REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA,**
**MPUMALANGA DIVISION (MAIN SEAT)**

**Case Numbers: 1823/19, 2538/18, 315/20, 208/20, 4082/19, 4423/19, 2382/19 and 4067/19**

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|---|---|
| 1. | REPORTABLE: ~~YES~~/ NO |
| ~~2.~~ | OF INTEREST TO OTHER JUDGES: YES/~~NO~~ |
| 3. | REVISED. |
| **1 APRIL 2022** | |
| DATE | SIGNATURE |

***In Re:***

In the matter between:

**PHUMZILE REMEMBER MNISI** **Plaintiff**

and

**THE ROAD COLLISION FUND** **Defendant**

**AND SEVEN SIMILAR MATTERS**

Due to the COVID-19 pandemic and the lock down provisions, this judgment will be delivered by placing a copy thereof, together with the order in respect of each of the matters on each of the court files. The judgment will also be sent to SAFLII for publication.

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**JUDGMENT**

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**Roelofse AJ:**

**INTRODUCTION**

[1] All the actions to which this judgment relates are separate actions that were instituted against the Road Accident Fund *('the RAF')*[1] by plaintiffs who are claiming compensation from the RAF arising from injuries they have sustained after they have been involved in motor vehicle collisions. In all matters, the plaintiffs have complied with the statutory prescripts[2] before instituting their actions.

[2] The actions include: PHUMZILE REMEMBER MNISI v The RAF / Case Number: 1823/19 ('MNISI"), BIGBRAIN SKUMBUZO MALALA v The RAF /

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[1] The RAF was established by section 2 of the Road Collision Fund Act 56 of 1996 ('the Act'). The object of the RAF is set out in section 2 of the Act as follows:'

> *'The object of the Fund shall be the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles.'*

[2] See section 24 of the Act. Section 26(6) of the Act provides:

> *'No claim shall be enforceable by legal proceedings commenced by a summons served on the Fund or an agent—*
>
> *(a) before the expiry of a period of 120 days from the date on which the claim was sent or delivered by hand to the Fund or the agent as contemplated in subsection (1); and*
>
> *(b) before all requirements contemplated in section 19 ( f ) have been complied with:*
>
> *Provided that if the Fund or the agent repudiates in writing liability for the claim before the expiry of the said period, the third party may at any time after such repudiation serve summons on the Fund or the agent, as the case may be.*

Case Number: 2538 (‘MALALA’); BOTHELO KGAMANE v the RAF / Case Number: 315/2020 (‘KGAMANE’); EMMELINAH NYATSELA MASHABA v The ROAD COLLISION FUND / Case Number: 208/20 (‘MASHABA’); NDUBASI ROBERT SHABANGU v The ROAD COLLISION FUND Case Number: 4082/19 (‘SHABANGU’); BUSISIWE FIKILE KHOZA v The ROAD COLLISION FUND / Case Number: 4423/19 (‘KHOZA’); CRAIG TALENT NGOBE v The ROAD COLLISION FUND / Case Number: 2382/19 (‘NUOBE’); and ANDREAS JAMES SITHOLE v The ROAD COLLISION FUND / Case Number: 4067/19 (‘SITHOLE’).

[3] I have resolved to produce this one judgment in respect of all the actions because they share similarities. There are also differences. However, the circumstances and way the actions proceeded at the hearing in my view, warrants this judgment. What is stated in this judgment has been stated before and should be obvious and nothing new. However, the aforesaid actions prompted me to restate what should be obvious for it appears to be not.

Similarities

[4] The first obvious similarity in respect of all the actions are that the RAF is the defendant. In addition: the matters were enrolled before me on 31 January 2022; the RAF did not participate in any pre-trial or case management procedures in terms of the Uniform Rules[3] or the case management directives of this Division[4]; no

[3] Rules 37 and 37A.
[4] Paragraph 2 of this Division’s Practice Directives dated 9 January 2020 as well as paragraphs 3.2 to 3.2.3 of this Division’s Consolidated COVID 19 Directive dated 6 September 2021.

attorney was on record for the RAF when the trials commenced; only the plaintiffs appeared when the trials were called; all the matters proceeded in terms of Rule 39(1) of the Uniform Rules; no oral evidence was tendered by any of the plaintiffs or their witnesses; the plaintiffs presented evidence on affidavit where after they closed their cases; and, the plaintiffs were all represented by the same firm of attorneys.

Differences

[5] In the KGAMANE, MASHABA, SHABANGU, KHOZA and NGOBE matters, the "merits" were previously settled. I put "merits" in quotation marks because, it has become custom in RAF matters that the enquiry after the "merits" have been settled summarily proceeds to "quantum". I put "quantum" also in quotation marks because this is where the plaintiffs in RAF matters proceed to prove the damages that they have suffered as a result of bodily injuries they sustained as a result of the collision or a dependant claims for loss of support due to the death of a breadwinner. These damages more often than not include both pecuniary and non-pecuniary loss. At this stage of the proceedings plaintiffs seek to rely on medical reports and the opinions of various experts. I return to the aspect of settlement on the "merits'' and the issue of "quantum" later in this judgment.

[6] In the MNISI, MALALA and SITHOLE matters, there were no settlement in respect of the "merits".

[7] In the MNISI, MASHABA, KHOZA, NUOBE and SITHOLE matters, the RAF delivered a special plea and a plea. In its special pleas, the RAF disputed its

obligation to compensate the plaintiffs for non-pecuniary loss for the alleged serious injuries they have sustained in the collisions.

[8] In the KGAMPANE matter, the RAF delivered no notice of intention to defend and has filed no plea.

[9] Save for the KGAMAPE matter (where no attorney was on record for the RAF), the RAF's attorneys withdrew as attorneys of record for the RAF relatively long before the date of trial. After the RAF's attorneys' withdrawal, further engagements by the plaintiff's attorneys were with the RAF's claim handlers. Calls by the plaintiff's attorneys to participate in pre-trial procedures were ignored. In all the matters, the RAF was served with the notice of set down for trial.

[10] It is therefore apparent from the above that the mix of matters that were before me on 31 January 2022, pertaining to representation, settlement, non-participation or partly-participation by the RAF, represents a relatively inclusive mix of RAF matters that are before the courts in this division. During the proceedings this court has also encountered issues of proof and procedure which is also common in RAF trials.

[11] This judgment will proceed as follows: Firstly, I deal with the cause of action in RAF matters. Secondly, I deal with procedural issues. Thirdly, I discuss evidence and lastly, I shall deal with each of the actions and pronounce on the amounts of compensation to be awarded in each case if an entitlement to compensation was proven by the respective plaintiffs.

**CAUSE OF ACTION IN RAF MATTERS**

[12] In C Septoo obo J M Septoo & another v The Road Collision *Fund* (058/2017) [2017] ZASCA 164 (29 November 2017) at para. 3, it is said by the Supreme Court of Appeal:

> 'Section 3 of the Act stipulates that:
>
> > 'The object of the Fund shall be the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles.'
> >
> > The underlying basis for the Act is the common law principles of the law of delict. A claimant must therefore prove all the elements of a delict before it can succeed with its claim in terms of the Act.'

[13] In Evins v Shield Insurance Co Ltd [1980] 2 All SA 40 (A)[5], the elements of a claim founded on delict were reaffirmed as follows:

> 'In the case of an Aquilian action for damages for bodily injury (and here I use the term Aquilian in an extended sense to include the solatium awarded for pain and suffering, loss of amenities of life, etc., which is sui generis and strictly does not fall under the umbrella of the actio legis Aquiliae: Government of RSA v Ngubane, 1972 (2) SA 601 (AD) at p 606 E - H) the basic ingredients of the plaintiff's cause of action are (a) a wrongful act by the defendant causing bodily injury, (b) accompanied by fault, in the sense of culpa or dolus, on the part of the defendant, and (c) damnum, i.e. loss to plaintiff's patrimony, caused by the bodily injury. The material facts which must be proved in order to enable the plaintiff to sue (or facta probanda) would relate to these three basic ingredients and upon the concurrence of these facts the cause of action arises. In the usual case of bodily injury arising from a motor collision this concurrence would take place at the time of the collision.'

[5] At at page 58:

[14] The Constitutional Court, in Law Society of South Africa and Others v Minister for Transport and Another 2011 (1) SA 400 (CC) at para. 25 confirmed that the Act retained the common law fault based liability:

> '……. Firstly, the scheme insures road users against the risk of personal injury and their dependants against the risk of their death caused by the fault of another driver or motorist. It has retained the underlying common law fault-based liability. This means that any collision victim or a third party who seeks to recover compensation must establish the normal delictual elements. The claimant must show that he or she has suffered loss or damage as a result of personal bodily injury or the injury or death of a breadwinner arising from the driving of a motor vehicle in a manner which was wrongful and coupled with negligence or intent.'

[15] Section 17 of the Act provides for the liability of the RAF (and its agents). The section provides:

> '17. Liability of Fund and agents.—(1) The Fund or an agent shall—
>
> (a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;
>
> (b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,
>
> be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee: 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.'

[16] Non-pecuniary loss means loss that is not quantified in money and includes, amongst other things, compensation for pain and suffering, disfigurement, loss of amenities of life, loss of enjoyment of life, emotional shock and so forth.

[17] Therefore, for the RAF to be liable to compensate the third party (ie, the plaintiff), it is necessary for the plaintiff to allege and prove: (a) the loss resulted from bodily injury to the plaintiff or, in the case of a dependant claiming loss of support subsequent to the death of a breadwinner, such loss; (b) the loss arose from the driving of a motor vehicle; (c) the injury was due to negligence or other wrongful act; (d) the negligence or wrongful act must be that of the driver or that of the owner of the motor vehicle or that of his or her employee.

Damages claimed in delictual actions

[18] The law adopts a wide concept of damage which includes patrimonial and non-patrimonial loss. In this regard see: Casely, NO v Minister of Defence [1973] 2 All SA 86 (A), at p94.[6] In RAF actions, the heads of damages usually include both categories of damages.

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[6] Where it is said as follows:

> 'Under the common law a person or his dependant is only accorded a single, indivisible cause of action for recovering damages for all his loss or damage for the wrongful act causing his disablement or death (see Oslo Land Co. Ltd. v. Union Government, 1938 A.D. 584, and Schnellen v. Rondalia Assurance Corporation of S.A. Ltd., 1969 (1) S.A. 517 (W) at p. 520D-H). Even though, as plaintiff's counsel maintained, the claim at common law for non-economic loss for pain, suffering, shock, disfigurement, and loss of amenities is anomalous and regarded as a kind of solatium (see Government of Republic of S.A. v. Ngubane, 1972 (2) S.A. 601 (A.D.) at pp. 606-7, it nevertheless still is an indivisible part of that single cause of action of the disabled person.'

[19] In respect of RAF actions, an award for non-pecuniary loss is restricted to a serious injury and paid in a lump sum.[7] The seriousness of the injury is assessed in terms of section 17(1A) of the Act, that provides as follows:

> '(1A) (a) Assessment of a serious injury shall be based on a prescribed method 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.
>
> (b) The assessment shall be carried out by a medical practitioner registered as such under the Health Professions Act, 1974 (Act No. 56 of 1974).'

[20] Regulation 3 of the Road Collision Fund Regulations, 2008[8] provides for the mechanism for the assessment of serious injury in terms of section 17(1A). It provides for: an assessment of the plaintiff by a medical practitioner in accordance with the Regulations[9] (usually complied with by the completion of the RAF4 form; the acceptance or rejection of the assessment by the RAF[10]; and an appeal process in the event of a rejection of the assessment.[11]

[21] In Road Collision Fund v Duma, Road Collision Fund v Kubeka, Road Collision Fund v Meyer, Road Collision Fund v Mokoena [2013] 1 All SA 543 (SCA, the Supreme Court of Appeal, para. 19 said as follows over Section 17(1)(a) and the regulation:

> 'In accordance with the model that the legislature chose to adopt, the decision whether or not the injury of a third party is serious enough to meet the threshold requirement for an

[7] Section 17 of the RAF Act.
[8] GNR.770 of 21 July 2008, Government Gazette No. 31249.
[9] Regulation 3(1)(a).
[10] Regulation 3(3)(e).
[11] Regulations 4 to 12.

award of general damages was conferred on the Fund and not on the court. That much appears from the stipulation in regulation 3(3)(c) that the Fund shall only be obliged to pay general damages if the Fund – and not the court – is satisfied that the injury has correctly been assessed in accordance with the RAF 4 form as serious. Unless the Fund is so satisfied the plaintiff simply has no claim for general damages. This means that unless the plaintiff can establish the jurisdictional fact that the Fund is so satisfied, the court has no jurisdiction to entertain the claim for general damages against the Fund. Stated somewhat differently, in order for the court to consider a claim for general damages, the third party must satisfy the Fund, not the court, that his or her injury was serious. Appreciation of this basic principle, I think, leads one to the following conclusions:

(a) Since the Fund is an organ of State as defined in s 239 of the Constitution and is performing a public function in terms of legislation, its decision in terms of regulations 3(3)(c) and 3(3)(d), whether or not the RAF 4 form correctly assessed the claimant's injury as 'serious', constitutes 'administrative action' as contemplated by the Promotion of Administrative Justice Act 3 of 2000 (PAJA). (A 'decision' is defined in PAJA to include the making of a determination.) The position is therefore governed by the provisions of PAJA.

(b) If the Fund should fail to take a decision within reasonable time, the plaintiff's remedy is under PAJA.

(c) If the Fund should take a decision against the plaintiff, that decision cannot be ignored simply because it was not taken within a reasonable time or because no legal or medical basis is provided for the decision or because the court does not agree with the reasons given.

(d) A decision by the Fund is subject to an internal administrative appeal to an appeal tribunal.

(e) Neither the decision of the Fund nor the decision of the appeal tribunal is subject to an appeal to the court. The court's control over these decisions is by means of the review proceedings under PAJA.'

[22] Therefore, in the absence of the administrative process prescribed in section 17(1)(a) and regulations 3 to 12, the court is ousted of its jurisdiction to adjudicate a RAF plaintiff's non-pecuniary loss or, as it is always referred to in RAF matters, "general damages". Theoretically, the loss of earning capacity falls under "general damages" as it requires the court to make an assessment of a future situation. The loss of earning ability may or may not materialize or it may materialize to a larger or lesser extent that was initially anticipated. In RAF matters, loss of future income is dealt with out of the realm of general damages. In my view rightfully so because section 17(1)(a) refers to non-pecuniary loss. Loss of future income is capable to be calculated or assessed in monetary terms while the iniuria caused to a plaintiff as a result of the collision cannot be determined mathematically.

The so called "settlement on merits".

[23] Under this heading I discuss what it really means if the RAF settles the "merits" of the claim in whatever form. Sometimes "merits" are settled by the acceptance of an offer made by the RAF or through an admission during the pre-trial process.

[24] In the actions in this judgment where the "merits" were settled, it was through the acceptance of an offer made by the RAF which was accepted by the plaintiffs and not in any pre-trial process.

[25] The is how the RAF's standard offer on "merits", in relevant part, reads and this is what was formally accepted by the plaintiffs in the matters before me:

> 'The Road Collision Fund (RAF) has considered the available evidence relating to the manner in which the motor vehicle collision giving rise to this claim occurred. The RAF has concluded that the collision resulted from the sole negligence of the RAF's insured driver.
>
> Consequently, without prejudice, the RAF offers to settle the issue of negligence *vis-a-vis* the occurrence of the motor vehicle collision on the basis that insured driver was solely negligent in causing the motor vehicle collision.
>
> This offer is limited to the aspect of negligence as to the manner in which the collision occurred. The offer may not be interpreted or construed in a manner that would have the RAF concede any other aspect of the claim. To avoid doubt, the RAF reserves all its rights in law with regards to all the other procedural and substantive aspects of the claim.
>
> Acceptance of this offer will only be effective when the RAF receives this document with the portion "Acceptance of Offer" fully completed.'[12]

[26] It immediately becomes clear that the RAF only accepts that the collision occurred due to the sole (or in some instances the part negligence) of the insured driver and nothing else.

[27] Therefore, all the other elements of the RAF cause of action remains to be proven by the plaintiffs. This includes: (a) the loss resulted from bodily injury to the plaintiff or, in the case of a dependant claiming loss of support subsequent to the

[12] Taken from the Mashaba matter.

death of a breadwinner, such loss; (b) the loss arose from the driving of a motor vehicle; and that (c) the injury was due to negligence or other wrongful act.

[28] It should also be immediately apparent that the causal link between the negligent act of the insured driver which was the sole or contributory cause of the collision, the injuries that were sustained by the victim and the pecuniary or non-pecuniary loss suffered as a result of the collision must be proven. This brings me to the issue of causation.

## Causation

In *JM Grove v The Road Collision Fund* (74/10) [2011] ZASCA 55 (31 March 2011) at para. 7, the following is said:

> 'The RAF is obliged to compensate for damages arising from bodily injury 'caused by or arising from' the driving of a motor vehicle. The causal link that is required is essentially the same as the causal link that is required for Aquilian liability. There can be no question of liability if it is not proved that the wrongdoer caused the damage of the person suffering the harm. Whether an act can be identified as a cause, depends on a conclusion drawn from available facts and relevant probabilities. The important question is how one should determine a causal nexus, namely whether one fact follows from another.'

[29] What the trial court therefore has to determine is whether the collission caused the plaintiff's injuries, what those injuries were and the effect of the injuries upon the plaintiff or, in the case of a dependant's claim, the effect of the death of the third party upon the dependant. In order for the court to determine these issues, the plaintiff bears the onus and must prove causation on a balance of probabilities.

[30] In M S v Road Collision Fund [2019] 3 All SA 626 (GJ), Fisher J, at para. 9, sets out as follows:

> 'Thus, once negligence of the third party driver is proved, wrongfulness is generally assumed. It must then be shown that the loss suffered by the claimant is due to the negligent/wrongful act in issue. This is when the causation phase of the enquiry begins.'

[31] Fisher J[13] proposes a four-stage inquiry at para. 12 of her judgment:

> '<u>First:</u> Did the negligence of the third party driver cause the collision? if both plaintiff and the third party driver were negligent blame may be apportioned on the basis of a percentage allocation in terms of the Apportionment of Damages Act. (I shall call this first phase the Merits Inquiry).
>
> <u>Second:</u> Did the plaintiff sustain the pleaded injuries in the collision? (This is the First Causation Inquiry).
>
> <u>Third:</u> How have [sic] these proven injuries have affected the plaintiff? (this is the Second Causation Inquiry).
>
> <u>Fourth:</u> How should the plaintiff be remunerated for the effects of such injuries on the plaintiff. (this is the Quantum Determination stage).'

[32] I respectfully agree. However, when a concession on the "merits" is made by the RAF, plaintiffs (or their advisors) often neglect the First and Second Causation Inquiries by proceeding directly to the Quantum Determination phase. They neglect to prove that the injuries were indeed sustained in the collision and merely rely on expert reports to show the effect of the injuries upon the plaintiff. Often, the expert

[13] In M S v Road Collision Fund supra.

reports are founded upon what the plaintiff tells the expert. The expert then proceeds on the basis of the plaintiff's subjective information. Examples that often arise (amongst many others) are the pain that is experienced, the severity of the pain, the frequency of the pain, activities the plaintiff is no longer able to do, feelings of anxiousness, depression and the like. All of these subjective advices from plaintiffs is most often difficult or impossible to verify objectively. In such instances, the court is at a disadvantage if the plaintiff is not seen and heard by the court.

[33] In the First and Second Causation Inquiry, the plaintiff must prove that the injuries she or he sustained was as a result of the collision (which by now has already been determined to have been as a result of the negligent driving of the insured driver - the Merits Inquiry) and the effect of the injuries upon the plaintiff. The causal link between the negligent driving of the insured driver and the effect of the insured driver's wrongful act must be proven in accordance with the normal rules of evidence unless the RAF makes concessions or admissions in this respect. Concessions and admissions may be made at the pre-trial or case management stage or even at the trial (that is if the RAF appears!). Therefore, in the absence of a concession or admission by the RAF, the injuries that were sustained by the plaintiff and the effect thereof upon the plaintiff must be formally and properly proven on a balance of probabilities.

Onus

[34] In RAF actions, being delictual claims, the onus to prove the elements of the claim lies upon the plaintiff for where the onus lies is determined by the substantive law. Onus is described in Woerman and Schutte NNO v Masondo and Others 2002 (1) SA 811 (SCA) para. 17 as follows:

> ‘In any event onus, in the sense of the duty that is cast on a particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence is a matter of substantive law and not of procedure. In During NO v Boesak and Another Grosskopf JA said:
>
> “Die ligging van die bewyslas word deur die substantiewe reg bepaal.”
>
> Soos gestel word in Hoffmann en Zeffertt The South African Law of Evidence 4de uitg op 495:
>
> > "Any rule of law which annexes legal consequences to a fact . . . must, as a necessary corollary, provide for which party is supposed to prove that fact."’

[35] There is therefore a duty upon the plaintiffs in RAF actions to prove the elements of their claims on a balance of probabilities, that is, the elements referred to in paragraph 17 above.

Manner of proof

[36] A plaintiff proves his or her case through presenting evidence to the court. A defendant likewise does so in proving his or her defence. It is no different in RAF matters. Section 8 of the Civil Proceedings Evidence Act 25 of 1965 provides:

> ‘Save in so far as this Act or any other law otherwise provides, every person shall be competent and compellable to give evidence in any civil proceedings.’

[37] Invariably, in all RAF matters, the papers before the Judge before the trial commences consist of a substantial volume of documents that may be relevant to the issues in the RAF action. These documents include, amongst others, witness

statements, collision reports, medical records, expert opinions and claim forms. These documents are filed and presented to the court in indexed bundles. It must be accepted that these documents are not there for no purpose. It is there because it relates to the claim and action against the RAF and invariable, the parties may wish to make use of these documents in their claims or defences. These documents are before the court as a result of the process and rules of discovery provided for in Rules 35 and 36 of the Uniform Rules. More often than not, parties are of the view that the mere discovery of the documents constitutes proof of the facts or opinions contained therein. Alas not.

[38] Documents can be classified in two categories.[14] The first category of documents is documents that are created to express the statement of intention of the creator. The second category of documents are documents that are created to express a statement of fact or to relate a sequence of events. The documents in RAF matters usually falls under the second category of documents. If the second category of documents is tendered to court simply to prove that the statement of fact has in fact been made, it supports the statement of fact (which has already been established through viva voce evidence) and will therefore be admissible. In other words, such a document is tendered to corroborate the statement of fact that has already been established. If the document is tendered to prove the truth of the contents of the document that is, the purpose of tendering the document is for it to be testimony of the truth of the content of the document, this will constitute hearsay and be inadmissible.

[14] See: LAWSA "Evidence" at para. 213.

[39] Unfortunately, this is where parties often falter in RAF matters. A perception exists that by mere discovery and production of the documents, the content of such documents constitute proper evidence for purposes of discharging the onus of proof. It is not. The second category of documents must be proven in accordance with the law of evidence. The law of evidence regulates the proof of facts in a court of law. The substantive law lays down what must be proven (See: *Tregea v Godart* 1939 AD 16 30. These documents cannot be accepted and considered as "evidence" for it constitutes hearsay. It is not only inadmissible but also has no evidential value at all.

[40] One often finds in RAF matters that the parties have no objection to the inclusion of the second category of documents as part of the papers before the court. This does not elevate these documents to the status of proper evidence for purposes of discharging the onus of proof. In the absence of an admission by the parties that the content of the documents is admitted, the documents must be proven in the usual way, that is, by calling the author of the document to identify same and to confirm the content thereof. For example, if the plaintiff in RAF matters seeks to rely on the plaintiff's hospital records in order to prove the plaintiff's injuries or medical costs, the authors of the records must be called to testify. Only then will such record be properly before the court and be considered as part of the evidence before it. The same applies to other documents such as accident reports, expert reports and documents which supports proof of the plaintiff's pre-collision income. There are exceptions to this rule which is not important for what this judgment intends to convey.

**PROCEDURAL ISSUES**

[41] Nowadays, (as is the KGAMAPE matter), the RAF often does not deliver a notice of intention to defend nor does it deliver a plea. To what extent is it then required by the plaintiff to still prove all the elements of the cause of action? In this instance I refer to the elements of a RAF claim referred to in paragraph 17 above (in summary – the collision; negligence, causation in respect of injuries and the effect thereof upon the plaintiff and damages.) This is what the Constitutional Court in Baliso v Firstrand Bank Limited t/a Wesbank 2017 (1) SA 292 (CC) said at para. 12 of its judgment over what evidence is usually lead in unliquidated claims:

> 'In terms of our civil procedure, default judgment for a debt or liquidated demand is granted on an acceptance of the allegations as set out in the summons, without any evidence. Where the claim is not for a debt or liquidated demand, the court may, after hearing evidence, grant judgment. This is usually only evidence on the amount of unliquidated damages. The reason for not hearing evidence on the other factual allegations made in the summons or particulars of claim is that, because the claim is not opposed, it may be accepted that those allegations are admitted or not disputed." [Endnotes omitted]

[42] The "factual allegations made" (referred to in Baliso supra) in RAF matters, relate to the collision, negligence and the injuries sustained and the effect thereof upon the plaintiff.

[43] In Abraham v City of Cape Town 1995 (2) SA 319 (C), the following was said:

> 'It was common cause before me that where an application for default judgment serves before a Court, it has a clear and unfettered discretion in terms of the relevant Rule of Court

to decide whether or not to hear oral evidence on any of the issues which may require to be decided in order to determine whether or not to grant the relief claimed.

Ms Williams, however, with reliance principally on a decision of Basson J in Dorfling v Coetzee 1979 (2) SA 632 (NC), advanced the proposition that it was incumbent on a Court in a case involving a motor-vehicle collision to hear evidence on 'the merits' as distinct from damages. This was, so it was contended, because of the possibility that there might have been contributory negligence on the part of a plaintiff which would necessitate an apportionment of the damages sustained by him or her. In his judgment in Dorfling (supra at 635) Basson J says the following:

> “Skadevergoeding kan uit hoofde van verskeie skuldoorsake geëis word en mens kan jou gevalle voorstel veral by kontrakbreuk waar die Hof die skadevergoeding kan bepaal sonder enige verwysing na getuienis oor die F skuldoorsaak. Aan die ander kant, waar die skuldoorsaak op delik gebaseer word, kan die skadevergoeding in die meeste gevalle slegs bepaal word nadat getuienis oor die skuldoorsaak ook gelei is, bv by aanranding, laster, ens.

Ek meen dat in die reël getuienis van die skuldoorsaak gelei moet word in gevalle waar skadevergoeding geëis word, maar dat dit aan elke Hof oorgelaat moet word om te besluit of in 'n bepaalde geval afgesien kan word van sulke getuienis.

In die geval van motorbotsings meen ek dat dit noodsaaklik is dat getuienis oor die skuldoorsaak ook voorgelê word sodat bepaal kan word (i) of verweerder wel nalatig was, (ii) of eiser bydraend nalatig was en (iii) in laasgenoemde geval die mate van eiser se skuld met betrekking tot die skade. Dit is eers nadat al die feite wat as bewys van die skuldoorsaak aan die Hof voorgelê is, oorweeg is dat die Hof kan besluit of die volle bedrag van die bewese skade toegeken moet word en of daar 'n verdeling van skadevergoeding moet wees ingevolge art 1 van Wet 34 van 1956.'

It is clear from the terms of the judgment that it was, at the time it was delivered, apparently the practice in the Northern Cape Division to require evidence also 'on the merits' in cases of this kind (see at 634G). I was informed from the Bar that this was not the practice in this Division. However that may be, I prefer rather to base my decision on logic than on possibly contentious averments as to what is practice and what is not.

This Court's point of departure should in my view be that it is for each presiding officer to decide for him- or herself, dependent on the facts of each case, whether to hear oral evidence or not. I am unpersuaded that the mere theoretical possibility that there may have been contributory negligence on the part of a plaintiff would be sufficient cause for a Court to insist rigidly that oral evidence should be led in every such case where a default judgment based on delict is sought. I use the word 'theoretical' advisedly, because ex facie the pleadings or evidence concerning the damages sustained by a plaintiff, the possibility may be apparent that such contributory negligence may be present. In such a case the Court may well in the exercise of its discretion decide to call for oral evidence. However, where such a contention is not raised by a defendant nor evident ex facie the pleadings, the mere fact that the Court has the power to apportion damages where contributory negligence is proved does not seem to me to be a valid reason for fettering the discretion of the Court in the manner contended for.

The logic of not requiring any evidence where default judgment is sought in the case of a debt or liquidated demand, seems to me to be related principally to the ability of the Court to determine the quantum of damages due to a plaintiff without an evidential enquiry into and a discretionary determination as to the amount due. However, in such cases there are numerous defences open to a defendant which could be raised to defeat the action or curtail the claim and which would be analogous to the raising of contributory negligence and a consequent apportionment of damages in an action based on delict. Therefore it does not seem to me to be right to insist on oral evidence on the merits of a plaintiff's claim being led merely because a defence such as contributory negligence, which could result in an abatement of the claim, could be raised but has not been pleaded or otherwise invoked by a defendant.'

[44] I respectfully agree with the reasoning in Abraham supra. A judge confronted with only the version of the plaintiff as set out in the plaintiff's pleadings, having regard to what is contained in the court file, should make a judgment call in deciding whether there is any indication from the information before him or her that the evidence to be tendered by affidavit requires additional scrutiny.

[45] In order to cater for these situations, ie, where no notice of intention to defend is delivered and/or no plea, or, when the RAF fails to contribute in the proceedings, the Uniform Rules and this court's Practice Directives provide for guidance. I turn to these rules and directives.

Rule 31(2)(a) – Default judgment

[46] I deal with this subrule because it has become common place now that the RAF fails to defend a claim and/or fails to deliver a plea. In those instances, the plaintiff is entitled to approach court for default judgment as contemplated in the subrule.

[47] The subrule provides as follows:

> 'Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as to it seems meet.'

[48] A claim against the RAF is not a claim for a debt or liquidated demand. The subrule specifically provides that the court may, after hearing evidence grant a judgment against the defendant. The hearing of evidence is therefore a requirement for judgment against the RAF in instances where subrule 31(2)(a) applies. Evidence means evidence properly presented in compliance with the Rules and in accordance with the rules of evidence. The mere handing in of expert reports or oral argument

from the bar as is often attempted by plaintiffs will not suffice. What must be proven on a balance of probabilities, even if the RAF fails to deliver a notice of intention to defend the action or a plea, remains all the elements of a RAF claim.

<u>Paragraph 3.10 of this court's Consolidated Covid-19 Directive</u>

[49] Paragraph 3.10 of this court's Consolidated Covid-19 Directive reads as follows:

> 'There shall be no judgment by default in damages claims without evidence in whatever form having been tendered on both merits and quantum. And should the evidence be on affidavits, essential elements of the claim either on merits and or on quantum, must be properly set out in detail, otherwise the party seeking the court to decide the matter on affidavits runs the risk of the matter being dismissed or absolution from the instance being granted.'

[50] The provisions of paragraph 3.10 of the Consolidated Covid-19 Directive reinforces what is required in terms of subrule 31(2)(a) where default judgment is sought in damages actions. It also provides that evidence may be presented by affidavit, an issue to which I shall turn to next.

<u>Rule 38(2)</u>

[51] The subrule provides:

> 'The witnesses at the trial of any action shall be orally examined, but a court may at any

> time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.'

[52] The subrule provides a mechanism whereby the court may on application and if sufficient reason is shown, allow that evidence be given on affidavit. Firstly, there must be an application to adduce evidence by affidavit. Secondly, there must be sufficient reason for doing so and thirdly, the court may lay down the terms and conditions for the evidence to be adduced. In Madibeng Local Municipality v Public Investment Corporation Ltd 2018 (6) SA 55 (SCA) at 25, the Supreme Court of Appeal expressed itself over subrule 38(2):

> 'The approach to rule 38(2) may be summarised as follows. A trial court has a discretion to depart from the position that, in a trial, oral evidence is the norm. When that discretion is exercised, two important factors will inevitably be the saving of costs and the saving of time, especially the time of the court in this era of congested court rolls and stretched judicial resources. More importantly, the exercise of the discretion will be conditioned by whether it is appropriate and suitable in the circumstances to allow a deviation from the norm. That requires a consideration of the following factors: the nature of the proceedings, the nature of the evidence, whether the application for evidence to be adduced by way of affidavit is by agreement, and ultimately, whether, in all the circumstances, it is fair to allow evidence on affidavit.'

[53] Plaintiffs in RAF matters often request the court to accept evidence upon affidavit. Especially now where in most RAF matters there is no appearance by the RAF or where the RAF has not participated in the pre-trial proceedings or where the

RAF has not defended the action and/or failed to deliver and file a plea. Of course, where the RAF does not appear at the trial, there will be no request for cross-examination as provided for in the subrule. Therefore, subject to what I sent out in paragraphs 61 and 62 below, I see no reason why Rule 38(2) may not actually be used to contribute to the speedy and cost-effective delivery of justice in RAF matters.

Rule 39(1)

[54] The subrule provides:

> 'If, when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him and judgment shall be given accordingly, in so far as he has discharged such burden. Provided that where the claim is for a debt or liquidated demand no evidence shall be necessary unless the court otherwise orders.'

[55] In all the matters which is the subject of this judgment, the RAF did not appear when the trial was called despite being served with the notice of set down of the trial. What is however of importance in terms of subrule 39(1) is that the plaintiff must still prove his or her claim in a damages claim so far as the burden of proof lies upon him or her. Therefore, as said above by presenting proper evidence to the court for purposes of discharging the burden of proof – that is – proving on a balance of probabilities all of the elements of the delict, or in RAF matters, the elements referred to in paragraph 17 above with due regard with what I set out under the headings onus and manner of proof above.

[56] In my view, having regard to the principles laid down in Madibeng Local

Municipality supra, in circumstances where there has been no participation by the RAF in the proceedings, there is no appearance by the RAF at the trial; proper pre-trial procedures were not participated in by the RAF; only the plaintiff delivered expert reports, a deviation from the norm that viva voce evidence must be lead on all the issues will not offend justice and should be followed. However, plaintiffs must be alive to the fact that it may be very difficult for a court to exercise its discretion in awarding compensation for non-pecuniary loss if the court is deprived from first hand seeing and hearing the plaintiff, especially with regards to the sequel of the injuries that were sustained in the collision.

**DAMAGES**

[57] Plaintiffs in actions against the RAF do not sue for nothing – they seek to be compensated for the loss they believe they have suffered as a result of the negligence of an insured driver.

[58] Damages, including damages in RAF claims, are classified. This is explained in Prince v Road Collision Fund (CA143/2017) [2018] ZAECGHC 20 (20 March 2018) as follows:

> ‘[5] In considering this appeal, it is important to emphasize the classification of damages in our law. There is a general division of damages into general damages and special damages. This applies to bodily injury cases which recognizes the distinction between general and special damages. All patrimonial loss actually incurred, such as for example medical and hospital expenses and past loss of earnings is treated as special damage. Quite apart from this all non-patrimonial loss, such as pain-and-suffering, loss of amenities, and loss of expectation of life is classified as general damage. However patrimonial loss, which up to the trial has not yet crystallized in actual loss but remains prospective, remains general

damage, such as future medical expenses and future loss of earnings. It is thus important to understand that past loss of earnings is treated as special damages, whilst future loss of earnings is treated as general damages.

[6] As pointed out in this authority, the basic principle in respect of an award of damages in this kind of action is that the compensation must be such as to place the Plaintiff, as far as possible, in the position he or she would have occupied had the wrongful act causing injury not occurred. In respect of bodily injury cases the claim is sui generis and the measure of damages is necessarily less exact. Further, by virtue of the principle of the once and for all rule it is necessary in one action to seek both past and prospective loss. In respect of prospective damages, which is the subject matter of the appeal, whilst this is a speculative element the loss must be established upon the usual test of a balance of probabilities. Justice may demand that a contingency allowance be made for the mere possibility of certain forms of loss.

[7] In Corbett (supra) the following appears:

"In this regard the distinction is drawn (in principle and not without difficulties) between causation and quantification: it has never been the approach of the courts to resolve the inescapable uncertainties by the application of the burden of proof. Mere difficulty in assessing this amount will not absolve the court from arriving at an estimate. The onus of showing that there is sufficient likelihood of such loss rests upon the plaintiff. This does not, however, mean that where the evidence suggests a range of possibilities, the courts will select the one least favourable to the plaintiff because he bears the onus, and has not proved that a more favourable possibility ought to be preferred."

[8] It is thus important to emphasize that in this matter the claim for future loss of earnings or loss of employability falls into the heading "General Damages", with all the consequences thereof accordingly. This is prospective loss in the context set out above.

[9] Again as pointed out by Corbett:

"Before damages payable to the injured person can be assessed it is necessary that the court should determine factually what injuries were suffered by the plaintiff as a result of the defendant's wrongful act..."

In this regard the question that must first be answered in the assessment of damages is and what must be determined is:

> "…disability which is likely to impair the injured person's earning capacity or to cause a loss of the amenities of life. Such disability may be temporary or permanent. Where it is temporary and has in fact disappeared at the time of trial, it is not normally of great importance as an independent factor.… On the other hand, where it is permanent or where, though temporary, it extends beyond the time of the trial, then it may cause prospective losses, such as a diminution in the injured persons earning capacity or an impairment of the amenities of life, for which compensation should be made by the award of damages. Moreover, a permanent disability may be present at the time of the trial or it may be one which will only manifest itself at some future date."'

[59] The plaintiff bears the onus to prove his or her loss. It is for the court to determine what should be paid.

[60] In respect of the loss of future earning capacity, the following is said in in Road Collision Fund v Guedes 2006 (5) SA 583 (SCA) at 586:

> 'It is trite that a person is entitled to be compensated to the extent that the person's patrimony has been diminished in consequence of another's negligence. Such damages include loss of future earning capacity (see for example President Insurance Co Ltd v Mathews). The calculation of the quantum of a future amount, such as loss of earning capacity, is not, as I have already indicated, a matter of exact mathematical calculation. By its nature such an enquiry is speculative and a court can therefore only make an estimate of the present value of the loss which is often a very rough estimate (see for example Southern Insurance Association Ltd v Bailey NO. The court necessarily exercises a wide discretion when it assesses the quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right. Courts have adopted the approach that in order to assist in such a calculation, an actuarial computation is a useful basis for establishing the quantum of damages. Even then, the trial court has a wide discretion to award what it believes is just (see for example the Bailey case and Van der Plaats v South African Mutual Fire and General Insurance Co Ltd.' [References omitted]

**CONCLUSION ON ISSUES TRAVERSED ABOVE**

[61] In my view, the approach in RAF matters in circumstances set out above where there is no participation by the RAF at all or only limited participation or there is no appearance when the trial is called for hearing, the approach to be adopted should be on basis of what is set out by Froneman J[15]:

> 'But then, the law often is a pragmatic blend of logic and experience.'

[62] In my view, the approach of Froneman J applies to RAF actions where the circumstances set out in this judgment apply. The court should be extremely astute and consider all the information before it which includes the pleadings, documents that were discovered, all reports by the experts and all affidavits (if filed) before the trial commences in order to determine the manner in which to approach the trial. The pleadings, the facts that appear from what is in the court file and the expert reports, (especially whether the findings therein) tally with the rest of the information. If there is any doubt in the court's mind regarding any of the elements of the delict that is pleaded and that must be proven, I am of the view that the court has to interrogate the issue with the plaintiff in order to set his/her mind at ease. The court must at all times be aware that RAF matters are by their very nature and now also, due to the inaction of the RAF, open to abuse. Each order that is granted comes from scarce public funds. Only meritious claims proven on a balance of probabilities, warrant an award in damages.

**INDIVIDUAL MATTERS**

[15] Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) 2011 (4) SA 113 (CC).

[63] Having set out the procedural and substantive principles in general terms, I proceed to deal with the individual matters.

PHUMZILE REMEMBER MNISI v The RAF / Case Number: 1823/19

[64] The collision occurred on 26 May 2018. The plaintiff was a passenger who was transported at the back of the light delivery vehicle. The vehicle that conveyed the plaintiff was stationary next to the road. A truck collided with the stationary vehicle. A passenger at the back of the stationary vehicle was witness to the collision.

[65] The defendant delivered a plea as well as a special plea. The special plea challenged compliance with section 17 of the Act in respect of a claim for non-pecuniary loss.

[66] The plaintiff presented his own affidavit as well as the affidavit of the witness to the collision. The plaintiff describes the collision in his affidavit.

[67] According to the plaintiff's affidavit, the plaintiff suffered a fracture to his left collar bone and a fracture to the back of the left shoulder blade as well as a hard blow to his upper leg.

[68] In the orthopaedic surgeon's report, the plaintiff confirms the injuries that she sustained. The plaintiff reported to the orthopaedic surgeon that she sometimes experiences pain for days in her neck which also extends to left hand side of her back. The plaintiff reported that she is unable to walk for long distances. She is unable to handle heavy objects with her hand and battle to mobilize objects above

shoulder height. She is unable to sit or stand for prolonged periods and she suffers from headaches approximate three times per week which she treats with medicine. The plaintiff battles to bend down and climb stairs. The plaintiff also has difficulty to sleep during the night, especially on the left hand side of her body. The plaintiff is no longer able to exercise or play sport.

[69] The orthopaedic surgeon recorded all the plaintiff's shoulder movements to be normal with mild pain with abduction flexion and addition. There is also a soft tissue injury to the left ankle and the range of motion is impaired and associated with pain. According to the orthopaedic surgeon, the aforesaid complaints have a definite effect on the plaintiff's employability. However, the plaintiffs orthopaedic injuries do not meet the requirements for a serious injury under the narrative test.

[70] According to the industrial psychologist, having regard to the plaintiff's scholastic history together with the plaintiffs grade 12 marks, same indicates that the plaintiff probably would not have been suited to work within the sphere of high intellectual and academic ability. The plaintiff's family history suggests a heavy dependence on unskilled work and manual labour. The plaintiff was 23 years old at the time of the collision and she remains employed as an unskilled worker. Having regard to the plaintiff's low matric pass rate and occupational history as well as her family history, it seems that that the plaintiff would in all likelihood have relied on unskilled employment opportunities in order to generate an income. The plaintiff would have continued working as a cook and a shop assistant had the collision not occurred, earning R 1000.00 per month until she found better employment opportunities after the collision. The plaintiff may have sought employment as domestic worker. The plaintiff would have been physically capable of working as a

farm worker, cleaner a domestic worker had the collision not occurred. It is likely that the majority of opportunities available to her would have been within the category of manual labour in an unskilled sphere.

[71] The occupational therapist is of the view that a full job match does not exist having regard to the plaintiff's post-morbid physical abilities and the demands of her pre-collision job as a general worker. The occupational therapist further reported that a full job much does not exist between the plaintiff's physical ability and the demands of her current occupation as a domestic worker. The occupational therapist is of the view is that with appropriate and successful treatment a degree of improvement may be expected. However, the plaintiff would only be able to meet the demands of medium work. This factor would likely impact significantly on the plaintiff's ability to pursue more permanent work.

[72] I have considered the evidence with regards to the defendant's liability for the loss caused to the plaintiff. I find that the defendant is solely liable for the plaintiffs proven loss.

[73] The calculations set out in the actuarial report was admitted into evidence. The actuary took into account the industrial psychologist's report. The actuarial calculations show that the plaintiff's present value of loss of income as calculated at 1 December 2021, amounted to R483 448. To this amount, contingencies still have to be applied.

[74] I had regard to the evidence before me as well as the expert reports which was presented by the plaintiff. I am of the view, and having regard to the fact that the

award of an appropriate amount is within the discretion of this court. I consider a pre-morbid contingency of 5% and a post morbid contingency of 25% a useful guide. I am of the view that an amount of R 400 000 will constitute just compensation to the plaintiff. I requested the plaintiff's attorney to forward me a draft order. Save for an amendment of the amount awarded for the plaintiff’s loss of income and an order managing the issue of general damages, I make the draft order an order of court. The order is attached as “X1” to this judgment.

<u>BIGBRAIN SKUMBUZO MALALA v The RAF / Case Number: 2538</u>

[75] The motor vehicle collision occurred on 29 May 2017. Regarding the occurrence of the collision, the plaintiff tendered into evidence his affidavit as well as the affidavit of a witness. According to the plaintiff, he was standing next to his vehicle. The vehicle was next to the road. The plaintiff was loading certain items on his vehicle. An unidentified vehicle left the road and hit him from the back. The vehicle fled the scene of the collision. The plaintiff lost consciousness. He was taken to a local clinic where the plaintiff regained his consciousness. The plaintiff was taken to a private medical practitioner and later treated at the Tonga Hospital. The witness saw many people next to the road as well as the plaintiff lying next to a vehicle when he arrived on the scene.

[76] In the absence of any evidence to the contrary, I accept the plaintiff’s version of the collision. In the premises, I find in favour of the plaintiff. The defendant is held to be solely liable for the plaintiff’s proven loss.

[77] The plaintiff proceeded to prove his income prior to the collision by way of an affidavit. The plaintiff furnished a further affidavit in which he set out that he, his wife, and four assistants were involved in selling food and cold drink at the Lebombo border post when the collision occurred. In his affidavit, the plaintiff sets out that he made R7000 per month in profit as a hawker.

[78] An affidavit of one of the plaintiff’s co-workers was tendered and entered into evidence The witness confirmed that she was a co-worker of the plaintiff and that they were selling cold drink and food at the border gate. A further affidavit by another co-worker was tendered and entered into evidence who corroborated the evidence of the other co-worker.

[79] In the plaintiff's affidavit, he also set out that he is no longer able to conduct the other activity he was engaged in prior to the collision. He was also cutting of wood to be sold. The plaintiff alleges that subsequent to his divorce, he no longer shares in any income at the border post. The plaintiff has started his own the nursery from home but does not make any profit yet.

[80] The plaintiff tendered the evidence on affidavit of the various experts that he consulted him regarding the loss he suffered as a result of the collision. The plaintiff suffered multiple closed fractures as well as a sprain of the superior tibiofibular joint and ligament.

[81] The orthopaedic surgeon, records that: the plaintiff has suffered degenerative changes to his left knee; a diagnosis of osteoarthritis in respect of the left knee; the plaintiff may require a left knee replacement future but that is not entirely

attributable to the collision; the plaintiff is limited to an ability to perform physical work but it is not attributable to the collision. According to the expert an apportionment of 20% is recommended.

[82] The occupational therapist records that the plaintiff is suited for work of a medium physical demand pre-collision but that post-collision the plaintiff is only suited for light to medium work. The collision appears to have accelerated the degenerative changes in the plaintiff's left knee. The plaintiff's symptoms from the collision have caused a reduction in the plaintiff's efficiency and core competencies. The plaintiff has mild symptoms of depression. Therapy, including physiotherapy, is recommended.

[83] The industrial psychologist postulated that had the collision not occurred, the plaintiff would have continued to be self-employed and records that the plaintiff was already close to the upper earnings for informal traders. Therefore, it was not anticipated that the plaintiff's earnings would have increased earnings significantly. After the collision, the plaintiff recuperated for 18 months. During that time, the plaintiff did not have an income. Afterwards the plaintiff returned to his self-employed capacity. This was however to a lesser extent as he is no longer engaged in selling wood as he cannot chop the logs. The plaintiff now only sells fresh produce from a vegetable patch that he owns.

[84] An actuarial report was admitted into evidence. The actuary calculated the plaintiff's loss of income having regard to the industrial psychologist's report. The plaintiff's past- and future loss of income was calculated at R 267 198. To this amount contingency must still be applied. Having regard to the plaintiff's

circumstances (including the apportionment of 20% suggested by the orthopaedic surgeon), pre-and post-morbid contingency must be applied. In my view, amount of R 200 000 awarded for future loss of earnings will be appropriate.

[85] I requested the plaintiff's attorney to forward me a draft order. Save for an amendment of the amount awarded for the plaintiff’s loss of income and the addition of orders relating to the general damages aspect of the claim, I make the draft order an order of court. The order is attached as “X2” to this judgment.

BOTHELO KGAMANE v the RAF / Case Number: 315/2020

[86] In this matter, the RAF has accepted liability for the insured driver’s negligence. The RAF did not defend the action and did not file a plea. The collision occurred on 25 August 2018. The plaintiff was a passenger.

[87] The plaintiff presented affidavits of the various experts who he has consulted All the experts confirmed the content of their reports by way of affidavits admitted into evidence.

[88] In his report, the orthopaedic surgeon confirms a right wrist injury (fracture of the ulna) as well as a right ankle injury. Regarding the wrist injury, the orthopaedic surgeon records: a deformity of the proximal third ulnar diaphysis; deformity of the distal right radius; and a narrowing of the radio-carpal joint space. Over the plaintiff’s ankle injury, the orthopaedic surgeon records that the plaintiff

suffered bimalleorlar fractures that was surgically treated with an open reduction and internal fixation.

[89] The orthopaedic surgeon records that the plaintiff experiences pain when picking up heavy objects. In respect of the right angle injury, the orthopaedic surgeon further records that the plaintiff has a moderate loss of range of motion with mild pain. With regards to the assessment of the plaintiff's employability, the orthopaedic surgeon records that the plaintiff worked as a vendor before the collision. He cut down trees with a chain saw which he then loaded onto a vehicle. He sold the wood in the area where is stays. The plaintiff did not return to work as his physician allegedly told him that he cannot lift heavy objects anymore. The plaintiff reported that he has pain when standing for long periods and when lifting heavy objects. In the orthopaedic surgeon's opinion, it will be difficult for the plaintiff to find work in his previous capacity and he will only be able to work in a sedentary environment. According to the orthopaedic surgeon, the orthopaedic injuries that the plaintiff sustained meet the requirements of a serious injury under the narrative test as he is unable to do his previous job as the plaintiff is functionally impaired. The orthopaedic surgeon's view was that there is a definite nexus between the current complaints and the injuries sustained in the collision. The orthopaedic surgeon calculate the plaintiff's whole person impairment at 17%.

[90] The occupational therapist records that the plaintiffs residual earning capacity had decreased to participation in a light to medium work environment over an eight-hour workday. Although the plaintiff is able to handle medium loads he will not be able to meet the full parameters of light and medium work given his compromised walking tolerance. The occupational therapist's opinion is that the plaintiff is better

said suited to sedentary light work with limitation and infrequent mobility demands to avoid the acceleration of the degenerative process in the ankle joints. She is also of the view that given the assessment findings, a full job-match no longer exists between the physical function of the plaintiff and the overall demands of his pre-collision job demands as a vendor which entails medium strength. The occupational therapist is of the view that the plaintiff's current physical limitations, the plaintiff would experience difficulties and reduced productivity due to resume his pre-collision work demands.

[91] The industrial psychologist postulates the scenario should the collision not have happened. Then the plaintiff would have remained self-employed in his capacity as an informal trader he compared this with his post-collision career postulation which she took as that the plaintiff would still be able to secure employment as a machine operator considering all the machines he received training on. The industrial psychologist postulates that it is likely that the plaintiff would still be able to secure some sort of temporary appointment as a general worker or performing piece jobs.

[92] An actuarial report was admitted into evidence. The actuary calculated the plaintiff's loss of income having regard to the industrial psychologist's report. The plaintiff's past- and future loss of income was calculated at R 415 191. To this amount contingency must still be applied. Having regard to the plaintiff's circumstances a pre-morbid contingency of 10% and a post morbid contingency of 15% applies as a guide for purposes of compensating the plaintiff. I consider an award of R 400 000 as just compensation to the plaintiff for the plaintiff's loss of future income.

[93] I requested the plaintiff's attorney to forward me a draft order. Save for an amendment of the amount awarded for the plaintiff’s loss of income and the addition of orders relating to the general damages aspect of the claim, I make the draft order an order of court. The order is attached as “X3” to this judgment.

<u>EMMELINAH NYATSELA MASHABA v The ROAD COLLISION FUND / Case Number: 208/20</u>

[94] The collision occurred on 3 October 2018. The plaintiff was a passenger. The plaintiff was a hawker prior to the collision. The defendant conceded that the insured driver was solely negligent in causing the collision.

[95] The plaintiff suffered a thoracic spine injury and a lumbar spine injury in the collision. With regards to the lumbar spine injury, the plaintiffs orthopaedic surgeon records a mild disc space narrowing L4/L5 with adjacent endplate osteophyte formation; osteoarthritis of the lower lumbar facet joint involving L4/L5, especially on the right. With regards to the thoracic spine injury, the orthopaedic surgeon records a mild spondylosis of the mid/lower thoracic spine with small endplate osteophyte formation. The diagnosis of a the orthopaedic surgeon is a thoracic spondylosis at multiple levels.

[96] The orthopaedic surgeon is of the view that the plaintiff will not be able to work as a hawker or do any kind of physical employment until the normal retirement age of 65 years due to her back injuries. The orthopaedic surgeon is also of the view that the injuries to the plaintiff’s thoracic lumbar spine meets the requirements for a

serious injury under the narrative test. The orthopaedic surgeon is of the view that there is also a definite nexus between the current complaints and the injuries the plaintiff has sustained in the collision. The orthopaedic surgeon assessed the seriousness of the plaintiff's injury as a serious long-term impairment and loss of thoracic lumbar spinal function.

[97] The occupational therapist records that the plaintiff’s pre-collision employment required medium physical demands. The collision interrupted her career and she was not able to work for approximately one year and eight months while recovering. The plaintiff no longer works as a hawker. The plaintiff now employs a gardener to plant vegetables in her yard. The claimant sells these vegetables from her residence. According to the occupational therapist, the plaintiff’s residual physical capacity presented with mobility, postural tolerance and weight handling skills that enabled her to perform work of a sedentary nature. The plaintiff presents with limited balancing skills and relies on the use of a crutch or external support to support in mobility skills. The plaintiff also presents with severe back pain restricting her bending and trunk spinal rotation. The plaintiff presents with restricted load handling capacity because of severe back pain. The plaintiff’s physical capacity limitations are consistent and compatible with the severity of the injuries. According to the occupational therapist the plaintiff has suffered permanent loss of pre-collision physical task performance capacity as a result of her injuries. The occupational therapist is of the view that given the assessment findings, there is no job match between the physical function of the plaintiff and the overall demands of her pre-collision occupation as a self-employed hawker.

[98] The industrial psychologist is of the view that the post-collision career postulation of the plaintiff, keeping in mind the expert opinions and that the plaintiff is only suited to perform work of the sedentary nature. However, the plaintiffs low level of education, lack of alternative work experience and advanced age at 53 years, it is unlikely that the plaintiff would secure employment of such a sedentary nature.

[99] The actuarial report took into account the reports of the industrial psychologist. The actuary calculated the present value of the loss of income of the plaintiff as result of the collision. The calculations and figures were determined without applying general contingencies. In her heads of argument, the plaintiff proposed, after the application of a contingency of 5% in respect of past loss and 15% in respect of future loss, that the total loss of earning should be R 680 563.45. I round the figure to R 680 000. I am of the view that this amount would adequately compensate the plaintiff for the loss of income she has suffered as a result of the collision.

[100] The RAF has failed to either accept or reject the plaintiff's serious injury assessment. As a result of what I have set out above over the issue of the RAF's liability for non-pecuniary loss, this court can therefore not presently pronounce on the issue.

[101] The order is attached as "X4" to this judgment.

<u>NDUBASI ROBERT SHABANGU v The ROAD COLLISION FUND Case Number: 4082/19</u>

[102] The collision occurred on 27 September 2018. The plaintiff was a pedestrian. In this matter merits have been conceded by the defendant on the basis that the defendant is 100% liable to pay the plaintiffs proven damages. At the time of the collision, the plaintiff was a dump truck driver.

[103] The orthopaedic surgeon reports that the plaintiff sustained an injury to his left knee. The orthopaedic surgeon records that the plaintiff's left knee is severely impaired with a painful range of motion. The orthopaedic surgeon assessed the seriousness of the plaintiff's injury under the narrative test with a combined WPI of 17%.

[104] The plaintiff's occupational therapist, reports that the plaintiff is better suited for temporary strength demands in his workplace during an eight-hour workday. He will also be restricted from positions requiring light to medium strength. The plaintiff is an unequal competitor in the open labour market. Also, according to the occupational therapist, the plaintiff has been rendered limited in his job choices in the open labour market when compared with his uninjured pears.

[105] The plaintiff's industrial psychologist records that the plaintiff remained unemployed for two years after the collision. As dump truck driver, the plaintiff earned an income of R 4672.35 per month. Since 2020, the plaintiff has been employed as a taxi driver. According to the expert the post-collision scenario of the plaintiff is that the plaintiff will have difficulty in his previous job and will be best suited in the sedentary labour environment. It is therefore likely that the plaintiff would continue his current capacity as a taxi driver earning a comparable R1500 per month. However, according to the expert, it seems reasonable to assume that the

plaintiff will not be able to sustain his current employment and that he will have likely have to search alternative employment in the near future due to his physical limitations.

[106] It is clear from the plaintiff's expert reports that the plaintiff has suffered damages as a result of the collision and will continue to do so. The plaintiff has lost income and will in future, as a result of the collision.

[107] The plaintiff's actuary, having regard to the industrial psychologist's report, calculated the plaintiffs past and future loss of earnings. According to the calculations, the plaintiff has suffered a past loss of income in the amount of R 355 591 and will suffer a future loss of income in the amount of R 3 604 349. To these amounts, general contingencies still has to be applied. I consider that an amount of R 3 500 000 will be a fair and just compensation to the plaintiff in respect of loss of income both and past and future.

[108] The RAF has failed to either accept or reject the plaintiff's serious injury assessment. As a result of what I have set out above over the issue of the RAF's liability for non-pecuniary loss, this court can therefore not presently pronounce on the issue.

[109] The order is attached as "X5" to this judgment.

<u>BUSISIWE FIKILE KHOZA v The ROAD COLLISION FUND / Case Number: 4423/19</u>

[110] The collision occurred on 11 November 2017. The plaintiff was a passenger in one of the vehicles that collided. The merits were settled.

[111] The plaintiff sustained the following injuries: a facial injury; direct injury to both of her eyes; cervical spine injury that is, an acceleration and the acceleration injury; thoracic spine injury with a compression fracture at level T8; a chest injury; a soft tissue injury. Since the collision, the plaintiff complaints of neck pain; headaches; pain between the shoulder blades; stiffness in the next; and dizziness.

[112] The plaintiff was employed as a caretaker before the collision. She did not work for a period of one month after the collision.

[113] The plaintiff's orthopaedic surgeon confirmed the plaintiff's injuries. The orthopaedic surgeon is of the view that after the collision the plaintiff is able to do sedentary type of work. The orthopaedic surgeon concluded that the plaintiff's injuries meet the requirements for a serious injury under the narrative test as the plaintiff is functionally impaired.

[114] The occupational therapist is of the opinion, considering the possibility of future treatment and the plaintiff's post-collision condition, that the plaintiff is restricted to sedentary and light work. The plaintiff is trained as an auxiliary nurse. The occupational therapist is of the view that the plaintiff will never be able to cope with being an auxiliary nurse within a hospital setting which is classified as medium work. Additionally, as the plaintiff requires spinal surgery she will be restricted to sedentary and occasional light work. The occupational therapist is of the opinion that the plaintiff will not be able to reach the pre-collision work potential. She will be a

vulnerable employee and she will struggle to attain work if she is not offered a reasonable accommodation. Her limited career options have a negative impact on her earning potential.

[115] The plaintiff's industrial psychologist postulated that the plaintiff will remain employed as a community health worker or similar given the history education and experience if the collision did not occur it seems likely that the plaintiff would have remained employed as a community health worker. After the collision the plaintiff returned to a pre-collision capacity as a community health worker. This seems justified, according to the industrial psychologist, as the plaintiff has residual capacity to engage in the inherent job requirements. However, the plaintiff's ability will be met with limitations with regard to constant walking. The plaintiff will have to be accommodated and will include all likelihood be dependent on a sympathetic and accommodating employer. As the plaintiff's pathology progresses it is expected that the plaintiff will struggle increasingly and the future employability might be jeopardized early retirement may become likely as the plaintiff's symptomology increases.

[116] The plaintiff's actuary, having regard to the industrial psychologist's report, records that it seems as if the plaintiff did not suffer a past loss of income. With regards to future loss of income, the actuary suggests that a higher than normal contingency be applied. I agree, having regard to the limitations of the plaintiff even though she is still employed as a community health worker. I accept that the plaintiff may be sympathetically employed and that this may have an impact on her future employment options. I regard an amount of R 100 000 to be fair compensation to the plaintiff under the present circumstances.

[117] The RAF has failed to either accept or reject the plaintiff's serious injury assessment. As a result of what I have set out above over the issue of the RAF's liability for non-pecuniary loss, this court can therefore not presently pronounce on the issue.

[118] The order is attached as "X6" to this judgment.

CRAIG TALENT NGOBE v The ROAD COLLISION FUND / Case Number: 2382/19

[119] The motor vehicle collision that occurred on 11 August 2018 at Hazyview. The plaintiff was a passenger. Merits was settled by the time that the trial was called. The defendant conceded the issue of negligence 100% in favour of the plaintiff.

[120] The plaintiffs orthopaedic surgeon recorded the injuries that were sustained by the plaintiff. These included: a left ankle injury; a traumatic brain injury; and a chest injury. The orthopaedic surgeon concludes that the plaintiff sustained a severe traumatic brain injury as indicated by his loss of consciousness and post-traumatic amnesia period. The plaintiff presents with travel anxiety; regular headaches and short-term memory loss. With regards to the left ankle injury, the plaintiff has lost flexion and hyper inversion to the ankle probably due to the laxity of the lateral ligament.

[121] The orthopaedic surgeon's opinion is that the plaintiff will have difficulty when walking or standing for long periods. The plaintiff was employed as a manager at a funeral parlour at the time of the collision. The plaintiff had to coordinate funerals; manage staff; deal with customer queries; and do general administrative duties. The plaintiff attempted to return to work in 2019 but had difficulty when walking or standing for long periods. After rehabilitation, the plaintiff should be able to return to work as a manager. The plaintiff's whole person impairment combined was assessed at 21%.

[122] The plaintiff's occupational therapist records that the plaintiff is suited to perform sedentary and light work over an eight-hour workday. It is also recorded that the plaintiff presents with compromised walking tolerance due to pain in his left ankle.

[123] The plaintiff, subsequent to the collision, started to work as a salesman. The plaintiff only works early in the mornings in order to avoid the heat. The plaintiff indicated that once he has recruited a new client, he returned to the vehicle in order to finalize the policy so that he could sit and rest his foot.

[124] The plaintiff's occupational therapist, is of the view that a full job match does not exist between the physical abilities of the plaintiff and the demands of his post-collision job as a salesman. The plaintiff will benefit from recommended medical interventions and he will also benefit from therapeutic intervention. The occupational therapist is of the opinion that with appropriate and successful treatment a degree of involvement may be expected that he will likely experience improved pain and comfort.

[125] The plaintiff's industrial psychologist confirmed the plaintiff's post-collision enjoyment his salary information and also summarised pre-collision career aspirations and earning potential. According to the industrial psychologist, the plaintiff's post-collision functioning scenario still matches that of his pre-collision employment as manager. However, the plaintiff will suffer limitations in prolonged standing and walking. The industrial psychologist is of the view that the plaintiff would be able to work in a similar capacity as he did prior to the collision the plaintiff would also be able to work as an insurance consultant.

[126] The plaintiff's actuary, after having regard to the plaintiff's industrial psychologist's report, calculated the overall loss of the plaintiff in respect of past- and future income at R 884 645. To this amount, contingencies must still be applied. Having regard to the plaintiff's expert reports, I am not convinced that the amount calculated will be fair under the circumstances where the plaintiff still retains the ability to work as before the collision. I do however consider that the plaintiff may potentially suffer a loss of future income having regard to his limitations. I consider an amount of R 400 000 to be fair under the circumstances.

[127] The RAF has failed to either accept or reject the plaintiff's serious injury assessment. As a result of what I have set out above over the issue of the RAF's liability for non-pecuniary loss, this court can therefore not presently pronounce on the issue.

[128] The order is attached as "X7" to this judgment.

ANDREAS JAMES SITHOLE v The ROAD COLLISION FUND / Case Number: 4067/19

[129] The motor vehicle collision that occurred on 4 February 2018. The plaintiff was a passenger. At the time of the collision, the plaintiff was a self-employed builder.

By the time the trial reached the court all the issues were still in dispute. In respect of the merits, the plaintiff tendered his own affidavit. According to the plaintiff two tires of the vehicle he was travelling in had burst. In the absence of any other evidence, I find that the collision was as a result of the sole negligence of the insured driver.

[130] The plaintiff sustained a fracture to his forearm; a left distal radius fracture; and a large laceration to his forehead. The current complains of the plaintiff include moderate pain to his left arm. The pain in the left arm is aggravated by cold weather and by handing heavy objects. The plaintiff suffers from moderate tenderness and has a deformity of the left arm. In addition, the plaintiff has a reduced range of movement of his left arm. The plaintiff has scarring on his forehead he has travel-related anxiety.

[131] The plaintiff's orthopaedic surgeon noted and moderate tenderness on movement at the head of the ulna and over the old fracture site. The plaintiff is diagnosed by the orthopaedic surgeon with: a radius fracture which has united; a sub-fluxation of the distal radio-ulnar joint; an injury to the distal radio-ulnar joint

with an injury to the triangular fibrocartilage complex; impaired and painful wrist movements; and residual soft tissue pain.

[132] The plaintiff's occupational therapist is of the view that the plaintiff pre-collision work falls within the medium to heavy physical demand level. The plaintiff retains function range of movement of both upper limbs with the exception of the reduced supination of the left forearm and extension of the left wrist. Strong pain was reported in the left forearm during mobilization after their forearm.

[133] According to the occupational therapist the plaintiff can no longer handle the same amount of weight as he did before the collision with the left arm due to pain in his left forearm the pain is exasperated during cold weather. The plaintiff reported reduced the range of movement in the left forearm and difficulty with home management activities. He has mild physical impairment which may improve with appropriate treatment through a complete recovery though a complete recovery is not anticipated.

[134] According to plaintiff's industrial psychologist, the plaintiff who was a bricklayer. The work entailed general building duties which included making cement building bricklaying and plastering the plaintiff also we walked over and even trained and worked on scaffolding. According to the industrial psychologist the plaintiff's physical abilities, the plaintiff is now only enable him to perform sedentary light and lower range medium work. Even such occupations will be performed with physical difficulty due to the deformity and chronic pain in the plaintiff's upper limb. No job match indicated between the plaintiff physical capacity and the physical demands of his occupation. The injury impacted his overall

occupational performance. According to the industrial psychologist, the plaintiff should ideally be limited to work of a light nature but that it is unlikely that such position would be available given the plaintiff's work experience and occupation.

[135] The plaintiff's actuary calculated the plaintiff's loss of earnings on the plaintiff's self-reported earnings. The total loss of income is calculated at R926 237. On this amount, general contingencies must still be applied.

[136] Having regard to the evidence before me, especially the substantial effects of the collision on the plaintiff, I am of the view that an amount of R 700 000 would be fair compensation to the plaintiff.

[137] The RAF has failed to either accept or reject the plaintiff's serious injury assessment. As a result of what I have set out above over the issue of the RAF's liability for non-pecuniary loss, this court can therefore not presently pronounce on the issue.

[138] The order is attached as "X8" to this judgment.

Roelofse AJ

Acting Judge of the High Court

DATE OF HEARING: 31 AUGUST 2022

DATE OF JUDGMENT: 1APRIL 2022

APPEARANCES FOR ALL THE PLAINTIFFS:

SJD INCORPORATED ATTORNEYS