# 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.: 5470/2018

In the matter between:

**MM MOLOI** Plaintiff

and

**ROAD ACCIDENT FUND** Defendant

Claim No: 560[…]

Link No: 447[…]

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**CORAM:** VAN ZYL, J

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**HEARD ON:** 14 & 15 MARCH 2023; 16 & 17 MAY 2023

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**DELIVERED ON:** 17 NOVEMBER 2023

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[1] The plaintiff issued summons against the defendant for payment of damages which she suffered as a result of a motor vehicle accident which occurred in the district of Bloemfontein on 4 February 2018 between a motorcycle, at the time driven by the

plaintiff and an unknown motor vehicle ("the insured vehicle"), at the time driven by an unknown driver ("the insured driver").

[2] In terms of the particulars of claim the accident was caused as a result of the sole negligence of the insured driver, having been negligent in one or more of the following respects:

"4.1 He travelled at a high speed under the circumstances;
4.2 He omitted to keep a proper lookout;
4.3 He omitted to keep his motor vehicle under proper control;
4.4 He failed to comply with the statutory traffic rules;
4.5 He failed to avoid an accident when by the exercising of reasonable care, he should and could have done so;
4.6 He failed to adequately apply the controls and other mechanisms of his motor vehicle in such a way that it does not pose a threat to other road users;
4.7 He failed to adequately consider the presence, movement and clearly visible movements of the other motor vehicles;
4.8 He failed to consider the rights of other road users."

[3] In the defendant`s plea it is denied that the insured driver was negligent and it is alleged that accident was caused as a result of the sole negligence of the plaintiff in that:

"4.2.1 She failed to keep proper control of her motorcycle;
4.2.2 She drove her motorcycle recklessly thereby causing the accident;
4.2.3 She drove her motorcycle at an excessive speed and thereby causing the accident;
4.2.4 She failed to timeously apply breaks and thereby causing the accident;
4.2.5 She failed to note that her motorcycle was in motion gear;

4.2.6 She failed to avoid the collision when she should and could have done so."

The defendant pleaded in the alternative that should it be found that the insured driver was casually negligent, then and in that event the accident was caused by the contributory negligence of the plaintiff.

[4] The matter was on the roll for the adjudication of both the merits and the *quantum.* I will first deal with the merits of the action.

**AD MERITS:**

[5] At the commencement of the trial the parties indicated that the occurrence of the accident is not in dispute, but that the element of negligence is in dispute.

**The plaintiff`s witnesses in respect of the merits:**

Ms MM Moloi:

[6] **The plaintiff, Ms Moloi**, is an adult female born on 1[…] S[…] 1977. She testified that on Sunday, 4 February 2018, she was driving her motorcycle, a Kawasaki VN900, with registration letters- and number FBB […]. At the time she had been driving the motorcycle since 2014. She was on her way home after having attended a funeral. It was between 12h00 and 13h00 in the afternoon. She was driving on a tarred road of which the surface was dry, which road is in the suburb Grassland, Bloemfontein. The road has two lanes, one lane in each direction. Motor vehicles were parked on both sides of the road.

The said vehicles were not parked in areas which were designated for parking, therefore, partly in the respective lanes and consequently partly in the way of other vehicles which travel on the road. The plaintiff estimates that she was driving at between 40 and 60km per hour and travelled with three other motorcyclists. They all attended the same funeral. They were travelling in single formation, the one behind the other. The plaintiff was travelling in front and at the time of the accident, there were four motorcycles in the said formation, one of which was being driven by Mr Neo Winston Morgan. The plaintiff was approaching a curve in the road, the direction of which was towards her right-hand side. The insured vehicle then approached from the front, travelling in the opposite direction. It was a Volkswagen Polo. At the time when the plaintiff saw the insured vehicle, it was veering into her lane. In an attempt to avoid an accident with the insured vehicle, she swerved to her left, which resulted in her colliding with one of the stationary vehicles parked at the side of the road. The insured vehicle failed to stop after the accident.

[7] The plaintiff testified that she could not have swerved to her right-hand side, since the curve in the road ahead prevented her from being able to see whether other vehicles may be approaching from the front. She further testified that if she had not swerved to her left, she would have collided with the oncoming insured vehicle.

[8] The plaintiff testified that the insured vehicle was travelling at a high speed. When she first saw the oncoming vehicle as it was veering into her lane, the distance between herself and the

insured vehicle was approximately the length of one motor vehicle.

[9] The plaintiff lost consciousness immediately after the accident and she was told by the other bikers that she was unconscious for approximately five minutes. Other people who also attended the funeral, were also at the scene. According to the plaintiff there were no police officers at the scene. She was taken to Pelonomi Hospital by ambulance.

[10] Two police officers came to see her at hospital the following day at approximately 22h00. She does not remember their names. According to her they only wanted to know where the accident occurred and she told them. They did not ask her how the accident occurred and she did not give them any version or statement in this regard.

[11] An accident report consisting of 4 pages contained in the bundle titled "Merits", at p. 9 – 12 thereof, dated 5 February 2018 at 22h00, which report reflects a stamp of the Bloemspruit Police Station, was dealt with in the plaintiff`s evidence in chief. The said report reflects the following under the heading "*brief description of the accident*":

> "It is alleged by the driver of the motor vehicle/bike that after they line up prepare to drive away, the driver of a motorbike was not aware that the bike is on gear 1. When she apply the accelerator it speed off with her, then she swerved to avoid head-on collision with the oncoming vehicle, that when she crashed into a vehicle parked the side of the road. Part of funeral proceed." [*sic*].

[12] In her evidence in chief the plaintiff testified that she did not provide the aforesaid version of the accident to the police. When they visited her in hospital, they only asked her where the accident occurred. She denied that the accident occurred in the manner described in the accident report. The plaintiff testified that she saw the accident report for the first time after she was discharged from hospital on 28 February 2018.

[13] During her evidence in chief the plaintiff was also questioned about a sketch contained in the accident report under the heading "*accident-sketch*". The sketch depicts that the plaintiff was travelling in the right-hand lane, hence on the wrong side of the road. When the insured vehicle approached from the front, she was in the vehicle's lane and swerved to the left, colliding with a stationary vehicle. The plaintiff denied the correctness of the sketch. She also denied that she gave such a version of the accident to the police. The police never asked her how the accident occurred. She further testified that the sketch also wrongly depicts the road to be straight, failing to reflect the curve in the road right ahead of where the accident occurred.

[14] The plaintiff further testified that she was not present when the accident report was completed. When she eventually saw the accident report and saw the incorrect information contained therein with regard to how the accident occurred, she went to the Bloemspruit police station and enquired about the name of the person who compiled the report. She was told that he had not reported for duty that day. Since she had difficulty walking at the time due to the injuries she suffered as a result of the accident, she only went to the police station once. She did, however,

phoned the police station more than once, but without any success.

[15] During cross-examination she testified that she testified that she considers herself to have been an experienced motorcycle driver at the time.

[16] The plaintiff explained during cross-examination that when she saw the insured vehicle for the first time as it appeared from the curve in the road, it was already veering into her lane. During re-examination she testified that at the time when she swerved to her left, more than half of the insured vehicle was already in her lane.

[17] When asked during cross-examination why she did not hoot or flash her lights, the plaintiff testified *"it happened so quickly, I was saving myself by swerving to the left"*.

[18] In further cross-examination it was put to her that the accident in fact occurred in the manner described in the accident report, which the plaintiff denied. She also denied that the report was completed in her presence. It was put to the plaintiff that the police officer will testify that the version reflected in the report is the version which was obtained from her, which she denied. It was further put to the plaintiff that the said police officer will testify that she was present when the report was completed, which she also denied.

[19] In response to a question posed by myself, the plaintiff testified that they drove away from the relevant house after the funeral,

which house was in the same street as where the accident occurred. From where they left the said house up to the point where the accident occurred, their group of motorcyclists were not stationary again.

Mr NW Morgan:

[20] The plaintiff called a witness, **Mr Neo Winston Morgan**. At the day of the accident, he was one of the motorcyclists who drove with the plaintiff. He was the last one in the formation. Mr Morgan witnessed the accident. The essence of his version of the relevant events and how the accident occurred, corresponded with the plaintiff’s version. I therefore do not deem it necessary to repeat the totality of his evidence. He did, however, testified that according to him they were travelling at about 40 – 50 km per hour and not at 60km per hour.

[21] Mr Morgan testified that the plaintiff and him have been members of the same motorcyclists’/ bikers’ club since 2014. He considers her to be a good motorcycle driver. Mr Morgan further testified that he has been riding motorcycles since 2003. Had he been in the plaintiff’s position, he would have done the same, namely to have swerved to the left-hand side, in an attempt to have prevented an accident. He also explained that the plaintiff could not have swerved to the right line or to her right-hand side, since there was a curve in the road right ahead of them and one was unable to see or know what traffic may be coming from the front. Mr Norman therefore considers the plaintiff to have acted reasonably in the circumstances.

[22] Mr Morgan also testified that an ambulance came to the scene. They also called the police, who enquired where the accident happened, whether somebody had been injured and then indicated that if no vehicle was blocking the road, the police will not be attending the scene. The police advised them that they should only report the accident at a police station. The police, therefore, did not attend the scene. Mr Morgan was not at any stage phoned by the police for a statement regarding the accident. With regard to the description of the accident and the accident-sketch which appear on the accident report, Mr Morgan testified that it was not a correct reflection of how the accident occurred.

[23] During cross-examination Mr Morgan testified that at the time when the plaintiff swerved to her left-hand side, almost the whole of the insured vehicle was in her lane. In his opinion, had the plaintiff not served to the left, the worst would have happened. After the plaintiff swerved to her left-hand side, the insured driver returned to his own lane. Had it not done so, the insured vehicle would have collided with all the motorcyclists.

[24] That concluded the case for the plaintiff on the merits.

**<u>The defendant`s witnesses in respect of the merits:</u>**

[25] The defendant called two witnesses, namely sergeant TK Atopo and sergeant NM Ndashe.

<u>Sergeant TK Atopo:</u>

[26] **<u>Sergeant Atopo</u>** testified that during 4 February 2018 he was an officer based at the Bloemspruit Community Service Centre. Presently he is a sergeant.

[27] With reference to the accident report, Sergeant Atopo confirmed that the said report was signed by him and reflects his service number underneath his signature at p. 4 of the report. He testified that the details of the plaintiff and that of her motorcycle as reflected at p. 1 of the report, and the parts marked not applicable at p. 2 of the report, were completed by him. However, the accident-sketch and the brief description of the accident, reflected at p. 3 of the report, had not been completed by him. He testified that he does not know who drew the accident-sketch and wrote the brief description of the accident on the report.

[28] He confirmed that the police did not attend the accident scene and that he cannot remember whether he visited the plaintiff in hospital.

[29] Sergeant testified that he can remember that the plaintiff attended the police station, together with a male person, and indicated that she wanted to amend the accident report. He distinctly remembered the plaintiff, since her hands were broken and from her elbows downwards, her arms were bandaged or plaster of paris. Sergeant Ndashe called him and gave him an accident report in the presence of the plaintiff and her male friend and indicated to him, sergeant Atopo, that the initial accident report has to be amended. Sergeant Atopo then completed p. 1, 2 and 4 of the report which was handed to him by constable

Ndashe. Sergeant Atopo testified that he does not know whether p. 3 of the report which contains the description of the accident and the accident-sketch was also completed on that day or not, since according to what he heard, the plaintiff previously came to the police station, but did not find him there. Sergeant Atopo then signed the report without reading it to the plaintiff because due to the fact that she was in the presence of constable Ndashe, he thought that the plaintiff already knew what the contents of the document entail. He himself did not read it either before he signed it. When he signed the report, he was under the impression that it is the amended report he was signing and that there was another, earlier accident report as well.

[30] During cross-examination when sergeant Atoko was asked whether he could remember in what respects the plaintiff wanted the report to be changed, he testified that he thinks that it was the accident-sketch and the description of the accident which she wanted to be amended.

[31] Ms Banda, who appeared on behalf of the defendant, found sergeant Atopo's evidence presented during his evidence in chief to be antagonistic and contrary to what he told her during their consultation and contrary to the version on behalf of the defendant. She even resorted to request that the witness be declared a hostile witness.

[32] After the completion of sergeant Atopo's evidence, which was at approximately 10h20 on 15 March 2023, Ms Banda indicated that given the evidence of sergeant Atopo and new information about another police officer having completed the accident

report and the possible existence of another accident report, she requests a postponement in order for her to trace officer Ndashe to call her as a witness. When I enquired from Ms Banda as to until when she is requesting the postponement, she randomly indicated that she would request the matter to be postponed for two months. I was not willing to merely grant the requested postponement without any basis for such a long period of postponement. I consequently enquired from Ms Banda whether she had made any enquiries about the whereabouts or availability of officer Ndashe prior to requesting the two-month postponement, whether it may not be possible that officer Ndashe may be available to testify on that very same day. Ms Banda indicated that she made no such enquiries. I consequently indicated that I am willing to let the matter stand down until 14h00 in order to grant Ms Banda an opportunity to make the necessary enquiries about officer's Ndashe's availability to be called as a witness. When the court reconvened at 14h00, officer Ndashe was indeed present in court and Ms Banda indicated that she was ready to present her evidence.

[33 Sergeant Ndashe indicated that she is employed at the Bloemspruit police station, Bloemfontein. During 2018 she was working at the accident enquiries at the said police station. Her duties entailed that she had to go to the CSC, check the accident reports as to whether they had been completed and if so, signed them off and at the end of the month, take the said reports to the traffic department. She has since obtained the rank of sergeant.

[34] She also explained the procedure which was followed when a person came to the CSC at the police station to report an accident. The said person will give the details of the accident to the police officer and the report will then be completed by the police officer or by the person who was reporting the accident. Thereafter the contents thereof will be confirmed with the relevant person and the officer will sign the report.

[35] Sergeant Ndashe testified that she did not complete the relevant accident report. She only inspected it after it had been completed, like she had to do with all the accident reports, where after she signed the report at p. 4 thereof, next to the signature of the officer who supposedly completed the report, merely to confirm that she had inspected it and that it had been completed. Sergeant Ndashe did not complete the report herself and consequently did not complete the accident-sketch and the description of the accident thereon either.

[36] During cross-examination she testified that she does not know who gave the description of the accident and/or who wrote it down and made the accident-sketch on the report. When asked whether she knows the plaintiff, she testified in the negative and also testified that she cannot remember having ever spoken to her. Mr Cross, who appeared on behalf of the plaintiff, then put it to her that sergeant Atopo testified that he remembers that the plaintiff came to the police station to amend an accident report and that she, sergeant Ndashe, gave Sergeant Atopo the apparent amended report to sign. Sergeant Ndashe denied same and testified that she knows nothing about such an incident. She further testified that she only works until 16h00 and

since the accident report appears to have been signed by sergeant Atopo at approximately 22h00, she, sergeant Ndashe, would definitely not have been there. She consequently stated that the version of sergeant Atopo cannot be the truth.

[37] That concluded the case for the defendant on the merits.

**Legal principles:**

[38] It is trite that the onus rests on the plaintiff to proof negligence on a balance of probabilities. I consequently have to determine whether the driver of the insured vehicle was negligent in causing the accident.

[39] In his heads of argument, Mr Cross, who appeared on behalf of the plaintiff, referred to and relied on the following case law:

1. **Sedumemanyatela v Road Accident Fund** (65678/2012) (2014) ZAGPPHC 445 (30 May 2014), in which judgment it was stated that even when an approaching vehicle is on its incorrect side of the road, the driver on his correct side may assume that the former will return timeously to its correct side. His assumption, however, does not entitle a driver on the correct side of the road to remain passive in the face of threatening danger. As soon as the danger of a collision becomes evident, he is under a duty to take reasonable steps to avert the accident.

2. **Road Accident Fund v Grobler** 2007 (6) SA 230 (SCA), in which judgment it was held as follows at paras [9] and [12]:

"[9] It is clear from the evidence that the respondent was plunged by the insured driver's negligence into a situation of sudden emergency, that he had no more than a second within which to escape that emergency, and that he effectively was given a choice between facing the danger, or veering away from it and hoping that it would not follow him. He did the latter.

[12] When a person is confronted with a sudden emergency not of his own doing, it is, in my view, wrong to examine meticulously the options taken by him to avoid the accident, in the light of after-acquired knowledge, and to hold that because he took the wrong option, he was negligent. The test is whether the conduct of the respondent fell short of what a reasonable person would have done in the same circumstances."

3. **Ntsala v Mutual and Federal Insurance Co Ltd** 1996 (2) SA 184 (T) at 192 G – 193 A, where the court held as follows:

"Where the driver of a vehicle suddenly finds himself in a situation of eminent danger, not of his own doing, and reacts thereto and possibly takes the wrong option, it cannot be said that he is negligent unless it can be shown that no reasonable man would so have acted. It must be remembered that with a sudden confrontation of danger the driver only has a split-second or a second to consider the pros and cons before he acts and surely cannot be blamed for exercising the option which resulted in a collision.

Van der Heever J (as he then was) in *Cooper v Armstrong* 1939 OPD 140 at 148 said the following:

> 'Where a plaintiff is put in jeopardy by the unexpected and patently wrongful conduct of the defendant, it seems to me irrational meticulously to examine his reactions in the placid atmosphere of the Court in the light of after-acquired

> knowledge; to hold that, had he but taken such and such a step, the accident would have been avoided, and that consequently he also was negligent. To do so would be to ignore the penal element in actions on delict and to punish a possible error of judgment as severely as, if not more severely than, the most callous disregard of the safety of others.'

In this instance I am of the opinion that, if the driver of the insured vehicle was in fact acting in a sudden emergency, he took the proper and obvious course by swerving to the left. If he then loses control of his vehicle or if in panic he swerves back onto the tarmac and a collision follows, he cannot be faulted and held to be negligent. There is therefore no merit in this submission by counsel for the plaintiffs."

## **Evaluation of the evidence:**

[40] The plaintiff presented her evidence in a chronological and clear manner, without contradicting herself. Her evidence was in all material respects substantially corroborated by the witness, Mr Neo Winston Morgan.

[41] With regard to the two police officers who were called as witnesses on behalf of the defendant, the credibility of sergeant Atoko is very questionable considering what happened between him and Ms Banda during the presentation of his evidence in chief. He and sergeant Ndashe also contradicted each other in material respects with regard to the events described by sergeant Atopo pertaining to the alleged amendment of the accident report in the presence of the plaintiff and sergeant Ndashe.

[42] In addition, neither of the two police officers attended the scene of the accident and neither consulted with the plaintiff after the accident. They were also not the authors of the brief description of the accident which appears in the accident report and did not draw the accident-sketch contained in the said report. In fact, it is completely unknown who the author was and where or how he/she obtained the information contained in the description and depicted on the sketch. They consequently bear no personal knowledge thereof.

[43] Mr Cross consequently submitted that those two parts of the accident report constitute inadmissible hearsay evidence and therefore cannot and should not be considered in the adjudication of this matter.

[44] Ms Banda, on the other hand, submitted that in exercising the discretion conferred upon me in terms of section 3(1)(c) of the Law of Evidence Amendment Act, 45 of 1988, the aforesaid hearsay evidence should be admitted on the basis that it is in the interest of justice to do so. In her heads of argument, she presented detailed arguments in support of her submission. I have duly considered her arguments. However, when I have regard to the factors set out in the said section 3(1)(c), there is in my opinion no basis upon which I am or can be of the opinion that it is in the interest of justice to admit the said evidence into evidence. On the evidence before court we do not even know who the author of the description of the accident and the accident-sketch was, let alone the reason why he/she did not testify. Even if he said parts of the accident report were to be admitted into evidence, it will carry absolutely no probative value in the

circumstances. It will be severely prejudicial the plaintiff to admit it into evidence and expect her to have an explanation for the said version, in circumstances where the defendant itself is not even in a position to give an explanation for the origin thereof. The said version in any event seems very improbable in the circumstances. The evidence of the plaintiff, in response to a question by myself, was that the group of motorcyclists were not stationary again after they left the house up to the point where the accident occurred. They were consequently not preparing to pull away at the point where the accident occurred. If they were preparing to pull away, as stated in the description in the accident report, and the plaintiff applied the accelerator of the motorcycle, it would mean that she intended to pull away, for purposes of which the motorcycle would have been put in “gear 1” to enable her to pull away. It would therefore not have caught her off-guard, especially also in view of the evidence that she is an experienced motorcyclist.

[45] I consequently find that the description of the accident and the accident-sketch contained and depicted in the accident report, constitute inadmissible hearsay evidence and is to be excluded from the evidence to be considered for the adjudication of this matter.

[46] The evidence of the plaintiff, as corroborated by Mr Morgan, has consequently not been gainsaid and stands uncontested by evidence to the contrary. There is in my view no reason why I should not accept their evidence, especially in respect of how the accident occurred. Since the insured driver is unknown and his evidence could therefore not have been presented, there is no explanation before court why the insured driver veered into the

lane of the plaintiff. I consequently find that the driver of the insured vehicle was negligent by having veered into the lane of travel of oncoming traffic, therefore the lain in which the plaintiff was entitled to drive, which negligence caused the accident.

**Contributory negligence:**

[47] The question which now has to be considered is whether there was contributory negligence on the side of the plaintiff in causing the accident.

[48] Ms Banda submitted that the plaintiff was contributory negligent in causing the accident since she was travelling at a speed of 40 – 60 km/h, in circumstances where a speed of 60 km/h was too high according to the evidence of Mr Morgan. She furthermore failed to hoot and flash her lights to alert the driver of the insured vehicle that he was in his incorrect lane.

[49] Considering the circumstances immediately before the accident, the plaintiff testified that that when she first saw the insured vehicle, it was already only the distance of about the length of one motor vehicle from her. The curve in the road prevented her from being able to see the vehicle at an earlier stage. The plaintiff was faced with a situation where she had to make a sudden decision in a split of a second. Ordinarily, a driver does not anticipate another to drive in the lane of oncoming traffic especially when there is another vehicle approaching from the opposite direction, like she was approaching the insured vehicle.

[50] The plaintiff in her evidence specifically testified that everything happened too fast for her to have hooted or flashed her lights.

[51] It would have been suicidal for the plaintiff to assume that the driver of the insured vehicle would move back to his lane. She had to take measures to avoid the collision then and there. In the circumstances I consider her decision to have swerved to the het left-hand side in order to avoid a head-on collision with the insured vehicle was a reasonable one in the circumstances, as also testified by Mr Morgan. See **Sedumemanyatela v Road Accident Fund,** *supra.*

[52] When one considers the question whether the plaintiff could or should have swerved just enough not to hit the parked motor vehicle on the left-hand side of the road, one must do so as a reasonable man placed in the position of the plaintiff. She found herself confronted with a situation of sudden emergency. In the circumstances she cannot be blamed for the fact that she took that option and collided with the parked vehicle. See **Ntsala v Mutual and Federal insurance Co Ltd**, *supra.* She could not have swerved to her right-hand side because there could have been a vehicle approaching from the front around the curve in the road and this would have meant a head-on collision with another vehicle. As such, the only reasonable option for her in the circumstances was to have swerved to the left-hand side.

[53] With regard to the issue of 60 km/h, I did not understand Mr Morgan`s evidence to mean that if the plaintiff was driving at 60 km/h it would have been too fast, in the sense of being dangerous in itself or constituting dangerous or negligent driving.

I understood his evidence in chief to have been that the plaintiff`s estimation of 60 km/h, is too high an estimation – the group were not driving at 60 km/h, keeping in mind that he was driving with the group. In his cross-examination he testified that if had she been travelling at 60 km/h, she would not have been able to avoid a collision with the insured vehicle; hence, she was driving slower than 60 km/h.

[54] In the circumstances I agree with the submission of Mr Cross that the defendant failed to prove any contributory negligence on the side of the plaintiff in causing the accident.

**Conclusion on the merits:**

[55] The negligence of the insured driver was the sole cause of the accident and the defendant is to be held 100% liable for the damages which the plaintiff prove she suffered as a result of the accident.

**AD QUANTUM:**

**Particulars of claim:**

[56] In the particulars of claim the plaintiff claimed damages in respect of the following:

"6.1 Pain and discomfort.
6.2 Loss of amenities of life.
6.3 Had to undergo medical treatment.
6.4 May have a loss of earning/earning capacity in future."

[57] On 15 June 2021, the plaintiff filed a notice to amend her particulars of claim with regard to the total sum of the damages claimed to be R6,813,470.00. In terms of the amended particulars of claim this amount is calculated as follows:

| | | |
|---|---|---|
| “7.1 | Past medical and hospital expenses | R5,000.00 |
| 7.2 | Estimated future medical treatment | R1,000,000.00 |
| 7.3 | Past loss of income | R1,882,665.00 |
| 7.4 | Estimated future loss of income | R5,033,674.00 |
| 7.5 | MINUS: effect of RAF cap | -R2,107,869.00 |
| 7.6 | General damages | R1,000,000.00” |

[58] The parties are *ad idem* that since the plaintiff was treated at provincial facilities, no damages were suffered in respect of past medical and hospital expenses.

[59] With regard to future medical expenses, the parties were *ad idem* that it will be compensated by way of an undertaking in terms of section 17(4) of the Road Accident Fund Act, 56 of 1996 (“the Act”).

**<u>General damages:</u>**

[60] In the plaintiff`s heads of argument, Mr Cross dealt with the principles pertaining to the determination of general damages and also referred to case law which he submitted is comparable to the present matter and submitted in conclusion that an amount of R 1 000 000.00 would be just and equitable compensation for the general damages the plaintiff suffered.

[61] In response to the aforesaid, Ms Banda submitted in the defendant`s heads of argument that in the circumstances of the present matter where the where the defendant has not objected to or rejected the plaintiff`s RAF FORM 4 by Dr Marin and Dr Van Heerden (Plastic Surgeon), the court does not have jurisdiction to adjudicate the plaintiff`s claim for general damages.

[62 In support of her aforesaid submission, Ms Banda, *inter alia,* referred to section 17(1)(b) of the Act which contains the following proviso:

"Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum."

[63] The said subsection 17(1)(A) determines as follows:

"(1A)*(a)* Assessment of a serious injury shall be based on a <u>prescribed method</u> adopted after consultation with medical service providers and shall be reasonable in ensuring that injuries are assessed in relation to the circumstances of the third party. (My emphasis)

*(b)* The assessment shall be carried out by a medical practitioner registered as such under the Health Professions Act, 1974 (Act 56 of 1974)."

[64] Ms Banda correctly pointed the following out in the defendant`s heads of argument:

"7.2 In terms of Regulation 3 (1) (a) a third party who wishes to claim compensation for non-pecuniary loss shall submit himself or herself to an assessment by a medical practitioner in accordance with these Regulations.

7.3 Regulation 3 (3) (a) provides that a third party whose injury has been assessed in terms of these Regulations shall obtain from the medical practitioner concerned a serious injury assessment report.

7.4 **Regulation 3 (3) (c )- The Fund or an agent shall only be obliged to compensate a third party for non-pecuniary loss as provided in the Act if a claim is supported by a serious injury assessment report submitted in terms of the Act and these Regulations <u>and</u> the Fund or an agent is satisfied that the injury has been correctly assessed as serious in terms of the method provided in these Regulations.**

**(d) If the Fund or an agent is not satisfied that the injury has been correctly assessed, the Fund or an agent must:**

**(i) reject the serious injury assessment report and furnish the third party with reasons for the rejection; or**

**(ii) direct that the third party submit himself or herself, at the cost of the Fund or an agent, to a further assessment to ascertain whether the injury is serious, in terms of the method set out in these Regulations, by a medical practitioner designated by the Fund or an agent.**

**(e) The Fund or an agent must either accept the further assessment or dispute the further assessment in the manner provided in these Regulations.”** (My emphasis)

[65] In **<u>RAF Practitioners Guide,</u>** H. B. Klopper, Last Updated: May 2023 - SI 46 at Page A – 50(3) – Page A – 50(4) the following relevant principles are stated:

"The time for the RAF to respond to the submission of a RAF 4 serious injury report has been fixed at 120 days. Failure by the RAF to react within the 120 days, will result in the RAF 4 not being accepted.

[In terms of a new regulation 3(3)(*d*)(ii). The regulation is not retrospective.]

The determination of whether a serious injury has been sustained must be done as prescribed in the regulation. A court is not able to do such an assessment and until such assessment has been made and the claimant has shown that he has sustained a serious injury, a claimant's right to recover non-patrimonial loss from the RAF is suspended. Where there were two RAF 4 assessments, one of which was rejected but the other admitted by the RAF during a pre-trial conference, the second assessment thus admitted remains valid and cannot subsequently be rejected. It is also uncertain whether a failure to reject, can result in applications for review but a *mandamus* compelling the RAF to decide can be obtained. Failure of the RAF to comply with a court order in this regard, does not have the effect that the injuries are then deemed to be serious. A plaintiff's remedy is a formal review in terms of PAJA after full exhaustion of all internal appeal processes in terms of reg 3 by referral with a RAF 5 to the appeal tribunal of the Health Professions Council.

[*Road Accident Fund v Oupa William Lebeko* (802/11) [2012] ZASCA 159; *Road Accident Fund v Duma and three related cases (Health Professions Council of South Africa as* Amicus Curiae*)* [2012] ZASCA 169, [2013] 1 All SA 543 (SCA). Also see Selman: "Much ado about Duma: *RAF v Duma and three related cases* [2013] 1 All SA 543 (SCA)" August 2013 *De Rebus* 55. See *Van Heerden v Road Accident Fund* (6644/2011) [2014] ZAGPPHC 958; *Zaina v Road Accident Fund* (CC55528/2015) [2017] ZAGPPHC 592 (25 August 2017); *Mokhomong v Road Accident Fund* [2021] ZAGPPHC 670; *Makuapane v Road Accident Fund* (9077/2022) [2023] ZAGPPHC 15 (19 January 2023).]

…

However, where the RAF does not accept the determination of its own expert, a court is not empowered to rely on the thus disputed determination to make an award of general damages and the matter must be dealt with according to the prescripts of regulation 3.

[*Faria v Road Accident Fund* (2210/12) [2013] ZAGPJHC 63 reversed on appeal – see *Road Accident Fund v Faria* (567/2013) [2014] ZASCA 65; 2014 (6) SA 19 (SCA).]

Where the inaction of the RAF results in doubt, whether it has accepted or rejected the RAF 4 assessment, a court is not entitled to proceed to consider general damages. The appropriate remedy is either an appeal to the Appeal Tribunal or an application in terms of the PAJA 3 of 2000.

[*Matabane obo M v Road Accident Fund* (2014/31190) [2015] ZAGPJHC 248 (30 October 2015) applying *Road Accident Fund v Duma and three related cases* (*Health Professions Council of South Africa as* Amicus Curiae) 2013 (6) SA 9 (SCA).] (My emphasis)

[66] Ms Banda also referred to applicable case law in the defendant`s heads of argument.

[67] In the circumstances I agree with the contention of Ms Banda that I do not presently have the jurisdiction to adjudicate the plaintiff`s claim for general damages. I consequently consider it apposite that the said claim be postponed to the pre-trial role.

**Loss of income: Evidence presented on behalf of the plaintiff:**

[68] Although I have thoroughly considered all the evidence presented by the experts, read in conjunction with their respective reports, I do not intend to deal with all their evidence in detail. I will be restricting myself to their main findings:

Dr JP Marin: Orthopaedic Surgeon:

[69] The qualifications and experience of Dr Marin was not in dispute. His Medico-Legal Report was received as Exhibit "A".

[70] Form the said report it is evident that he examined the plaintiff on 31 January 2020.

[71] In respect of his diagnosis Dr Marin indicated the following in his report:

"7.6.1 Bilateral distal radial (wrist) …resulting in:

7.6.1.1 Painful instrumentation in both wrists

7.6.1.2 Residual bilateral wrist pain

7.6.1.3 Decreased range of movement with dorsi- and plantar flexion in both wrists

7.6.2 Left tibial plateau fracture with:

7.6.2.1 Painful instrumentation

7.6.2.2 Residual knee pain

7.6.3 Disfigurement"

[72] Dr Marin testified that the plaintiff remains symptomatic and continues to suffer pain in both her wrists, as well as her left knee. The pain will progressively increase over time due to the degenerative nature of the injuries.

[73] Dr Marin was very adamant about the progressive degeneration which will occur in the wrists and the left knee of the plaintiff, since fractures in joints like in this instance are degenerative injuries. The knee is a weight bearing joint which makes it even worse.

[74] Dr Marin testified that there are signs of post-traumatic osteoarthritis (with a high probability for the degeneration in her wrists and left knee to progress to end- stage osteoarthritis) of the wrist joints and left knee and that she would require a left total knee replacement and arthrodesis/fusion of both wrists.

[75] According to Dr Marin the plaintiff must be placed in a permanent light duty/sedentary work.

[76] The plaintiff was not limited in her choice of jobs in the future prior to the accident.

[77] Dr Marin testified that the plaintiff's bilateral wrist and left knee injuries had a profound impact on her amenities of life, productivity and working ability and will continue to do so in future.

[78] According to Dr Marin if the plaintiff were to lose her current employment, her ability to secure any form of alternative employment will be decreased due to the debilitating effects of the injuries on her physical abilities. With the progression of degeneration in her wrists and left knee, her productivity will decrease.

[79] He stated that the plaintiff has become an unfair competitor in the open labour market.

[80] According to Dr Marin, from an orthopaedic perspective, even if accommodated, provision must be made for 10 (ten) years early retirement.

[81] Since the plaintiff cannot do heavy lifting and repetitive work involving her wrists and left knee like she did before the accident, the plaintiff is no longer suited to driving as she was before the accident.

[82] According to Dr Marin, the plaintiff indicated to him that she resigned from her previous employment due to personal reasons, but that her main issue was driving close to 200 km to work every day which caused her wrists and knee to experience extra pain as a result of the injuries she suffered. He confirmed that the driving, especially with a vehicle which does not have an automatic transmission, will definitely cause her knee to experience pain.

[83] During cross-examination he confirmed that his report is stale/outdated since he examined the plaintiff on 31 January 2020, whilst he only testified in court on 16 May 2023.

Ms Claire Hearne: Clinical Psychologist:

[84] Ms Claire Hearne gave evidence and compiled a report about the plaintiff, dated 25 March 2020, as a result of her consultation with the plaintiff held on 25 March 2020. The report was received as Exhibit “B”.

[85] The plaintiff`s one sister was murdered during 2003 and her brother passed away during 2020, which caused her to become depressed. A health related incident during 2016 also caused

her to become very depressed, but she has since come to terms with it.

[86] Ms Hearne testified that the plaintiff became depressed due to her work struggles as she had to travel a total of over 200 km per day. The plaintiff subsequently resigned due to the pain she suffered in both her hands/wrists and left knee caused by the travelling.

[87] According to Ms Hearne the plaintiff was experiencing symptoms of moderate depression, anxiety and PTSD which were directly as a result of the accident. Ms Hearne explained that pre-accident trauma and post-accident loss would make the plaintiff less resilient to deal with the effects of the accident which would therefore have had a more considerable effect on her.

[88] The plaintiff's chronic pain exacerbated her depression and anxiety and negatively impacted upon her motivation across all activities of daily living.

[89] Ms Hearne opined that the plaintiff may have limited employment opportunities compared to her pre-accident scenario due to her physical limitations and emotional dysfunction, most notably due to the PTSD.

[90] She testified that the plaintiff is at risk of experiencing despondency and fluctuating motivation and commitment in her work environment, due to the extra physical and emotional effort required in completing work tasks particularly on awareness of her dysfunction. She stated that the plaintiff`s physical

discomforts may also trigger traumatic recollections which would make her emotionally vulnerable in the workplace.

[91] She stated that the plaintiff had become socially withdrawn when compared to before the accident.

[92] Ms Hearne explained that poor stress and frustration tolerance could place significant relationships at risk, including family, social and work environments and her mood symptoms would also impact upon the quality of her interpersonal relationships, motivation and productivity.

[93] She testified that the plaintiff's psychological difficulties render her a vulnerable individual which would impact upon her occupational functioning.

[94] When asked in evidence in chief whether a re-assessment should not have been done considering the date of the present assessment, Ms Hearne testified that although she cannot state whether the plaintiff is presently still depressed or suffering from anxiety, it should be understood that symptoms which one experienced as the result of a previous traumatic incident, can be triggered and caused to resurface by a subsequent traumatic incident, even if the subsequent incident occurs 20 years later. Therefore, the symptoms of anxiety, depression and PTSD which the plaintiff suffered from as a direct result of the accident, will continue to make her less-resilient to deal with any subsequent trauma in future.

[95] During cross-examination Ms Banda put it to Ms Hearne that usually a reassessment is done after two years, to which Ms Hearne responded that she cannot say whether a re-assessment of the plaintiff would in any way assist and/or change her present opinion. She persisted with her opinion that the plaintiff will continue to be less stress and intolerance resilient as a result of the accident.

Ms Gouws: Occupational Therapist:

[96] Ms Gouws/Stroebel testified that the assessment reflected in her report was done on 4 April 2023 and the report is dated 14 April 2023, which report was received as Exhibit “C”.

[97] The plaintiff remains symptomatic with regard to painful wrists, left knee pain and swelling of her left lower leg. She is also still experiencing functional challenges as a result of her injuries, which negatively impact on her productivity and efficiency at work. The plaintiff`s knee pain has since also been causing secondary pain, stiffness and discomfort in her lower back.

[98] Ms Gouws opined that the plaintiff's vocational capacity is reduced due to the injuries she sustained in the accident.

[99] The plaintiff is significantly impaired as a result of the accident, considering her physical limitations, psychological and emotional difficulties and a consequent need for extensive accommodations which may typically not be of a reasonable nature to the majority of employers.

[100] The plaintiff completed grade 12 and thereafter obtained a Diploma in Executive Secretarial Studies and a B Tech Forensic Investigation degree at Unisa.

[101] At the time of the accident she was employed as Area Leader at the Free State Gambling, Liquor and Tourism Authority. After an absence of 2 months after the accident, she returned to her duties as Area Leader. She did not suffer a loss of income during this time period.

[102] The plaintiff experienced difficulty coping with her job demands after the accident and subsequently resigned at the end of December 2019.

[103] The plaintiff managed to find employment in March 2023 at the SAPS as a Forensic Analyst (currently working in a shadowing/training capacity). Her current work can be categorized as sedentary to light work, but as soon as she becomes fully trained she will be required to do more driving and attend crime scenes. Her work will effectively become a lot more demanding than presently.

[104] Ms Gouws testified the plaintiff's salary as a Forensic Analyst (R26 000.00 plus benefits per month) is significantly less when compared to her previous salary as an Area Leader (R59 000.00 plus benefits per month).

[105] On the day of her evaluation it was evident that the plaintiff is left with physical limitations of both her wrists and left knee. These limitations, accompanied by symptoms of pain, negatively

influenced her functional performance. She will likely require intermittent rest breaks when required to walk or stand for prolonged periods.

[106] On the day of her evaluation, the plaintiff met the demands of sedentary and light work, but Ms Gouws again noted that rest breaks could negatively impact work productivity.

[107] With regard to the plaintiff`s future earning capacity, Ms Gouws testified that even with successful medical intervention as testified by Dr Marin, as degeneration in the plaintiff's wrists and left knee progresses, pain and discomfort will likely increase. Her functional limitations will likely deteriorate with progression of osteoarthritis in her wrists and left knee and her physical work capacity and her productivity are not expected to improve to her pre-accident level.

[108] Ms Gouws testified that as degeneration of the plaintiff`s wrists and left knee joints progresses in the future, the plaintiff may become an unequal competitor within the position as Forensic Analyst, requiring more accommodation in terms of rest breaks during frequent walking and standing, and in terms of fine motor work tasks. On days when frequent driving/driving for prolonged distances are again required, this could also become problematic again. In addition, as degeneration progresses, dynamic postures such as kneeling and elevated work when collecting evidence at a crime scene could become increasingly problematic. With exposure to frequent standing and walking demands, continuous strain will likely be placed on the plaintiff's left knee joint and with repetitive upper extremity tasks

(prolonged driving and typing) continuous strain will likely be placed on her wrists, which could negatively impact on the prognosis, necessitating earlier surgical procedures.

[109] She testified that considering the plaintiff's age (45 years), prognosis (degenerative changes already present in multiple joints) and envisaged future surgical procedures (wrist arthrodesis and knee replacement), her ability to retain her current position until retirement age and to excel in her career path is compromised. She agrees with Dr Marin that even in a sedentary to light work category, early retirement cannot be excluded.

[110] Ms Gouws stated that should the plaintiff again experience psycho-social distress with an increase in pain symptoms, this could again negatively impact her work motivation, work speed and relationships within a work environment.

[111] According to Ms Gouws the accident in question impacted negatively on the plaintiff`s psychological and emotional well-being.

[112] Ms Banda, during cross-examination put it to Ms Gouws that many parts of her report relies on the report of Dr Marin. Ms Gouws confirmed same, in so far as the future employment of the plaintiff is concerned. When asked whether her conclusion will be affected should it turn out that there is in actual fact no progressive degeneration occurring, Ms Gouws responded in the negative, stating that she will still be symptomatic and presenting with pain, with the concomitant functional challenges.

[113] On a question by Ms Banda, Ms Gouws confirmed that she bases her view with regard to early retirement on the opinions of Dr Marin expressed in his report.

Mr Ben Moodie: Industrial Psychologist:

[114] Mr Moodie testified that he is qualified as and has been an industrial psychologist in private practice since 1992. Before that, during 1987 to 1990, he was employed by the SADF Psychology Department during which time he studied toward his Master`s degree and completed the Psychology Internship program. He achieved the rank of Captain. He was also employed by the SAPS as Chief Psychologist for the Witwatersrand District. He was promoted to the rank of Lieutenant-Colonel and only resigned to devote his attention to his private practice. He compiled a report on behalf of the Plaintiff, which report was received as Exhibit "D".

[115] He dealt with the plaintiff's tertiary education and further training from which evidence it is evident that the plaintiff completed and passed a Diploma in Executive Secretarial Studies in 1999, completed and passed a National Diploma in Policing from 2006 to 2008 at Unisa and completed and passed a B. Tech in Forensic Investigation from 2013 to 2014, also at Unisa.

[116] He described the plaintiff as an educated and intelligent lady.

[117] The plaintiff applied for her present position, where she was requested to undergo psychometric tests and was subsequently

invited to an interview. Due to her qualifications, it was not necessary to undergo police training.

[118] He testified that the plaintiff was earning R59 446.73 plus benefits at the time of the accident. He testified that he received copies of the plaintiff's payslips confirming her employment at the Free State Gambling, Liquor and Tourism Authority pre-accident as well as her earnings noted above. Mr Moodie opined that she would have continued her employment as an Area Leader/Manager had it not been for the accident. After having reached her career ceiling at age 45, yearly increases based on the consumer price index would have been applicable until retirement age of 60.

[119] He stated that she resigned as she wasn't coping with the driving demands associated with her job post-accident.

[120] Mr Moodie testified that he consulted with the plaintiff at court and confirmed her current employment at the SAPS as a Forensic Analyst. He is also familiar with the SAPS salary scales due to his background work experience and confirmed the plaintiff's current reported earnings of R 26 000.00 per month as accurate. At the time she had not yet received a payslip since she still had to be registered on the SAPS system. He is also aware that she will be receiving a thirteenth cheque, membership of a medical fund and a pension fund.

[121] Mr Moodie went to great lengths to explain the complexities associated with being a Forensic Analyst. He stated that

individuals working in this field are continually faced with an incredible amount of grief, sadness, pressure and stress.

[122] He testified that the plaintiff is highly compromised concerning her current employment having regard to her PTSD. He opined that she will probably not cope once fully trained, requiring her to attend gruesome crime scenes at times, which would no doubt exacerbate her already existing PTSD with the result that she will be forced to retire at age 50 years, rendering her functionally unemployable thereafter for all intents and purposes. The usual retirement age at the SAPS is 60 years.

[123] He testified that the employees of the SAPS who are most affected by PTSD, are the Forensic Analysts. The situation is exacerbated by the fact that they are continuously exposed to those scenes.

[124] With regard to the evidence and opinions of Dr Marin, Mr Moodie testified that with the pain and discomfort of the plaintiff`s injuries increasing, her emotional stability will be negatively affected. Considering her physical and emotional condition as a result of the accident, in conjunction with the nature of her present employment, Mr Moodie opined that she may even have to retire before the age of 50 years. At the age of 50, considering that the nature of her qualifications are only police related, and what her physical and mental condition would probably be like by then, it is highly unlikely that the plaintiff will then be able to obtain other employment.

[125] Mr Moodie dealt in detail at paragraph 13 of his report with the plaintiff`s post-accident earning potential as oppose to what her

pre-accident income potential was, dealt with at paragraph 12 of the report.

[126] With regard to her past loss of income, Mr Moodie stated that with the information at hand, her post-accident resignation from her pre-accident employment appears to have been justified, as she was no longer suited to travel long distances. He therefore opined that a total past loss of income from the date of her resignation until she gained re-employment is justified.

[127] In respect of her future loss of income, he testified that it will firstly have to be calculated on the basis of what she would have earned pre-accident and what she is presently earning. He, however, opined that she will probably not be able to remain in her present position for longer than 2 years, where after she will again be suffering a complete loss of income. At paragraph 15 of his report, he stated as follows in respect of her future loss of income:

"15.1 The writer notes that although the claimant should be suited to a host of employment opportunities, the physical and psychological sequelae of the accident have rendered the claimant vulnerable within the open labour marked and at risk of suffering losses of income due to periods of unemployment suitable to her limitations. As such, a significantly higher contingency deduction needs to be applied in this regard.

15.2 The claimant is likely to suffer a further future loss of income in terms of a 10 year expected early retirement regardless of her accommodation in a suitable position."

Mr Moodie testified that the plaintiff will, therefore, be suffering a "*massive actual loss of earnings".*

[128] During cross-examination he was questioned about the payslips form the plaintiff`s previous employer which he obtained but which are not attached to the report and whether he obtained proof of her qualifications. Mr Moodie indicated that he has the necessary documentation in support thereof available at his office and that he is more than willing to make them available. After the completion of his evidence the requested documents were obtained from his office and provided to Ms Banda, to which she responded that the contents thereof are noted, but not admitted.

[129] In response to further questions of Ms Banda, Mr Moodie testified that the plaintiff is an educated woman, the sole breadwinner and with two children whom she had to maintain at the time. She would not have merely resigned from her pre-accident employment in order to sit at home and do nothing. She was a hard worker and a real go-getter. She had no other option, since she could not cope with the pain she experienced due to her injuries as a result of all the driving she had to do. Mr Moodie testified that he contacted her supervisor at her previous employer and he said that pre-accident her work performance was good and he rated it to have been 9/10. However, after the accident she struggled to drive due to the pain in her arms and her leg and her work performance rating dropped to 4/10.

[130] Mr Moodie also testified in cross-examination that according to him the plaintiff will be experiencing such severe psychological

problems by the time she leaves her present employment, that she will not be able to do any other work. He testified that the SAPS appointed her in her present position without being aware of her physical and psychological limitations.

[131] I wish to place it on record that Mr Moodie, in my view absolutely correctly so, requested me to excuse the plaintiff from sitting in court when he was about to testify about the sensitive issues pertaining to the plaintiff personally and in relation to Mr Moodie`s opinion on her future career as a Forensic Analyst. The respect which he showed towards the plaintiff in having made the request, is commendable.

The plaintiff:

[141] The plaintiff testified that at the time of the accident she was employed at the Free State Gambling, Liquor and Tourism Authority as Area Leader for the Gariep Region. She was stationed in Trompsburg where her office was located, approximately 120 kilometres from her home in Bloemfontein. She owned and drove a Nissan NP 200 bakkie with a manual gear system, but with power steering, which vehicle she is currently still driving. The plaintiff testified about the pain she generally experiences in her left and right wrists and her left knee. She explained that the long distant driving caused her even more pain since it affected her knee when she used the clutch and also her wrists when she turned the steering wheel and when she changed gears.

[142] The plaintiff testified that at the time of the accident she owned a house in Bloemfontein and lived there with her two children who were at school, with the result that she was not in a position to move to Trompsburg. She is presently still staying there.

[143] The plaintiff testified that after the accident when she returned to her employment, she was accommodated for three months by being allowed to work from an office in Bloemfontein in order to limit her daily commuting.

[144] The plaintiff testified that she was responsible to regulate the liquor and gambling industry in Gariep area. This, *inter alia,* involved travelling from town to town, doing inspections, attending cluster meetings and perform operations with other stakeholders. The Gariep area for which she was responsible, had 500+ outlets. She had to do inspections at all the outlets once or twice a week, depending on her manager’s instructions. The outlet which was the furthest from Trompburg was 200 kilometres.

[145] She further testified that her duties included the compiling and typing of reports from the inspectors and her own inspections. Before the accident she experienced no problems with her typing duties. However, she experienced difficulty after the accident, since her wrists became tired and painful which necessitated her to rest her wrists in-between, which resulted in her taking longer to perform her typing duties.

[146] The plaintiff started her employment at the said employer on 3 October 2008. She testified that she resigned from her pre-

accident employment due to her being unable to cope with all the driving which caused her much pain in her wrists and her left knee.

[147] Before she resigned, she applied to be transferred to Bloemfontein, but the request was declined. She was advised that there was no position open for her in Bloemfontein.

[148] Her previous employer never discussed its policy regarding disability with her and she had no personal knowledge thereof. If they had discussed the option with her, she would have applied for that.

[44] The plaintiff also testified that if it had not been for the accident and the consequent injuries she suffered, she would not have resigned from her previous employment.

[149] The plaintiff testified that at the time she was earning a gross income of approximately R51,100.00 per month, excluding benefits.

[150] She testified that she is currently employed at the South African Police Services as a Forensic Analyst, in which position she started on 6 March 2023. She testified that she will be earning approximately R26,000.00 per month, before deductions. At the time of the presentation of her evidence, she had, however, not yet received a payslip.

[151] After 31 December 2019 when she resigned from her previous employer she initially did not seek other employment, since she

needed time to recover from her injuries. She only started looking for employment again during 2022.

[152] The plaintiff explained that a Forensic Analyst goes out to crime scenes and take photographs, collect relevant exhibits, lift fingerprints, etc. At the time of her evidence, she was still working in a shadowing/training capacity and as such she had not yet attended any crime scenes.

[153] The plaintiff testified that when she applied for her present post and during her interview, she did not divulge any of her physical or mental difficulties/problems, since she was not asked about anything in that respect. This evidence is in accordance with what Mr Moodie also testified.

[154] The plaintiff testified that in this position she will also have to drive to crime scenes. The extent of driving will depend on where the crime scenes are and how many scenes she will have to attend.

[155] The plaintiff has two children and she is the sole breadwinner.

[156] The plaintiff explained that the felt depressed after the accident and also when she had to resign but that she did not take any medication. According to her, she is not presently depressed. However, her injuries make her feel useless, like she cannot do anything for herself. Before the accident she could drive wherever she wanted, she went to the gym, she enjoyed running and she was able to do everything at her house for herself. The fact that she is no longer able to do so, is very frustrating.

[157] During cross-examination she testified that she has not driven a motorcycle since the accident, as she is not ready for it yet.

[158] During cross-examination she also testified that she is happy to have been appointed in her present position, since it is the field she specialised in.

[159] In response to questions I posed to the plaintiff, she testified that at the time when she resigned, she experienced pain every day, whilst presently she only experiences pain occasionally. However, when driving, it still causes pain in her wrists and her left knee. When she does experience pain, she takes aspirin for it. She further testified that sitting and elevating her knee helps with the pain in her knee.

[160] Before Mr Cross closed the plaintiff's case with regard to the *quantum,* he indicated that although there are two further reports, one of a plastic surgeon and one of a neurologist, they will not be called as witnesses and that the plaintiff abandons the contents of those reports. In my view the defendant is not to be held liable for the costs of those expert reports for purposes of the present proceedings. The said costs may become applicable again in possible later proceedings in respect of general damages.

[161] That concluded the case for the plaintiff in respect of the *quantum.*

**<u>The defendant`s case in respect of quantum:</u>**

[162] The defendant did not file any expert reports in respect of the *quantum.* The defendant consequently closed its case without presenting any evidence.

**<u>Heads of argument:</u>**

[163] After the trial concluded on 17 May 2023, the parties agreed to file their heads of argument on 24 May 2023 and 2 June 2023, respectively.

**<u>Evaluation of the expert evidence:</u>**

[164] In **<u>Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung Mbh</u>** 1976 (3) SA 352 (A) the following was 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."

[165] The following relevant principle was reiterated in **<u>Road Accident Fund v Zulu and Others</u>** (50/11) [2011] ZASCA 223 (30 November 2011):

"[14] I have already alluded to the fact that the learned judge in the court below relied heavily on the evidence of Dr Holmes, an expert witness. A useful guide to the approach of expert evidence is found in *Michael v Linksfield Park Clinic (Pty) Ltd* where the court stated:

> '. . . what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning.'"

[166] Ms Banda submitted in the defendant`s heads of argument that the reports of Dr Marin and Ms Hearn are stale to the extent that they are misleading to the court and should therefore be ignored.

[167] For the aforesaid submission Ms Banda, *inter alia,* relied on an unreported judgment in the matter of **GN v Road Accident Fund** (13/305990 [2018] ZAGPJHC 691 (4 December 2018) at para [42]. Although I agree with the principle that older reports **may** in certain circumstances be misleading, such as in that matter where the assessment of the plaintiff was done when he was still a minor and at school, whilst the report was presented in evidence at a time when he was already employed, I do not think it should be considered to be a rule cast in stone. Like always, it depends on the particular circumstances of every case.

[168] When considering the evidence of Dr Marin, in conjunction with his report, it is evident that it is a medical fact that the nature of the injuries is degenerative joint injuries. It is based on this medical fact that Dr Marin opines that with passage of time, there will be degeneration, since that is also a medical fact. Once there is degeneration, the process will not reverse. Dr Marin also testified that there are signs of post-traumatic osteoarthritis, which is also a medical diagnosis which he made for a fact. In his expert opinion, the degeneration will probably progress to end-stage osteoarthritis. His aforesaid opinions, in my view,

constitute *"his reasoned conclusion based on certain facts",* as required by the aforesaid case law. It is not speculation. At the time he assessed her, the plaintiff already presented with pain, post-traumatic osteoarthritis and the inability to do heavy lifting and repetitive work involving her wrists and left knee like she did before the accident. This pain and the limitations were also noted by Ms Gouws personally during her evaluation of the plaintiff, which was done as recent as 4 April 2023. This confirms that the plaintiff`s condition is not getting better, which is in accordance with Dr Marin`s opinion. In my view there is no reason why I should not take the report of Dr Marin, read in conjunction with his evidence and opinions, into consideration in adjudicating this matter.

[169] With regard to the report of Ms Hearne, it is important to properly consider the applicability thereof. Ms Hearne readily conceded that she is not in a position to state whether the plaintiff is presently suffering from depression and anxiety. The important and highly relevant crux of her report, read in conjunction with her evidence, is that the symptoms of depression, anxiety and PTSD which the plaintiff suffered as a direct result of the accident (factual diagnosis which she made during her evaluation of the plaintiff), will **continue** to make her less-resilient to deal with subsequent trauma and stress. These psychological difficulties render the plaintiff a vulnerable person which would impact upon het occupational functioning in future, which will be exacerbated by her physical pain and restrictions. In my view Ms Hearne presented "*reasoned conclusions based on certain facts"*, which will remain relevant for the rest of the plaintiff`s (career) future. I am consequently also satisfied that there is no reason why I

should not also accept the report, evidence and opinions of Ms Hearne.

[170] There is further no reason why the reports, evidence and opinions of Ms Gouws and Mr Moodie should not be accepted.

[171] The report, evidence and opinions of Mr Moodie were, in my view, extremely valuable in this matter, considering his applicable knowledge, experience and background in respect of the SAPS and the particular working conditions and duties of a Forensic Analyst and the subsequent emotional impact thereof on persons employed in that position. I consequently accept his report, evidence and opinions which completely complied with the requirements for expert evidence to be reliable and acceptable.

**Contingencies:**

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

[173] 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 **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) 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.’”

[174] In the judgment of **Gillbanks v Sigournay** 1959 (2) SA 11 (N) the following was stated at 17 E – F in respect of contingencies in an estimation of a plaintiff`s claim for loss of earnings:

"In any estimate of a person's loss of earning capacity allowance must be made for all contingencies including the accidents of life and certain deductions must be made from the estimated gross income to allow for unemployment benefits, insurance and so on. These contingencies would include -

(i) a possibility that plaintiff's working life may have been less than sixty-five years;
(ii) a possibility of his death before he reaches the age of sixty-five years;
(iii) the likelihood of his suffering an illness of long duration;
(iv) unemployment;
(v) inflation and deflation;
(vi) alterations in the cost-of-living allowances;
(vii) an accident whilst participating in sport such as hockey or cricket, or at any other time which would affect his earning capacity; and
(viii) any other contingency that might affect his earning capacity."

[175] In the judgment of **Dlamini v Road Accident Fund** (59188/13) [2015] ZAGPPHC 646 (3 September 2015) at para 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."

[176] Mr Cross submitted that in the actuarial calculations by Mr Sauer dated 17 May 2023, the contingencies that were used, namely 5% deduction for past losses, both pre-morbid and post-morbid, and 5% deduction for future losses pre-morbid (namely 0.5% per future working year) and 25% deduction for future losses post-morbid, are just and equitable.

[177] Ms Banda submitted in the heads of argument filed on behalf of the defendant that a contingency deduction of 15% should be applied on past losses pre-morbid and 5% on past losses post-morbid. In respect of future losses, a contingency deduction of 20% pre-morbid and 25% post-morbid should be applied. These contingencies were suggested based on an early retirement age of 55 years. The same contingencies were also submitted in the supplementary heads of argument filed on behalf of the

defendant, although it was then suggested on the basis of an early retirement age of 50 years.

**Calculation of the loss of income:**

[178] The plaintiff`s actuary, Mr Sauer, made an amended actuary calculation of the plaintiff`s loss of income as a result of the accident, dated 17 May 2023, based on the postulations testified to by Mr Moodie, but which are also in accordance with the general opinions of the other expert witnesses.

[179] The contingencies applied in the said calculation of Mr Sauer, are based on the evidence of Mr Moodie, with which I agree as being fair and reasonable in the circumstances. This fact is also specifically confirmed by the remark of Mr Sauer that the higher future post-morbid contingency deduction is "*to allow for increased employment vulnerability, labour incapacity uncertainty possible long periods of unemployment and early retirement*", which is 100% in accordance with the opinion of Mr Moodie in this regard.

[180] The plaintiff`s evidence, in my view, lay a proper basis for the evidence and opinions of the respective experts. There is no reason why I should not accept her evidence in support of the claim for the loss of past and future earnings. Furthermore, based on the findings and postulations in the report of Mr Moodie, considered in conjunction with his expert opinion as expressed in court, as well as the opinions expressed by the other expert witnesses, which I have already indicated I accept as properly proven by the plaintiff, I am in agreement with the

basis of the calculations and the contingencies applied in the report of Mr Sauer.

[181] The said calculations reflect a pass loss of income in the amount of R2 224 390.00 after having applied contingencies of 5%, both pre-morbid and past-morbid. The calculations further reflect a future loss of income in the amount of R7 795 834.00, after having applied contingencies of 5% for future loss pre-morbid and 25% for future loss post-morbid. After the deduction of the RAF cap, the plaintiff`s total loss of income is an amount of R6 223 572.00.

**Order:**

[182] I consequently make the following order:

1. The defendant is liable to pay 100% (One Hundred Percent) of the plaintiff's proven damages.

2. The defendant shall pay the plaintiff the sum of R6 223 572.00 (Six Million, Two Hundred and Twenty –Three Thousand, Five Hundred and Seventy-Two Rand) in respect of loss of earnings.

3. The defendant shall pay the aforesaid amount into the Trust account of the plaintiff's attorneys, VZLR Inc, the details of which the plaintiff`s attorneys will provide to the defendant.

4. The defendant shall furnish the plaintiff with an Undertaking, in terms of Section 17(4)(a) of Act 56 of 1996, in respect of future

accommodation of the Plaintiff in a hospital or nursing home or treatment of or the rendering of a service or supplying of goods of a medical and non-medical nature to the plaintiff (and after the costs have been incurred and upon submission of proof thereof) arising out of the injuries sustained in the collision which occurred on 4 February 2018.

5. The defendant is to pay the plaintiff's taxed or agreed party and party costs of the action, which costs shall include, but not be limited to the following:

5.1 Previously reserved costs.

5.2 The qualifying, preparation- and reservation fees and costs of obtaining reports and the evidence, where applicable, of the following experts:

Dr JP Marin, Orthopaedic Surgeon;
Claire Hearne, Clinical Psychologist;
Ms Gouws/ Alana Stroebel, Occupational Therapist;
Mr Ben Moodie, Industrial Psychologist; and
JJC Sauer, Actuary.

6. The above-mentioned payment with regard to costs shall be subject to the following conditions:

6.1 The plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the defendant's attorney of record.

6.2 The plaintiff shall allow the defendant 14 (fourteen) calendar days to make payment of the taxed costs.

7. The plaintiff`s claim in respect of general damages are postponed to the pre-trial roll of 29 January 2024.

**C. VAN ZYL, J**

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