

SOUTH AFRICA / JUDGMENT

Claasen v Road Accident Fund (2053/2023) [2024] ZAFSHC 256 (23 August 2024) [2024] ZAFSHC 256

COURT

Free State High Court, Bloemfontein

BEFORE

Van Zyl

CASE / FILE NUMBER

2053/2023

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case number: 2053/2023

In the matters between: TANIA JADE CLAASEN Plaintiff (ID No. 9[...]) and THE ROAD ACCIDENT FUND Defendant (Claim No. 502[...]) (Link No. 527[...])

CORAM:

VAN ZYL, J

HEARD ON: 23 FEBRUARY 2024

DELIVERED ON: 23 AUGUST 2024

- [1] Ms TJ Claasen (“the plaintiff”) instituted action against the defendant for damages arising from the injuries she sustained in a motor vehicle accident which occurred on 7 September 2021 at Bloemfontein, Free State Province.

- [2] The merits of the matter were settled between the parties on the basis that the defendant is liable for 100% of the plaintiff's proven or agreed damages.
- [3] The parties also settled the issues of general damages, future medical expenses and costs as per the order granted by agreement between the parties on the last day of the trial, 23 February 2024.
- [4] The only remaining issue to be adjudicated is the quantum of the plaintiff's claim in respect of past and future loss of earnings/earning capacity.
- [5] Adv De la Rey appeared on behalf of the plaintiff and Ms Gouws on behalf of the defendant.

Witnesses and reports:

- [6] During the trial, the following experts testified on behalf of the plaintiff and their respective medico-legal reports were subsequently accepted into evidence:
 - 1. Dr C Barlin (Orthopaedic Surgeon).
 - 2. Ms A Mdabambi (Occupational Therapist).
 - 3. Ms R Pretorius (Industrial Psychologist).
- [7] In addition to the aforesaid, the actuarial report by G Mellet of SNG Argen was also accepted into evidence by agreement between the parties, subject to the proviso that the parties will be allowed to argue thereupon as they deem fit.
- [8] The plaintiff was also called as a witness.

The evidence:

Dr Barlin:

- [9] Dr Barlin testified that his assessment of the plaintiff occurred on 16 August 2022. As a result of the accident the plaintiff sustained the following injuries:
 - 1. Cervical spine injury.
 - 2. Lumbar spine injury.
 - 3. Right arm injury.
 - 4. Left elbow injury.
- [10] The plaintiff initially went to her general practitioner with cervical spine pain and was managed conservatively with analgesics.

- [11] Because of ongoing neck pain and new-onset paraesthesia in her right upper limb by way of pins and needles in her right arm, the plaintiff was admitted to Mediclinic Hospital, Bloemfontein, on 17 September 2021 for further examinations by way of MRI scans. She was subsequently diagnosed with cervical radiculopathy. She was treated conservatively with a neck brace and was discharged on 20 September 2021. On 23 September 2021 she was again admitted for ongoing symptoms and was placed on cervical traction.
- [12] On 27 September 2021 the plaintiff underwent surgery by way of an anterior decompression fusion. The surgery was successful with no complications and the plaintiff was discharged on 1 October 2021.
- [13] She continued having paraesthesias in her right hand and subsequently underwent nerve conduction studies and then a right carpal tunnel release approximately six weeks later.
- [14] With regard to the plaintiff's current symptoms, being the symptoms she was experiencing when Dr Barlin assessed her, Dr Barlin recorded as follows in his report:

"She complains of persistent pain in her neck, back, right arm and hand. She struggles to look to the right side, sleep on her sides and experiences a lot of migraines.

The lower back is painful when sitting for extended periods of time and painful when laying down. Tremoring of her right hand, loss of grip, numbness and pins and needles are constant."

- [15] In conclusion, Dr Barlin recorded the following, which opinions he also expressed during his viva voce evidence:

"9.3 She continues to experience neck pain and stiffness, right arm neurological symptoms as well as lower backache.

9.4 Her neck and lower backache are likely to persist requiring continuing physiotherapy, analgesics and anti-inflammatories. There is a 5% chance that she will require extension of the cervical fusion.

9.5 I do not believe that she will be able to return to work as a Head Chef which require a great deal of physical work. I defer to the opinion of the Occupational Therapist and Industrial Psychologist in this regard."

- [16] Dr Barlin also testified that the plaintiff had a tremor which is connected to her neck injury. Her lower back pain is probably also connected to her neck injury and constitutes a deferred pain. She will have difficulty to pick up items heavier than 2 to 3 kilogram.
- [17] Dr Barlin opined that the plaintiff will very likely continue to experience pain when walking, standing and sitting for extended periods of time and also when sleeping. As a day progresses, the pain will probably get worse.

[18] During cross-examination Dr Barlin testified that although the usual period for maximum medical improvement is 18 to 24 months, in this particular instance the likelihood of significant improvement is small, considering that a fusion had already been done without success in combatting the pain. He further explained that with a recovery after a neck fusion, 90% of the improvement would have already occurred by the time he examined the plaintiff.

The plaintiff:

[19] The plaintiff resides in Bloemfontein, is married and has two children. She was born on 15 August 1992. She studied at the Food and Beverage Institute, Bloemfontein, to become a Chef. She obtained her diploma and then went to America to do her practical training, which she did at the Ritz Carlton Hotel, Florida. She remained there for a year.

[20] When she returned to South Africa, she finished her further training and studies.

[21] She obtained employment in 2014 at the St. Andrews Hotel in Johannesburg for about a month as Chef de Parte.

[22] She thereafter obtained a temporary appointment at Potterskloof Game Reserve, whilst an employee was on maternity leave. There she was the Head/Executive Chef for three to four months.

[23] After that she was appointed as Chef De Parte at Anta Boga Boutique Hotel in Bloemfontein, which position she occupied for three years.

[24] The plaintiff then received a better offer from Fedics. At Fedics she occupied the position of Executive Regional Chef. Within Fedics she reached out to NRC at the hospital where she prepared and cooked food for the dialysis patients. Fedics was not satisfied that she continued doing that whilst in the employment of Fedics. She therefore resigned from Fedics after approximately a year.

[25] Thereafter she concentrated on the business she was running at NRC and was therefore self-employed. She cannot remember for how long she was self-employed, but ceased the business when it turned out not to be financially viable.

[26] At a later stage her husband and she moved to Rustenburg for purposes of his career. He is a Clinical Technologist. She was unable to obtain employment as a Chef in Rustenburg, whereupon her husband's boss offered her work as a Receptionist at the same medical facility as where her husband was employed. In the meantime, she fell pregnant and it was a very difficult pregnancy with her being in and out of hospital. Eventually her husband and she decided that she would rather be concentrating on a healthy pregnancy instead of working any further.

- [27] After three years the family moved back to Bloemfontein. She started job hunting again for a position as Chef when she noticed an advertisement by the Free State Residential Centre, where she was successful in obtaining the position of Head Chef.
- [28] In the said position she was responsible for the whole kitchen. She had an assistant whom she had to train and explain what to do. The plaintiff had to prepare three meals per day for approximately 150 people at a time and she also had to dish up the food. She furthermore had to make platters for the staff for teatime. When the cleaner went off duty, she had to mop the floors and do the cleaning herself. At that stage she was receiving R6 000.00 per month. She explained that it was a huge salary drop to what she was used to as Chef previously, but decided to rather work for the said salary than being unemployed. She testified that she loved her work. However, she was yearning to become the kitchen manager at Free State Residential Centre, but which position was filled at the time.
- [29] She was working in the aforesaid capacity when the accident occurred on 7 September 2021. After the accident she was hospitalised and eventually she was approximately three months away from work. When she returned to work, she had so much pain in her neck and her arm, together with pins and needles and lameness, that the doctor decided to book her off for longer. When she again returned to work, the doctor provided her with a letter that she should perform light duties. However, there was no light duties available in the kitchen. Her manager told her to take the day off. He also told her that she should resign, but she was not willing to resign since she felt that it was not her fault that she could not perform her duties. Eventually there were different meetings held and the plaintiff and the employer entered into a mutual separation agreement. In terms thereof she did not receive any further money from the Centre.
- [30] She explained that her duties in the kitchen, inter alia, entailed that she had to be able to carry 50 kg of flour, as well as big, massive pots filled with food, which she was unable to do after the accident. Even dishing up was problematic for her. She was unable to cope with the duties and obligations which the position required.
- [31] The plaintiff gave an explanation of the history of her injuries since she first went to a general practitioner up to the point where C5 and C6 in her neck were fused and she also had carpal tunnel surgery to her right hand. Her evidence in this regard corresponded with the evidence presented by Dr Barlin. She also testified about one night, before the fusion was done, when she was sleeping and attempted to turn in the bed, but she was completely paralyzed and could not move at all.
- [32] With regard to the pain the plaintiff experienced before her operations, she testified that she had very bad pain in her neck, her shoulder and her arm, which pain extended to her fingers. The fingers of her right hand were also numb. She also struggled to walk after the night when she experienced paralysis.

- [33] After the operations the plaintiff could walk, but very slowly. She was also physically unable to play with her baby daughter.
- [34] Currently, despite the lapse of time, the plaintiff is still suffering tremendously with a lot of pain in her neck which radiates down into her lower back. She also has a tremor which influences her daily tasks. She used the example that when she needs to write down a grocery list and she has to look downwards, the tremor gets even worse and she develops a spasm in the palm of her right hand. Whenever she tries to carry a heavy item, her hand also goes into a spasm to the extent that she is unable to open her hand.
- [35] The plaintiff testified that she did not suffer from any of these issues prior to the accident. Despite the fact that she was also involved in an earlier motor vehicle accident in 2010, that she had a very difficult birth of her child in 2021 and that she had also undergone a lumber punch previously, none of these had any influence on her health, her functioning or her working ability.
- [36] Since she left her employment at Free State Residential Centre, the plaintiff has been actively seeking work as a Receptionist. She estimated that she has since February 2022 up to now done more than 100 applications, sometimes at 14 to 15 different places a day, reading the requirements and knowing that she does not have the required certificate in administration or the required two to three years' experience, but she still applied, hoping that somebody will grant her an opportunity. However, she has not even been invited to an interview. She testified that she, however, will continue to so apply.
- [37] The plaintiff testified that, according to her, the chances of her obtaining employment as a Receptionist are very low. She does not have the required qualifications, nor the required experience. She handed out her curriculum vitae at two different employment agencies, but also without success. She also contacted her lecturer and spoke to students to ascertain whether one of them was maybe aware of possible employment for her, but with no success.
- [38] With regard to monthly income, she testified that when she was a Head Chef at Potterskloof, she earned R15 000.00 per month, without overtime.
- [39] Considering the lapse of time and how she would have progressed in her position as a Chef, she estimates that a monthly salary of R20 000.00 per month would now be reasonable. She dearly wanted the appointment as kitchen manager at the Free State Residential Centre where she probably would have earned between R15 000.00 and R20 000.00 per month.
- [40] The plaintiff testified that her unemployment has put a great deal of negative pressure, including financial pressure, on her marriage. Cooking is her passion. She loved it when she had three hours to cook for 150 to 200 people, to experience the adrenaline rush that goes along with it. When testifying about this, she became emotional in court and said "I will never get that back".

[41] According to the plaintiff her injuries are getting worse and not better. She has gone for a few pain blocks, which lasts for less than three months, but at least after a pain block she experiences pain which she can bear. Other times she is experiencing constant pain, especially when bending her neck and turning her neck. To her it feels that it is constantly getting worse.

Cross-examination of the plaintiff:

[42] The plaintiff was asked whether she would be able to function as a Receptionist, to which she responded that based on her previous experience of three months, she would be able to do so. I then enquired from her whether she will physically be able to do the work. She answered that sitting for long periods of time gives her pain and so does standing for too long. She can't write for too long either. Although she is computer literate, she has not typed on a personal computer since the accident and does not know what physical impact that may have upon her. She testified that she will, however, attempt try it if only she gets an opportunity to do it. Currently she is doing everything on her phone, instead of on a personal computer.

[43] Reference was made to the evidence of the Industrial Psychologist who testified that the plaintiff would have been able to progress in her career had it not been for the accident. However, the question was posed to the plaintiff that it seems that it would not have been so easy for her to progress in her career as a Chef in Bloemfontein as such. The plaintiff responded that before she took up the employment at Free State Residential Centre, there was employment available at Sun International in Bloemfontein. However, they only took in night shift employees at the time. Because her husband is a Clinical Technologist at the hospital and also has to work night shift from time to time, she realized that they can't

both work night shift. That is the reason why she took the employment with Free State Residential Centre where her hours were from 06h30 to 18h00, seven days a week, but then she was off for seven days, which granted her the opportunity to spend time with her children.

[44] When asked whether she was bound to Bloemfontein for employment purposes, she confirmed same. She explained that she receives a lot of assistance from her mother in law, her parents and her husband's career is in Bloemfontein.

[45] It was further posed to the plaintiff that Bloemfontein does not present as many opportunities for her to have progressed with her career as a Cook or a Chef as postulated by the expert. She testified that at the time of the accident she was still very young and her experience may not have been enough for a well-known establishment to hire her as Executive Chef, but with time and experience she would have worked herself up in her career.

[46] In re-examination she testified that she has no other option but to seek for work, since she is financially compelled to do so.

Ms A Ndabambi: Occupational Therapist:

[47] Ms Ndabambi, an Occupational Therapist, was called as an expert witness on behalf of the plaintiff. Her report is dated 31 August 2022.

[48] Ms Ndabambi, in her evaluation, took into consideration what was stated by Dr Barlin in his report.

[49] She explained that her evaluation pertained to the functional capacity of the plaintiff in relation to her job performance.

[50] At paragraphs 9.8 to 9.10 of her report Ms Ndabambi stated as follows, which opinion she also repeated in her viva voce evidence:

“9.8 Current work capacity: Mrs Claasen tested capable of engaging in sedentary work. Her limitations are related to residual neck pain and right arm

neurological deficits such as pins and needles. She also presented with weakness of her right hand with associated tremors.

She is also limited in prolonged sustained postures. She did not fully meet the demand of light work. She is unsuited to engage in medium and heavy occupations.

9.9 Job match: Mrs Claasen’s current physical abilities do not meet/match the demands of her own pre-accident job as Head Chef. She is unsuited to engage in light and medium occupations. She is unsuited to engage in manual related tasks such as load handling, trunk rotation, elevated work and prolonged standing demands. She is not suited to work in her pre-accident capacity as a Head Chef, cook, assistant chef or any similar role.

...

9.10 Alternative and future occupations: With optimal successful intervention and vocational guidance, Mrs Claasen is likely to be suited to engage in sedentary to occasional aspects of light work. She will benefit from reasonable accommodations based on the job she will be doing. She should refrain from tasks which require prolonged sustained postures such as sitting, standing, stooping and elevated work. She will also benefit from rest breaks. It is unlikely that she will be suited or meet the demands of medium work due to the accident related injuries. She should thus refrain from engaging in medium and heavy occupation.

....

However, should her neck symptoms and associated radiculopathy of her right upper limb worsen she is likely to find herself well suited for sedentary to half day work in the open labour market. She will continuously benefit from reasonable accommodations in the work place.”

[51] It was put to the witness that her evidence that the plaintiff has never been employed in a sedentary role before, is incorrect, since she was a receptionist previously. Ms Ndabambi responded by saying that the plaintiff's stint as a receptionist was very brief. Further, the explanation the plaintiff gave to her regarding the responsibilities she had as a receptionist, was to the effect that it was not 100% sedentary, since she also performed some light work. She, in between sitting, walked around, carrying and storing files.

[52] Ms Ndabambi further testified that since the plaintiff cannot sit all the time due to her physical limitations, she will be an unequal competitor in the open market.

Ms R Pretorius: Industrial Psychologist:

[53] Ms Pretorius, an Industrial Psychologist, was also called by the plaintiff as an expert witness. She prepared two reports which were presented in evidence. The date of the first report is 7 September 2022 and the date of the addendum report is 10 October 2022.

[54] She testified that the purpose of her reports is to determine the extent and impact of the accident, which took place on 7 September 2021, its related injuries and sequelae thereof, on the plaintiff's employability and earning capacity.

[55] In compiling her report she had various documents which she took into consideration in her opinion provided, including, inter alia, the medico-legal reports of Ms Ndabambi, the Occupational Therapist and that of Dr Barlin, the Orthopaedic Surgeon.

[56] With regard to her pre-accident health, the plaintiff informed Ms Pretorius that she had previously been involved in motor vehicle accident in 2010 as a passenger. However, she did not sustain any serious injuries in this accident and she was not hospitalized. She also underwent a lumbar puncture in 2018. Nevertheless, and overall, the plaintiff stated that she was in good health at the time of the accident.

[57] In her report Ms Pretorius dealt with the plaintiff's pre-accident employment history, which in essence corresponds with the plaintiff's evidence in this regard and I am consequently not going to repeat same.

[58] Ms Pretorius obtained collateral information regarding the plaintiff's pre-accident employment by means of a conversation with Ms Koekemoer, who was employed in the position of Kitchen Manager at the Free State Residential Centre. Regarding her pre-accident job performance, Ms Koekemoer stated that she had no problems with the performance of Ms Claasen, she was good and she got well on with the residents. Ms Koekemoer rated the plaintiff's job performance as "good". Regarding promotions, Ms Pretorius stated as follows in her report at paragraph 6.7.1.4:

"Regarding promotions, Ms Koekemoer stated that Ms Claasen had enquired regarding Ms Koekemoer leaving her employment and whether she could perhaps apply for her position, however Ms Koekemoer stated that she did not aspire to leave and Ms Claasen would have still been employed in the same position as Cook, had the accident not occurred."

[59] Ms Koekemoer stated that the retirement age at the Centre is 60 years, however one can work until 65 years old should one`s health permits.

[60] With regard to the plaintiff`s pre-accident employment projection, Ms Pretorius stated in her report, which evidence she also repeated during her viva voce evidence, as follows:

“6.8.2 The authors are of the opinion that had the accident not occurred, Ms Claasen would have continued working in the position of a Cook for her employer at the time of the accident, Vrystaat Nasorgsentrum.

6.8.3 The authors consider that there were no promotional opportunities for Ms Claasen with Vrystaat Nasorgsentrum as per collateral employment information. Further considered were her age at the time of the accident (29 years) as well as her various qualifications, the highest being a diploma. Taking these factors into account, it is opined that she would have sought out alternative employment in the position of a Cook which would have offered Ms Claasen opportunities to progress further in her career. It is therefore assumed that she had not reached her career or her earnings pinnacle at the time she encountered the accident in question. It is further assumed that she would have reached her career and her earnings pinnacle between the ages of 45 and 50 years, perhaps in the position of a Senior Cook, or in a similar position”.

[61] With regard to the plaintiff`s pre-accident earnings projection, Ms Pretorius testified and stated in her report as follows:

“6.10.2 The authors opined that Ms Claasen would have progressed her career and her earnings further, to earn in-line with a 75 percentile for Cooks between the ages of 50 and 54 in the formal sector, i.e. R241 573.00 per annum, 2021 terms, as per the Analytics earnings research. This would have formed her career and earnings pinnacle between the ages of 45 and 50 years.

6.10.3 The authors opine that Ms Claasen would thereafter have received normal, annual inflationary increases until retirement.”

[62] For purposes of the aforesaid, Ms Pretorius made use of figures from Analytico earnings research for Cooks, 2021 terms. It indicates that it is for “Cooks plan, organize, prepare and cook foodstuffs in hotels, restaurants and other public eating places, on board ships, on passenger trains and in private households”. In the diagram reflected in her report, the age percentiles for the age of 50 to 54 years old, reflect the following figures:

25th percentile R61 360

50th percentile R111 503

75th percentile R241 573.

[63] Regarding the plaintiff`s pre-accident retirement, it was assumed by Ms Pretorius that the plaintiff would have worked until the age of 67.5 years. The authors opined that she would have retired working for a different employer than Free State Residential Centre.

[64] With regard to the plaintiff's post-accident future earnings projection, Ms Pretorius made provision for two scenarios.

[65] The first scenario is that the plaintiff will re-enter the labour market in the position of a Receptionist or in a similar position. Ms Pretorius opines that there is a 50% chance that this scenario may occur. This scenario is projected as follows in the addendum report:

"4.7.1.1 It is assumed that Ms Claasen may re-enter the labour market in the position of a Receptionist, after approximately 22 to 24 months from the date of this report, for calculation purposes.

4.7.1.2 Upon re-entering the labour market as described above, she will earn in-line with the 25th percentile for Receptionists in the formal sector, i.e. R72 416.00 per annum to 2022 terms, as per the Analytico earnings research.

4.7.1.4 It is opined that Ms Claasen will receive normal, annual inflationary increases until retirement."

[66] The second scenario is to the effect that the plaintiff would remain unemployed. Ms Pretorius opined that there is also a 50% chance that this scenario may occur. In this regard Ms Pretorius opined Ms Claasen may not re-enter the labour market and therefore not generate work-related earnings for the rest of her life.

[67] With regard to the aforesaid first scenario, Ms Pretorius also opined that the plaintiff will experience difficulty securing employment in the position of a Receptionist, periods of unemployment are foreseen. She therefore recommended an appropriate, higher post-accident contingency deduction to be considered.

[68] The scenarios were postulated on a post-accident retirement age of approximately 67.7 years.

[69] Ms Pretorius testified and confirmed that the post-accident projected career on the basis of a 50/50% is reasonable given the background information she has at her disposal.

Cross-examination of Ms Pretorius:

[70] Ms Pretorius was asked why she postulates a 50/50% chance between the two scenarios, and not for instance a 70/30% postulation. Ms Pretorius responded that it is difficult to determine such a percentage, since it is not an exact science. She, however, awarded an equal likelihood to both scenarios since the plaintiff has not previously worked in a sedentary position and she does not have any qualifications in that regard. In the open labour market a person with the necessary experience and qualifications will enjoy preference by a potential employer. Ms Gouws then advised Ms Pretorius that the plaintiff has indeed previously worked as a Receptionist at a medical practice for a period of three months and also explained to Ms Pretorius what the plaintiff's obligations entailed in that position. After consideration of this fact, Ms Pretorius testified that in the circumstances she would say that the impact of that experience may perhaps up the possibility of obtaining sedentary employment in future from 50% to 55%. She, however, still foresees that the plaintiff will

experience difficulty in obtaining such employment, considering her limitations. The plaintiff still has a 45% chance of remaining unemployed, because of her limited experience and her lack of an applicable qualification such as a certificate in administration. She has severe limited

work experience in a sedentary position, since it is vastly different from the work which she performed as Cook. She therefore

remains at a disadvantage compared to someone who has more experience.

[71] Ms Pretorius was further asked how she can project that there would have been an increase of income pre-accident and that the plaintiff would have, proverbially speaking, climbed the corporate ladder. Ms Pretorius testified that considering the plaintiff's past experience she does believe that the plaintiff would have developed within her career and would have progressed had it not been for the accident. She opined that considering the age of the plaintiff at the time, being 29 years of age, she cannot see that the plaintiff would not have progressed between the age of 29 years and 45 years.

[72] With regard to the plaintiff's pre-accident earnings projection as set out at paragraph 6.10.2 of the report of Ms Pretorius, Ms Gouws enquired from her why she did the projection on the 75th percentile for Cooks, which is the highest spectrum of earnings. Ms Pretorius testified that because of her tertiary qualifications,

her work experience, the fact that she has the reputation of being a good worker and a good performer as a Cook at her previous employer and also the fact that for someone of her age, she was earning a relatively low income at the time of the accident, she progressed her to the 75th percentile.

[73] When asked how much Chefs in Bloemfontein earn, Ms Pretorius indicated that she does not know. When it was put to her that the opportunities for Chefs in Bloemfontein are restricted, Ms Pretorius did not agree and referred to the work history of the plaintiff in respect of positions she previously obtained and occupied in Bloemfontein.

[74] Ms Pretorius was cross-examined on why, for purposes of the post-accident first scenario, namely should the plaintiff re-enter the labour market in the position of a Receptionist or in a similar position, the 25th percentile was postulated. Ms Pretorius testified that the said percentile is the lowest spectrum of earnings and that that is being used because the plaintiff has been absent from the labour market for quite some time, she would be entering the labour market in a position where she has very limited experience and therefore she would have to start at the bottom of the occupation, basically at entry level. The absence from the labour market to which she refers, is the postulation of one to two years to obtain a position of a Receptionist or similar position. She testified that even taking into consideration the experience and exposure which the plaintiff previously had as a Receptionist, it would not affect the opinion of Ms Pretorius that the 25th percentile should be used and not the 50th percentile. The earnings for the 50th percentile is R139 482.00. Ms

Pretorius testified that with more experience and with opportunities to have proven herself, she would eventually reach that percentile, but it is unrealistic and improbable that she would jump from no income to earnings of R139 482.00.

- [75] Ms Pretorius was asked what the percentage chance is that the plaintiff would have, pre-accident, again obtained employment in the formal sector. Ms Pretorius testified that it is highly likely because she has previously worked in that sector and she has experience in the formal sector. She therefore testified that one can safely assume that the percentage chance is above 50%.
- [76] During re-examination Ms Pretorius confirmed that considering that the plaintiff only has three months' experience as a Receptionist out of a period of 7 years, the post-accident scenario cannot be postulated at higher than 25%.
- [77] In re-examination Ms Pretorius was also requested to give clarity on the issue of the age bracket of 50 – 54 years, but then postulating it in the age bracket of 45 – 49 years. She testified that 50 - 54 is the age bracket she used in terms of the scales. She has, however, also considered other scales, such as the Patterson Corporate Scales and Koch's Scales to have come to the conclusion to use the earnings of the 50 - 54 years bracket for purposes of the scales. Mr De La Rey then pointed out to her that the actuary did his calculations on the basis that she would have reached her career pinnacle at the age of 48 years, which Ms Pretorius confirmed to be correct.
- [78] During further re-examination Ms Pretorius testified that she based her pre-accident projections on factual evidence. Her post-accident postulations she based on the report of the doctor, the Occupational Therapist, the plaintiff's lack of relevant experience, her lack of qualifications and postulated it as best as it is going to get.
- [79] Ms Pretorius also testified in re-examination that the pre-accident postulation is based on the income of a Cook and not that of a Chef. Considering that the plaintiff has previously been a Head Chef and a Chef De Parte, the pre-accident scenario is actually very conservative, since it postulates the lower income of a Cook as opposed to that of a Chef.
- [80] Lastly, in her re-examination, she confirmed that she concedes her initial 50/50% scenario to a 55/45% scenario due to the fact that she did not have knowledge of the plaintiff's previous experience as a Receptionist, albeit very limited experience.

Evaluation of the expert evidence:

- [81] Ms Gouws referred in her heads of argument to the judgment of *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA) at paras [22] – [23]:
- [22] It is trite that an expert witness is required to assist the court and not to usurp the function of the court. Expert witnesses are required to lay a factual basis for their conclusions and explain their reasoning to the court. The court must satisfy itself as to the correctness of the expert's reasoning. In *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd and Another* 2016

(2) SA 586 (SCA) ([2015] ZASCA 164) para 15, this court said:

'Lastly, the expert evidence lacked any reasoning. An expert's opinion must be underpinned by proper reasoning in order for a court to assess the cogency of that opinion. Absent any reasoning the opinion is inadmissible.'

In Road Accident Appeal Tribunal and Others v Gouws and Another 2018

(3) SA 413 (SCA) ([2018] 1 All SA 701; [2017] ZASCA 188) para 33, this court said:

'Courts are not bound by the view of any expert. They make the ultimate decision on issues on which experts provide an opinion.'

See also Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another 2001

(3) SA 1188 (SCA) ([2002] 1 All SA 384) para 34.

[231] The facts on which the expert witness expresses an opinion must be capable of being reconciled with all other evidence in the case. For an opinion to be underpinned by proper reasoning, it must be based on correct facts. Incorrect facts militate against proper reasoning and the correct analysis of the facts is paramount for proper reasoning, failing which the court will not be able to properly assess the cogency of that opinion. An expert opinion which lacks proper reasoning is not helpful to the court. ... (My emphasis)

[82] In Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung MbH 1976 (3) SA 352 (A) the following principles were stated at 371:

"As I see it, an expert's opinion represents his reasoned conclusion based on certain facts on data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert." (My emphasis)

[83] Ms Pretorius was cross-examined at length and in depth by Ms Gouws. The most controversial issues that were raised with her by Ms Gouws, were the 75th percentile postulation pre-morbid, the 25th percentile postulation post-morbid and the issue regarding the calculations based on the 45 – 49 years' and the 50 – 54 years' age brackets. In my view Ms Pretorius duly explained her opinions in respect of those issues, which explanations were based on factual evidence which cannot be said to be incorrect or unreliable. In fact, when Ms Pretorius was made aware that the plaintiff had in fact previously occupied the position of Receptionist, which she was not previously aware of, she immediately conceded that her 50/50% chance for the two possible post-morbid scenarios should be rectified to be 55/45%. Considering that it was very limited experience of 3 months, I'm actually of the view that Ms Pretorius was very lenient in her concession. However, the important fact is that after the "new" facts were brought to her attention, Ms Pretorius did not attempt to persist with her original postulation.

[84] The other issue raised by Ms Gouws in cross-examination and in her arguments, is the alleged restricted opportunities for Chefs/Cooks in Bloemfontein. Not only was that duly answered and negated by Ms Pretorius in her responses thereto in cross-examination, but, in my view, the legal basis of that approach is incorrect. As correctly pointed out by Mr De la Rey in his heads of argument, a claim for loss of earnings is premised on a plaintiff's loss of earning capacity and not his/her physical loss of income. In *Santam Versekeringsmaatskappy Beperk v Byleveldt* 1973 (2) SA 146 at 50 C - D it was stated as follows in Afrikaans:

“Die verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik gemeet aan die standaard van verwagte inkomste, is 'n verlies van geskiktheid en nie 'n verlies van inkomste nie.”

[85] I have duly considered the evidence, including the cross-examination, of the expert witnesses by Ms Gouws. In my view all three experts, most importantly Ms Pretorius, based their opinions on the correct facts. The facts as testified to by the plaintiff, were corroborated by the reports of the experts in all material respects. The experts, in their reports and in their viva voce evidence, duly explained their reasoning and the basis/grounds for their reasoning. Their opinions and conclusions are therefore based on established facts and based on their objective expertise. There is no reason for me not to accept their evidence and expert opinions.

Contingencies and calculations:

[86] It is trite that it is for the court to determine the percentage of contingencies to be applied in a matter such as this.

[87] Contingencies discount the vicissitudes of life and it is a method used to arrive at fair and reasonable compensation. The question of contingencies was dealt with in *[zRPz]Southern Insurance Association Ltd v Bailey* N.O. 1984 (1) SA 98 (A) at 113G and 116G – 117A:

“Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future,

without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.

Where the method of actuarial computation is adopted, it does not mean that the trial Judge is ‘tied down by inexorable actuarial

calculations’. He has ‘a large discretion to award what he considers right’ (per HOLMES JA in *Legal Assurance Co Ltd v Botes* 1963

(1) SA 608 (A) at 614F). One of the elements in exercising that discretion is the making of a discount for ‘contingencies’ or the ‘vicissitudes of life’. These include such matters as the possibility that the plaintiff may in the result have less

than a 'normal' expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. See *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd* 1980

- (3) SA 105 (A) at 114 - 5. The rate of the discount cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case.

It is, however, erroneous to regard the fortunes of life as being always adverse: they may be favourable. In dealing with the question of contingencies, WINDEYER J said in the Australian case of *Bresatz v Przibilla* [1962] HCA 54; (1962) 36 ALJR 212 (HCA) at 213:

'It is a mistake to suppose that it necessarily involves a 'scaling down'. What it involves depends, not on arithmetic, but on considering what the future may have held for the particular individual concerned... (The) generalisation that there must be a 'scaling down' for contingencies seems mistaken. All 'contingencies' are not adverse: All 'vicissitudes' are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune? Each case depends upon its own facts. In some it may seem that the chance of good fortune might have balanced or even outweighed the risk of bad.'

- [88] In the judgment of *Dlamini v Road Accident Fund* (59188/13) [2015] ZAGPPHC 646 (3 September 2015) at paras [30] to

- [31] the court dealt with and applied some guidelines referred to by Koch in *The Quantum Year Book*:

"[30] Koch refers to the following as some of the guidelines as regards contingencies:

'Normal contingencies' as deductions of 5% for past loss and 15% for future loss.

'Sliding scale': 1/2 % per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in the middle age and relies on *Goodall v President Insurance* 1978 (1) SA 389.

'Differential contingencies' are commonly applied, that is to say one percentage applied to earnings but for the accident, and a different percentage to earnings having regard to the accident.

- [31] When a court is called upon to exercise an arbitrary discretion that is largely based on speculated facts it must do so with necessary circumspection. In the absence of contrary evidence, the court can assume that a reasonable person in the position of the plaintiff would have succeeded to minimize the adverse hazards of life rather than to accept them. Both favourable and adverse contingencies have to be taken into account in determining an appropriate contingency deduction. Bearing in mind that contingencies are not always adverse, the court should in exercising its discretion lean in favour of the plaintiff as he

would not have been placed in the position where his income would have to be the subject of speculation if the accident had not occurred.”

- [89] The actuarial report reflects two scenarios of calculations as per the evidence of Ms Pretorius. The parties are ad idem that the quantification of the plaintiff’s loss of earnings/ earning capacity should be based on scenario 1. I agree. However, the said calculation is to be done subject to what is stated hereunder.
- [90] Pertaining to the plaintiff’s pre-morbid past loss of earnings and her post-morbid past loss of earnings, the parties both suggested that the “usual” 5% contingency is to be deducted in respect of both. I am in agreement that it will be fair and reasonable.
- [91] With regard to the plaintiff’s pre-morbid future loss of earnings, Ms Gouws suggested that a contingency of 50% should be deducted. This submission is based on her submission that the 75th percentile calculation is unsubstantiated and too high and further based on the issue in respect of the 45 – 49 years’ and the 50 – 54 years’ age brackets. As indicated earlier, I accept the explanation by and the opinion of Ms Pretorius in respect of both issues. I therefore agree with the submission of Mr De la Rey that a contingency deduction of 50% is flawed.
- [92] When the sliding scale calculation is used as basis, it constitutes a pre-morbid future loss of earnings contingency of 17%, calculated on an expected retirement age of 65 years. This is the submission by Mr De la Rey and with which I am in agreement as being fair and reasonable in the circumstances.
- [93] With regard to the post-morbid future earnings of the plaintiff, Ms Gouws submitted that a 30% contingency deduction should be made. She advanced no reasons in support of this submission. Mr De la Rey, on the other hand, suggested a contingency deduction of 45% based on the evidence of Ms Pretorius and the concession she made, referred to earlier. I am in agreement with Mr De la Rey and consider it to be a fair and reasonable contingency deduction in the relevant circumstances.
- [94] Furthermore the calculation in scenario 1 of the actuarial report is to be amended to be calculated up to a retirement age of 65 years. There was no evidence presented to justify a later retirement age.
- [95] Lastly, the actuary calculation was done based on a calculation date of 1 December 2022. The date of calculation is to be updated to 1 August 2024.
- [96] I intend making an order based on the aforesaid findings.

Costs:

[97] An order of costs has already been made in the Court Order dated 23 February 2024. However, should there have been additional costs incurred since the date of the said Order in respect of the adjudication of the loss of earnings/earning capacity, the proposed Draft Order should also make provision for those costs.

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Order:

[98] I consequently make the following order:

1. It is declared that an updated actuarial calculation is to be drafted pertaining to the plaintiff's loss of earnings as a result of the motor vehicle accident which occurred on 7 September 2021, for purposes of which the plaintiff's attorney is directed to forthwith request the plaintiff's actuary to perform such a calculation in accordance with my relevant findings in this judgment, namely:

1.1 The actuarial principles and assumptions, as well as the other postulations as applied in the report of Mr Mellet, dated 16 November 2022, scenario 1, as reflected at p. 6 – p. 7 of the report, are to be applied again, subject to the following:

1.1.1 The following contingencies are to be deducted:

1.1.1.1 Pre-morbid past loss of earnings – 5%

1.1.1.2 Post-morbid past loss of earnings – 5%

1.1.1.3 Pre-morbid future loss of earnings – 17%

1.1.1.4 Post-morbid future loss of earnings – 45%

1.1.2 The retirement age is to be 65 years.

1.1.3 The calculation is to be done as at 1 August 2024.

2. Leave is granted to the parties to approach Van Zyl, J in chambers, once the aforesaid calculation is received, with a draft order as agreed upon between the parties in order to obtain an order for the payment by the defendant to the plaintiff of the amount calculated as aforesaid, together with interest, costs (if any in addition to the costs previously ordered) and related issues.

3. The aforesaid costs are also to include the additional costs for obtaining the newly calculated and updated actuarial report, as well as any consequential costs incurred in order for it to be made an order of Court.

C. VAN ZYL, J

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