REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 8962/06

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

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DATE SIGNATURE

In the matter between:

DONOUGH, BRONWYNN MARCHE Plaintiff

and

ROAD ACCIDENT FUND Defendant

J U D G M E N T

MBHA, J:

INTRODUCTION

[1] The plaintiff sued the defendant in terms of the Road Accident Fund Act 56 of 1996, for damages suffered as a result of injuries sustained in a

motor collision that occurred at Witkoppen Road, Fourways, Johannesburg on 20 April 2003.

[2] The matter became defended and it proceeded to trial on 10 August 2010. On the first day of the trial, the defendant conceded the merits in favour of the plaintiff and agreed that it was liable for 100% of the plaintiff's agreed or proven damages.

[3] The defendant also agreed to:

3.1 furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for the plaintiff's future medical, hospital and associated medical expenses;

3.2 pay the plaintiff R36 000,46 in respect of the plaintiff's past medical expenses.

[4] The only issue this Court was called upon to determine related to the following heads of damages:

4.1 the quantum of general damages; and

4.2 the past and future loss of earnings of the plaintiff.

[5] The plaintiff led the evidence of the following witnesses:

5.1 the plaintiff;

5.2 Mr Donough (the plaintiff's husband);

5.3 Dr. C. Angus – Clinical Psychologist;

5.4 Ms. I. Hattingh – Speech Therapist;

5.5 Dr. H. Edeling – Neurosurgeon;

5.6 Dr. G. Read – Orthopaedic Surgeon;

5.7 Ms. S. Vos – Industrial Psychologist;

5.8 Ms. L. Maphutha – Occupational Therapist.

[6] The expert witnesses mentioned above also furnished reports on behalf of the plaintiff.

[7] The defendant led the evidence of one witness, Mr A. Kok, an industrial psychologist who also furnished a report on behalf of the defendant.

GENERAL DAMAGES

[8] It is trite that when considering general damages comprising pain and suffering, disfigurement, permanent disability and loss of amenities of life, a trial court has a wide discretion to award what it considers to be fair and adequate compensation to the injured party. See *RAF v Marunga* 2003 (5) SA 164 (SCA) at 169E-F.

[9] In *Wright v Multilateral Vehicle Accident Fund,* Corbett & Honey Vol 4 at E3-36, Broom DJP, whilst recognising the necessity of making a

comparison to past awards, emphasized that there was no such thing as a case which is on all fours and that past awards serve no more than to give some indication of what sort of awards were considered appropriate on the facts of the particular case. He nonetheless acknowledged that generally, awards were higher than those made in the past and said:

> "*I consider that when having regard to previous awards one must recognise that there is a tendency for awards to now be higher than they were in the past. I believe this to be a natural reflection of the changes in society, the recognition of greater individual freedom and opportunity, rising standards of living, and recognition that our awards in the past have been significantly lower than those of most other countries"*.

[10] In *Protea Insurance Co Ltd v Lamb* 1971 (1) SA 530 (A) at 535H-536A, Potgieter JA emphasised that a comparison of a plaintiff's general damages with previous awards need not take the form of a meticulous examination of awards made in other cases in order to fix an amount of compensation, nor should the process be allowed to dominate the enquiry so as to fetter the general discretion of the court. Comparable cases should rather be used to afford some guidance in a general way towards assisting the court to arrive at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages.

[11] Clearly, the court has a wide discretion in awarding general damages and while awards for analogous *sequelae* can provide a guide the court may, if it so chooses, award an amount that is higher than those given previously.

[12] Drs. Read and Ismail, the parties' respective orthopaedic surgeons, were agreed that the plaintiff was injured in a motor vehicle accident which occurred on 20 April 2003, that she sustained a head injury as well as a posterior dislocation of her right hip, and an injury to her left eye.

[13] Dr Read was of the opinion that the plaintiff sustained a soft tissue injury to her right knee that requires conservative treatment as well as a possible arthroscopy.

[14] Regarding the injury to the hip, both doctors agreed that the plaintiff requires conservative treatment and that she is at considerable risk in the future of developing osteoarthritis in the hip which will require total hip replacement. Dr. Read was of the opinion that the plaintiff will need a hip replacement in about twenty years time.

[15] Regarding the brain injury, Dr Edeling was of the view that the plaintiff suffered what was initially a mild primary diffuse concussive brain injury which got complicated by certain respiratory difficulties and other physical injuries. Dr Edeling was accordingly of the view that the brain injury, though initially moderate, probably became, progressively, a severe head/brain injury.

[16] Dr Edeling noted in his report that considering the nature and degree of the brain injury sustained, as well as what he described as the clinically evident *sequelae*, a significant degree of permanent employment disability should be expected. However, when he testified he changed and said that a

more acceptable view was that the plaintiff suffered no more than 10% permanent employment disability.

[17] The *sequelae* which were described by the plaintiff to the doctors were *inter alia*, fatigue, headaches, visual impairment, impairments of cognitive mental function, impairments of executive mental function, insecurity, depression and emotional difficulties of a permanent nature.

[18] Regarding the injury to the right knee, Dr Read noted that the plaintiff still complains of pain in the right knee which is aggravated by cold and inclement weather.

[19] Based on the findings of Dr Edeling, I am prepared to accept that the plaintiff did sustain a brain injury. I am however unable to agree with Dr Edeling's assessment that this was so severe to have rendered the plaintiff virtually unemployable. I have already stated that Dr Edeling changed saying that the plaintiff suffered no more than 10% permanent employment disability. I will revert to this aspect in fuller detail when I consider the plaintiff's claim in respect of loss of future earnings.

[20] Counsel for both parties referred me to various cases and the one which, in my view, is somewhat similar to that of the plaintiff, is the one of *Prinsloo v MMF* 1997 (4) C&B B4-16, where the court gave an award of R149,000,00 for a post-traumatic organic brain injury.

[21] In my view an amount of R175 000,00 is adequate compensation in respect of the plaintiff's head injury.

[22] Regarding the injuries to the plaintiff's right hip, left eye and knee and the sequelae thereto, I am of the view that a compensatory amount of R150 000,00 is appropriate.

[23] The total amount that must be paid to the plaintiff as compensation in respect of general damages, comes to R325,000.00

LOSS OF INCOME

A. Future loss of income

[24] The defendant has put into issue whether the plaintiff has discharged the *onus* the plaintiff bears in regard to the following:

(1) Whether the plaintiff would have successfully completed her studies for the Chartered Institute of Secretaries ("CIS") diploma qualification.

(2) In the event that she did manage to complete the CIS qualification, whether she would be able to cope with the attendant pressure or workload.

(3) That post collision, the defendant left several jobs because of her inability to cope as a result of the injuries she sustained in the collision.

(4) Whether the plaintiff will suffer any future loss of earning capacity as a result of the collision.

[25] The plaintiff is currently 37 years old and was 30 years of age when the collision occurred in April 2003.

[26] The plaintiff left school in 1990 while in Grade 10 to start work, as the family apparently needed money.

[27] She managed to pass matriculation whilst working and also successfully completed courses in bookkeeping for which she received certificates.

[28] The plaintiff resumed with her studies for the CIS diploma course in 2001. In that year she registered for a single course which she subsequently passed. In 2002 she passed three other subjects. As such at the time of the collision, she had completed four of the required 17 subjects.

[29] It was submitted on behalf of the plaintiff that in view of:

29.1 the plaintiff's proven ability to study while working, her high intelligence and academic ability prior to the brain injury;

29.2 her acknowledged drive and ambition to better herself;

29.3 the supportive family environment regarding her studies,

it may be accepted that on a balance of probabilities, the plaintiff would have achieved the CIS diploma.

[30] Initially the plaintiff contended that she would have completed her CIS diploma in the year 2005. Later she conceded that it would not be possible for her to have achieved the diploma in that year considering the fact that the institution where she is studying would have allowed her to only register for a maximum of four subjects a year.

[31] The plaintiff, after conceding that it would not have been feasible for her to have completed the diploma during 2005, then adopted a very conservative approach contending that she would have completed the remaining 13 subjects in the 8 years between January 2003 and January 2011, and that she would have found employment as a company secretary six months later in July 2011.

[32] Ms Vos, the plaintiff's industrial psychologist, contended that the plaintiff would have been able to find such employment and that she would have worked in that capacity until the retirement age of 65. Ms Vos then set out the expected salary progressions in her report.

[33] On the other hand Mr André Kok, the industrial psychologist who led evidence on behalf of the defendant, testified that it could not be said with any precision whether or not the plaintiff would complete and obtain the CIS diploma. In support of this contention, he said that the plaintiff was in the early stages of the course. Furthermore, the birth of the plaintiff's third child in 2002 was definitely one of the factors that could have prevented her from completing the course in the year she hoped she would have. Mr Kok pointed out further that it had to be recalled that during 2002 the plaintiff took off eight months from her work for the birth of her child.

[34] In my view Kok's opinion is to be preferred to that of Vos as it is more realistic, considering the plaintiff's particular circumstances.

[35] It is clear that as at the time of the collision the plaintiff had not any made significant progress towards attaining the CIS diploma qualification. There is no certainty that she would have completed her studies considering the fact that she had only completed four courses out of the required 17. Therefore to draw the conclusion that the plaintiff would have definitely completed her CIS qualification would be to have too much faith in the plaintiff and to ask the court to make such a conclusion would be to set a precedent that courts can determine the imponderable based on inconclusive evidence given by experts for the plaintiff, who could and probably often make a wrong diagnosis. In my view, the external circumstances concerning the plaintiff such as giving birth and raising children, coupled with the apparent busy lifestyle that she maintained, would in all probability have hindered her success

[36] It must also be borne in mind that from 2002 till to date, the plaintiff has only managed to pass two subjects. She still has to complete 11 courses before she can obtain the CIS diploma. Even her concession that she would complete her studies in 2011 is clearly out of reach.

[37] I have not lost sight of the plaintiff's testimony when she said she was hoping to eventually pass and obtain her CIS diploma. Clearly the question that remains to be answered is when will she be able to do that. Even if she were to ultimately pass the CIS course, there is no certainty or indication as to when that will happen.

[38] I am of the view that the plaintiff's studies for the CIS diploma course should not be taken into account in the post-accident scenario and that a probable and realistic scenario would have allowed the plaintiff to continue with her work within the secretarial/general administration environment for the remainder of her natural working life.

[39] In assessing the plaintiff's employment potential post collision, I have considered the plaintiff's work history which has been elaborately set out in the various expert reports and in bundle G, the plaintiff's employment documentation.

[40] It is trite that the positions which the plaintiff held were all of a secretarial/personal assistant nature. Furthermore, at the time of the collision she was employed by PPC Cement in the capacity of personal assistant. She

commenced working at PPC Cement on 3 March 2003 and resigned on 31 March 2004.

[41] It is common cause that in the 13 years prior to the collision, the plaintiff held seven positions and on each occasion she left because of better prospects. Significantly, her salary at each successive employer was an improvement on the last. The only exception to this being in 2002 when she took eight months off for the birth of her child.

[42] Post-accident the plaintiff worked for various employers for varying periods and in all of these she continued working in the same capacity as secretarial/personal assistant.

[43] Except for one or two occasions, her salary at each successive employer continued to be an improvement on the last. In fact in her last employment at Rand Water, where she was employed on a six months fixed term contract as Manager: secretariat services, she earned R47 000,00 per month. This was almost a 100% improvement on her previous salary at Computer Share Investor Services where she had started earning R21 938,46 per month. As will be apparent later, at this company she got promoted twice from being company secretarial administrator to manager where her salary was R317 400,00 per annum.

[44] The picture that emerges is that post-collision, the plaintiff changed jobs frequently for better prospects in the same manner as she had done

before the collision. It is common cause that the plaintiff's employers, post-collision, never dismissed her or forced her to resign on any allegation of being unable to cope with the work that was expected of her.

[45] The documentary evidence in bundle "G" conclusively shows that the plaintiff always left her employment as a result of voluntary resignation.

[46] Dr C Angus, testifying on behalf of the plaintiff, said that as a result of the accident, the plaintiff has not been able to keep jobs because of her inability to cope with the work that she was given. The plaintiff testified to the same effect and cited problems such as redoing work twice, inability to solve problems and a general inability to meet her employers' requirements.

[47] Significantly, Dr Angus never contacted the majority of the employers of the plaintiff's employers post-collision, to verify whether the plaintiff was unable to cope with her work. The only employer that Dr Angus contacted post-collision was one Mrs Natalie Domingo, the company secretary at Anglo American where the plaintiff worked as the assistant company secretary from September 2005 until July 2006. It is significant that the Plaintiff testified that when Mrs Domingo resigned as the company secretary, it was suggested to the plaintiff that she should assume the role of company secretary but she declined to consider the offer. This is confirmation that the company had definite confidence in the plaintiff's work ability.

[48] On page 121 of her report, Dr Angus has recorded that Mrs Domingo

described the plaintiff as an adequate worker who worked quickly but seemed to get bogged down and ended up taking a lot of work home. Mrs Domingo also told Dr Angus that the plaintiff's standard of work was very good and that overall her work was of a high standard, that she was meticulous and particular although it was clear that the plaintiff could not perform the volume of work and took twice as long to do things as she constantly double checked things. Generally speaking, Mrs Domingo had found that the plaintiff had a very nice nature and generally got on well with everyone, was easy going and not bad-tempered.

[49] Ms S Vos, also testified that post-accident, the plaintiff resigned from her various employments due to her inability to cope with the work demand. However, it is noteworthy that Ms Vos never made any attempt whatsoever to contact any of the plaintiff's employers post-accident. I personally asked Ms Vos why she never did so and she answered saying "*I did not have the time to check with her employers*".

[50] On the other hand Mr Kok, who testified on behalf of the defendant, contacted the plaintiff's former employers post-collision who confirmed in no uncertain terms that they were all content with the level of the plaintiff's work. Mr Kok also did a survey based on categories such as work speed, general work output and potential for employment and the results revealed that the plaintiff always scored high marks regarding her work performance.

[51] At the survey conducted with the plaintiff's line manager at PPC Cement, Mr R. Burn, it was in fact revealed that the plaintiff was even eligible for promotion. In this regard it must be reiterated that the scores obtained by the industrial psychologist were as high as 3 out of 4 and even 4 out of 4. These marks suggest not only an employee who is able to meet her employer's requirements, but even exceeded them. At the second survey regarding her post-accident potential for promotion, the plaintiff was awarded a 4 out of 4 which translates to excellent.

[52] The court takes cognisance of the fact that Mr Kok phoned PPC Cement, the plaintiff's employer to assess her performance before and after the accident. The survey conducted revealed that there is no noticeable difference between her pre-accident and post-accident state of working ability. To the contrary, the evidence confirms that should the company have wanted to promote the plaintiff, they would have easily done so.

[53] The plaintiff's employment at a company called Computer Share is significant. She started working at this company on 13 November 2008 where she was appointed on a fixed period contract as a company secretarial administrator at a salary of R23 000,00 per month.

[54] On 13 March 2009 she was promoted from the position of company secretarial administrator to manager. On 4 May 2009 she was advised that in recognition of her outstanding performance, her salary was accordingly adjusted from R23 000,00 to R24 466,25 per month.

[55] I find it totally unacceptable that the plaintiff's experts, particularly Dr Angus, Ms Vos and Ms Hattingh omitted to contact the plaintiff's employers post-accident, to corroborate their opinions. Clearly their opinions are merely based on the say-so of the plaintiff. On the other hand I find Mr Kok's assessment totally reliable and of assistance to this Court. To show the court's displeasure in the manner in which these experts conducted their investigations, I have decided that they should not be entitled to their full qualifying fees.

[56] I also have great difficulty with certain aspects of the findings of Dr Edeling, the neurosurgeon who testified on behalf of the plaintiff. In his report he noted that considering the nature and degree of the brain injury sustained, one would expect a significant degree of permanent employment disability to have resulted. He also said that in addition to limitations imposed by the plaintiff's cognitive mental impairment, communication disorder, and physical impairment, it was anticipated that her ability to apply her retained intellectual capacity will be jeopardised by executive mental impairment, as well as by mood and personality factors. Significantly, during his testimony Dr Edeling changed and told the court that the plaintiff would not suffer more than 10% of permanent disability.

[57] Dr Edeling examined the plaintiff on 17 January 2007. His assessment and projections as set out above are neither supported nor borne out by the plaintiff's actual experiences at the workplace post-collision. As I have shown above, the plaintiff's work's performance and ability, post collision,

speaks something entirely different from Dr Edeling's assessment and to the contrary, the plaintiff's employment post collision suggests one of excellence and high potential of promotion.

[58] In the light of all the evidence before this court, I am satisfied that the plaintiff will be able to continue with her vocation in the secretarial/personal assistant field.

[59] The court accepts that the plaintiff will retire five years early i.e. at age 60 and not at 65 years because of the physical injuries she sustained in the collision. Her right hip in particular, is still presenting serious *sequelae*. The court accordingly finds that the plaintiff's loss of future earnings will only be in relation to the plaintiff's truncation of working lifespan from age 65 to age 60.

[60] In assessing the plaintiff's loss of future earnings, I have decided to have these calculated on the basis of the salary she earned at PPC Cement, where she was working at the time of the collision. Upon her resignation at this company in March 2004, she was earning R12 360-00 per month. I have been advised that in current terms this translates to R18 875, 45 per month, thus placing her on a C4 Paterson scale on the Deloitte Consulting Guide. I have also decided that given all the particular circumstances of the plaintiff, a contingency of 20% would be appropriate.

[61]. The court also notes that the plaintiff will require a maximum of eight weeks off work in order to attend to the treatment in relation to her hip. This period will be included in the calculation of the plaintiff loss of future earnings.

[62] Taking all these factors into consideration, the plaintiff's loss of future earnings amounts to R 374,866,00.

PAST LOSS OF EARNINGS

[63] The plaintiff was off work for a period of six weeks while she was recuperating from her injuries. It is trite that during this aforesaid period she continued to receive her normal salary from her employers at PPC Cement.

[64] The evidence conclusively shows that post collision the plaintiff changed jobs frequently for better prospects. There is no evidence whatsoever which shows that the plaintiff sustained any past loss of earnings due to the collision. To the contrary, post collision, she was able to change jobs frequently and work without any impediment as she had done before the collision. Furthermore, the evidence shows conclusively that she continued to perform at her optimum best without any impediment whatsoever.

[65] The court notes that during argument Mr Erasmus, appearing for the plaintiff, told the court that the parties had come to an agreement about a certain figure which would cover the plaintiff's past loss of earnings. However, as there was no such agreement at the commencement of the trial, the entire

trial proceeded on the basis that the claim for past loss of earnings was in dispute. Whatever the terms of such agreement are, such would not be in accordance with my findings, namely that the plaintiff could not discharge the onus on her of proving any loss in respect of past earnings.

[66] I accordingly find that the plaintiff has failed to discharge the *onus* of proving that she sustained any loss under this heading.

[67] I accordingly make an order as follows:

1. The defendant shall pay the plaintiff the amount of R735,866,46.
2. The defendant shall provide the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for the plaintiff's future medical, hospital and associated medical expenses.
3. The defendant is ordered to pay the plaintiff's costs on the High Court scale either as taxed or agreed, to date hereof, including any costs attendant upon the obtaining of payment referred to in 1 above and the full qualifying fees of Dr. Edeling, Dr. Read and Ms Lephutha. Dr Angus and Ms Vos are only entitled to 50% of their qualifying fees.

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JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG