling to walk the +- 40 minutes, single trip, to school;
- 15.4 She is suffering the following disability and impairment as a result of the accident:
- (a) The left lower limb is longer than the right by 3cm;
 - (b) chronic trochanteric bursitis of the right limb;
 - (c) chronic right thigh pain;
 - (d) She cannot stand for long periods;
 - (e) She cannot walk long distances;
 - (f) She cannot lift heavy objects.
- 15.5 Plaintiff is expected to suffer from chronic pains for the rest of her life in her right hip;
- 15.6 This is a serious long-term impairment with permanent serious disfigurement over the right thigh with severe long term mental or behavioral disturbances.

[16] **Sandra Moses – industrial psychologist:**

- 16.1 She brought out her first report on 12 May 2014. The date of the assessment was 2 May 2014, more than 4 years after the accident;

- 16.2 At the time of the assessment, the Plaintiff was 18 years of age. Plaintiff was in Grade 10 and at that stage it was opined that she would manage to complete Grade 12;
- 16.3 The Plaintiff is one of 5 siblings. At the time of the assessment her two older sisters were 24 and 22 years old respectfully and both unemployed, with a highest qualification of Grade 12. Her mother was 42 years old and unemployed and her father was a winch operator. Her two younger brothers were still scholars;
- 16.4 In the report reference is made to an evaluation a certain Ms RS Tshitake, an occupational therapist, who noted that during the evaluation the Plaintiff demonstrated severe cognitive problems;
- 16.5 Pre-accident she would have most likely matriculated and continued at tertiary level;
- 16.6 Post-accident she is only suited to unskilled to semi-skilled work and she will need a sympathetic employer and her experience intermittent periods of unemployment into the future, early retirement has been indicated;
- 16.7 The industrial psychologist provided an addendum report dated 23 July 2024 and for this report she assessed the Plaintiff on 23 July 2024, more than 14 years after the accident;
- 16.8 Plaintiff quit school at Grade 11 and did not pass Grade 12 after the accident. During the follow-up assessment the Plaintiff was still unemployed. Her unemployment seems to be justified because she is limited to unskilled jobs, which is generally physical in nature;
- 16.9 The Plaintiff is unemployable on the open labour market;

16.10 She thus suffers a total loss of income. She will suffer chronic pains for the rest of her life. She cannot lift heavy objects and is expected to retire about 3 years earlier. Her total loss of income is justifiable.

[17] **MB Ntuli – educational psychologist:**

17.1 The educational psychologist assessed the Plaintiff on 17 July 2024. Her current symptoms are:

- (a) painful left leg and tiredness when walking for long distances;
- (b) she is forgetful and struggle to focus;
- (c) she suffers regular headaches and dizziness.

17.2 Before the accident, she was in good health and was never hospitalised;

17.3 At the time of this assessment the Plaintiff's mother was still unemployed. Her father passed away in October 2023. Her older sister, Numsa, has obtained NQF Level 4 and 5 of a teaching qualification and is pursuing her teaching studies. She was unemployed at the time of the assessment. Her other sister Linah was employed as a teacher at Edwin Mohalusi Primary School and was pursuing her studies in B-Ed with U-Tech. Her brother, Siphosiso, left school at Grade 10, because he was a slow learner. He was unemployed. Her other brother, James, obtained Grade 12 and is studying a teaching course;

17.4 The results of the cognitive assessment showed that the Plaintiff's verbal comprehension scale as exceptionally low, her perceptual reasoning scale was average, her working memory scale was exceptionally low, the processing speed was average and her full scale was estimated to be within the borderline range, suggestive of inadequate global cognitive skills;

- 17.5 Her borderline delayed score in respect of perceptual functioning suggests that she has inadequate ability regarding visual motor abilities, inadequate visual memory abilities and essential discriminators of brain damages were noted;
- 17.6 According to the educational psychologist the Plaintiff would likely not have repeated any Grade pre-accident until she reached and passed Grade 12. She would also have obtained a diploma or degree at a college or university of her choice, funds allowing;
- 17.7 Taking into account all the factors it is likely that the accident had an impact on her scholastic performance to an extent that she had to quit school, whilst she did not repeat any grade before the accident. The identified unusual situation as a result of the accident can likely compromise her ability as a successful competitor in the open labour market.

[18] **Johan Potgieter – consulting actuary:**

- 18.1 A further report by Johan Potgieter dated 12 August 2024 was provided to Court;
- 18.2 Based on the information of the addendum report of the industrial psychologist, Ms Moses, the actuary used two scenarios;
- 18.3 Scenario 1 – for no tertiary education and scenario 2 - for tertiary education;
- 18.4 He applied 10% general contingency deduction to past income had the accident not occurred and 25% general contingency deductions to future income had the accident not occurred;

18.5 He provided his calculations on the limited loss scenario based on the limitations in terms of the Road Accident Fund: Adjustment of Statutory Limit in respect of claims for loss of income and loss of support. According to his calculations the following is the limited loss for scenario 1: Past loss – R1 123 007 and Future loss – R5 573 149: Total - R 6 696 226. The limited loss for scenario 2: Past loss – R1 117 891 and Future loss – R6 020 760: Total - R7 138 651.

Conclusion:

[19] Although there is not a new orthopaedic surgeon's report there are new expert reports which assisted the Court;

[20] There is the addendum report of the industrial psychologist and the new report of the educational psychologist clearly indicating an impaired cognitive ability and opining a total loss of income scenario to be justified;

[21] The Defendant did not provide the Court with any expert evidence contradicting the evidence by the experts of the Plaintiff;

[22] The Defendant did not provide the Court with a calculation taking into account the argument raised by the Defendant that there is no indication that the injuries are still the same. Such a calculation would have assisted the Court in considering the significance of the argument.

[23] The Defendant did absolutely nothing to prepare for trial, notwithstanding the fact that this matter was already instituted in 2011, that the merits were already conceded in 2018 and the notice for set-down for trial for 30 August 2024, was already served on the Defendant on 17 March 2023.

[24] The Defendant was in possession of some of the expert reports as early as 2014 and 2015 and notwithstanding the Defendant did nothing to obtain his own expert reports and opinions.

[25] The Court is of the opinion that the Defendant should not be accommodated in respect of its single argument that the orthopaedic surgeon's report is 10 years old. This argument does not erase all the other experts' reports before Court and the fact that the Defendant provided absolutely nothing to contradict the experts' evidence before Court.

[26] The only issue before Court to be determined the question of past and future loss of earnings. There is nothing contradicting the conclusion that a total loss of income is justified;

[27] The Defendant provided nothing to the contrary in this regard and the expert evidence of the Plaintiff's experts stands uncontested;

[28] That being said, I am cautious to simply accept that this Plaintiff would have received tertiary education were it not for the accident. I am mindful that today's youth understand the importance of tertiary education and receive financial assistance to accomplish same. However, even the industrial psychologist provided for two scenarios, being one without tertiary education and one with tertiary education. I cannot ignore the possibility that the Plaintiff might not have received tertiary education;

[29] In the premises, I am of the opinion that it will be a fair and reasonable award for past and future loss of earnings, if the possibility of no tertiary education is taken into account. I will therefor give an award equal to the average between the two scenarios as calculated by the actuary.

[30] **Order:**

30.1 In payment of the Plaintiff's claim for loss of earnings the Defendant is directed to pay the sum of R6 917 438.50 (Six-million-nine-hundred-and-seventeen-thousand, four-hundred-and-thirty-eight rand and fifty cent) to the Plaintiff, within 15 days of the grant of this order. The aforesaid amount is to be paid to the plaintiff's attorney into the account referred to in sub- paragraph 3 hereunder;

30.2 The Defendant is ordered to pay the Plaintiff's taxed or agreed party and party costs for and up to 30 August 2024, to include, but not be limited to the following:

(a) The reasonable taxable costs in respect of the medical legal reports of the Plaintiff's expert witnesses, being:

(i) Thusanong Consulting (Ms Sandra Moses): Industrial psychologist;

(ii) Nomalanga Paulina Ntuli: Educational psychologist; and

(iii) GRS Actuarial Consulting (Mr Johan Potgieter): Actuary.

(b) The reasonable taxable preparation, reservation and qualifying fees (if any), of the expert witnesses of which notice was given and summary of the opinions.

26.3. The Defendant is directed to pay the Plaintiff's taxed costs, *alternatively* agreed costs up to and including 30 August 2024, which costs include the costs of senior counsel on scale C. The aforesaid costs are to be paid to the Plaintiff's attorney within 7 days of taxation or agreement to the following bank account:

Account Holder: AO Ndala Inc.

Bank: ABSA Bank

Account No: 4[...]

Branch Code: 632005

Ref: Mr Ndala/RAFR00679

N VAN NIEKERK

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: Friday, 30 August 2024

Date of judgment: Friday, 22 November 2024

Appearances:

On behalf of the Plaintiff: Adv CA Da Silva SC

Instructed by: AA Ndala Inc.

On behalf of the Defendant: Mr Mostert

Instructed by: State Attorney