

Reportable:	YES / <u>NO</u>
Circulate to Judges:	YES / <u>NO</u>
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>



IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: RAF

112/2017

In the matter between:

ESTER KGOMOTSO MATLAPENG

Applicant

and

ROAD ACCIDENT FUND

Respondent

DATE OF HEARING

: 05 JUNE 2018

DATE OF JUDGMENT

: 19 JULY 2018

FOR THE APPLICANT

: ADV. MAFOKO

FOR THE RESPONDENT

: ADV. FERRIS

JUDGMENT

HENDRICKS J

Introduction

[1] On the 17th November 2015, Ms. Kgomotso Ester Matlapeng, the plaintiff, was driving her motor vehicle on the road leading to Sun City. A truck driven by Molatlhegi Ernest Mokolo collided with plaintiff's motor vehicle near the Sun City complex T-junction, after it failed to stop. The plaintiff sustained bodily injuries as a result of the accident. She instituted a claim for damages against the Road Accident Fund (RAF) [the defendant], in the amount of R5 000 000.00. On 27th November 2017, this Court per Leeuw J.P. ordered that the defendant should pay 75% of plaintiff's proven damages. General damages were rejected and are referred to the HPCSA tribunal. An undertaking for future medical expenses was given by the defendant to the plaintiff. A trial was conducted to determine loss of earnings or earning capacity suffered by the plaintiff.

[2] The plaintiff testified and her evidence can be succinctly summarized as follows. As a result of the motor vehicle accident, she suffered bodily injuries. Amongst others, her neck was cracked and her back was injured. She has not fully recuperated. She can't stand or sit for long periods of time, without experiencing pain and discomfort. She was employed at Sun City Hotel & Casino as a treasurer in its safe area. She was retrenched during 2014. The reason for the

retrenchment was because of the reduction or diminishing of positions. At the time that the accident occurred on 17th November 2015, she was still unemployed, although she had looked for employment. The retirement age was 60 years. If the employer said that she could work until age 65 years, she would continued to work. Her mother's vision became impaired and she looked after her mother whilst she was unemployed. This she does interchangeably with her other siblings.

[3] Ms. Mirriam Mathabela, the Industrial Psychologist of Magethi Industrial Psychology Services, testified. She confirmed the correctness of the content of the report she compiled. She testified that the plaintiff was 55 years of age at the time when the motor vehicle accident occurred. Post-morbit, the plaintiff reported that she is no longer able to execute her household chores like she used to do, compared to her pre-morbid health state. She reported that she has difficulty bending or sitting for long periods of time without experiencing back and neck pain. She is also unable to stand for long periods of time; she is experiencing headaches; she is unable to walk long distances and she is forgetful.

[4] As far as her career aspirations are concerned, pre-morbid the plaintiff stated that after being retrenched, she was content with being at home and not being employed. Post-morbid, plaintiff informed that she has no desire to work. She is currently unemployed. That

however, does not mean that the accident did not affect the plaintiff's employability. The injuries she sustained will make it difficult for her to compete fairly in the open labour market. As far as her earning capacity is concerned, the following appear in the report:

“In view of the above results and other specialist opinions, Ms. Matlapeng has residual work capacity that falls within sedentary light and medium physical demands though with adapted ways. She will require adaptive ways of task execution as well as reasonable accommodations in her prospective employments, such as adequate rest breaks in consideration of her painful back with prolonged static postures. She will not be able to generate an income by means of heavy to very heavy physical work and she is therefore facing a restriction towards possible future employment. Her chances of finding a suitable job in open labour market are limited taking into consideration her age and limited work experience. The probability that she will remain unemployed for most part of her work life is quite high.”

- [5] The plaintiff still had approximately between 5-10 years before reaching retirement age of 60-65 years, depending on the age of retirement determined by the employer. Should she choose to seek employment, her earnings would likely be placed at the unskilled labourer, non-corporate sector, median to upper quartile. Considering that she is 55 years of age and had reached her career ceiling, her earnings would increase as per inflationary demand up until she reaches retirement age.

[6] As far as future loss of earnings are concerned, the plaintiff operates in a diminished capacity. She would likely face difficulty when trying to secure employment. The occupational therapist, Kgomotso Kgatla, opined that plaintiff's chances of finding a suitable job in the open labour market are limited taking into consideration her age and limited work experience. The probability that she will remain unemployed for most part of her work life, is quite high. Therefore, her earnings in the injured state are considered nil. Plaintiff relied on her physical strength for sustenance of employment. She is left with post-accident deficiencies which have compromised her employability. She is an unequal competitor in the open labour market.

[7] The defendant admitted all the expert reports of the plaintiff and presented no expert reports of its own to counter what is contained in the expert reports of the plaintiff. The contents of the expert reports filed by the plaintiff was also admitted as being correct. This Court is therefore bound to accept and to consider the expert reports presented by the plaintiff.

[8] That the plaintiff suffered neck, back and right upper limb injuries as she testified, is confirmed by the report of Dr. Mafeelane, the Orthopedic surgeon. He reported that as a result of these injuries, plaintiff has difficulty carrying and lifting heavy objects and also to bent, which would make it difficult for her to compete fairly in the

labour market. Dr. Tshifularo, the Ear, Nose and Throat Specialist, diagnosed the plaintiff from suffering loss of hearing in her right ear, headaches, nasal blockage, memory loss and post-traumatic stress. Dr. Dikobe, the Psychiatrist, concluded that because of the whiplash caused as a result of the accident, plaintiff sustained mild brain trauma resulting in some neurocognitive changes with mood and anxiety symptoms.

- [9] The Clinical Psychologist, Ms. Kalane, concluded that, in terms of occupational functioning, her main complaints of headaches, dizziness and inability to physically exert herself for prolonged periods may make it difficult for her to obtain employment and meet work demands. Further, that from a neuropsychological perspective, the accident in question has probably affected her ability to compete equally within the labour market. The emotional difficulties she experiences would be expected to affect her negatively in her overall functioning and may affect her decision making, planning and work speed. Further, given available information, it would appear that the plaintiff may have sustained a possible mild concussion and a whiplash in the accident under review. The neuropsychological assessment indicates that the plaintiff currently has neurocognitive impairments and executive dysfunction. The impairments were believed to be causally related to the "possible concussion".

[10] The fact that the accident affected the plaintiff physically is beyond question. In my view, the accident also affected the plaintiff's employability to compete fairly in the open labour market. The contention that because of the fact that the plaintiff was retrenched in 2014 and therefore unemployed at the time of the accident and that she did not obtain any employment thereafter, means that the plaintiff did not suffer any loss of earning capacity, is incorrect. The plaintiff suffers from headaches, dizziness and inability to exert herself for prolonged periods either to sit or stand which will make it difficult for her to obtain employment and to meet work demands. Furthermore, because of the mild concussion sustained as a result of the accident, plaintiff's neurocognitive impairments will most definitely result in deficiencies and executive dysfunction. These impairments are causally related to the accident.

[11] As a result of the executive dysfunction, the plaintiff may find it difficult, if not impossible, to function in many occupations. The reports of the psychiatrist and clinical psychologist makes it clear that the accident also affected the plaintiff's mental faculties or mental well-being. This will incapacitate her to some extent to function normally in a work environment. According to the occupational therapist, the plaintiff is now suitable for light to medium sedentary employment. However, her limited work experience and age limit her chances of obtaining employment. The probability that she will remain unemployed for most part of her work life is quite high. However, contingencies should also be taken into consideration.

[12] At the time of the accident, the plaintiff was 55 years of age. The general age of retirement for women is 60 years of age. The plaintiff also testified that at her previous employment the retrenchment age was 60 years. But for the retrenchment, it can safely be accepted that the plaintiff would most probably have worked until she reached the age of 60 years. Therefore, from the time of the accident, the plaintiff would have worked for a period of 5 years, in a similar employment as her previous employment.

[13] Before retrenchment, she earned R12 459.00 *per annum*. According to the Industrial Psychologist her earnings would be that of an unskilled labourer, non-corporate sector, medium to upper quartile of an unskilled worker. According to the Actuary, Robert Koch, the plaintiff could have been employed from January 2016, earning R37 750.00 *per annum*, had she not been injured. He however calculate it until the age of 65 years. The loss of past income uninjured, the actuary calculated it at R97 829.00 and for loss of future income at R244 071.00. The plaintiff was retrenched in 2014 and the accident happened in 2015. She had no income in her injured state and her possible income in her injured state is nil.

[14] Therefore, the past loss of earnings calculated from January 2016 to June 2018, is for a period of 2 years and 6 months at the suggest

income of R37 750.00 *per annum*. This amounts to R94 375.00, less 20% contingencies (-R18 875.00) which equals R75 500.00. With regard to the future loss of earnings, the plaintiff would have retired after 5 years. Calculated at the suggested income of R37 750.00 *per annum*, the plaintiff would have earned R188 750.00 less 20% contingencies (-R37 750.00) which equals to R151 000.00. The total amounts of loss of earnings is R226 500.00.

[15] Insofar as costs are concerned, this is but one of the heads of damages claimed and not the total of all the heads of damages claimed. The initial amount claimed for damages is R5 000 000.00. The defendant did not oppose the claim instituted in this Court, as the appropriate forum. However, the awarding of a cost order is within the discretion of the Court. The plaintiff contended, correctly so, that the costs that were reserved on the previous occasion should be costs in the cause because the postponement was occasioned by the Court (per Kgoele J) requiring that the Industrial Psychologist should testify in person to clarify the difference in surnames relating to her maiden surname being different from her married surname. General damages were referred to the HPCSA tribunal which may, if awarded in favour of the plaintiff, brings the amount awarded within the civil jurisdiction of this Court. I am therefore incline to grant costs on the High Court scale as between party and party, excluding the costs that were reserved on 24th April 2018.

Order

[16] Consequently, the following order is made:

- (i) The defendant is ordered to pay an amount of R226 500.00 to the plaintiff for loss of earnings (past and future) subject to merits apportionment of 25% (-R56 625.00), which amounts to the final figure of R169 875.00.
- (ii) The defendant is ordered to pay the costs of suit on a High Court scale, as between party and party.
- (iii) Such costs should exclude the reserved costs of the 24th April 2018, which should be costs in the cause.

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