

**IN THE HIGH COURT OF SOUTH AFRICA,
EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT**

CASE NO: 1439/2017

ECD 4039/2017

REPORTABLE:

OF INTEREST TO OTHER JUDGES:

REVISED:

In the matter between:

MALAKHIWE GWARUBE

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

BOTHA AJ:

[1] This is an action for damages in terms of the Road Accident Fund Act 56 of 1996 ('Act 56 of 1996').

[2] It proceeded on a default judgment basis, following dismissal of the Defendant's defence on 25 January 2023.

[3] Ms Malakhiwe Gwarube (the 'Plaintiff') sustained bodily injuries from a motor vehicle collision which occurred on 16 August 2015. The Plaintiff was 18 years old at the time and a passenger in the insured vehicle.

[4] Following the collision, the Plaintiff lost consciousness briefly and was taken by ambulance to Life St Dominic's Hospital in East London. She regained consciousness in the ambulance and was hospitalised in intensive care for a few days, followed by a week in a general ward. She spent 10 days in hospital in total.

[5] The Plaintiff suffered a fracture of the left humerus, multiple facial and left foot lacerations, bruising and a mild head injury to the left side of her face, which resulted in a small keloid scar on her lower lip. She underwent various procedures to treat her injuries, including an internal fixation of the fractured humerus.

[6] The Road Accident Fund (the 'Defendant') conceded liability for 100 per cent of the Plaintiff's proved damages. The Defendant offered to pay an amount of R350 000 (Three Hundred and Fifty Thousand Rand) in respect of general damages, which amount was accepted by the Plaintiff. The Defendant also agreed to provide the Plaintiff with an undertaking in terms of s 17(4)(a) of Act 56 of 1996, which undertaking was accepted.

[7] The only outstanding issue is loss of earnings.

Expert reports

[8] For the claim for loss of earnings, the Plaintiff relied on the following expert reports, namely: Dr K.A. Watt (Orthopaedic Surgeon); Ms V. Ruiters (Occupational Therapist); Dr A.B. Mazwi (Neurosurgeon); Ms M Mphelo (Clinical Psychologist); Ms M. Kheswa (Industrial Psychologist); and Munro Forensic Actuaries.

[9] The Defendant produced only three expert reports namely: Ms N.C. Magakwe (Occupational Therapist), Ms H Tomu (Industrial Psychologist), and Mr Grant Pretorius (actuary), but because the Defendant's defence was dismissed, the Defendant presented no evidence.

[10] Nonetheless, the industrial psychologists and occupational therapists met before the trial and filed joint minutes.

[11] The physical injuries suffered by the Plaintiff are common cause. However, the Defendant disputed the *sequelae* of the head injury sustained by the Plaintiff and her capacity to be employed in the future, as is gleaned from the various experts reports and the joint minutes of the industrial psychologists and occupational therapists. I shall refer again to the disagreements between these experts when I record the evidence of the experts called for the Plaintiff.

[12] The Orthopaedic Surgeon, Dr Watt, was not called to give evidence, but his report indicates that, as at 2017, the Plaintiff had made a good recovery from her shoulder injury, apart from a decreased range of movement of ten degrees in her left shoulder as compared to her right shoulder. The Plaintiff also still suffered from minor pain and discomfort in her left shoulder at the extremes of movement and had a slight weakness of the left shoulder – a *sequelae* with which both parties agreed. As to her future prognosis, Dr Watt reported that apart from playing water polo (in which the Plaintiff participated before the injury), all other activities should be satisfactorily continued without any real discomfort, except at the extremes of movement.

[13] Dr Watt added that the Plaintiff appeared to have recovered fully from her head injury, apart from the scar which is still visible.

[14] The Defendant has not produced any report or evidence to refute the claims of Dr Watt.

Plaintiff's evidence

[15] Five witnesses testified for the Plaintiff: the Plaintiff herself, Ms V. Ruiters, the Occupational Therapist, Dr A.B. Mazwi, the Neurosurgeon; Ms M. Mphelo, the Clinical Psychologist; Ms M. Kheswa, the Industrial Psychologist; and Ms J. Valentini, an actuary at Munro Forensic Actuaries.

The Plaintiff

[16] The Plaintiff testified first. She is an adult female, born on 10 September 1996. She resides in Beacon Bay, East London. At the time of the accident, in August 2015, the Plaintiff was 18 years old. When she presented her evidence, she was 26 years old.

[17] At the time of the accident, the Plaintiff was a student studying civil engineering at Buffalo City College (a TVET vocational college), having completed grade 10 in 2008. She aimed to become an Artisan (Civil Engineering).

[18] Following the accident, the shoulder operation and her stint in hospital, the Plaintiff returned home to live with her parents to recover. She stayed there for three months, whilst her parents cared for her, but because of her injuries, she was unable to write her examination for the civil engineering course. Her injured shoulder also impeded her from completing the practical work that was required. As a consequence, she did not complete the course.

[19] In 2018, the Plaintiff successfully completed a project management course. However, since then she has not studied further and nor is she employed, despite having worked on two occasions as a data-capturer and as a mobile money agent between the date of the accident and the date of the trial.

[20] In response to a question posed by me as to the reason for not studying further, she indicated that she had not 'found the need' to continue with her studies or to take up employment. No explanation was given for this statement, nor was it explored any further by Plaintiff's counsel, which was most unfortunate, given the facts mentioned in par [19] above.

[21] As indicated below, however, the evidence of Ms Mphelo, Ms Ruiters and Ms Kheswa provides some contextual basis to ameliorate the effect of this statement.

[22] The Plaintiff is not married and still lives at home.

Dr Mazwi – Neurosurgeon

[23] The second witness called for the Plaintiff was Dr Mazwi, a Specialist Neurosurgeon, practising in Pretoria.

[24] Whilst the expert report filed on behalf of Dr Mazwi did not qualify him as an expert, oral evidence was led as to his qualifications and experience, which I accepted.

[25] Dr Mazwi completed his MBChB from MEDUNSA in 2003 and then qualified with a Masters' degree in Neurosurgery from the University of Pretoria in 2013. In 2015 he successfully completed an independent examination from ABIME in the USA. He has been a registered Specialist Neurosurgeon with the Health Professional Council of South Africa for 9 years and is employed as a Specialist Neurosurgeon at Steve Biko Academic Hospital, linked to the University of Pretoria, and at the Muelmed Mediclinic in Pretoria.

[26] Dr Mazwi first assessed the Plaintiff on 25 January 2019, almost four years after the accident. He then prepared an expert report, which, as I pointed out in court, contained scant detail about the testing conducted and how these tests linked to the conclusions reached. This was most unfortunate.

[27] In his evidence, Dr Mazwi endeavoured to expand upon the findings in his report, focusing on the Plaintiff's cognitive functioning.

[28] He testified that he confirmed the injuries sustained by the Plaintiff as contained in the hospital reports. During the assessment in 2019, the Plaintiff narrated to Dr Mazwi that she was suffering from the following symptoms: difficulty concentrating, memory disturbances, poor focus, headaches and behaviour disturbances, plus a short temper.

[29] Prior to the accident, the Plaintiff was: healthy, had no prior neurological or mental illnesses or head injuries, performed at a 'normal' level scholastically and was mentally sound. She was also born with no congenital abnormalities.

[30] Dr Mazwi's neurological examination of the Plaintiff, which included a 'Mini Mental Status Exam' revealed that the Plaintiff struggled to concentrate, had poor attention, and had difficulty with memory recall.

[31] Whilst not contained in his expert report, Dr Mazwi testified that the Exam conducted involved the Plaintiff having to recall recent events (such as one's breakfast that morning) and to memorise and repeat a list of objects which Dr Mazwi called out.

[32] Dr Mazwi testified that the Plaintiff had difficulties with the recall of recent events, including a discussion which he had had with her at the beginning of the consultation, and that she also struggled to remember the list of objects after they were called out to her. The conclusion that Dr Mazwi reached was that this pointed to significant problems with concentration, memory and recall.

[33] The physical tests conducted by Dr Mazwi, however, did not show any neuro-physical damage. The Plaintiff's cranial nerves were also intact according to an x-ray taken after the accident. Apart from the impact of the physical injuries sustained during the accident (to her shoulder and the scarring to her face), the Plaintiff presented as being physically able and her injuries did not impact on her life expectancy. However, as I explain below, Dr Mazwi's concluded that the Plaintiff's head injury resulted in neuropsychological damage, causing cognitive and behavioural disturbances, including memory loss, headaches, and poor concentration and focus.

[34] The impact of the Plaintiff's head injury, which Dr Mazwi classified as mild (class 1), was assessed according to the American Academy of Neurology grading, the Glasgow Coma Scale and the American Congress of Rehabilitation Medicine Definitions. A mild head injury includes concussion and amnesia which lasts for less than a day. According to Dr Mazwi, for mild head injuries, the alteration in one's mental status would be between 5 to 12 per cent. In the Plaintiff's case, according to the examination conducted by Dr Mazwi, the impairment was 7 per cent (i.e. at the mid of the scale for a mild head injury). This was evidenced by the report of persistent headaches (even four years after the accident) and the Plaintiff's poor memory recall.

[35] Approximately 15 per cent of patients with mild head injuries present with cognitive disturbances. According to Dr Mazwi, the Plaintiff fell within this range.

[36] Dr Mazwi concluded that the Plaintiff sustained a mild head injury, with long term mental disturbance, which would impact on her ability to study and work. This was evidenced by the fact that she still suffered from cognitive disturbances four years after the accident. Most patients with mild head injuries should recover fully within 12 months after the accident.

[37] Dr Mazwi therefore referred her to a neuropsychologist for further assessment to determine the Plaintiff's long term mental disturbance and her ability to work post-accident.

Ms Metse M. Mphelo - Clinical Psychologist

[38] Similarly to the expert report filed on behalf of Dr Mazwi, the report filed on behalf of Ms Mphelo also did not qualify her as an expert. Her curriculum vitae was handed in and then oral evidence was led as to her qualifications and experience, which I accepted.

[39] Significantly, Ms Mphelo has worked and trained as both a clinical and an industrial psychologist. Ms Mphelo explained that the difference between the two is that a clinical psychologist is trained to assess the impact of a patient's injuries on his or her psychological functioning, whilst an industrial psychologist works in industry and would be required to assess issues such as employee recruitment and an employee's capacity to fulfil a specific job's requirements.

[40] Unlike Dr Mazwi's report, however, Ms Mphelo's report was detailed. Both her report and evidence provided useful insight into the Plaintiff's cognitive functioning.

[41] Following Dr Mazwi's recommendation that the Plaintiff be referred to a psychologist for assessment, Ms Mphelo examined the Plaintiff in August 2022.

[42] Ms Mphelo confirmed: the Plaintiff's injuries, that prior to the accident: the Plaintiff's medical history was uneventful; she had never experienced any trauma or neurological illness; and there was no genetic history of medical disorders in the family.

[43] Ms Mphelo also confirmed the Plaintiff's biographical details, as contained in her expert report, and that prior to the accident the Plaintiff: had passed grade 10 (although she had to repeat grade 8); had passed level 2 of a Civil Engineering course at Buffalo City College; had failed to complete level 3 of the same course because of the trauma (both physical and psychological) caused by the accident; and had completed a project management certificate (a short course, unlinked to the building industry at NQF level 5) at the East London Management Institute in 2018.

[44] At the time of the assessment, the Plaintiff was unemployed.

[45] Prior to the accident, the Plaintiff was healthy, active, mentally stable and physically strong.

[46] Ms Mphelo confirmed that the Plaintiff reported daily headaches, pain in her left shoulder, sleeping disturbances, and numerous cognitive challenges, including memory loss, forgetfulness, and maintaining focus. She also reported emotional and behavioural changes, such as irritability, impatience, a short temper, extreme anxiety when travelling in a motor vehicle and a general feeling of devastation resulting from the impact of the accident, including thoughts of killing herself (although the Plaintiff has said that she would not actually carry these out).

[47] Ms Mphelo conducted many psychometric tests with a focus on identifying and assessing the cognitive challenges the Plaintiff reported. The purpose of these tests was to determine the impact of the minor head injury on the Plaintiff's intellectual functioning.

[48] The 'comprehension' and 'similarities' tests revealed that the Plaintiff had retained her reasoning, judging and abstract concept formation abilities. Her result for both tests was in the average range.

[49] The result for the 'memory for digits' test, however, was below average. This test assesses short-term memory and concentration and is a very useful test for measuring cognitive ability. The test result revealed an inadequate ability to concentrate and focus attention, which aligned with the symptoms reported by the Plaintiff.

[50] The next test used was the Bender Gestalt Test, which measures *inter alia* perceptual motor functioning, visual perceptual skills, and planning and organisation skills. This test helps to determine whether there has been any neuro-physical or cranial nerve damage. There was no evidence of neurocognitive impairment, which according to Ms Mphelo, aligned with Dr Mazwi's diagnosis.

[51] The next test assessed the Plaintiff's visual spatial functioning, focusing on memory and concentration. The Plaintiff's result was below average, which indicated challenges with attention span, concentration and short-term working memory.

[52] Thereafter, Ms Mphelo tested the Plaintiff's emotional functioning post the trauma of the accident. All three of the tests conducted revealed that the Plaintiff had suffered significant post-traumatic stress as a result of the accident, impacting on her coping skills, and leaving her moderately depressed, emotionally immature and vulnerable.

[53] These findings correlated with Dr Mazwi's findings.

[54] Ms Mphelo then proceeded to explain the impact of the findings of the test results on the Plaintiff's post-accident functioning. The main physical impact was headaches, dizziness and shoulder pain. The neurocognitive areas which have suffered the most are her attention span, her ability to focus and concentrate and her working short-term memory. Whilst the Plaintiff's intellectual abilities remain within the so-called average range, because of the neurocognitive impairment, according to Ms Mphelo, the Plaintiff will struggle in the future to acquire new knowledge and to cope with learning. As Ms Mphelo explained, 'memory is an engine for learning' and if one's memory is impaired, the ability to study or work competently would be severely

constrained. This consequence is exacerbated by the fact that the Plaintiff is also still struggling with post-traumatic stress disorder, depression and emotional disturbances.

[55] According to Ms Mphelo, this state of affairs could explain the Plaintiff's comment that she did not see the need to study further or to find employment.

[56] In Ms Mphelo's opinion, the *sequelae* to the head injury will impact negatively on her ability to study further, to compete fairly in the open labour market, her productivity at work, and to cope with the stress of employment. It is highly unlikely that she is capable of either finding a job or becoming a competent employee.

[57] Significantly, however, Ms Mphelo did recommend that the Plaintiff needed psychotherapy to assist her to cope with her depression, post-traumatic stress symptoms and behavioural problems, all of which impacted on her daily life, and her general well-being. There is no evidence that the Plaintiff has undergone therapy.

[58] Ms Mphelo also recommended that the Plaintiff be assessed by an educational psychologist, but no report of this nature has been filed.

[59] Ms Mphelo's evidence was clear, well-presented and assisted the court. She impressed me immensely.

Ms V. Ruiters – Occupational Therapist

[60] Like the other expert reports filed, Ms Ruiters' report also did not qualify her as an expert. Her *curriculum vitae* was handed in and oral evidence was then led as to her qualifications and experience, which I accepted.

[61] Ms Ruiters assessed the Plaintiff in July 2018. At the time the Plaintiff was 21 years old. She drove herself to the assessment.

[62] Ms Ruiters provided the court with useful biographical and family detail. The Plaintiff's mother is an educator and her father is a full-time pastor. She has two

siblings. The Plaintiff's eldest sibling, Siviwe, has a law degree and works in Cape Town. Her younger sister, Sibulele, has a degree in economics and is also employed.

[63] At the time of the assessment, the Plaintiff was busy with the Project Management course, as referred to earlier, and was unemployed.

[64] Ms Ruiters confirmed that the shoulder injury still caused the Plaintiff pain and that this impacted on her range of movement and her ability to engage in tasks which required shoulder strength. She would only be able to perform sedentary to "light" work and would probably need to work reduced hours. The construction / civil engineering sector would be far too physical for the Plaintiff to cope.

[65] The Defendant's expert occupational therapist agreed with Ms Ruiters on the impact of the shoulder injury, as is reflected in both their expert reports and the joint minute, and so the balance of Ms Ruiters' testimony related to the Plaintiff's cognitive functioning, especially in the work-environment.

[66] Ms Ruiters conducted a Cognitive Assessment of Minnesota (CAM) test to assess the Plaintiff's cognitive abilities. The CAM is a comprehensive one as it tests a wide range of cognitive skills in a hierarchical manner, that is from basic cognitive functioning to higher functioning cognitive skills. The CAM considers various aspects, ranging from memory, orientation and attention span, moving ultimately to concrete problem solving and abstract reasoning.

[67] It was in the mid-range of activities in the hierarchy test that the Plaintiff started struggling. She had difficulties with visual memory and sequency, recall, and auditory memory and sequency. She scored very poorly in relation to concrete problem solving and was unable to comprehend all the assigned abstract reasoning tasks.

[68] The impact of these results is that: the Plaintiff is unlikely to be able to follow instructions effectively, especially when these are not clearly set out; she is likely to be accused of not listening or paying attention; she will struggle with complex / multiple digit maths (with which given her level of education she should experience no

difficulty); and her ability to draw logical conclusions and to engage in abstract thinking will be severely constrained.

[69] The next test conducted by Ms Ruiters was the Work Agreement Scenario Profile (WASP) test, which screens working ability, and is specifically designed for the South African context.

[70] The conclusion reached is that given the cognitive symptoms displayed, the Plaintiff would have difficulty functioning as a project manager as this job requires many skills (attention span, recall, memory, co-ordination demands, i.e. between listening and follow through, and problem solving), all of which the Plaintiff now lacks.

[71] Based on these results, Ms Ruiters recommended that the Plaintiff consult a neurosurgeon and psychologist and concluded that the Plaintiff's working capacity was severely restrained.

[72] In 2022, and following receipt of the other medical reports, Ms Ruiters prepared a supplementary report. She confirmed the content of this report in her testimony.

[73] In summary, Ms Ruiters explained that the findings of the other doctors confirmed the results of the 2018 tests. In her opinion, therefore, the Plaintiff presented with reduced physically functionality and neurocognitive 'fallouts' that would impact on her ability to study and to work. She certainly would not be able to pursue her original goals and to qualify as a civil engineer. Moreover, in order to find employment in the first place (in a sedentary or light role), she would need an employer who was sensitive to her disabilities. Assuming she was able to secure such employment, she would be unlikely to sustain long-term employment because of her concentration and memory difficulties, which would impact on her performance and her relationship with colleagues. The Plaintiff would thus always remain at risk of loss of employment and would be very vulnerable in the open labour market.

[74] The Defendant's expert occupational therapist agreed with these findings, as is reflected in the Joint Minute dated May 2022.

Ms Moipone Kheswa - Industrial Psychologist

[75] Ms Kheswa's expert report did not qualify her as an expert, but her *curriculum vitae* was handed in and evidence was led as to her expertise as an industrial psychologist, which I accepted.

[76] Ms Kheswa first assessed the Plaintiff in April 2019 and then again in September 2022.

[77] Whilst Ms Kheswa's testimony focused specifically on the areas where she and the Defendant's expert industrial psychologist differed, Ms Kheswa provided valuable information about the Plaintiff's academic journey both before and after the accident and her family history.

[78] The Plaintiff left school in 2013 with a Grade 10 qualification. She then registered for a Civil Engineering Certificate at a TVET college (offering vocational studies). She passed Level 02, but because of the accident, she failed to complete Level 03 and Level 04 of the course, with the latter being the equivalent of grade 12.

[79] Had the Plaintiff completed the Civil Engineering Certificate, her plan was to register for a N6 Certificate in Civil Engineering which is required to become a qualified Artisan, Civil Engineering.

[80] Ms Kheswa confirmed that the Plaintiff had completed a Project Management Course and that she also worked as a Data Capturer for the Department of Education from March to September 2016, earning R5 000.00 per month. After her fixed term contract expired, it was not renewed. Later, from July to December 2019, the Plaintiff again worked, this time as a money mobile agent, earning R4 500 per month. As I indicate below, however, Ms Kheswa later testified that the Plaintiff had struggled with the course and the work she did because of her neuro-cognitive functioning.

[81] It is Ms Kheswa's opinion that had the Plaintiff not been injured in the accident, she would have completed her studies and qualified as an Artisan Civil Engineer. This opinion was based on the Plaintiff's scholastic record, her own narrative about her

vocational plans, her inclination towards a technical career path / environment, and the fact that her home life was cognitively stimulating, with education playing a prominent role. To illustrate, both the Plaintiff's parents have Honours degrees and her sisters have completed degrees (one in Law at an LLM level and the other in Economics).

[82] Artisan civil engineers are in demand in South Africa and the Plaintiff would not have struggled to find gainful employment. Initially she would have entered the labour market on the lower quartile earnings at Paterson level B4, progressing to the median quartile of level C3 or 4 when she reached the age of 45. At age 50 she would probably have reached the upper quartile band for Paterson level C4/C5. She would probably have retired at age 65.

[83] The joint minute filed by the parties reflects that the Defendant's expert industrial psychologist agreed with Ms Kheswa's projections.

[84] But, as Ms Kheswa testified, the experts disagreed about the Plaintiff's employment prospects post the accident. According to the Defendant's expert, the Plaintiff would have moved to a "lighter career" and would probably have been able to work as a skilled employee in the corporate section.

[85] Ms Kheswa disagreed with this opinion. She explained that given the nature of the cognitive difficulties that the Plaintiff experiences as a result of the injury, it would be highly unlikely that she would be able to sustain employment, even an office environment, where the work is not physical in nature. The reality is that without good memory, recall and concentration a person is unemployable.

[86] Even if the Plaintiff were to try and conceal her difficulties or if she were to find work with a sensitive employer (which is nigh impossible in the current economy and business environment), the Plaintiff would have been unable to perform at a level which would sustain employment.

[87] Should the Plaintiff find employment, but then lose her job, she would find it difficult to secure and sustain similar employment elsewhere, given her medical

history, cognitive and psychological difficulties and the resulting impact on her performance and efficiency,

[88] Following this testimony, I asked Ms Kheswa to comment on the relevance of the fact that the Plaintiff had been employed as a data-capturer for the Department of Education for a fixed term. Ms Kheswa response was that the Plaintiff told her that she had secured this job through her mother's contacts, but that the contract was not renewed because she made many mistakes during her tenure, which was very distressing. Also, the Plaintiff told Ms Kheswa that she only managed to complete the project management course with the assistance of her family, who helped her to complete assessments.

[89] According to Ms Kheswa, this narrative is consistent with her findings and opinion, namely that the Plaintiff is not cognitively equipped to find employment. As Ms Kheswa noted, the other experts called on behalf of the Plaintiff all agree that the mild head injury has impacted severely on the Plaintiff's cognitive functioning.

[90] Ms Kheswa did not comment, however, on whether psychotherapy as recommended by the clinical psychologist would assist the Plaintiff to overcome some of the cognitive issues she currently faced.

Ms Julie Valentini – Actuary

[91] Plaintiff's Counsel explained that the original actuary from Munro Forensic Actuaries, Mr Willem Boshoff, was not available to give evidence on the day of the trial, because of a personal family commitment, which reason I accepted. However, a second and updated actuarial report, dated 26 January 2023, had been prepared by both Mr Boshoff and Ms Julie Valentini and Ms Valentini had filed an affidavit and was also available to testify via Zoom.

[92] I accepted Ms Valentini's affidavit and Counsel for the Plaintiff's closed the Plaintiff's case, praying for damages for loss of earnings in the sum R5 520 800.00, as per the Amended Particulars of Claim and the original actuarial report. When I pointed out that Ms Valentini had since calculated the Plaintiff's loss of earnings to be

R9 438 400, which was far in excess of the original calculated loss and the amount claimed for loss of earnings, Counsel elected to re-open the Plaintiff's case to enable Ms Valentini to testify to explain the increased claim and / or to enable the Plaintiff's legal team to apply for an amendment of the Plaintiff's Particulars of Claim to reflect the claim for loss of earnings accurately.

[93] Unfortunately, given the vexed relationship between technology and the strain of loadshedding, evidence via Zoom could not proceed on the day. The matter was then postponed to a later date to enable Ms Valentini to testify.

[94] When the trial resumed, Ms Valentini presented evidence via Zoom. Her qualifications as an actuary were accepted.

[95] Ms Valentini testified that she was instructed to calculate the capital value of the potential loss of earnings, both past and future, suffered by the Plaintiff as a result of the accident. Figures were calculated as at 1 February 2023.

[96] Using the report of the Plaintiff's industrial psychologist, Ms Kheswa, and the other experts, Ms Valentini testified that she worked on the assumption that the Plaintiff would be unemployable in the future as a result of the accident.

[97] Ms Valentini estimated that the Plaintiff would have entered the labour market in January 2019 as an intern after having completed her courses. She would have worked as an intern for a year, and would have commenced employment as an artisan civil engineer in January 2020. As testified by Ms Kheshwa, the industrial psychologist, the Plaintiff would have entered the labour market on the lower quartile earnings at Paterson level B4 (for the intern year at 50per cent of this scale), progressing to the median quartile of level C3 or 4 when she reached the age of 45. At age 50 she would probably have reached the upper quartile band for Paterson level C4 / C5. Annual inflationary increases would apply thereafter until retirement at age 65.

[98] Ms Valentini noted, however, that the industrial psychologist's report used *The Quantum Yearbook 2019* by Dr R J Koch to reflect the Plaintiff's projected earnings.

Ms Valentini's second report updated these figures using *The Quantum Yearbook 2022* by the same author.

[99] In Ms Valentini's view, but for the accident, the Plaintiff's uninjured earnings from the date of the accident to the date of the trial, that is her past loss of earnings, would have been R868 000. With the application of a standard 5 per cent contingency, this figure was reduced to R824 600.

[100] From this amount, the Plaintiff's injured earnings of R62 000, had to be deducted. The Plaintiff's past loss of earnings therefore amounted to R762 600.

[101] The actuarial calculation for the Plaintiff's future loss of earnings (from the date of trial until retirement at age 65), being the anticipated capital value of the Plaintiff's earnings had she been able to work, was calculated as R11 342 100. To this, the actuary applied the so-called standard 15 per cent contingency to reduce the Plaintiff's future loss of earnings to R9 640 785. According to Ms Valentini, the 15 per cent contingency which she applied took into account the usual factors that would influence the Plaintiff's earning capacity, including her health and life expectancy.

[102] The combined past and future loss of earnings amounted to R10 403 385.

[103] As Ms Valentini correctly pointed out, the claim, as formulated, fell within the ambit of the RAF Cap, as introduced by section 17(4)(c) of the Road Accident Fund Amendment Act 19 of 2005. Contingencies must, however, be deducted before the cap and, for this reason, the claim had to be reduced by 9.28 per cent.¹

[104] The result is that the Plaintiff's amended claim for loss of earnings was assessed at R9 438 400.

[105] The Plaintiff then closed her case.

Employability

¹ See *Sil v Raf* 2013 (3) SA 412 (GSJ).

[106] All the experts who presented evidence agree that the Plaintiff will not be able to complete her Civil Engineering certificate and will not be able to sustain employment, even in a sedentary career, because of the *sequelae* of the injuries sustained.

[107] Whilst it is unfortunate that none of the experts testified as to the possible positive impact of psychotherapy to address the impact of the mild head injury on the Plaintiff's cognitive and behavioural functioning, as recommended by the clinical psychologist, I am compelled to accept that the Plaintiff is unemployable in the open labour market, as concluded by the experts. The positive impact of such therapy should however be considered when assessing the contingency which should apply when calculating the Plaintiff's future loss of earnings.² Nonetheless, as I have said, I accept that the Plaintiff is not expected to return to work in future, given her physical, psychological, and cognitive presentation.

Loss of earnings and applicable contingencies

[108] The approach to determining loss of earnings and applicable contingencies, was recently lucidly explained by the Supreme Court of Appeal in *Road Accident Fund v Kerridge*.³ I have taken the liberty of repeating five consecutive paragraphs from this judgment given their applicability to this case:

“[40] Any claim for future loss of earning capacity requires a comparison of what a claimant would have earned had the accident not occurred, with what a claimant 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 estimate, which is often a very rough estimate, of the present value

² The industrial psychologist indicated that there is no guarantee that treatment and recuperation would alleviate the Plaintiff's functioning, but the reverse is also true. Treatment, including therapy, which was recommended, could improve the Plaintiff's functioning.

³ 2019 (2) SA 233 (SCA) at paras [40]—[44]. Note that I have not included the citations for the cases mentioned in the quote.

of the loss.

[41] Courts have used actuarial calculations in an attempt to estimate the monetary value of the loss. These calculations are obviously dependent on the accuracy of the factual information provided by the various witnesses. In order to address life's unknown future hazards, an actuary will usually suggest that a court should determine the appropriate contingency deduction. Often a claimant, as a result of the injury, has to engage in less lucrative employment. The nature of the risks associated with the two career paths may differ widely. It is therefore appropriate to make different contingency deductions in respect of the pre-morbid and the post-morbid scenarios. The future loss will therefore be the shortfall between the two, once the appropriate contingencies have been applied.

[42] Contingencies are arbitrary and also highly subjective. It can be described no better than the oft-quoted passage in *Goodall v President Insurance Co Ltd* where the court said: 'In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practiced by ancient prophets and soothsayers, and by authors of a certain type of almanack, is not numbered among the qualifications for judicial office.'

[43] It is for this reason that a trial court has a wide discretion when it comes to determining contingencies. An appeal court will therefore be slow to interfere with a contingency award of a trial court and impose its own subjective estimates. ...

[44] Some general rules have been established in regard to contingency deductions, one being the age of a claimant. The younger a claimant, the more time he or she has to fall prey to vicissitudes and imponderables of life. These are impossible to enumerate but as regards future loss of earnings they include, inter alia, a downturn in the economy leading to reduction in salary, retrenchment, unemployment, ill health, death, and the myriad of events that may occur in one's everyday life. The longer the remaining working life of a

claimant, the more likely the possibility of an unforeseen event impacting on the assumed trajectory of his or her remaining career. Bearing this in mind, courts have, in a pre-morbid scenario, generally awarded higher contingencies, the younger the age of the claimant. This court, in Guedes, relying on *Koch's Quantum Yearbook 2004*, found the appropriate pre-morbid contingency for a young man of 26 years was 20per cent which would decrease on a sliding scale as the claimant got older. This, of course, depends on the specific circumstances of each case but is a convenient starting point.”

[109] As said earlier, I am satisfied that the evidence has demonstrated that the Plaintiff is unable to work due to the accident and that this situation will continue for the rest of her life.⁴

[110] The Plaintiff must, however, prove her actual loss of income.⁵ The court requires good evidence to make this determination. There must be some reasonable basis for arriving at a particular figure.

[111] In *Goldie v City Council of Johannesburg*⁶ the court observed that:

‘[I]n the case where it is necessary to award compensation for loss of future earnings, I have difficulty in appreciating what better starting point there can be than the present value of the future earnings which the Plaintiff has been prevented from earning. From this point proper allowance must be made for contingencies, but if the fundamental principle of an award of damages under *lex Aquilia* is compensation for patrimonial loss, then it seems to me that one must try to ascertain the value of what was lost on some logical basis and not impulse or by guesswork.’

[107] Each case must depends on its own facts and circumstances and the evidence before the court,⁷ but as held in *Hersman v Shapiro and Company*:⁸

⁴ See *Chakela v Road Accident Fund* [2017] ZAGPJHC 141.

⁵ *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) at para [11].

⁶ 1948 (3) SA 913 (W) at 920.

⁷ *Terblanche v Minister of Safety and Security* 2016 (2) SA 109 (SCA) at para [14].

⁸ 1926 TPD 367 at 379-380.

‘Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages.’

[108] There are some issues with the evidence in this case. The Plaintiff’s testimony was vague and not very detailed. Given that it is her case that she will never be able to work again, she did not offer a satisfactory explanation for how she was able to complete a project management course successfully and work for two contract periods between the date of the accident and the date of the trial. Her statement that ‘she did not see a need to do so’ (when asked out about future working and study plans) concerned me. I would have expected the Plaintiff to explain for herself that she had memory recall and focus problems and that the experiences had been both stressful and damaging. I would also have expected her to testify about whether she is undergoing therapy for the cognitive and behavioural challenges that she is facing, but this evidence was not presented. I shall take these factors into account when considering the applicable contingency deduction for the claim for future loss of earnings.

[109] Luckily for the Plaintiff, the industrial and clinical psychologists convinced me that the Plaintiff’s cognitive functioning was indeed impaired by the head injury, despite the apparent successful completion of a certificate course and employment opportunities on two occasions.

[110] I am also, of course, extremely aware of the fact that the Defendant’s defence was dismissed and that only the Plaintiff’s case was presented.

[111] Nonetheless, the evidence produced by the Plaintiff is sufficient to establish that damage has been suffered, and to determine the amount of compensation. As set out

in *Hersman* ‘if it is certain that pecuniary damage has been suffered, the Court is bound to award damages.’⁹

Contingency deductions

[112] The only issue is that of the contingency deductions which should apply. Contingencies are the usual hazards that ‘beset the lives and circumstances of ordinary people’.¹⁰ The principle is that provision must be made for the fact that the assessed loss may be impacted upon by uncertain events which occur independently of the loss caused by the accident,¹¹ such as the possibility of an early death or an illness which prevents a person from working or a retrenchment. The percentage of the contingency deduction depends on numerous factors and can range from 5 per cent to 50 per cent, depending on the facts of the case.¹²

[113] However, from an actuarial perspective five per cent and 15 per cent for past and future loss, respectively, have become accepted as ‘normal contingencies’. The usual considerations include, taxation, early death, saved travel costs, loss of employment, promotion prospects divorce, etc.¹³ In this case, the second actuarial assessment, dated January 2023, took these factors into account.

[114] Ultimately, however, the deduction is the prerogative of the court.¹⁴ The court must nonetheless do the best it can in the particular circumstances of the case.

[115] It is standard to link contingencies to the age of the Plaintiff. As was stated by the SCA in *Road Accident Fund v Kerridge*,¹⁵ the younger the plaintiff the more likely

⁹ 1926 TPD 367 at 379.

¹⁰ *RAF v Guedes* 2006 (5) SA 583 (SCA) at 585.

¹¹ *Southern Insurance Association v Bailey* 1984 (1) SA 98 (A) at 116-117.

¹² *AA Mutual Association Ltd v Maqula* 1978 (1) SA 805 (A) at 812; *Goodall v President Insurance* 1978 1 SA 389 (W) at 393.

¹³ *RAF v Kerridge* 2019 (2) SA 233 (SCA) at para [30], quoting Robert J Koch *The Quantum Yearbook* (2015) at 120.

¹⁴ *Goodall v President Insurance* 1978 1 SA 389 (W) at 392H-393G; *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd* 1980 (3) SA 105 (A) at 114F-115C-D.

¹⁵ 2019 (2) SA 233 (SCA) at para [44].

it is that he or she may be the victim of a detrimental life event impacting on the ability to work.¹⁶

[116] I am aware that the fortunes of life are not always negative. For example, when calculating the future loss of earnings of a young child, the court should consider that the child may have an exceptional career and earn far in excess of what was initially anticipated.¹⁷ This rule, however, does not apply in this case because evidence was led as to the career choice that the Plaintiff had already made and her loss of income was calculated based on this choice.

[117] At the time of the accident, the Plaintiff was 18 years old. When the second actuarial report was prepared the Plaintiff was 26 years old.

[118] The Plaintiff has studied and worked after the accident, but her personal account was that she does not plan to do so in the future. As explained by the experts, this is probably because of the stress of working and studying caused by her cognitive and behavioural difficulties, but the Plaintiff did not specifically give this evidence.

[119] There is also no evidence that the Plaintiff is attending therapy sessions, even though she is depressed and has thoughts of suicide.

[120] How do these factors impact on the contingency deductions to be applied in this case?

[121] I am satisfied that the 5 per cent contingency applied by the actuary in respect of the past loss of earnings is a suitable one.

[122] I have some difficulty, however, with the 15 per cent contingency suggested by the actuary for the claim for future loss of earnings, given *inter alia*: the Plaintiff's age (currently 26 years old); her own attitude towards her future, complicated by the fact that there is no evidence of therapeutic interventions in an attempt to alleviate the

¹⁶ See too *Bee v Road Accident Fund* 2018 (4) SA 366 SCA at para [116].

¹⁷ *Southern Insurance Association v Bailey* 1984 (1) SA 98 (A) at 117.

Plaintiff's behavioural difficulties; and the Plaintiff's state of mind, including her thoughts of suicide (even though she says that she is not likely to take her own life).

[123] Plaintiff's counsel, himself, conceded in his written submissions that a 20 per cent contingency for future loss of earnings would be appropriate. He referred me to *Goodall v President Insurance*¹⁸ in which the Court held that the so-called sliding scale of a half per cent per year to retirement age should be adopted, that is 25 per cent for a child, 20 per cent for a youth and 10 per cent in middle age.

[124] The Plaintiff is a youth and the starting point should thus be a 20 per cent contingency deduction. However, given the other factors which I have mentioned, namely the successful completion of the certificate course and two working stints, coupled with her depression and the lack of evidence of any therapeutic interventions, in my opinion an appropriate contingency deduction based on the facts of this case should be 25 per cent for the future loss of earnings.

[125] The calculation is therefore as follows:

- a. Past loss of earnings: R868 000, reduced to R824 600 with the 5 per cent contingency, minus R62 600 for actual earnings, a total of R762 600.
- b. Future loss of earnings: R11 342 100, less a 25% contingency of R2 835 525, totalling R8 505 575.
- c. **TOTAL LOSS OF EARNINGS: R9 269 175.00**

[126] The RAF Amendment Act cap now no longer applies. The cap per annum as at the date of the accident was R234 366 per annum.¹⁹ According to the Morris method of actuarial calculation, which was accepted as being the correct method in *RAF v*

¹⁸ 1978 (1) SA 389 (W). See too the more recent decision from this division of *SJ obo SJ v RAF* [2022] ZAECBHC 41 (11 November 2022) where the court referred to Goodall with approval and referenced that according to Koch Quantum Yearbook (2022) 121 the standard contingency for a minor child is 25 per cent. In that case the minor child was born in 2005.

¹⁹ See *RAF v Sweatman* 2015 (6) SA 186 (SCA).

Sweatman,²⁰ the correct approach is as follows: “If in each year after the accident the actual loss exceeds the annual loss determined at the date of the accident, the Fund is liable to pay only the lesser amount – the annual loss.”²¹ According to my calculations, the cap that applies in this scenario is R10 312 104.00 and the total loss of earnings with a 25% contingency deduction falls below this figure.

Order

[1] The following order is issued:

- a. The Defendant shall pay to the Plaintiff an amount of R R9 269 175.00 in respect of past and future loss of earnings within 14 days from date of this order;
- b. Interest on the aforesaid amount calculated from the day following the lapse of a period of 14 days from the date of the granting of this order to date of final payment, in accordance with the Prescribed Rate of Interest Act 55 of 1975, read with section 17(3)(a) of the Road Accident Fund Act 56 of 1996, as amended;
- c. The Defendant shall pay the Plaintiff’s costs of the suit, as taxed or agreed, on a scale as between party and party, such costs to include the costs of Counsel employed on behalf of the Plaintiff, including preparation, consultations with witnesses as well as the three trial days and, and furthermore costs incurred in respect of the reports, addendums, joint minutes, appearances and reservation fees, if any, of the following expert witnesses:-
 - i. Dr. K Watt – Orthopaedic Surgeon;
 - ii. Dr. AB Mazwi - Neurosurgeon;
 - iii. Ms M Mphelo – Clinical Psychologist;
 - iv. Ms V. Ruiters – Occupational Therapist;

²⁰ 2015 (6) SA 186 (SCA).
²¹ At para 12.

- v. Ms M. Kheswa – Industrial Psychologist; and
vi. Ms J. Valenini – Consulting Actuary.

d. In the event of the costs above in paragraph (d) not being agreed, the Plaintiff's bill of costs will be served on the Defendants, and the taxed bill of costs will be payable within 14 (fourteen) days after taxation.

e. The compensation payments and costs referred to in paragraphs (a) and (d) above, are to be made in the Plaintiff's attorneys' trust banking account, the details of which are as follows: Trust Banking Account: Name: KOLISWA JOJO INC.

Bank:	First National Bank
Branch:	Vincent Park
Type of account:	TRUST Business Trust
Cheque Account Number:	6[...]
Branch Code:	211-021
E-mail:	a[...]@kjojoattorneys.co.za
Reference:	Gwarube/MVA/Anda

f. The Plaintiff and her attorneys, Kholiswa Jojo Inc., have concluded a valid fee agreement in terms of the Contingency Fees Act 66 of 1997.

J. C. BOTHA
ACTING JUDGE OF THE HIGH

APPEARANCES:

Counsel for the Plaintiff:	<i>Adv Magadla</i>
Instructed by:	Koliswa Jojo Attorneys East London
For the Defendant:	No appearance

Heard on:	26 January; 14 February 2023
Delivered on:	10 October 2023