



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 No: 4990/2018

In the matter between:

CHANTELL MARTIN

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

CORAM: NAIDOO J

HEARD ON: 2 FEBRUARY 2021

DELIVERED ON: 8 JUNE 2021

[1] This is a personal injury claim, arising out of injuries suffered by the plaintiff in a motor vehicle accident on 4 October 2015. She was a passenger seated at the back of a motorcycle. The merits were conceded by the defendant (RAF) on 12 April 2019, and the parties agreed that the matter would proceed in respect of

quantum only. At the commencement of the trial, Adv RD McClarty SC, who represented the plaintiff, advised that the parties had now settled the aspects of general damages, future loss of earnings and future medical expenses. The only issues for this court to adjudicate are past medical expenses and past loss of earnings. There was no appearance for RAF.

[2] According to correspondence from RAF to the plaintiff's attorneys, handed up by Mr McClarty, it appears that the issue that RAF had with past loss of earnings is that IRP5 forms were rendered in respect of the plaintiff up to 2020. RAF regarded the payments made to the plaintiff, and which were reflected on the IRP5 forms, as salary which she received for the relevant periods. With regard to the past medical expenses, RAF alleged that they did not receive an updated schedule and vouchers in support of the claim. Their bill reviewer would therefore require time to examine and consider the past medical expenses. The plaintiff alleges that the schedule and vouchers were sent to RAF, and she intended to proceed with the trial, which did proceed.

[3] The plaintiff testified and also led the evidence of her husband, Brandon Martin (Mr Martin). The plaintiff's evidence is that she obtained an estate agency certificate and worked as an estate agent before joining her husband's second-hand motor car business as an Administration Clerk/Manager. She held this position until the accident in October 2015, and earned a gross salary of Nine Thousand Seven Hundred and Forty Eight Rand (R9748.00). Between October 2015 and October 2016, she underwent several operations to correct the problems caused by

the injury to her leg. She tried to return to work in 2016, but was unable to continue, as the pain in her leg was very severe. She was eventually replaced when her husband hired someone else to do her work. Her husband, however, continued to pay her, even though she has not worked in the business since 2016, as he felt sorry for her.

- [4] Mr Martin confirmed the version of the plaintiff with regard to her salary before the accident, that he has continued to pay her a monthly amount equal to the salary she was earning, even though she no longer works in the business and that he has had to replace her at work. He further confirmed her evidence that prior to the accident the plaintiff worked half the day, from 8h00 to 13h00. Mr Martin testified that the business had expanded exponentially and that the person employed to replace the plaintiff is now working a full day. If the accident had not occurred, the plaintiff would, likewise, have been obliged to work a full day. He further confirmed that he rendered IRP5 returns, in respect of the amounts he paid to the plaintiff, from 2016 to 2020.
- [5] It will be useful to briefly summarise the injuries suffered by the plaintiff. Apart from the abrasions to her left shoulder and both her hands, the most serious injury suffered by the plaintiff was to her right leg and foot. She suffered a fracture of the right patella (knee cap), a shaft fracture of the right femur and fractures of the 2nd and 3rd metatarsals of the right foot. She was treated and attended to

by a number of medical practitioners, having had a total of fifteen (15) surgeries and surgical procedures. She requires further surgical intervention in order to achieve mobility of the knee (where the knee cap was removed) and to restore the function of the quadriceps muscles in the right thigh. Defective hip mechanism and weakened gluteal muscles, (presumably due to the shortening of the right leg and stiff knee) have caused the plaintiff to have a severe limp.

- [6] The plaintiff has suffered severe loss of amenities of life, and the experts agree that the *sequelae* of her injuries have rendered her functionally unemployable, due to the fact that she has suffered significant loss of earning and employment capacity. Her duties as an administration manager often entailed her driving the vehicles of clients and also driving to licence and register vehicles that were sold to clients. Performance of her office duties also became very difficult due to the fact that she was in constant pain and had difficulty with her mobility.
- [7] The papers reveal that her husband was the driver of the motorcycle at the time of the accident. It is not inconceivable that this is a factor that contributed to his feeling sorry for the plaintiff, motivating him to continue paying her on a monthly basis. The fact that he rendered IRP5 returns in respect of the amounts paid to her does not, in my view, automatically justify the conclusion that such payments are to be regarded as salary. A salary is usually paid to an employee in return for services rendered to the employer. The clear and uncontroverted evidence of the plaintiff and her husband is that she was no longer capable of working and

rendering the services that she was previously paid a salary for. In addition, another person was employed to do the work that the plaintiff did prior to the accident. In my view, therefore, it is clear that the payments made by Mr Martin's business to the plaintiff were gratuitous and made out of benevolence.

- [8] It has been established in a number of cases that gratuitous payments made to an injured employee should not be taken into account in calculating that employee's damages or loss of earnings. In the matter of *Santam Versekeringsmaatskappy Bpk v Byleveldt 1973(2) SA146 (A)*, Rumpff JA cited with approval, at page 150 F-G, the remarks of the court in the English case of *Parry v Cleaver 1970 A.C. 1*, where Lord Reid said on p14:

"It would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relatives or of the public at large and that the only gainer would be the wrongdoer"

- [9] More recently, in *Bee v Road Accident Fund 2018(4) 366 (SCA)*, the court cited the *Santam* matter with approval, and remarked (at para [101]) that "If, out of benevolence, an employer allows an injured employee to return to work and to perform such limited tasks as he is able to do, and continues to pay him a salary, the injured employee is not obliged to deduct such salary when quantifying his loss of earnings"

The court further remarked in para [102] that "The fact that a 'salary'.... paid to an injured employee out of benevolence, is recorded in a company's financial records as a salary rather than a donation is neither here nor there. I should think it extremely likely that a company which pays an injured employee a benevolent salary would record the amount as a salary, deduct employee's tax and so forth....it may have suited the employer to treat

his benevolence as salary for services rendered since he could record the payments as a business expense in his books”

- [10] In the present matter, the plaintiff rendered no services at all since 2016 but received a ‘salary’. There is no reason not to accept her evidence and that of her husband that such payments were gratuitous. As such, those amounts should, in my view, be excluded from the calculation of the plaintiff’s past loss of earnings. The actuary engaged by the plaintiff took into account several factors in calculating her loss of earnings as a result of the injuries she suffered in the accident. These included her age, gross employment income had she not been injured, retirement age, health and life expectancy. He also factored into his calculations, inflation and tax. He left the issue of contingencies to be negotiated between the parties or determined by the court.
- [11] As indicated earlier, the only issues for this court to decide are past medical expenses and past loss of earnings. The issues of general damages, future loss of earnings and future medical expenses were settled shortly before the trial was scheduled to commence. The past loss of earnings calculated by the actuary was an amount of Eight Hundred and Seventy Nine Thousand Rand (R879 000.00). After application of a 5% contingency fee, the amount in respect of past loss of earnings was R835 050.00. In order to settle the matter, the plaintiff indicated to RAF that she was prepared to accept an amount of Five Hundred and Seventeen Thousand Five Hundred and Fifty Nine Rand (R517 559.00). This was communicated to RAF on 1 February 2021, the day before the trial was due to commence. No response

was received from RAF in this regard by the time the trial commenced the next day. I am, however, of the view that this amount is a fair representation of the plaintiff's past loss of earnings.

[12] I deal now with the aspect of past medical expenses. The plaintiff presented a full record of all the hospitals she was admitted to, all the medical expenses she incurred, supported by vouchers and all the medication purchased for the treatment of her injuries, also supported by vouchers. In her testimony, she confirmed that those were indeed the expenses she incurred and that she checked each document for correctness, RAF presented no evidence to the contrary, so that the plaintiff's evidence is the only version before me. I see no reason to reject her evidence in respect of her past medical expenses, which amounted to Two Million Nine Hundred and Sixteen Thousand Nine Hundred and Five Rand and Thirteen Cents (R2 916 905.13).

[13] Consequently the following orders are made:

13.1 The defendant is ordered to pay to the plaintiff the amount of Three Million Four Hundred and Thirty Four Thousand Five Hundred and Four Rand and Thirteen Cents (R3 434 504.13), made up as follows:

13.1.1 Past hospital and medical expenses	R2 916 905.13
13.1.2 Past loss of earnings	R 517 599.00

- 13.2 The defendant is to furnish the plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 in respect of her future hospital expenses, medical expenses and assistive devices;
- 13.3 The defendant is ordered to pay interest on the aforesaid amount at the prescribed rate of interest, which shall be calculated, and commence running fourteen (14) days after the date of this order;
- 13.4 The defendant is ordered to pay the plaintiff's cost of suit, including any qualifying expenses of such experts in respect of whom the plaintiff has furnished expert reports, and including the travelling and accommodation costs, if any, which she incurred in order to consult with the experts and to attend trial proceedings.

S NAIDOO, J

On behalf of Plaintiff : Adv RD McClarty SC
Instructed by : Phatsoane Henney Attorneys
35 Markgraaff Street
Bloemfontein
(Ref: HEY8/0002/LC/jb)

On behalf of Defendant : No Appearance