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## IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: RAF 354/2014

In the matter between:

**D M**

Applicant

and

**ROAD ACCIDENT FUND**

Respondent

**DATE OF HEARING**

: 06 JUNE 2017

**DATE OF JUDGMENT**

: 29 JUNE 2017

**COUNSEL FOR THE APPLICANT**

: ADV. WILLIAMS SC  
with ADV. RAFEDILE

**COUNSEL FOR THE RESPONDENT**

: ADV. MOTHIBI

## JUDGMENT

### **HENDRICKS J**

#### **Introduction**

- [1] On the 07<sup>th</sup> December 2013 the plaintiff was a passenger in a motor vehicle travelling along the N4 route between De Kroon and Brits in the North West Province. The motor vehicle in which she was travelling was involved in an accident. The plaintiff was severely injured as a result of the accident. She suffered a severe traumatic brain injury; a C1 neck fracture; a pelvis fracture; a left clavicle fracture; a right femur fracture and an injury to her chest. She was hospitalised for a considerable period of time.
- [2] The plaintiff instituted an action for damages as a result of the accident against the Road Accident Fund (defendant). The defendant conceded liability. The claim for past hospital and medical expenses was abandoned by the plaintiff. The defendant gave an undertaking to compensate future medical expenses in terms of Section 17 (4) (a) of the Road Accident Fund Act 56 of 1996, as amended. What need to be determined by this Court is the future loss of earnings / earning capacity and non-pecuniary loss (general damages).

- [3] Joint minutes have been obtained from the parties respective orthopaedic surgeons, occupational therapists, neurosurgeons, clinic psychologists, educational psychologists and industrial psychologists.

### **The Plaintiff's case**

*Viva Voce* evidence was tendered during the trial on behalf of the plaintiff by the following experts:

- Dr Liebenberg (orthopaedic surgeon);
- Mrs Ferreira-Teixeira (occupational therapist);
- Mr Samuel Mphuthi (clinical psychologist);
- Andria Grobler (educational psychologist);
- Dr Pretorius (industrial psychologist);
- Dr Mandla Manganyi (general practitioner);
- Dr Mokgopong (neurosurgeon);
- Mr. Eddie Theron (actuary).

- [4] These experts confirmed the contents of their respective reports and the joint minutes compiled by each one of them in conjunction with their counterparts. I will deal herein below succinctly with their evidence. The contents of the reports filed by Marco du Plooy (orthotist) and Dr. Selahle (plastic and reconstruction surgeon) were admitted by the defendant. Dr. Moloto (orthopaedic surgeon) was the only witness called to testify on behalf of the defendant. I will deal with his evidence vis-à-vis that of Dr. Liebenberg herein below.

- [5] Dr. F Liebenberg (orthopaedic surgeon) testified as an expert witness. He testified, amongst others, that the plaintiff in addition to the other complaints, also complained to him about spiral and pelvis pains and injuries. They were not mentioned to Dr. Moloto. Only the head, chest and thigh pain were mentioned by the plaintiff to both doctors. With regard to the clinical examination, the doctors agree that the knee and hip movements were pain free. Dr. Liebenberg found SI joint pain with the stress tests that were conducted. No neurological defect was present and scars are prominent. Radiology requested revealed the healed right femur fracture with angulation and Dr. Liebenberg detected sclerosis which is a sign of degeneration of the right sacro-iliac joint.
- [6] During cross-examination Dr. Moloto confirmed that a patient might mention or complain about something to one doctor whereas (s)he would not mention it to the other doctor. It may well be the case that the plaintiff forgot to mention it or that it was not something to complain about at that particular moment in time.
- [7] Dr. Moloto find a 3% whole person impairment whereas Dr. Liebenberg place it between 11% - 14%. According to Dr. Liebenberg only the femur alone is at 4%. The 3% of Dr. Moloto is according to Dr. Liebenberg too low. With regard to future treatment, Dr. Moloto

allows for R19 000.00 and Dr. Liebenberg allows R30 000.00. There is however an undertaking given for future medical expenses. As to employability, Dr. Moloto found that the plaintiff's work capacity has not been affected whilst Dr. Liebenberg found her capable of doing sedentary and light physical work only. Dr. Moloto conceded, quite correctly in my view, that he would defer to the occupational therapists and industrial psychologists in this regard.

[8] The fact that the plaintiff did not complain to Dr. Moloto about the spiral and pelvis pain and injuries, makes it understandable why Dr. Moloto determined the whole person impairment to be at approximately 3%. Had the Plaintiff mentioned the spiral and pelvis problems she encounters to Dr. Moloto, I am sure that he would have determined the whole person impairment at a higher percentage. The view of Dr. Liebenberg with regard to sedentary work is to be preferred above that of Dr. Moloto because the plaintiff did not complain about spiral and pelvis pains to Dr. Moloto.

[9] Mr. S. Mphuthi, a clinical psychologist, testified as an expert that the plaintiff has neurocognitive deficits as a result of the head injury as well as significant residual cognitive deficits as a result of other injuries and factors. He differs from the report compiled by Dr. Fisha (also a clinical psychologist) with regard to her conclusions. Dr. Fisha, in the report compiled, concluded:

*“The results of the comprehensive and standardised neuropsychological assessment indicates the following; there are no findings of clinical signs consistent with neuro cognitive deficits or executive dysfunctioning, but mild mood disturbance without suicidal ideation. These symptoms were not evident prior the accident. The results were objectively validated for reliability.*

*Two years 10/12 has passed since the accident, MMI has been reached and there are no prospects of further spontaneous recovery. Lifespan is not affected by reported mental psychological symptomatology due to absence of psychotic features and suicidal thoughts.*

*Mild non clinical mood disturbance.*

*Prognosis is good as there are no permanent clinical signs of neuro cognitive deficits.”*

Dr. Fisha did not testify. The evidence of Mr. Mphuthi should therefore be accepted.

- [10] Andria Grobler, the educational psychologist testified and recorded neuropsychological findings. There was a childlike demeanour detected in the plaintiff with mood fluctuations. The plaintiff suffered loss of memory and concentration. Although she is a qualified geologist, the plaintiff can't recall anything in significant detail. She would remember for instance that she worked on a computer but can't remember what the work entail. She gets tired easily. She suffers also from a loss of drive or motivation. Her evidence is unchallenged.

[11] Mrs. M. Texeira, the occupational therapist testified that the plaintiff's productivity will not be efficient. She won't be able to sustain work in the future. She also opined that the plaintiff would be confined to sedentary work in the future and will not be able to work as a geologist, the profession for which she qualified. During cross-examination she stated that it is not that the plaintiff is in a vegetable state. She can do basic work but won't be effective. She can even do manual work but need to be seated when working.

[12] Dr. Pretorius, an industrial psychologist, testified that the plaintiff is employable with certain limitations. Pre-accident she would most probably obtained a degree but post-accident she will not be able to obtain a degree. This limitation is not only physical in nature but also psychological. He concluded that some elements of impairment may benefit from treatment but some may not although the plaintiff may receive treatment. He sketched an optimistic scenario with reference to sedentary type of work in the informal sector and a pessimistic scenario with sympathetic type of employment. During cross-examination he stated that the plaintiff is still employable but with a high amount of risk involved. He made provision for certain contingencies.

[13] Prof. M. Mokgokong, a neurosurgeon, testified that the plaintiff suffered a severe brain injury. According to the Narrative Tests, she qualified at 0% - 35%. During cross-examination he reiterate that there is a 20% risk of epilepsy. This is more of a possibility than a probability because it has less than a 50% chance of occurring. He explained the difference between neurophysical and neuropsychological deficits. Neurophysical has to do, for example, with a leg that is weak or shorter and cause a patient to limp wheras neuropsychological has to do with the higher mental functions of the brain, for example, loss of memory.

[14] Dr. Manganyi, an independent medical practitioner, testified that he examined the plaintiff and compiled a report. He concluded that the plaintiff suffered serious long term impairment, permanent serious disfigurement and severe long term mental or behavioural disturbance. He recommended that the plaintiff consult a clinical pshycologist for an assessment for mental and behavioural disturbances disorder, an orthopaedic surgeon for future treatment, an occupational therapist for assessment of her work speed, working ability and the workload she can tolerate, an educational therapist and a plastic surgeon. The evidence of Dr. Monganyi is uncontested.

[15] Mr. Eddie Theron, an actuary testified about the past and future loss of earning. The revised calculations were done on 22<sup>nd</sup> May 2017. He relied on the joint minutes for his calculations. Pre-morbid the plaintiff



would be earning a high income. There is however a cap placed by the Road Accident Fund. He sketched two scenarios namely an optimistic scenario and a pessimistic scenario. On the conservative optimistic scenario the past and future loss is calculated at R7 827 580.00. This is based on 20% contingencies and 50% post-morbid seeing that the plaintiff will struggle to find work. These calculations are based on assumption of a graduate, (NQF7). It should however be noted that although qualified as a geologist, the plaintiff was unemployed at the time of the accident at the age of 23 years.

[16] As already alluded to earlier on in this judgment, Dr. Moloto, the orthopaedic surgeon, was the only witness called to testify on behalf of the defendant.

[17] Adv. Mothibi on behalf of the Defendant submitted, quite correctly I may add, that the compensation for loss of earnings capacity should be fair, taken into account all the facts and circumstances. General damages must also be assessed at what is reasonable under the circumstances of this particular case.

## **Conclusion**

[18] Considering all the facts and circumstances of this case, and having due regard to similar caselaw as a guideline, I am of the view that an

amount of R900 000.00 should be awarded as general damages. Based on the actual calculations of Mr. Theron, an amount of R7 827 580.00 should be awarded for loss of earnings / earning capacity.

### **ORDER**

[19] Consequently, the following order is made:

- (i) The defendant is ordered to pay to the plaintiff R 8 727 580.00 (Eight Million Seven Hundred and Twenty Seven Thousand Five Hundred and Eighty rands).
- (ii) The defendant is ordered to furnish to plaintiff an undertaking in terms of Section 17(4) (a) of Act 56 of 1996 in respect of future accommodation in a hospital or nursing home for treatment of or rendering of a service or supplying of goods to her, to compensate the plaintiff in respect of the said costs after the costs have been incurred and on tendering of proof thereof, arising from the collision which occurred on 7 December 2013.
- (iii) The defendant is ordered to pay the plaintiff's costs of the action, including the costs for 6 March 2017 and 5 and 6 June 2017, such costs to include the costs of two counsel (only when two counsel appeared).

- (iv) The costs should exclude the costs of 22 and 23 May 2017.
- (v) The costs are to be paid into the trust account of Messrs Maluleka Tlhasi Incorporated as follows:
  - Bank : FNB
  - Account holder : Maluleka Tlhasi Inc.
  - Account number: [...]
  - Branch code : 251445
  - Ref: Mr Maluleka/MVA1059/11/M...
- (vi) The plaintiff's attorney is entitled to charge contingencies fees in terms of the Contingency Fees Act on the basis of the contingency fee agreement dated 25 November 2014.

**R D HENDRICKS**  
**ACTING DEPUTY JUDGE OF THE HIGH COURT,**  
**NORTH WEST DIVISION, MAHIKENG**