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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION (PORT ELIZABETH)**

Reportable / Not Reportable

Case No: 2136/2017

In the matter between:

SAMANTHA SIDLABANE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

NQUMSE AJ:

[1] The plaintiff instituted a claim for damages against the defendant, arising out of a collision that was due to the sole negligence of the insured driver in whose vehicle the plaintiff was a passenger.

[2] It is as a result of the said collision that caused plaintiff to suffer the following injuries:

2.1 A mild brain injury;

- 2.2 A laceration of the left lower face involving the left lower lip with tissue torn;
- 2.3 Laceration of the left side of the neck;
- 2.4 A small laceration of the right forehead;
- 2.5 Abrasion and bruising of the face and body;
- 2.6 An injury to the lower jaw;
- 2.7 An injury to the teeth and
- 2.8 A psychological and post-traumatic stress disorder.

[3] The defendant in the index in respect of minutes handed into court has conceded the merits and disability of the plaintiff's claim in its entirety¹. At the time of trial the following head of damages had become settled:

- 3.1 The defendant shall furnish the plaintiff with an undertaking in terms of Section 17(4) (a) of the Road Accident Fund², to pay to the plaintiff the costs of future accommodation in a hospital or nursing home, or the treatment of or the rendering of a service to, or the supporting of goods to the plaintiff, as a result of the injuries sustained by her in the motor vehicle collision which occurred on 31 August 2014 in Port Elizabeth, and the sequelae thereof, after the costs have been incurred and upon proof thereof;
- 3.2 General damages in the sum of R500 000; or
- 3.3 The plaintiff abandoned her claim for past medical expenses.

[4] Accordingly, the only issues I am called upon to determine are;

- 4.1 Plaintiff's past and future loss of income and earning capacity; and
- 4.2 The costs consequent upon the employment of two counsel.

¹ Index in respect of Minutes, Page 6

² Road Accident Fund Act, No 56 of 1996

[5] It is common cause that at the time of the accident, plaintiff was an employee of Joshua Door since 01 August 2013. Her specific job was that of a sales lady. According to Exhibit H which was handed in by consent the plaintiff earned a basic salary as well as commission which was normally paid in the month following the month in which it was earned. The pay slips indicated commission earned from delivery charges, life insurance sold, BPP commission, SPIVS, and club commission.

[6] Mrs. Molloy, a lay witness who was the plaintiff's sales manager described the plaintiff prior the accident as a vibrant young girl, with customers who enjoyed her beautiful personality. With her potential she was independent and gave 100% performance in her work. Her selection to attend a management course enabled her to be in line for a promotion to management.

[7] According to Mrs. Molloy, plaintiff lost her vibrancy after the accident. She no longer wanted to mix with her sales colleagues. She struggled to speak to her Xhosa clientele due to a difficulty with the Xhosa click sounds. She would spit whilst talking, with drool coming out of her mouth. This caused her to be depressed and withdrawn. As a result she deployed the plaintiff to perform other duties which are administrative in nature.

[8] When the plaintiff returned to work after the incident in February 2015, she gave the plaintiff her support. She also received the support from the other sales ladies. The other sales ladies attended her customers, a gesture that earned the plaintiff high commission for March and April 2015. Mrs. Molloy further testified that plaintiff was dismissed from work pursuant a disciplinary hearing for absconding from work. Upon the plaintiff's return to work in January 2016, she launched an appeal against her dismissal, results of which she does not know.

[9] She also testified that because she obtained an alternative employment in February 2016, she left Joshua Doore leaving the plaintiff behind and still in the employ of Joshua Doore.

[10] A number of medico-legal reports compiled by medical practitioners, who examined the plaintiff, were placed before me by agreement. Those are to be found in Exhibit A, B, C, D, E and F. The actuarial report was admitted only to the extent of the methodology used in the calculations. The only expert witnesses which testified were, Dr. Keely, a neurosurgeon, Dr. de Witt, a clinical psychologist, David Williams an Employment Consultant, two industrial psychologists, Mr. Lani Martiny on behalf of the plaintiff, Mr. Gregory Shapiro on behalf of the defendant, Ms. C du Plessis a Remuneration and Benefits Manager for the JD Group and George William Annandale a Human Resource Executive.

[11] According to Dr. Keely, the plaintiff suffered a significant loss of functions to her face and mouth. Due to her lip being scarred and distorted she cannot keep saliva in her mouth since it dribbles continuously. Whatever she eats and drinks leaks during the process of chewing without the plaintiff being conscious due to loss of sensation to her lower lip. Her condition has also affected her speech. He further describes her injury as an extensive scarring from the left mouth extending down to her chin for 6 cm to the left and right along the lower jaw. Her ugly scarring amounts to a severe disfigurement.

[12] She also suffered a 13 cm hairline scar running vertically along the side of her face just in front of the ear. The disfigurement would not be corrected despite multiple plastic surgeries. He further described plaintiff's pain as a dysesthetic pain that is a persistent uncomfortable 'tingling' ache similar to an electric shock. He states that the origin of this pain is from the tearing of the nerve fibres which in turn short circuit onto adjacent nerve fibres. It is significant to note that he opines that this type of pain does not respond to medication and there is no surgical treatment therefor.

[13] He further described the pain as permanent and will remain with the plaintiff for the duration of her life time. He further opined that plaintiff is severely handicapped for seeking re-employment. He puts the plaintiff's whole person impairment at 34%. Under cross examination Dr. Keely confirmed that the plaintiff informed him that she lost

employment as a result of her appearance, distorted speech and being in and out of hospital.

[14] Dr. de Witt a Clinical Psychologist testified that she interviewed the plaintiff and in preparing her report took into account the medico-legal reports, RAF1 and other RAF documents as well as other relevant hospital records.

[15] The plaintiff informed her that she was an extremely talented and vibrant person who after the accident felt extremely self-conscious about the injuries to her face and could not cope working with the public. Plaintiff further informed her that she has lost her beauty and finds herself physically repulsive. She also finds it stressful to travel with taxis given the proximity with other passengers and the feeling that she is being scrutinized and judged by her appearance. This further caused her to think that she is being perceived as rude and an aggressive person, a character she disavows. She is dating a man who she believes is cheating on her but for fear of being alone and lack of confidence that she will meet another man, she is tolerating his infidelity. She also informed her that she was abusing alcohol as a coping mechanism.

[16] Following the evidence of Dr. Keely in court, Dr. de Witt made the following assessments:

- 16.1 Severe disfigurement with WPI of 34% which is a very high rating;
- 16.2 The plaintiff's pain is permanent in nature;
- 16.3 The plaintiff has problems with her eating and with her speech, an aspect which she finds important since plaintiff cannot engage properly with people as she struggles with pronunciation.

[17] Her assessment of impairment according to the AMA guidelines, caused her to score the plaintiff at 48% which constitutes 20% impairment and further scored her 10% on daily living activities. Her clinical assessment revealed a mental and behavioral impairment of 20% which is regarded as a very high score. Dr. de Witt also found that

the plaintiff suffers from Persistent Depressive Disorder (PDD), a Body Dymorphic Disorder (BDD) with actual flaws which has no cure, and Post Traumatic Stress Disorder (PTSD).

[18] She opined that the plaintiff's prognosis is poor and it is only her depression that can be treated. She further opined that the plaintiff will not be able to return to employment in which she is required to engage directly with fellow employees or members of the public or an employment that requires the ability to communicate verbally. As a result, the plaintiff is not likely to be competitive in the open labour market. She further concluded that for plaintiff to return to work or service will only exacerbate her psychiatric condition.

[19] Under cross-examination Dr. de Witt conceded that nowhere in her report did she mention that the plaintiff was dribbling. She also conceded that she did not make a follow up with plaintiff's employer for an explanation on how plaintiff was able to earn the monies she earned after returning to work. She further stated that plaintiff's abscondment as opposed to being retrenched would make sense to her from a clinical perspective. According to her the plaintiff would have opted to abscond than to go through the stressful pain of resigning or confront a disciplinary hearing, a behavior she regards as consistent with her clinical diagnosis. She further stated that even if the plaintiff had absconded from work that does not change her clinical diagnosis.

[20] According to David Williams, an Employment Consultant, plaintiff completed her schooling in 2002. Upon completing her studies she enrolled at Edu-Options on a part time basis with the aim of improving her grade 12 results. She successfully completed the mathematics and accountancy subjects. She enrolled for tertiary training at Russel Road College on a part time basis and was only able to complete one year of the two year course she had enrolled for.

[21] He noted the plaintiff's work as having worked as a waitress at Fish Tales from December 2003 to December 2005. She was subsequently transferred to another outlet

where she worked as a manageress from 2005 to 2007. From January 2008 to December 2012 she was employed as a sales consultant at Russell Furnishers (part of the JD Group) until her retrenchment due to closing down of the store. In April 2013 she rejoined the JD Group at their Joshua Doore Store as a sales consultant/ stand-in manageress until the accident. After her rehabilitation the plaintiff returned to work during February 2015 until her retrenchment in January 2016.

[22] He opined that the plaintiff had a successful career in sales and in all probability would have continued working in this field into the future with a career progression as a strong possibility and would have worked for various employees until the normal retirement age of 65 years. He further opines that the plaintiff's future occupational prospects have been severely curtailed and compromised. They must be regarded as extremely poor going forward. According to Mr. Williams this is mainly due to the plaintiff's severe facial disfigurement and scarring, an inability to eat or speak properly, the effects of pain on her concentration, her psychiatric and psychological mood disorders coupled with the depressed employment conditions which job seekers are exposed to across the broad spectrum in general.

[23] In his view plaintiff will not be competitive to do clerical work such as a data capturer. This is owing to her level of experience, her physical and emotional problems compared to younger persons with no impairments and who are in possession of tertiary qualifications. Under cross-examination, Mr. Williams conceded that plaintiff was not retrenched and that her employer was a sympathetic employer. He also conceded that he failed to investigate the reasons for plaintiff's abscondment. He also conceded that plaintiff did not apply for any administrative jobs but only for sales positions since January 2016.

[24] Mr. Martiny an industrial psychologist with a vast experience in medico-legal matters of personal injury claims, who has testified in a number of High Courts and prepared over 4000 reports and assessments, testified in this matter using his report which was admitted by agreement as a basis for his testimony. However, before he

testified on the body of his report, taking advantage of having been in court and listened to the oral evidence that was led, he saw it prudent to correct his report to the effect that the plaintiff did not leave her employment at the end of 2016 but in January/February 2016.

[25] In addition to the collateral evidence contained in other expert reports, he conducted two telephonic consultations with Mrs. Molloy (previous manager of plaintiff). According to Mr. Martiny he has no doubt that plaintiff was able to work as a salesperson and as a shop manager but for the injuries she sustained. He has set out the plaintiff's pre-morbid scenarios as a person who was a prefect at school, who passed her schooling every year and obtaining a grade 12 qualification. She is born of parents who were skilled and professional workers who fall on the Paterson C1/C2 level category.

[26] He further testified that the plaintiff's ambitions to become an accountant were thwarted by lack of financial resources. His interview with Ms. Juju, a former work colleague of plaintiff revealed that plaintiff was a competent salesperson prior to the accident. Ms. Mboniswa also a former colleague reported to him that the plaintiff was a competent sales lady prior the accident and both she and plaintiff attended a management course which she (Mboniswa) completed and she further confirmed to him that she worked at Joshua Doore until she was retrenched. Ms. Mboniswa also reported to him that the plaintiff was a very intelligent person who had a pleasant personality and in her view the plaintiff had a managerial potential.

[27] Mr. Martiny expressed the plaintiff's pre-morbid career scenario as follows:

27.1 At the time of the accident the plaintiff was earning R7117.58 (basic salary with overtime and commission). She would have received a 13th cheque (annual bonus). He assumes that the employer would have paid contributions to the Alex Forbes Provident Fund to which she belonged.

- 27.2 The plaintiff was intending to study part time for a tertiary qualification the year after the accident. That it is probable she would have qualified by the end of 2018/2019 (4 to 5) years later and that plaintiff would have been a candidate for affirmative action since she is an African female.
- 27.3 Plaintiff would have probably advanced in her career with gradual annual increments from approximately when she was retrenched from Joshua Doore to where she would have been able to secure employment at Paterson C1/C2 level in 2019/2020 at the age of 35-36 years.
- 27.4 She probably would have worked for a formal employer. In order to consider corporate and non-corporate employment, he suggested that the average between the medians of the basic and full cost to employment scales be used in the actuarial calculation. It is likely that with gradual increases, the plaintiff would have progressed to Paterson C3 level at age 40 years.
- 27.5 She could have progressed to a supervisory/junior management role at Paterson C4/C5 level at the age of 45 years.
- 27.6 An average annual increments of approximately 7% per annum would probably have applied thereafter. He confirmed with the JD Group that their retirement age is 65 years.

[28] Mr. Martiny further stated that a person does not have to carry a qualification to be placed on the Paterson C band but could work their way up the bands through experience gained as well as in-house training. It was further his opinion that whether the plaintiff had absconded from work or retrenched that had no bearing whatsoever on her pre-morbid scenario. With regards to her post-morbid career path, he considered the impairments as set out in the admitted expert reports. It is his opinion that in light of all the evidence plaintiff will remain unemployed in future.

[29] He conceded under cross-examination that he did not investigate the results at Edu-Options where plaintiff re-wrote the matric examinations. He also conceded that plaintiff had no further qualifications post matric. He agreed that on the Paterson C

scale you need a qualification to be a skilled worker and as a result the plaintiff would be a semi-skilled worker who is in the category B band of the Paterson scale. He further conceded that his report is incorrect where it states that the plaintiff was retrenched. He therefore accepts that the plaintiff was dismissed as a result of her staying away from work.

[30] He also agreed that none of the experts appear to have investigated the reason for plaintiff's abscondment and agreed that Dr. de Witt speculated her reason therefor. He also did not dispute the assertion that plaintiff stayed away from work from 16 December 2016 to 29 December 2016. He further conceded the statement that was put to him taken from the unreported judgment of *Constable v Road Accident Fund*,³ that a plaintiff who elected to cease his employment, it scarcely behoves him to now given the economic realities, complain about the difficulty in securing alternative employment as a perfectly logical statement.

[31] He further conceded that he did not mention in his report that the plaintiff was dribbling and spitting, neither did he proffer any explanation for his failure therefor. He also conceded that the plaintiff had attempted courses which she did not complete. That up to 2014 she had not attained any degree or diploma and she also did not obtain the intended qualification as a stock clerk. As a result the only evidence the court should accept is that plaintiff was a salesperson. He accepts Mr. Shapiro's view that the average earnings as proposed by Mr. du Plessis in his report should be used as a basis for the actuarial calculations.

[32] Mr. Shapiro is an industrial psychologist for 14 years and has been involved in third party claims and motor vehicle accident claims since 2012 up to date. He has testified in the various high courts. He has never been discredited as an expert. He testified based on his report and the addendum thereto, that the plaintiff had a significant facial scarring. He tried to contact Ms. Molloy in order to obtain collateral

³ Case no. 306/2016 ECLD (delivered on 28 June 2018)

information but failed and instead contacted Ms. Chantelle du Plessis as well as Mr. Balekisi of Lewis store, a similar industry as Joshua Doore.

[33] The information in Exhibit K, that plaintiff was employed until 4 January 2016 does not affect his opinion and recommendation. He agreed with Mr. Martiny that both parents of the plaintiff were in the category C1/C2 band. However, whilst family careers may be a motivating factor, plaintiff had a work history from which you can judge her future career path. He testified that he gave two scenarios and used the Paterson Grading System. He stated that to be in the skilled band you require a diploma or University degree and the plaintiff was semi-skilled at the time of the accident. She obtained matric in 2002, attended a junior bookkeeping certificate that she did not complete but completed only one year thereof.

[34] He opined that if a person had presented with a pre-morbid psychiatric history such as plaintiff in this matter, it may affect or exacerbate his post-morbid condition. He further testified that plaintiff was not part of the retrenched workers of Joshua Doore. Instead he is of the view that the facts presented in court make it unlikely that plaintiff would have continued with studies post the accident. He further testified that plaintiff did not mention to him that she could not continue with studies by reason of finances. The plaintiff never advised him that she applied for other jobs except the job of a salesperson. He agrees that plaintiff has an excellent command of the English language.

[35] He further agrees with the observations indicated by Mr. Martiny in his report that the plaintiff would have been able to work as a salesperson and as a shop manager but for her injuries. According to Mr. Shapiro the actuaries ought to have based their actuarial calculations on the average actual earnings of plaintiff and not one month's salary after commencing employment. He further contends that the total cost to company contributions paid by the employer during the absence of plaintiff from work should be considered as part of the past loss of earnings and not merely deduct R66

000.00 since the plaintiff had received her total income plus cost to company benefits except in January 2016 as per the evidence of Ms. Du Plessis and Mr. Annandale.

[36] It is further submitted by Mr. Shapiro that plaintiff's disability benefit ought to be considered when past loss of earnings is calculated and the actuary must work with the actual salary advices not a projected figure. He further contends that since the plaintiff had absconded from work, and therefore not mitigating her losses, this ought to be considered when applying contingency deductions to her future loss of earnings. In cross-examination he stated that the further information he obtained led him to change his opinion that he expressed in his initial report and the main reason therefor is his discovery that plaintiff was not retrenched as previously informed by her but had ceased her employment through abscondment.

[37] When he was asked if the court should ignore his entire initial report, he stated that the only part of the report that must be ignored is the paragraph in which he wrote, "The writer opines that Ms. Sidlabane would have continued as a sales consultant probably until the time of her retrenchment. She probably would have been able to complete her training for management yet such does not guarantee placement as a Branch Manager, probably securing another post as a sales consultant in approximately one year. Thereafter with further training and development reaching a branch manager function where her career would be expected to plateau."

[38] The additional information he received from plaintiff's pay slips is another reason that influenced his change of opinion. He stated that he stands by both his pre-morbid and post-morbid opinions but qualified by plaintiff's cessation of work. He also conceded that based on the evidence of Ms. Molloy, the plaintiff would probably have been retrenched when the store closed in April. He further conceded that if the court accepts the evidence of plaintiff's witnesses that she is unemployable into the future, his statement about plaintiff's red flagging and influencing her post-morbid scenario, would fall away.

[39] He conceded that if the plaintiff is unemployable at the time of losing her employment the red flag falls away. He does not agree that plaintiff's resignation or retrenchment has no bearing in her post-morbid scenario. He opines that plaintiff could have returned to employment of sedentary in nature because of her residual capacity. He also agreed under cross-examination that you do not specifically need a diploma or degree to get on the skilled band; however he qualified his concession by stating that it's unlikely for one to be competitive without the necessary qualifications. Whilst conceding that the plaintiff has a potential to advance in her career, he disagrees that she would have attained the level of Regional Manager.

[40] He agreed notwithstanding the defendant's pleadings to the contrary, that if Dr. de Witt's evidence is accepted, it therefore means the plaintiff would have suffered a past and future loss of earnings. He further confirmed his opinion that plaintiff has suffered future loss of income.

[41] Ms. du Plessis testified that as a Group Remuneration Manager of JD Group she sees to the payments of employees as well as their benefits. Her evidence was to a large extent focused in explaining Exhibit H which contained the pay slips of the plaintiff from April 2014 to February 2016, as well as the salary and benefits received over the same period. She further testified that she did not come across any record in which the plaintiff lodged an appeal against her dismissal. Neither did she see a 'red alert' against plaintiff's name.

[42] I find most of the questions she faced under cross-examination to have been irrelevant since they were specifically focused on her personal education, development and career growth. She stated that she had no dealings with the plaintiff except to deal with her file. She also stated that she cannot dispute that plaintiff lodged an appeal albeit not in the records at her disposal.

[43] Mr. George Willem Annandale, a human relations executive at the Joshua Doore Group testified on behalf of the defendant and stated that in 2015 he was the human

resources executive of Joshua Doore Group and responsible for human resource functions, employment and termination of employment contracts. The plaintiff was a salesperson since 1 August 2013. He explains the disciplinary procedure of his company pursuant an abscondment by an employee. He further explained that if a person is aggrieved by an outcome of a disciplinary hearing, such a person may lodge an appeal within seven (7) days by completing the necessary form which must be addressed to the immediate supervisor. He stated that there are no appeal records in respect of the plaintiff. He also testified that an employee whose employment has been terminated completes a form to withdraw retirement benefits from the Fund. He is of the view that had the plaintiff been at their Govan Mbeki branch during February 2016, she would probably have been affected by the retrenchment that took place.

[44] He further testified that the only requirement to be a branch manager is a matric certificate but that position depends on the availability of vacancies and willingness of an employee to relocate to elsewhere. He further explained the remuneration levels of managers and regional managers according to their responsibilities and size of their shops. He also stated that African females are in an advantage for affirmative action as they carry the most BBBEE points. He cannot dispute that the plaintiff lodged an appeal against her dismissal neither can he say she was red-flagged. He stated further that, had the plaintiff presented the company with her disability information she would have received her January 2015 payment which she did not receive and further would have qualified for a 75% disability benefit until retrenched or death had she not absconded.

[45] There can hardly be any dispute on the injuries sustained by the plaintiff as a result of the accident she was involved in. The evidence of Dr. Keely is unassailable as far as the extent and import of these injuries on the plaintiff. The evidence that the plaintiff is dribbling and spitting when she talks is uncontroverted. As well as his evidence that when she eats and drinks, contents thereof would leak out without her being conscious. Most significantly is what he stated about plaintiff's inability to seek re-employment since she is severely handicapped.

[46] It is not in dispute that prior to the accident the plaintiff was a vibrant talented person who is acclaimed by her supervisor and fellow workers as someone who was extremely talented and intelligent with a potential to become a manager. However, the deflowering of her face due to her injuries, produced a different person who is distressed, who would no longer cope in being in the presence of people and instead found herself physically repulsive and preferred to be isolated from other people. Dr. de Witt explained that due to the effect of her injuries her chances of employability are affected. Plaintiff suffers from a body dysmorphic disorder which is an obsessive compulsive disorder which has resulted in plaintiff being pre-occupied with her lip. This disorder is associated with high levels of anxiety, social avoidance, a depressed mood, neuroticism, perfectionism as well as low extroversion and low esteem.

[47] It is regrettable that the plaintiff was deliberate in lying to the experts about her dismissal from work. She chose not to be candid to mention the reason for her dismissal and as a result she misled them to accept her story that she was retrenched whereas that was not true. As a result Dr. Keely, Dr. de Witt, Mr. Martiny and Mr. Shapiro had to amend their reports to reflect the true position that she was not dismissed from work but had been dismissed following a disciplinary hearing against her.

[48] Dr. de Witt tried to explain for her abscondment without a proper investigation and I find her view in this regard speculative. I tend to agree with the submission by counsel for the defendant that the plaintiff ceased her employment when, she absconded in December 2015.

[49] Had the plaintiff been called to testify, that would have been very helpful in establishing the reason for concealing and avoiding to be forthright about her dismissal. Be that as it may, I am only left to rely on the information before me and the value thereof.

[50] This leads me to deal with the evidence of the two individual psychologists, Mr. Martiny on behalf of the plaintiff and Mr. Shapiro on behalf of the defendant. At this juncture I find it necessary to reiterate the legal position pertaining to experts. It is trite that an expert witness is required to assist the court and not to usurp the function of the court. In *Glenn March BEE v Road Accident Fund*⁴ the court reiterated what was said in *Road Accident Fund Appeal Tribunal and Others v Gouws & Another*⁵ where the following was said “courts are not bound by the view of any expert. They make the ultimate decision on issues which experts provide an opinion”. (See also *Michael and Another v Linksiel Park Clinic (Pty) Ltd & Another*.⁶) In *Glenn March BEE*⁷ the court went further and said “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 hearing, it must be based on correct facts. Incorrect facts militate against proper reasoning and the correct analysis of the facts is favourable for proper reasoning, failing which the court will not be able to properly assess the agency of that opinion. An expert opinion which lacks proper reasoning is not helpful to the court.” (my emphasis).

[51] In this matter the court did not have the advantage of a joint report from the two industrial psychologists. Their opinions differed remarkably on whether the plaintiff did suffer a past loss of earnings and will suffer future loss of earnings. Most of the critical evidence Mr. Martiny relied upon was from the plaintiff herself and some of which was not verified. He did not confirm plaintiff’s previous academic performance in order to formulate a reasoned opinion that she would have indeed pursued or achieved her studies in 2015. This also goes for his failure to verify whether the plaintiff had ultimately passed the subjects she wrote at Edu-Options.

[52] Mr. Martiny remained resolute in his opinion that whether the plaintiff had absconded or was retrenched had no bearing on her pre-morbid scenario. However,

⁴ (093/2017) [20180 SASCA 52 (29 March 2018)

⁵ [2017] SASCA 188, [2018] 1 All SA 701 (SCA) at para 33

⁶ [2002] 1 All SA 384 (A) at para 34

⁷ *supra*

this is at the backdrop that plaintiff, after rehabilitation returned to her job and performed relatively well in her duties with no noticeable reduction in her salary and commission.

[53] Mr. Shapiro on the other hand contends that plaintiff's abscondment means she has been red flagged by the JD Group and will no longer be eligible for employment. This statement is made notwithstanding that none of the witnesses from JD Group could state with certainty whether the plaintiff was red flagged or not. Mr. Shapiro has however, opined that the plaintiff will secure work intermittently with a sympathetic employer in the non-corporate section doing basic administration work as a data capturer. That plaintiff will no longer progress in her career and will instead face long periods of unemployment. He concluded by saying plaintiff should be compensated for her condition. I also cannot find fault in the opinion expressed by Mr. Shapiro that plaintiff's future employability has been compromised and at best retains a small residual capacity in a basic level as a data capturer or similar position. His view in this regard resonates with the opinion expressed by Ms. Van Zyl, the occupational therapist, that plaintiff had a residual work capacity in a secondary position. Mr. William an employment consultant was also not in a position to jettison the opinion of Ms. Van Zyl in this regard. Mr. Shapiro's submission that plaintiff's actual earnings ought to be considered from the payslips that were made available is a point that was in my view correctly made.

[54] Much as Mr. Shapiro received a level of criticism from the defence counsel to be someone who is biased against the plaintiff, I find this criticism as unduly harsh and unwarranted. In my view he has met the requirement enunciated in the case of *Michael & Another v Linksfield Park Clinic (Pty) Ltd*⁸ that what is required in the evaluation of an expert's evidence is whether and to what extent is the opinion advanced founded on logical reasoning. He was willing to concede when an issue fell outside of his expertise. This is demonstrated when he conceded that if the medical opinion and evidence points to the fact that plaintiff is unemployable, then his statement regarding her having some residual working ability is incorrect. He went to the extent of saying if the court accepts

⁸ 2001 (3) SA 1188 (SCA)

Dr. de Witt's evidence regarding the abscondment of plaintiff which Dr. de Witt found to be consistent with her diagnosis, he was prepared to concede that the plaintiff's resignation or retrenchment will be immaterial to her pre-morbid career.

[55] Both Mr. Martiny and Mr. Shapiro have had shortcomings in the verification of the necessary information pertaining to the plaintiff. They have both based their opinions on the information that was at their disposal. It is on those bases that I find the criticism on Mr. Shapiro to be undue.

[56] Notwithstanding the brave fight put up by counsel for the defence to categorize this case in the scenario that obtained in the case of *Constable v Road Accident Fund*⁹ where Chetty J made the following comment:

“The plaintiff elected to cease her employment and it scarcely behoves him to now, given the economic realities, to complain about the difficulty in securing alternative work.”

I have to disagree with that submission for the following reason. In that matter the regressive work period of plaintiff was of a short duration and thereafter he continued to perform his tasks optimally and the standard of his work was such that, upon his supervisor being apprised of that he opted to avail himself of the voluntary retrenchment package, he implored the plaintiff to reconsider his decision.

[57] However, in this matter, I am unable to ignore the evidence proffered by Ms. Molloy that post accident the plaintiff could not speak to her customers, she struggled to communicate in isiXhosa owing to her difficulty with the click sound. As a consequence of her spitting and drooling whilst talking, she was depressed and became withdrawn. As a result she had to allocate to plaintiff other duties which were administrative in nature removing her from the rest of other workers.

⁹ Supra

[58] In this regard there is no appraisal of the plaintiff performing her tasks without any hindrance or that she performed her work optimally. Instead the evidence suggests that she had to receive assistance from her colleagues and her supervisor.

[59] A careful interrogation of all the body of evidence persuaded me to conclude that the plaintiff has established that due to her impairment she has suffered future loss of income and loss of earning capacity. It therefore follows that the conservative scenario of Mr. Martiny is the most preferred of the two industrial psychologists.

[60] Any claim for future loss of income requires a comparison of what a claimant would have earned had the accident not occurred with what she is likely to earn thereafter. The loss is the difference between the monetary value of the earning capacity immediately prior to the injury and immediately thereafter. This can never be a matter of exact mathematical calculation and is, of its nature a highly speculative inquiry. All the court can do is make an estimation, which is often a very rough estimate, of the present value of the loss (see *Road Accident Fund v Kerridge*¹⁰).

[61] The approach to adjudicating loss of earnings is stated aptly in the off-quoted case of *Southern Insurance Association v Bailey N.O*¹¹ where Nicholas JA stated as follows:

“... 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. It has open to it two possible approaches. One is for the judge to make a round estimate of an amount which seems to him to be fair and reasonable. This is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumption resting on the evidence. The validity of this approach

¹⁰ 1024/2017) [2018] ZASCA 151 (1 November 2018)

¹¹ 1984 (1) SA 98 at paras 113F – 114E

depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. But the court cannot for this reason adopt a non-possumus attitude and make no award...”

[62] The conservative scenario as proposed by Mr. Martiny assumes that the plaintiff would have completed a tertiary qualification by the end of 2018/2019. The proposition by Mr. Martiny that plaintiff would have advanced in her career to regional manager is too optimistic in my view. No account has been taken of the fact that plaintiff had a four year old child and how that would have impacted on her ambition to study further.

[63] At the time of writing my judgment the court was of the view in light of the incontrovertible evidence that the actuarial figures arrived at failed to take into account the benefits earned by plaintiff post-accident more particularly costs to company benefits as well as information relating to average earnings that only emerged during the trial. This caused me to request both counsel for plaintiff and defendant to favour the court with supplementary heads of argument in respect of those aspects only. They both submitted sets of detailed supplementary heads of argument for which I am indebted to them.

[64] The request for supplementary heads of argument availed the plaintiff with an opportunity to correct a concession made in his earlier submissions which was according to plaintiff's counsel made in contradiction to the actuarial report that was admitted into evidence as Exhibit G.

[65] The erroneous concession made was that the court should deduct from the claim for past loss of earnings an amount of R66 233.35 as money that was received by the plaintiff from the time of the accident in September 2014 until February 2016. The plaintiff now contends that according to Exhibit G (actuarial report), the plaintiff does not claim for loss of earnings for the period September 2014 to February 2016. Therefore no amount of income received during the aforesaid period stands to be deducted as no

loss of earnings have been claimed for such period. Consequently any amount earned being cost to company from post the accident is not deductible for the reason aforementioned.

[66] According to the plaintiff's counsel this correction settles the matter that was brought to bear by the plaintiff's payslips as per Exhibit H for the period September 2014 to February 2016. The upshot hereof is that plaintiff's claim for past loss of income/earning capacity is calculated by her actuaries from 1 January 2017 though she may have lost income from September 2014 to end of December 2016.

[67] The defendant has not contested the submission above by the plaintiff and has effectively acquiesced to the proposition that no deduction is warranted for the earnings covering the period from September 2014 to 31 December 2016. Given that the calculations of the actuary in Exhibit G does not include a claim for the plaintiff's loss of earnings for the period September 2014 to February 2016, I am of the view that the correction is justified and ought to be allowed.

[68] It is a conceded fact that the defendant chose not to place before the court evidence of an actuary. The court therefore is left only to consider the actuarial report that has been submitted by the plaintiff. In the light of the correction made by the plaintiff to their earlier submissions, I am inclined to consider the calculations of the actuaries of the plaintiff.

[69] In summary, it is proven facts that post the accident on 31 August 2014 the plaintiff returned to work at JD Group in February 2015. Due to her abscondment from work in December 2016, she was summarily dismissed after a disciplinary inquiry which was held on 4 January 2016. According to available facts the dismissal was not challenged by way of appeal since there is no proof thereof.

[70] Plaintiff's employment was officially terminated on 14 January 2016. Subsequently the plaintiff completed and submitted a withdrawal of her pension

benefits, a clear indication that she was accepting the fact that her employment with JD Group had terminated.

[71] According to Dr. de Witt plaintiff sustained a severe disfigurement and as a consequence of her injuries she suffered a mental and behavioral impairment which has a high score of 20%. Dr. de Witt opined that the plaintiff will not be able to return to employment that requires the ability to communicate verbally due to her speech impairment. Her employment opportunities are severely limited and is therefore not likely to be competitive in the open labour market.

[72] At the time of the trial the plaintiff was unemployed. Whilst Dr. de Witt's contention that the abscondment of plaintiff from work was as a result of the accident is speculative and was not investigated thoroughly, I nevertheless find her opinion probable.

[73] I turn now to deal with the question whether the costs of two counsel should be awarded. Plaintiff's counsel referred me to the case of *Koekemoer v Parity Insurance Co. Ltd*¹² where Coleman J crystalised some of the relevant considerations in an enquiry of this nature to be the following:

- (a) the volume of evidence (oral or written) dealt with by counsel or which he or they could reasonably have expected to be called upon to deal with;
- (b) the complexity of the facts or the law relevant to the case;
- (c) the presence or absence of scientific or technical problems; and their difficulty if they were present;
- (d) any difficulties or obscurities on the relevant legal principles or in their application to the facts;
- (e) the importance of the matter in issue, in so far as that importance may have added to the burden or responsibility undertaken by counsel.

¹² 1964 (4) 138 (T) at 144 H – 145 A

[74] It is without a doubt that this matter generated a lot of evidence both oral and written. This is so, given the number of expert reports that were handed in and the number of expert witnesses as well as lay witnesses that testified during the trial. The complexity thereof is evident in the stark differing positions of the experts, particularly the industrial psychologist. It therefore follows that the issues of law that were challenging and the technical aspects that characterized the litigation of this matter raised difficult legal aspects in their application to the facts. It is undoubtedly so, that the matter has important consequences for the plaintiff. In light of the above I am inclined to award the costs of two counsel as requested by the plaintiff.

[75] In the result I issue the following order:

1. The defendant is to pay to the plaintiff the sum of R221 237.00 in respect of loss of income/earning capacity.
2. The defendant is to pay to the plaintiff the sum of R6 196 390.00 in respect of plaintiff's claim for future loss of income/earning capacity.
3. Payment of the aforesaid amounts shall be made within fourteen (14) days from date of this order directly to plaintiff's attorneys of record, Roelofse Meyer Inc., trust account, details of which are as follows:

Name	:	Roelofse Meyer Inc.
Bank	:	Standard Bank
Branch	:	Port Elizabeth
Account N.	:	080....

4. The defendant shall pay plaintiff interest on the aforesaid amounts above at the rate of 10.25% per annum calculated from a date of fourteen (14) days after this order to date of payment.
5. The defendant is to pay to plaintiff's costs of suit, as taxed or agreed, such costs are to include:

5.1 The costs of the reports and supplementary reports, if any, of:

- 5.1.1 Dr. F Rank;
- 5.1.2 Dr. R J Keeley;
- 5.1.3 Dr. D Solomons;
- 5.1.4 Ms. A van Zyl;
- 5.1.5 Dr. E de Witt;
- 5.1.6 Dr. A Kassan
- 5.1.7 Mr. D Williams
- 5.1.8 Mr. L Martiny
- 5.1.9 Algorithm Consultants and Actuaries.

5.2 The reasonable qualifying, reservation fees and expenses; if any, of:

- 5.2.1 Dr. F Rank;
- 5.2.2 Dr. R J Keeley;
- 5.2.3 Dr. D Solomons;
- 5.2.4 Ms. A van Zyl;
- 5.2.5 Dr. E de Witt
- 5.2.6 Dr. A Kassan
- 5.2.7 Mr. D Williams
- 5.2.8 Mr. L Martiny
- 5.2.9 Algorithm Consultants and Actuaries.

5.3 The attendance and testifying fees, of:

5.3.1 Dr. R J Keeley;

5.3.2 Dr. E De Wit;

5.3.3 Mr. D Williams;

5.3.4 Mr. L Martiny.

5.4 The reasonable costs of consultations of plaintiff's counsel and plaintiff's attorneys with plaintiff's experts and lay witnesses in the preparation for the trial.

5.5 The costs involved in attending a pre-trial inspection in loco with counsel where so employed.

5.6 The costs of photographs.

5.7 The cost of the employment of two counsel where so employed.

6. The defendant is to pay interest on plaintiff's said taxed or agreed costs at the rate of 10.25% per annum from a date fourteen (14) days after allocator or agreed to date of payment.

V M NQUMSE

ACTING JUDGE OF THE HIGH COURT

Counsel for the plaintiff	:	Mr. Frost & Ms Westerdale
Instructed by	:	Roelofse Meyer Attorneys
		Port Elizabeth

Counsel for the defendant	:	Ms. Veldsman
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Instructed by : BLC Attorneys
Port Elizabeth

Date heard : 23 – 25, 29 – 31 October and 1 – 2 November
2018

Date judgment delivered : 26 March 2019