



**NORTH WEST HIGH COURT
MAFIKENG**

CASE NO.: 3303/2009

In the matter between:

MODISANA EMILY

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

DATE OF HEARING : 7 FEBRUARY 2012

DATE OF JUDGMENT : 26 APRIL 2012

FOR THE PLAINTIFF : ADV HAWMAN

FOR THE DEFENDANT : ADV VAN DEN ORDEL

JUDGMENT

LANDMAN J:

- [1] The plaintiff is Emily Modisana born 16 September 1989, who seeks damages for past medical expenses as well as general damages from the Road Accident Fund, the defendant, in the amount of R1 500 000.00.
- [2] Ms Hawman for the plaintiff, and Mr Van den Ordel for the defendant, were agreed that:
- (a) The defendant is 70% liable for the plaintiff's damages.
 - (b) The quantum of future loss of income is in dispute.
 - (d) The quantum of the general damages is in dispute.
 - (e) No expert evidence would be led but the court will determine the general damages on the basis of the medical reports which have been filed. The plaintiff filed reports by: Dr A M Matime, T Motsepe, Prof Patrick Lekgwara, Narropi Sewpershad, W M Khumalo, Dr M Willemse and Lowane Mayayise. The defendant on the other hand filed reports by: Dr Lourens P G Blignaut, Rita Du Plessis, Mrs Dudu S Moja, Dr J H Kruger and Andre Lamprecht.
 - (f) No other heads of damages or orders were raised in argument.
- [3] In the course of argument counsel for the plaintiff sought to amend the particulars of claim to increase the amount of damages claimed. I offered counsel for the RAF the opportunity of postponement in order to provide him with

an opportunity to place further evidence before me but he declined to do so. I reserved judgment on the proposed amendment.

- [4] I am satisfied that although it was incumbent on the plaintiff's legal representatives to have sought a postponement at an earlier stage of the proceedings, the medical and other reports gave the RAF sufficient warning that the claim would be increased. The RAF's refusal of a postponement and a concomitant order as to costs, points to the lack of prejudice. I therefore grant the amendment.

The plaintiff's injuries

- [5] The plaintiff was a pedestrian walking on the side of the road when she was knocked down by a minibus taxi.
- [6] I set out the medical evidence briefly and I do not record all points of view. The reason for this approach will be discussed below.
- [7] Dr Matime, an orthopaedic surgeon, recorded the plaintiff's medical history and noted that the plaintiff sustained the following injuries:
- head injury with loss of consciousness and loss of recall
 - bruises/laceration over the right side of the face

- neck injury
- contusions both elbows
- contusions left leg.

[8] The plaintiff was admitted to the Rustenburg Provincial Hospital soon after the accident on 16 November 2007 where she was evaluated including X-rays of the injured body parts. She was treated on antibiotics, analgesia and anti-inflammatories.

[9] The right side of the face was sutured, and the rest of the wounds dressed.

[10] She was discharged from hospital on 23 November 2007 to be followed as an out-patient.

[11] The plaintiff was a minor dependent and lived with her family. At the time of the accident the plaintiff was a grade 9 school pupil. She played volley ball and took part in choir singing in her leisure time.

[12] The plaintiff informed Dr Matime that she was in perfectly good health prior to this accident. She had never been involved in a road traffic accident before nor suffered any severe trauma. She had no previous surgical operations.

[13] The plaintiff complained to Dr Matime that the injuries

sustained in this accident have affected her health adversely. Her major complaints when she was examined were:

- recurrent headaches
- painful eyes
 - occasional swelling both lower limbs, especially following exertion.

[14] On examination Dr Matime noted that the plaintiff is a reasonably healthy 20 year old female. She is 154cm tall, with a body mass of 53kg. There are no obvious signs of systemic disease. She has a small permanent scar on the right side of the face as a result of the accident.

[15] The plaintiff suffered severe acute pain for 2 to 3 weeks. This acute pain gradually subsided over a period of up to 4 weeks.

[16] The plaintiff has never been completely pain free since the accident and still has to take pain medication whenever the pain is severe.

[17] Dr Matime returned to the injuries and opined that:

(a) Head injury

The plaintiff sustained a head injury with concussion. On admission to hospital her Glasgow Coma Scale was assessed to be 13/15. Dr Matime concluded that: "At the time of the present examination there is no obvious neurological complication from the concussion".

The plaintiff complains of bilateral eye pain. She should be assessed by an Ophthalmologist if the eye problem is considered accident related. Dr Willemse, an Ophthalmologist, later filed a report.

The facial abrasions have resolved and there is only a small scar on the right side of the face from the laceration.

(b) Neck injury

The plaintiff sustained a neck injury in the accident that she was treated symptomatically for. At the present examination she did not complain of any neck symptoms. Clinically there was no obvious complication and radiologically the neck is reported by the Radiologist as being normal.

(c) Soft tissue contusions both left and right elbows and left leg.

The plaintiff sustained soft tissue contusions over both left and right elbows and the left leg. These soft tissue injuries have resolved and there is no obvious complication noted at this examination. She complains of recurrent/occasional pain and swelling. She should benefit from intermittent pain medication and anti-inflammatories as and when necessary. Provision should be allowed in the settlement for the cost of such future medical treatment.

[18] Prof PL Lekgwara, a specialist neurosurgeon, examined the plaintiff on 2 December 2009. He noted four scars:

- 2cm scar on the right mandible
- 3cm scar on the right supra-orbital region
- Abrasion scar on the right Zygoma
- 2cm scar on the left leg.

[19] In the light of the post traumatic amnesia of seven days the concluded that the plaintiff had suffered a severe head injury.

The sequelae of the injuries

[20] Ms Narropi Sewpershad, a clinical psychologist, examined the plaintiff and conducted a series of tests.

[21] Ms Sewpershad findings, based on the neuropsychological assessment, are that the plaintiff has some neuro-cognitive difficulties and neuropsychological sequelae which are compatible with a severe diffuse traumatic brain injury. Furthermore the effects of her neuro-cognitive difficulties appear to be compounded by other post factors including pain stress, her depression, PTSD and post-concussion headaches. From a neuropsychological point of view her cognitive dysfunction is of such a nature that she is going to find tasks that demand sustained attention and concentration difficult. In addition to this, difficulty with attention, and memory, are likely to affect her availability for learning at times, and will hamper her occupational performance and progression to a certain degree. Furthermore, due to weaknesses in her executive functioning, self regulation, low drive and loss of confidence, she will most likely function better in a structured environment.

[22] Ms Sewpershad goes on to say that given the presence of her head injury and the limitations in her cognitive and occupational functioning, the plaintiff is at risk for developing severe secondary psychological and neuropsychiatric difficulties. In such cases the psychiatric disorder is organic in nature, in other words it will not resolve and there is no

prospect for recovery. Based on the information from the clinical interview, and from the assessment, it is evident, she is currently presenting with impatience, irritability, depression and possible feelings of self-doubt and insecurity, thus signifying post accident changes in her psycho-emotional functioning. If left untreated, this will impact negatively on her current interpersonal functioning and with her future earning potential. These changes combined with her difficulty regulating her emotional responses and with her neuropsychological problems may cause her to overreact to potential stressors by regressing emotionally or acting out aggressively and will place tension on all her relationships and it may also lead to her being seen as a “difficult to manage employee” in the future. In her social functioning, her interpersonal difficulties will emerge in areas of forming friendships, and as she matures into adulthood with her marriage partner and with parenting.

[23] In summary, in light of the findings of the neuropsychological findings it is evident that the plaintiff is suffering from a severe brain injury with permanent cognitive impairments.

[24] Ms Sewpershad observes that the plaintiff's neuropsychological profile has been noted with some of her cognitive functions under consideration in the below average range, which are likely to affect her higher mental functions.

[25] The plaintiff is at increased risk for developing severe psychological and neuropsychiatric disturbances. Her involvement in the accident constituted a significant traumatic event and resulted in persisting psychological symptoms as reported above and it can be concluded that she has been placed at risk and left in a psychologically more vulnerable position as a result of it. The following factors require specific consideration in this regard:

- The presence of residual symptoms of a Post Traumatic Stress Disorder.
- The presence of a Major Depressive Mood Disorder.
- A poor self concept and lack of confidence.
- Cognitive difficulties.
- Pain syndrome.

[26] Her recovery will be hampered by the complications as reported below as well by the time that has lapsed since the accident.

[27] Ms Sewpershad lists the following complications:

- Severe diffuse traumatic brain injury.
- Amnesia.
- Cognitive difficulties.
- Social functioning.

[28] From a neuropsychological point of view, she suffered a significant loss of academic prospects and amenities of employment. She has repeated Grade 10 and 11 after her injury and the writer believes that based on neuropsychological test profile, she is not likely to progress beyond a low level Grade 12 pass, with further delays anticipated to be a year or two (given current trend) though this is considered highly optimistic. Ms Sewpershad notes that prior to her injury she was considered capable of obtaining a Matriculation pass and pursuing a tertiary qualification.

[29] The Educational Psychologist would need to give more detailed comment on the impact of her neuropsychological difficulties on her performance in a formal academic context.

[30] Hence it can be concluded that the plaintiff has suffered a significant loss of potential with ultimate limitations on occupational outcome. From a cognitive point of view she would be expected to experience severe limitation in terms of opportunities and choices available to her on the open labour market. She is also considered to be a vulnerable employee with her mood and behaviour difficulties contributing to difficulty in obtaining and retaining employment for long periods of time. Her vocational

prognosis would also be dependent on her psychiatric profile. It is recommended that the opinion of a psychiatrist be canvassed in order to comment on the manifestation of neuropsychiatric complications that may have emerged as a result of her severe head injury. I interpose to note that a psychiatric report has been filed.

[31] Deference is given to the more detailed opinion of the Industrial Psychologist with regards to potential loss of income, bearing in mind her poor performances, post-accident and neuropsychological profile.

[32] Ms Lowane-Mayayise, an industrial psychologist, reported that she is of the opinion that only with an understanding employer who would be accommodating and willing to provide the required supervision would any employment prospect be possible. It should also be noted that the basic and temporary nature of her employment prospect would always mean that her career will be characterized by periods of unemployment thus with no earnings. With no specific skill, such periods are likely to remain longer and more frequent. Ms Lowane-Mayayise suggests that a higher than normal post-accident contingency should be considered in this regard.

[33] With regards to her post-accident retirement age, Ms Lowane-Mayayise, although deferring to the medical experts, is of the opinion that, if at all medically possible, the

plaintiff will retire at the age of 60 when the government old age grant would be applicable.

[34] Ms Rita du Plessis, a counselling psychologist, she conducted an examination and extensive tests. Ms Du Plessis is of the opinion that the plaintiff could have suffered a mild to moderate concussive head injury. As regards the plaintiff's pre-accident ability Ms du Plessis says that the plaintiff's cognitive ability would have enabled her to pass grade twelve but on a low level. The plaintiff's poor command of English, the slow work speed, her emotional difficulties and poor home environment would probably have resulted in her having to repeat grad eleven once or twice and her probably leaving school without a Matriculation certificate.

[35] Ms Du Plessis said that although the plaintiff's emotional well-being and quality of life has been compromised by the sequelae of the accident there are psychological and interpersonal factors which are not accident related and have largely contributed to this situation.

The plaintiff's evidence

[36] The plaintiff gave evidence. She was born in 1989. She

started school in 1997 but failed grade one twice. She did not get on with her step mother. She was ill treated. She repeated grade 2 and failed grade 3. She repeated the 2003 school year but thereafter she passed every year. In 2007, when she was injured, she was in grade 9 which she passed. She was 18 years old. She repeated grade 10. She did not complete grade 11 as she became pregnant.

[37] The plaintiff said that prior to the accident she had thought of becoming a social workers. She said that she still would like to matriculate and read for a social work degree. But she needs finance to do so.

[38] She said that she has not recovered and has headaches.

[39] The plaintiff came across well. She is well spoken but the deficiencies stemming from her injuries are noticeable. But this is only because I have had insight into her history, injuries, tests and her vulnerabilities.

The assessment of plaintiff's pre-accident abilities

[40] The major differences between the expert reports submitted by the plaintiff and those the defendant relate to the assessment of the plaintiff's pre-accident mental intelligence and her pre-accident career prospects.

[41] As no tests can be done to establish her functioning before the accident and as there is no indication that she was assessed prior to the accident, an assessment needs to be made with reference to the plaintiff's history, scholastic achievements and other available information.

[42] It is clear that the experts on both sides assess the plaintiff as she appeared to them at the time of assessment and then using that impression estimate her intelligence and functioning prior to the accident taking into account the injuries which she suffered and notionally thinking them away. It follows that the post accident assessment, as a starting point, must be an accurate one. It will not be accurate one and the projections and opinions will also be tainted if the post accident assessment is not based the true medical position. It stand to reason if the plaintiff's post accident functioning is based on an assumption that the plaintiff is suffering from a mild head injury e.g. brain injury, that her pre-accident functioning may be assumed to have been better but not that much. On the other hand if the assessment is predicated on an assumption that the plaintiff suffered a severe head or brain injury that she would have function very much better than post accident.

[43] Ms Rita du Plessis, a counselling psychologist, assumed, from the medical report at her disposal, that the plaintiff suffered from "a mild to moderate concussive head injury". See para

10.5 of her report. But there is a caveat. Ms Du Plessis noted that the results of the tests which she administered indicated that the brain injury was more severe than she had been informed. This point was lost on the experts who relied on her report to arrive at their respective assessment.

[44] Mr Andre Lamprecht, an industrial psychologist, drafted his report and arrived at his assessment of the plaintiff's pre-accident functioning, on the basis of Ms Du "Plessis" report that the plaintiff had suffered "a mild concussion". See para 5.3.5. of his report.

[45] Ms Dudu Moja, an occupational therapist, also premised her assessment on the basis that the plaintiff suffered a "mild concussion". See para 6 of her report. None of these experts refer to, and I may properly accept that none of them had access to the report of any neuro-surgeon.

The degree of the brain injury

[46] Dr Kruger, a neuro-surgeon, commissioned by the defendant, is of the view that the plaintiff sustained a "moderately severe concussion". See "summary of injuries" page 7 of his report. Prof Lekgwara, neuro-surgeon, was of the opinion that the plaintiff suffered a "severe head injury". See page 8 of his report. Dr M Willemse, an ophthalmologist, is also of the opinion that the plaintiff sustained a "severe head injury".

See page 4 of her report.

[47] I accept and find that the head injury suffered by the plaintiff was a severe brain injury. It was at least moderately severe.

Consideration of expert opinion

[48] The result of this finding is that it unsafe to rely much on the opinions of Mr Lamprecht and Ms Moja.

[49] I turn to consider the remaining reports as well as that of Ms Du Plessis.

[50] Mr W M Kumalo, an Educational Psychologist and Remedial Therapist, assessed the plaintiff's pre-accident functioning on the basis of her scholastic achievements without having sight of a neurosurgeon's opinion and without referring to a diagnosis of the severity of her head injury. He concludes that she was probably of above average intelligence and that she would have passed Matric and could have embarked on tertiary education. Kumalo remarked that "Her pre-accident school reports should be obtained for collateral". See para 10.1 of his report. I intend to approach his evidence cautiously on this account. Furthermore the school reports do not seem to me to be particularly outstanding.

[51] Ms Narropi Sewpershad, a clinical psychologist, noted that a neurosurgeon, Prof Lekgwara, was of the opinion that the plaintiff sustained a severe head injury and after examining and testing the plaintiff concluded that an overview of her overall functioning prior to the accident indicated that she was probably of average intelligence. Ms Ria du Plessis's opinion is not much different to that of Prof Lekgwara. Ms Sewpershad concludes that pre-accident "she was considered capable of obtaining a matric pass and pursuing a tertiary education". See para 14.4.6.

[52] Ms Lowane-Mayayise, an Industrial Psychologist, expresses no opinion of her own on this issue but, relying on Ms Sewpershad and Mr Kumalo, she postulates that the plaintiff would have obtained a Matric and have obtained a post-Matric diploma or degree after some 3 or 4 years of study. She would have entered the labour market at B4 of the Patterson Grading system and have reached C4/D1 level as her ceiling until normal retirement age i.e. between 60 and 65.

[53] I prefer to rely on the evidence of Ms Du Plessis and Ms Sewpershad to that of Mr Kumalo on the issue of the plaintiff's pre-accident intelligence.

[54] It seems to me that the plaintiff's true pre-accident ability lies somewhere between Ms Sewpershad's conclusion and that of Ms Du Plessis. But taking my observation of the plaintiff's

force of character, in spite of her adversities, into account, I find that the plaintiff would have Matriculated.

[55] I find that pre-accident the plaintiff was capable of obtaining a Matriculation certificate with a low pass but it is most unlikely that she would pursue tertiary studies of three year duration. She may have obtained a certificate or diploma after a year of study. But there are no probabilities pointing to this.

[56] This brings me to the assessment of the plaintiff's future loss of income. In order to arrive at this I need to establish what she was capable of earning pre-accident and post accident and take into account such provision for such contingencies as may be justified.

[57] The report of GRS Actuarial Consulting provides figures based on a career in the formal and informal sectors and differentiates according to whether the plaintiff would have passed grade 10 or grade 11.

[58] Dr Koch has calculated the plaintiff's pre-accident earning upon the basis set out in Ms Lowane-Mayayise's report e.g. that plaintiff passes Matric and completes three years of tertiary studies. Dr Koch arrives at a figure of R5 257 929 without making provision for contingencies.

[59] In calculating the plaintiff's post-accident earnings Dr Koch relies on reports which correctly base their assessment of the plaintiff's post-accident injuries as those relating to a moderate to severe head injury. On the other hand the reports upon which GRS Actuarial Consulting relied on are largely based on the wrong assumption that the plaintiff's head injury was a mild one.

Post accident earnings

[60] I therefore prefer the report of Dr Koch and find that it is probable, leaving contingencies aside, that the plaintiff would earn R687 501 post-accident.

[61] The position is more difficult as regards the pre-accident earning which the plaintiff could probably have been expected to earn. Because I reject the factual basis on which Dr Koch's report is based I cannot use his pre-accident figures.

[62] The figures presented by GRS Actuarial Consulting are based on the assumption that the plaintiff would have passed grade 10 or 11 but would not have Matriculated. If the plaintiff passed grade 10 she would have earned R 579 801 in the informal sector and R1 201 564 in the formal sector. Should she have passed grade 11 she would have earned R 900 152 in the informal sector and R1 517 933 in the formal

sector.

[63] In order to calculate what the plaintiff would have earned with a matriculation pass, it seems to me that the best I can do is take the grade 11 earnings and increase them by at least a third. Possibly the increase should be more but there is nothing which goes to show this. Taking an average between the formal and informal sector projected earnings with a grade11pass and increasing the figure by a third, I arrive at R1 209 043 based on a Matriculation pass.

The difference

[64] The difference between pre-accident and post accident earnings amounts to R 521 542.

Contingencies in respect of future loss of earnings

[65] I would take the fact that I have worked on an average (which may be a little low) into account in setting the percentage for contingencies. Therefore I would deduct 10% for the usual contingencies. This brings the amount to R469 388.

General damages

Injuries

[66] The plaintiff suffered the following injuries:

- head injury with loss of consciousness and loss of recall
- bruises/laceration over the right side of the face
- neck injury
- contusions both elbows
- contusions left leg.

Consequences on her injuries

- The presence of residual symptoms of a Post Traumatic Stress Disorder.
- The presence of a Major Depressive Mood Disorder.
- A poor self concept and lack of confidence.
- Cognitive difficulties.
- Pain syndrome.
- Scarring.
- Parietal gliosis and peripheral visual field defects in both eyes.

Pain and suffering

[67] The plaintiff suffered severe acute pain for 2 to 3 weeks. Dr Matime is of the opinion that this acute pain gradually subsided over a period of up to 4 weeks.

[68] The plaintiff has never been completely pain free since the accident and still has to take pain medication whenever the pain is severe. The plaintiff suffers chronic headaches which may possibly lessen.

Loss of the amenities of life

[69] The plaintiff lost all the usual amenities of life during her hospitalization. She resumed choir singing but not volleyball. But it is unlikely that she would have played much volley ball after leaving school.

[70] Her social functioning is distinctly impaired and, most importantly, her chance of happiness has been marred. I take account of her pre-accident background but her injuries have had a very adverse affect on her personality and overall functioning.

Plaintiff's submissions

[71] The plaintiff claims R600 000 as general damages. Plaintiff's counsel referred me to **Zarrabi v RAF** Vol 5 C&B B4-231; **Smit NO v RAF** Vol 5 C&B B4-251 and **Annalize Amore Roberts v RAF** ECD 707/07.

Defendant's submissions

[72] Counsel for the defendant submitted that the plaintiff's general damages should be assessed at R200 000 to R250 000. The precedents to which he referred me are not of assistance in this matter.

Evaluation

[73] In my view the circumstances relating to the plaintiff's injuries should be assessed at a figure lower than that of R800 000 awarded in **Zarrabi v RAF**. An amount of R600 000 is in my opinion a reasonable and fair amount.

Reduction of damages

[74] The plaintiff's damages, following upon the agreement between the parties, must be reduced by 30%. This means that the plaintiff's claim for future loss of earnings is fixed at R 365 080 and her general damages at R 420 000.

Costs

[75] Costs must follow the cause.

[76] In the result I make the following order:

1. The defendant is ordered to pay to the plaintiff, within 14 days from the date of this judgment the following amounts (and failing payment interest calculated on those amounts at the legal rate):
 - (a) R 420 000 in respects of general damages; and
 - (b) R 365 080 in respect of future loss of income.
2. The defendant is to pay the plaintiff's costs of suit (together with interest on the costs calculated at the legal rate should the defendant fail to pay the costs 14 days from the date of the allocator to date of payment) including the qualifying expenses, if any, of the following witnesses:

Dr A M Matime;

Mr T Motsepe;

Prof Patrick Lekgwara;

Ms Narropi Sewpershad;

Mr W M Khumalo;

Dr M Willemse; and

Ms Lowane Mayayise.

A A LANDMAN

JUDGE OF THE HIGH COURT

Attorney for plaintiff : Gura Tlaletsi Inc

Attorney for defendant : Smit & Stanton