

**IN THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

1 March 2017

CASE NO: 67408/2012

NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED

R G

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

KHUMALO J

INTRODUCTION

[1] On 23 November 2012, a 55 year old Plaintiff, Ms G R, ("Ms R") instituted an action against the Road Accident Fund as a statutory insurer in terms of s 17 of the Road Accident Fund Act 56 of 1996 ("the Act"), as amended, ("the Defendant") for compensation for damages she allegedly suffered arising from personal injuries she sustained when a motor vehicle with registration number [...] GP ("the insured vehicle") driven by one Bheki Khumalo ("the insured driver") in which she was a passenger overturned on the Heidelberg road near Alberton on 8 November 2010.

[2] In her particulars of claim Ms R alleges that the sole cause of the accident was the insured driver in that he drove the insured vehicle negligently in one or more respects as set out in her particulars of claim, and to have as a result sustained the following personal injuries:

[2.1] Chest injury;

[2.2] Head injury;

[2.3] Left and Right Knee;

[2.4] Right eye injury;

[2.5] Multiple lacerations and abrasions.

[3] Ms R further contends that the injuries constitute a serious injury as envisaged by s 17 (1A) of the Act, and claimed in his particulars an amount of R660 000.00 (Six Hundred and Sixty Thousand Rand) constituted as follows:

[3.1]	Past Medical Expenses	R10 000.00
[3.2]	Future Medical Expenses	Undertaking ito Section 17 (4) (a)
[3.3]	Past Loss of Income	R50 000.00
[3.4]	Future Loss of Income	R100 000.00
[3.5]	Non- Pecuniary Loss (General Damages)	R500 000.00

With a proviso that the amounts were still to be substantiated.

[4] Save for admitting to Ms R's personal details, citations and *locus standi*, the Defendant, in its Plea, denied any liability to her claim, putting her to the proof of all the

allegations in her particulars of claim. The Defendant pleaded in the alternative that, if Ms R is found to have sustained injuries and suffered the consequent damages as alleged, it denies that such injuries and damages are related to the accident. It pleaded further in the alternative that, if the injuries and damages are found to be related to the accident, Ms R **contributed to the injuries and or damages she may have suffered**, due to her failure to comply with the rules of the National Traffic Legislation.

[5] The Defendant's plea indicates a lack of diligence and prudence. It referred to Ms R as a "he" and claimed contributory negligence from her even though she pleaded to have been a passenger in the car and the insured driver's motor vehicle to have been the only vehicle involved in the accident. Also, the Defendant had, in agreement with Ms R's particulars, pleaded that the accident was caused by the insured driver's sole negligence, and thereafter stated in contradiction to that assertion, that 'if the court does find that the insured driver was negligent as alleged it denies that such negligence was the cause of the accident. No exception was raised to the pleading. Both parties lacked attentiveness.

[6] On 25 March 2015, a few weeks before trial that was set down on 4 May 2015, Ms R's particulars of claim were amended. The injuries she sustained were amended to include the following:

[6.1] A head injury with **brain injury**;

[6.2] **Multiple soft tissue injuries on the face**;

[6.3] Paralysis of the sixth cranial nerve;

[6.4] Injuries to both *patelia femoral* joints;

[6.5] **Multiple soft injuries over her body.**

[7] Furthermore, the total amount she was claiming was also amended to R2 310 000.00 with the past loss of earnings amended to R300 000.00, the future loss of earnings to R1 000 000.00 and general damages to R1 000 000.00. The increase in the

loss of earnings was stated to be for the reason that:

[7.1] R has **a grade 12** level of education;

[7.1] **At the time of accident she was employed as a machinist at Service Products since June 2010;**

[7.3] **In addition to her employment she also conducted 2 businesses of her own, catering and sewing.**

[7.4] **But for the collision R would have been promoted into a supervisory position** and would have continued with her catering and sewing business.

[7.5] **As a result of the collision R's job description was changed from stitching the garments to cleaning them of excess threads;**

[7.6] **R's business in catering and sewing collapsed and she lost this source of income;**

[7.8] **It would appear that R is now in significantly sympathetic employment and not expected to be sustained much longer;**

[7.9] The Plaintiff is for all intents and purposes **unemployable.**

[8] Prior thereto, on 27 November 2014 the parties had agreed in a pre-trial conference in respect of the status of the documents that, during the trial copies may be used. The documents will serve as proof of what a document purports to be without further evidence thereof being necessary, the truth of the content of such document not being admitted. It was also noted that in the accident report in possession of the Defendant, the Plaintiff is not mentioned to be one of the passengers that were in the insured motor vehicle at the time of the accident.

[9] At the beginning of the trial, I was however accordingly advised that the issue of

liability has been settled. The Defendant conceded 100 % liability of Ms R's proven damages.

[10] The Defendant on the main challenges, *inter alia*, the extent of Ms R's damages arguing that the amount that was to be paid to her with regard to loss of earnings was to be nominal as **she was employed informally (in a sheltered employment) at the time of the** accident and that there was no proof of the additional business that she alleged she was conducting for an extra income. Also that if she proves that she ran an additional business, she must prove the impact of her injuries on her ability to continue with the business. In other words indicating that she was so affected to the extent that she would not be able to continue with the business.

[11] Ms R, as a result bore the onus to prove the nature, extent and *sequelae* of her damages on a balance of probabilities. She was therefore expected to demonstrate that her head/brain injury resulted in a significant neuropsychological or cognitive impairment that impacted on her ability to continue with her informal business and or being a participant in the formal labour market and affected her life in general as alleged in her amended particulars.

[12] The parties agreed that the reports compiled by the experts filed of record, specifically the ones consulted by Dr Cathy Angus in compilation of her report and mentioned during her evidence, are to be considered by the court in determining the exact nature of Ms R's damages and the appropriate compensation she is to be awarded, only to the extent of what they purported to be, and not as to truth of content. They were to be admitted as reflecting both what they had been told and an opinion based on the information they identified, it being the court's function to weigh them and make an appropriate finding should they differ.

[13] The reports that were handed in are those of experts, Dr J J du Plessis (Neurosurgeon), Ms Cathy Angus (Clinical Psychologist); Ms Ida-Marie Hattingh (Speech/Language Pathologist & Audiologist); Dr David Shevel (Psychiatrist); Ms Alison Crosbie (Occupational Therapist); Dr Van den Bout (Orthopaedic Surgeon); Dr L van der Merwe (Ophthalmologist); Ms Rialette Gaus (Speech /Language Pathologist & Audiologist); Mr Louis Linde (Industrial Psychologist); Mr G Whittaker (Algorithm); Dr S

Bouwer (ENT Specialist); Ms Celeste De Freitas (Speech Therapist & Audiologist)

EVIDENCE

[14] Evidence was led on behalf of Ms R by three witnesses, that is, Ms Cathy Angus ("Angus"), the clinical psychologist whose special interest is in neuropsychology, Ms Mary Khanyile ("Khanyile") R's friend and Ms R. The sequence followed was a result of the initial indication by Ms R's counsel that she was not going to testify as they think she will not be able to follow the proceedings. However after the evidence of the first two witnesses, she was called to testify. No evidence was led on behalf of the Defendant. Counsel for the Defendant indicated that the matter would be argued on Ms R's case. Titles hereafter if not used, is to curtail proliferation of words and ease of reference, with no disrespect intended.

[15] Dr Angus, whose expertise were not in dispute was the first to testify. She indicated at the beginning of her testimony that the report she was presenting was compiled in consultation with R and with reference to the following relevant sources:

[15.1] Hospital records;

[15.2] RAF Forms 1 and 4;

[15.3] Medico- legal reports by Dr AH van den Bout (the **Orthopaedic Surgeon**), Dr L van der Merwe (the **Ophthalmologist/Eye Specialist**), Dr J J du Plessis (the Neurosurgeon), Dr D Shevel (**the Psychiatrist**), Ms R Gaus (the Speech Language Pathologist and Audiologist), Ms I Hatting (Speech/Language Pathologist & Audiologist);

[15.4] Telephonic interview with Ms Busi Zulu (daughter) and Ms Erika Coetzee a Human Resources Manager and Patricia a Supervisor from Service Products.

[16] She testified to have reported the following, that: Ms R's level of education is Grade 12. Her hospital records show that she suffered a **mild head injury** in the

accident. Clinical tests that followed show a moderate and a peripheral vision, some areas the intensity being average, with two (double) tracks of concentration. She could not understand Ms R when she spoke to her as Ms R struggled with details. Information had to be repeated to her, always and she confabulated, making up her own information which would normally impede any hearing/learning. Her **opinion was that the problem that manifested itself in Ms R was psychometric and therefore she supported supervision. A reasonable time for recovery for a mild brain injury is normally a two year period, after which no further improvement to the injury is expected (deferring to her report for further analysis).**

[17] **On Ms R's capacity to earn** - she figured that issues that could impact on her ability to sustain her business are her cognitive mental functional problems, like depression, anxiety, physical condition intertwined with inability to stay focused. During the interview she observed that R withdraws when angry but was appropriately emotional at times. She regarded R's mood as euthymic (which is a normal non-depressed reasonably positive mood). **She indicated that prior to the accident Plaintiff's physical disabilities made her work at a sheltered employment company under the auspices of the Labour Department.** The disabilities did not include cognitive problems and her physical condition considered treatable. However at the time of accident R was already **working at a sheltered employment. She went back after the accident and was paid the same amount of salary she earned at the time of the accident.** Dr Angus reckoned that due to the condition of R's ailments, should she loose her work at the sheltered employment, she will not be able to find other work. **She considered her to be unemployable in an open labour market, her cognitive ability, drive and motivation to have been reduced and her combination of problems to vastly reduce her ability to handle problems.**

[18] She said Ms **R's letting her aunt take over her house,** transferring the house to the aunt's name **displayed a deficiency in her ability to judge. She could therefore be easily and unduly manipulated and influenced by outside sources.** However in handling of substantial award, she was of the opinion that Ms R **could handle day to day finances** but advised that large amounts should be handled by an expert. She said she concurred with **Dr du Plessis's** report that Ms R will require some level of protection and supervision since she is a vulnerable individual who can be

easily manipulated and influenced by outside sources.

[19] On the question of the serious head injury, her take was that during the consultation Ms R became really fatigued. Occasionally, they had to repeat instructions to her although not always. On the concept of a court room performance, Ms Angus was certain that she would cope with giving evidence, but needed just to be asked in a simple and constructive manner. She said her short term memory was not functioning properly, however her old learning was still stable. The stuff that she already knew will remain, so she will not have a problem with that since it is something that she has lived with. Commenting on the suggestion that was made that she might have difficulty answering questions that are even simple, Angus' replied that if 2 or 3 long and complicated questions are asked at a time, Ms R will struggle. However on issues of recollection of the accident even when considered with regard to her short term memory, Angus did not think she has forgotten, but regarded her only problem being with the day to day events. She also was of the opinion that **Ms R does not need a curator ad litem. Although** if the court was to be asked to consider if Ms R would indeed need curatorship then she said her recommendation would be that the services of a psychiatrist be engaged. Although due to Ms R's **severe brain damage her money will need to be protected from her aunt**, it however has not been suggested that she needs a curator. **The information she got from Ms R was that she has got problems with exercising judgment and therefore needs to be protected.**

[20] On the *sequelae*- She confirmed that Ms R was a few months before the accident, already diagnosed, with dizziness, osteo-arthritis and a problem with the right eye. The ailments were treatable by medicine. Her **present situation could be controlled, she has to get a neuropsychology treatment**, the medical expertise on depression and anxiety, a field of specialty. **She pointed out that the treatment is not curative but assist to improve the quality of life.** Ms R will still be able to knit and be able to communicate as well. The symptoms that she had before were mostly physical and not cognitive, she only experienced the cognitive after the accident. Ms Angus confirmed (as pointed out in Dr Linde's report) that a **report written by Dr SB Khumalo** ("Khumalo") indicated that she was diagnosed with the **hypertension, osteo-arthritis, right eye short sightedness and peptic ulcer disease prior to being employed at Service products.** For this reason she was placed in a sheltered

employment as a mechanist. When she went back after the accident she was downgraded to cleaning the clothes. Therefore **it is possible for Plaintiff to find her own way and god willingly to live a normal life again. The injuries sustained from the accident were mild.**

[21] Ms Khanyile was the next witness to testify. She testified in respect of the informal business that Ms R allegedly operated. Her testimony was that she knew Ms R from Soweto where they all stayed prior to moving to Dawn Park. Ms R moved to Dawn Park first in 1991. She followed in 1996 and they linked up again. She assisted R to run a dressmaking business that she started when she was in Soweto and continued with it at Dawn Park. Ms R was now also doing catering. They catered for weddings, parties and mostly government functions. The size of groups catered for was dependent on the event whether it was a wedding or a government function. In respect of Government functions they used to be told the number of people to be catered for, usually about 200 to 400. They did catering on average twice a month and it will depend on the type of function sometimes they will cater for 4 to 5 days in a week. She assisted Ms R with the business until November 2010 when Ms R was involved in the vehicle accident. Ms R stopped working after the accident.

[22] When asked about the dressmaking, she said it took place at Ms R's garage where she kept her **industrial machines, cutting tables and materials**. She sew gowns, costumes and garments for ladies. They used to **start at 7h00 early in the morning work until 17h00. If they had a big order they will work until 10 at night**, depending on the workload. **When Ms R was working she would come back from work and do her part**. She used to go to Ms R's house more frequently to assist her. **Ms R was not well when she came back from hospital in November 2010**. It was bad because she is the one who had the skills and did all the cutting. She would forget orders. One example is when Ms R forgot about a jacket that she had bought her. She also had to help Ms R to wash her clothes after she came out of hospital.

[23] In explaining how the business was conducted she said Ms R took the money from customers, wrote down their payment and issued receipts. She kept a book where she wrote orders. She however could not comment on whether or not Ms R reserved the books and receipts since it seemed Ms R's children took the books. As far as she

knows, Ms R paid tax and had a certificate to prove it. She herself could not produce any proof since she was not known to SARS as she was just employed. Ms R ran the company. She confirmed that Ms R's condition has improved a little bit, she can now cook and sew again but not for business. She tried sewing for other people but has lost interest. With regard to catering she forgets. She would ask her if she has put salt in the food. She worked with Ms R from June until November 2010 when she was at the sheltered employment. She did not have work when Ms R had an accident.

[24] Ms R's testimony in chief was that she finished school quite a long time ago, probably in 1974 or 1975 and got her first job at Carola working as a table hand. The company made jerseys and shirts. She did not work for long there and moved on to **BagerTears**, once more as a tablehand and later a machinist. She worked for **Bagers** for 2 to 3 years, gaining experience in making leather and denim handbags. She then moved to Sealy Trust also employed as a machinist doing stitching. She did dressmaking on the side. In 2005, she registered a company for catering, transport, cleaning and dress making services, in order to expand and do other things. She during that time compiled a profile for her company in which she indicated what services her company offered. On construction, she explained that they did painting and repaired windows of houses and schools. She had actually started the business in 2004 before she registered it as "Ka Wena Nka Phela Construction" CC in 2005. She had decided to formalize the business, expand and register catering as well. However she could not get a clearance for catering and therefore could not get the government jobs. When she registered the company in 2005 she was already at home with no formal employment, having left Sealy.

[25] Ms R confirmed that the only documents she can produce as proof for the existence of the catering business are, the Company Profile and the registration documents of the construction and catering business. She stopped the catering and dressmaking businesses in 2010 after the accident. She had catered for weddings, individuals, school events and for the Department of Arts and Culture, for groups of between 150 - 200 people. She used to cook and do the decorations as well. She would **do between 3 and 4 events in a month.** They charged according to the number of days they would have catered and the number of people.

[26] On dressmaking Ms R produced an undated, unnamed newspaper tear sheet of an article about a very young looking lady referred to as Dipuo Thulare and her thriving sewing business. She indicated that the young lady was her. She confirmed that she looked different in the article and said at the time she was staying in Soweto (which should be prior to 1991). According to the article Dipuo was by then 12 years in the business, making leather bags and clothing. Ms R said at the time she was using one of her bedrooms as a workshop where she kept a **double needle stitching machine**, overlocker and scrum machine, buttons, hole hamming machine. On weekends **she worked right through the night. When she was working she also did some of the work at work. She was assisted by her friend Maria.** She became very busy from 2005- 2010 when she was unemployed. There was always people at her house. Sipho Hotstix Mabuse was one of her customers. She was always very busy unless if she decided to give herself a break. She then worked with leather but also did curtains, trousers, coats and bags, charging R750, trousers R350 and leather bags R300. She also did wedding dresses for which she charged according to whether or not they bring their own material. **The average she was making per month was +-R10 000.00 and she** always had work.

[27] With regard to the books she **said she had books were she wrote the orders but her** children burnt everything when they were cleaning and nothing was left. She explained that her **company profile does not mention dress making because the profile was not compiled for the Road Accident Fund. When it** was put to her that also she could not produce any evidence on catering, the newspaper article also does not say **anything about catering.** She said she cannot answer to that because she was under stress. **She wanted to remember everything, but it is difficult.** She said **she** forgets quickly and her forgetfulness is related to the accident. The doctors told her she had a head injury and has been told that she forgets due to the head injury. She said she was however not sure about that because she only saw herself hurt in the eye which had **a double vision. When she sees a car coming she does not know whether to go left or right.** She did not have a vision problem like that prior the accident although she wore glasses. Every now and then she would have dizzy spells, actually every day, and she told all the specialists. **She would like to be assisted in terms of dealing with the money. Her daughter helped her,** but she was now at university.

[28] She testified further that she now worked at Service Products. At the time she had an accident she was about to be promoted, the promotion due by December 2010. **She missed on it because of the accident. She was instead, demoted when she came back to work after the accident. However, as shown on the salary slip, she was paid the same salary she received prior to the accident as a mechanist. The salary that was to be paid on promotion was never discussed.** She explained that she ended up working in a sheltered employment company despite running a lucrative business because she had a problem with her husband whom she was **divorcing at the time, hardly six months before she had started there.** They also did not employ just anybody that is employable at Service Products, but only people with disabilities. However not everybody employed there has a disability. A person has just to allege that there is something wrong with them to be employed there. **She alleged to suffer from high blood** although **it was not true at the time.** Now she has got it. She obtained a letter from a **Dr S Bheki Khumalo ("Khumalo")** in which Dr Khumalo stated that she was sick. **She had told Khumalo to write that she suffered from high blood, hypertension, gastro- arthritis, right eye problem with short sightedness and pelvic ulcer, to get the job. At the time she suffered from none of these ailments. She only suffered from headaches and did not have any other health problems.**

[29] It was put to her that in recording all the history she told Dr Khumalo, she did not mention what was a fact at the time, that she had an operation done on her wrist. She confirmed that she indeed did not tell Dr Khumalo about the wrist operation **because for her to be hired at the shelter she needed both hands to function. She was asked why the court should now believe her or the doctors who had written reports reliant on the information she gave them, when she had lied to a health official before, registering non-existent ailments and hiding information to get access to employment.** She said she lied then because she was going through a divorce at the time. She felt she had to go and look for something as the situation was not right at the house. **She confirmed that she could not tell the court about any head injury except the eyes. Her 6th nerve cracked and caused the eye to make her to go to St John. She felt that something was not right with the eye but could not explain. She said her eyes were not painful now but better and** she gets medication every month which makes her feel better. She also had a fracture on the ankle and not

on the knees, which is not related to the accident.

[30] Furthermore **she told the court that when she was injured, she was very busy making more money than at the sheltered employment. She said she however went to work at the shelter because things were not right at home, she was going through a divorce and the job provided security in some way. So she had to work for somebody else even though she was doing well working with a friend from the comfort of her home. She refused to continue working for herself because pensions and other things were not right. She confirmed again that she did not have a single shred of paper to indicate that she ran the other businesses and also could not prove the income she generated.** She did not know anything about bookkeeping. It was done by her daughter. **She did pay tax and SARS issued her with a tax clearance certificate. She however had no idea of their whereabouts.** The children helped her with the certificates. It was at the time they **stayed in Soweto. They now don't have the books.** She confirmed that before the accident she had no health problems she was ok.

[31] In re-examination she reiterated her allegation that she told Dr Khumalo to write all the fictitious ailments because she wanted to get out of the divorce. She also confirmed **that she also did not have peptic ulcer when she actually claimed to have it. She said she only had problems with her knees, headaches and the back.** When the accident happened they were talking in the taxi. She heard a scream, the next thing she woke up it was after 5 days. She was told that she was airlifted from there to hospital where she remained for a long time. **She subsequently had dizzy spells.**

ANALYSIS OF THE EVIDENCE

Ms R's evidence on her earning capacity

[32] As it is evident, on Ms R's own version she has not been truthful. She lied about suffering from certain ailments in order for her to secure the sheltered employment. She has therefore unjustifiably continued to date to receive a salary with concomitant benefits from the state funded enterprise that she in reality did not deserve,

having secured the job illegally. Ms R's conduct of fraudulently obtaining the letter from Dr S B Khumalo that certified the existence of fictitious ailments and using it to secure the sheltered employment, is a criminal act. The matter should be referred to the National Health Professional Council of South Africa ("NHPCSA") for Dr Khumalo's role in the matter to be properly investigated and a copy of the judgment be sent to Service Products since R remains in their employment to date.

[33] A sense of justice anchored on basic principles of fairness and legality calls for the Plaintiff's claim for loss of earnings past or future as far as this employment is concerned to be disregarded as it cannot have any merit. The earnings of such an unlawfully secured employment cannot be legitimized, the income earned in such a way is of an unlawful nature. The court cannot rely upon such earnings to determine the effects of the accident and its *sequelae* on Ms R's employability and earning capacity which is against public policy. If Ms R had not obtained the fraudulent medical certificate she would not have been in that employment, a Labour Department initiative. One's age, colour, creed or station in life should not cause society to place a blind eye on crime. These are ill gotten earnings which in actual fairness should be paid back to the Labour Department.

[34] Authorities advocate that when courts deal with illegally earned income, they should consider the issue of future loss of earnings from a perspective of the fact that what is being established is the Plaintiff's weakened capacity to earn and therefore the illegality of the earnings may be a factor to consider as an inhibition or an inherently diminishing factor of Plaintiff' capacity to earn but not an instant disqualifier for consideration of the loss; see *Santam Versekeringsmaatskappy Bpk v Byleveldt* **1973 (2) SA 146**. In *Shield Insurance Co Ltd v Booysen* 1979 (3) SA AT 964 D-E it was said that even though some activities may be found to be illegal, they can nevertheless be relied upon as an indication of a person's earning capacity. In *Dlamini v Multilateral Motorvoertuig Ongelukkefonds* **1992 (1) SA 802** (T) it was held that illegal earnings as in illegal taxi-driving without a licence could be taken into account as an indication of the deceased's earning capacity and that a deduction of 30 % should be made for the change-over from illegal to legal taxi driving. The deceased could have earned the same monthly income from legal taxi driving. However I believe it would be a different scenario if the claimant would never have qualified to obtain a licence and was driving

with a fraudulently obtained licence. No action arises from a bad cause.

[35] It is trite law that an award of damages for the loss of a claimant's earnings or earning capacity is intended to place him in the financial position he would have been in, had it not been for the delict, to allow him to enjoy financial benefits equal to the quantum of the earnings lost by him. It is not intended to be a money making scheme as it has turned out to be. In *Rudman v Road Accident Fund* **2003 (2) SA 234** (SCA) on para [10]- [11] of the judgment, the court made it quite clear that a reduction in earning capacity only results in a loss if it gives rise to a pecuniary loss. 'Similarly, and on grounds of public policy, a South African court would not make an award for diminution in earning capacity if the only way in which the earning capacity could remain productive was by a failure on the part of the claimant post- accident to comply with his legal duties or by perpetuating the criminal conduct; see *Heese NO v Road Accident Fund* (A 586/2012) **[2013] ZAWCHC 157**; **2014 (1) SA 357** (WCC) (23 October 2013).

[36] In this case the illegality will pervade Plaintiff's earnings into the future. Recognising her continuance in her illegally obtained employment and the earnings, the court will then be perpetuating the criminal conduct. Our courts should therefore draw a line between earnings obtained illegally and those obtained through a criminal act. The court should disregard the latter earnings and only consider the fact of the earnings in the former situation as a diminishing factor. Any regard to such earnings would be an affront to public conscience and therefore opposed to public policy.

[37] Ms R has unashamedly proceeded to seek as part of her claim, compensation for having missed on the promotion for the job she illegally secured. In consideration of all the factors in this matter, the earning power of Ms R based on this illegally obtained employment may not accurately represent her future economic damages. Any claim premised on the sustainability of this job affronts public policy and is unmerited, more so since the Applicant is directly involved in the fraud and had in the process listed the services of other people, like Dr Khumalo, to perpetuate the deceit and realise her criminal objective. So even if Ms R's conduct was to be equated with the circumstances in **Dlamini** where the courts have taken into account earnings derived from illegal activities for a loss of support claim, the direct involvement of Ms R being the claimant *in casu* and the criminality of Ms R's conduct differentiates between the two cases.

Dlamini's driving of the taxi without a licence is an illegal act but it can hardly be regarded as a criminal act; see *Wong Keung v Ng Kwok-Leung*, H.C. Action 3143/75 (Unreported) **where Justice Li** found it rather difficult to assimilate the earnings of an unlicensed hawker with the illegal earnings of a criminal. Such differentiation also was reflected upon in a matter of *Mak-Yuk-Kiu v Thin Shing Auto Radio CTR. Ltd* [1981] HKLR 77 in support of a decision where the claimant was directly involved, having aided and abated the deceased to obtain the illegal earnings, her claim was not to be allowed; at 83 Chief Justice Roberts of Hong Kong High Court stated that:

"I do not suggest that in all circumstances dependents would be able to recover if their income has been derived from criminal activities. It may well be that they would be barred in some cases, for example if they had themselves taken a direct part as parties in the illegal activity which gave rise to the income"

[38] Ms R further testimony about the informal work or business she alleges she was conducting outside her supposedly formal employment as a source from which her earning capacity could be assessed is the only evidence left to be considered by the court, dependent on its probability or trustworthiness. The court has to also determine its veracity.

[39] According to Ms R, outside the formal employment of **Service** Products, she also ran a business of dressmaking and catering, earning a monthly income of +- R10 0000.00. The loss of earning capacity on this business has according to the amendment effected on her particulars escalated her claim for future loss of earnings to R1 000 000.00. Considering her overall performance in court which was very unimpressive, the court has to be guarded in evaluating that evidence. The Plaintiff could not just be taken on her word, having regard to the whole of her testimony and the issue of her unreliability.

[40] It seems appropriate then to deal first with the veracity or sincerity of this claim and its relevance to her earning capacity before considering the other categories of damages and their extent and the amount of her proven damages that are payable. Her allegations in relation to the existence of such businesses was to be corroborated supposedly by Ms Khanyile and the article from the undated newspaper, the only two

determinants from which the existence of the businesses could be ascertained, there being no other hard facts.

[41] Ms Khanyile's version was that she worked with Ms R in Soweto, until 1991 when Ms R moved to Dawnpark. In 1996 when she also moved to Dawn Park she again assisted her with the business of catering and dressmaking. Ms R alleges that she was featured in the article as a successful businesswoman a very long time ago whilst she was still staying in Soweto. At the time she had established herself in the sewing industry. As a result she looks very young in the article and a lot more different from how she looked in court. From that viewpoint it sounds probable since according to Ms Khanyile she would have left Soweto in 1991 that is 23 years ago from the date of trial, therefore if true she would have been 33 years old or younger. The article features her **prior 1991 as Dipuo Thulare, already a single mother with 3 children**. Yet according to her and the information she told the experts she went through a divorce in 2009 and 2010 which she alleged in court to have caused her to seek a letter from Dr Khumalo to secure employment at Secure Product. According to all the experts then Ms R was divorced after leaving Soweto, 16 years later in 2009 or by 2010, which she says was before her first 6 months at Secure Products. So the article cannot be about her. If the article is about her, then she was not candid when she alleged that she obtained the fraudulent medical certificate on June 2010 she used to secure the sheltered job because she was going through a divorce. According to the article she was already single 23 years ago using her maiden surname 'Thulare'. Their evidence contradicts the article.

[42] Furthermore, according to the article she was prior to 1991 already a single mother with three children. Her youngest daughter by that time would have been born. However in 2014 her daughter was said to be 19 years old, which makes it improbable that she would have been born at the time the article was published which would be prior to Ms R leaving Soweto in 1991. Another contradiction between Ms R's witnesses and the article.

[43] Ms R in her testimony further stated that when running her business in Soweto she was assisted by a friend Maria or Mary, referring to Ms Khanyile. Ms Khanyile confirmed that they worked together in Soweto and also when they met again in

Dawnpark. Neither Ms Khanyile nor Ms R, throughout their evidence mentioned any other person who assisted Ms R at any time in any of the alleged businesses. Ms Khanyile under cross examination actually confirmed that her version is that it was only the two of them and she was the only one offering assistance to Ms R who would call her as and when there is something to do. The article on the other hand, states that Thulare employed two ladies to assist her to cope with the demands of her dressmaking business in Soweto. The article therefore is not corroborative of Ms R or Ms Khanyile's evidence.

[44] Furthermore the article does not say anything about or mention catering, although it is Ms R's allegation that she had started with the catering business whilst she was in Soweto.

[45] Ms R also led the evidence on an old document that profiled the business or services rendered by her close corporation, for which she was the sole director. Dressmaking her old business or trade, is not mentioned, even though that is the only business Ms R spoke at length about during the trial, in an attempt to prove an additional loss of what she alleges to have been a lucrative business she allegedly ran besides catering. It is alleged in her particulars to form the basis of her claim for loss of her earning capacity. A business she claims to have been doing for decades. Surprisingly none of the services she purported in the profile to have been running are mentioned in her particulars or her testimony and no claim was filed in respect thereof. There is no reason proffered for the omission.

[46] It is her evidence also that she registered her company in order to expand the services she could provide to include dressmaking, but the company registration and profile as already indicated do not mention dressmaking. Catering is also not mentioned. The answer she gave for not mentioning catering was that she could not get a tax certificate and therefore could not do business with the Government Departments. And yet she had testified that she catered for the Government Department in groups of approximately 200 -400 people (160-200 according to Ms Khanyile) three times a month and made +- R10 000.00 a month which contradicts her prior statement. Such evidence is unreliable. The 2009-2010 clearance certificate discovered cleared the company only in respect of the construction business. Which reinforces the conclusion that the

existence of these two businesses is doubtful, evidence of both Ms R and Ms Khanyile in proof thereof is shrouded with inconsistencies and contradictions.

[47] Ms Khanyile had testified that even after Ms R had secured employment at Secure Products they remained very busy with both catering and dressmaking businesses. During that period they would work until late at night. Ms R would usually join her after work and be busy until 10h00 at night, working on the catering orders. On the other hand Ms R's testimony is that after securing employment at Secure Products she ran the business only on weekends and did not mention her running the business and working after hours until late at night. It would also be far-fetched that the said business was booming even after Ms R had secured a full time job at Secure Product, continuing to make the alleged income of R10 000.00 per month. Ms R was allegedly according to Ms Khanyile, the one with skill and on a full time employment during the day, so not possible that the business could have continued to generate the same income.

[48] The final straw in the evidence led on behalf of Plaintiff is the incomprehensible explanation Ms R gave for having allegedly opted to forego the full time running of a lucrative business for a sheltered employment (even going to the length of fraudulently obtaining medical certificate) that pays comparably, a paltry salary. Her initial answer was that her head was not right as she was going through a divorce. Afterwards she said (which is probably the truth) she wanted the security that the sheltered job offered in respect of pension. Even in that regard which of all these versions is the truth.

[49] In addition to all these inconsistencies and contradictions Ms R and Ms Khanyile could not produce reliable documentary evidence to prove that such a business existed or made the alleged income. The main damaging causative factor is that the circumstances or reasons for not being able to produce such evidence were unconvincing and lacked sincerity. If Ms R has at some point submitted financial statements to SARS, evidence would be accessible. She alleged that her daughter or children handled the books and also took care of her tax issues as well. She then again alleged that the reason for her not being able to produce any documents is that her daughter or children when they were cleaning, burnt the books or threw away everything. If her children knew what the documents were for, and were involved in their

compilation and kept them for Ms R and SARS for tax purposes, it is incomprehensible or improbable that they that they would just burn or throw away the books as part of cleaning.

[50] Taking into account all the snags in Ms R's evidence I find that there is no tangible evidence that she conducted the business of dressmaking or catering whilst working at Secure Products or even prior to that. She had a company registered for different services in 2005 but had not registered dressmaking or clothing, her major business. There is no also proof that she ran a catering business. On her own evidence she could not get the business from the Government Departments due to not having a tax certificate which she could not get issued because of the money that was required. The evidence on the existence of these businesses is unreliable and the amount its alleged they generated indeterminate, there being no credible details from which that could be established. In argument it was conceded by Ms R's Counsel that a higher contingency should be applicable, instead of total disregard of the evidence as suggested by Defendant. As a result a discount of 40% on the alleged earnings should be effected. The uncertainty being a serious diminishing factor on Ms R's capacity to earn.

The nature, extent and effect of the injuries sustained

[51] All the experts compiled their reports in consultation with Ms R who then reported on her physical, emotional and cognitive status prior and post the accident. Notably, on the accident itself her evidence was that she could not remember anything that happened at the time of the accident **except for what she says she was told when she woke up in hospital after 5 days.** What **she** could notice then was only the eye that was hurting and a headache, **alleging that she was unconscious for 5 days.** The experts gave their opinions structured upon the facts she relayed to them in relation to her pre and post- accident condition, in addition to the documents filed of record, like the hospital records, RAF 1 and RAF 4 Forms and other expert opinions.

[52] It is trite that courts must ensure that the facts underlying the experts' opinions were sufficiently reliable. The concern *in casu* being that an expert's opinion is only as reliable as the evidence on which it is based. If the court could not find the facts

according to the Plaintiff legally reliable, the opinions become to that extent unusable. The court will therefore in weighing the evidence of the experts take cognizance of what has been found to be unreliable in Ms R's evidence and carefully assess the conclusions made by the experts and enquire on their rationality. Especially if the information they based their assessment on to determine the nature, extent and effect the accident had on Plaintiff's **as presented in their reports is inconsistent and discrepant.** It is the function of the court to base its inferences and conclusions on all the facts placed before it. In *S v Harris* 1965 (2) SA 340 (A) at page 365B-C the court stated that:

"In the ultimate analysis, the crucial issue of appellant's criminal responsibility for his actions at the relevant time is a matter to be determined, not by the psychiatrists, but by the Court itself. In determining that issue the Court - initially, the trial Court; and, on appeal, this Court - must of necessity have regard not only to the expert medical evidence but also to all the other facts of the case, **including the reliability of appellant as a witness and the nature of his proved actions throughout the relevant period.** (*my emphasis*)

[53] In respect of the nature of the injuries sustained the first documents to be consulted should be Ms R's hospital records. The court took into account Ms Angus's evidence and report together with the report of the neurosurgeon Dr du Plessis to highlight what was supposedly in the record, which the parties did not bother to attach to the records.

[54] Taking into consideration Ms Angus's evidence and report on the injuries sustained, Ms R consulted with Dr Du Plessis, the neurosurgeon, on 21 February 2014, three years after the accident. According to him Ms R sustained injuries in the accident that were recorded by the hospital as: (i) **a mild head injury, (ii) damage to the 6th cranial nerve on the right which resulted in a double vision and a squint and (iii) soft tissue injuries to the left side of the face, leading to Ms R feeling dizzy** and having a double vision. She was unable to go back to work. She received Botox injections for her squint and later underwent surgery to fix the squint. Ms **R reported to him that she also sustained soft tissue injuries to both knees.** The injuries are not recorded in the hospital records.

[55] Dr Du Plessis conducted a special investigation by referring Ms R for a MR scan of the brain on the day of the consultation. **The scan showed no sign of a diffuse or focal brain injury, but for small ischemic changes noted in both hemisphere which he says is probably related to chronic hypertension,** a pre-existing condition at the time of accident. Plaintiff said dizziness was not a problem before.

[56] According to him the following information was recorded in the hospital documents:

"On arrival the Plaintiff was groaning from pain with a **GCS of 15/15** and a swelling in the periorbital area. **Diagnosed with a mild head injury. At 13h00 in the afternoon she was received from casualty, conscious not restless** with left side of face swollen and left eye not opening but **responding to verbal commands**. At 17h00 that afternoon it was noted that **she is fully awake but not well oriented**. On 9 November 2010 at 17h00, a day after the accident, the Doctor's note said **she was fully awake, alert and oriented and well oriented at GSC 15/15**. The recordings said **he was awake, alert and oriented with a GSC score of 15/15 for the following days. On 12 November 2010** it was noted that **she was also communicating well**. The GSC score stayed at 15/15 until the Plaintiff was discharged from hospital on 22 November 2010".

[57] **St John's Hospital records indicate that on 9 December 2010 she had no headaches or dizziness.** Still 15/15 GSC and right sided abducens nerve palsy. I have noted that in other reports the GSC score was recorded from the RAF Form completed on behalf of Ms R after the accident noted as 14/15. The court will take into account the information and GSC as recorded in Ms R's hospital records as none of the experts had explained why they had reported on the information differently. The court note also as of significance that Ms R was already awake at 13h00 on 8 November 2010, the date of the accident when she was received from casualty, responding to verbal commands and not restless. On 9 November 2010 she was well oriented. According to Ms R she was only awake after the 12 November 2010.

[58] The court has taken into account that Du Plessis reported that Ms R was

disorientated for approximately 12 hours after the accident and not unconscious. Further that it would appear she was drowsy for the first few days after the accident. An episode of confusion appearing again recorded on 17 November 2010, 9 days after the accident. **It is to be noted that the doctor does not use the word unconscious in his report.** Since it is **clearly indicated that Ms R was awake and well orientated since the date of admission till 17 November 2010.** Du Plessis instead speaks about being drowsy, retrograde amnesia and post-traumatic amnesia and an episode of confusion again. There is no drowsiness or episode of confusion recorded in the first few days after the accident, that repeated itself on 17 November 2010 as alleged by du Plessis. Drowsiness meaning sleepy or tiredness was only indicated on 18 November 2010 after which it was later indicated that **drowsy/sleeping due to the heat and tiredness.** Such drowsiness cannot be rational of Plaintiff having sustained **a moderate to severe concussive head injury** as Du Plessis indicated comparable to the mild injury recorded by the hospital. He reported that from the hospital records and history Ms R provided and from an impression gained at examination, she sustained a moderate to severe concussive head injury. However the hospital records do not justify such a conclusion and the history of 5 days of unconsciousness as provided by Ms R is not supported by the hospital record. She would not have been able to respond to verbal commands at 13h00 and noted to be fully awake at 17h00 on the date of her admission to hospital with a moderate to severe concussive head injury. The MR scan/examination he ordered Ms R to undergo indicated no sign of a diffuse or focal brain injury.

[59] **The past medical history** that Ms R provided to Du Plessis was that **she was not on chronic medication, not dizzy and had no eye problem before the accident.** She said to him she was on treatment for hypertension. She underwent surgery for a tenolysis of her right wrist in 2000. Then the current symptoms Ms R mentioned were dizziness, moderate headaches, forgetfulness, misplaces her belongings, concentration affected, taking more breaks at work than before, struggles intellectually cannot interpret patterns when she makes clothes.

[60] Du Plessis concluded that Ms R's memory and concentration has been affected and **her dizziness caused by the head injury. Suggesting that her residual visual symptoms, might be because of injury to the vestibular tracts in the brain stem or**

the result of damage to the inner ear structures, deferring to an ENT and an Ophthalmologist. It is important however to note that he subsequently contradicted his conclusion on the dizziness by pronouncing that **"dizzy spells do not necessarily point to a head injury"**, in response to the information Ms Angus obtained from Ms R's employer. **He also acknowledged that Ms R was not candid with him and did not provide accurate information with regard to dizziness. She had alleged not to have struggled with dizziness before the accident. He also altered his opinion on the residual visual symptoms admitting that it has no relevance to the abduces nerve palsy that developed after the accident.** Such evidence is very critical as it has already been shown that most of the experts were consulted upon such conclusions being made. Du Plessis had, following such a conclusion suggested that an ENT and an Ophthalmologist be consulted on the basis of his opinion on the residual visual symptom. **The costs of such experts were unnecessary and therefore not to be borne by the Defendant.** The court took into account that all experts have relied on the aspect of dizziness being reflective of the seriousness of the head injury despite being recorded by the hospital as a mild injury. It is not the first time Ms R has not been truthful to a doctor and such costs.

[61] It is critical also to note that Ms Angus on the other hand noted as the post-accident condition that Ms R suffered from persistent headaches, dizziness, and whilst at her office she complained of a moderate headache, at the end of the consultation her headache had worsened. During the testing the headaches remained bad. She reported to Dr Angus that she suffers from headaches everyday, lasting the entire day covering her whole head, complained of an ongoing dizziness and thus poor balance. Also that when Ms Angus questioned her about **the dizziness she had** before the accident Ms R said it was occasional and **the dizziness and balance problems have been significant since the accident.** However Ms Angus concluded that **the headaches that Ms R suffers from are typical of brain injury. It was however** countered by the information she discovered on investigation that Ms R had the headaches prior the accident. Ms Angus also noted Hatting reporting in her addendum that it leaves no doubt as to the cause and origin of her post accident dizziness and balance difficulties to be the head injury. This however should be viewed from the perspective that Du Plessis afterwards backed down from his opinion that dizzy spells point towards the severity of the brain damage, since Ms R suffered some measure of dizzy spells and

headaches before the accident. When she was cross examined on the ailments she suffered from before the accident she said she had headaches.

[62] Moreover, taken into consideration was the fact that on testing by Ms Angus, Ms R showed good mathematical ability even though her **working memory found to be poor** and to may have been affected by sustained concentration difficulties. Her concentration fluctuated significantly and the test also suggested a difficulty in sustaining concentration which proves sensitivity to **the cognitive impairments that results from brain injury**. Ms Angus noted that Ms R struggled with sustaining concentration and has complex attention and double conceptual tracking problems. Her verbal memory was good and that she had a working memory problems. Her work speed was very slow. The many deficits she had were typical brain injury. Ms Angus noted that Hatting also took into account that she has specific verbal and retrieval skills amongst other difficulties which was said to highlight that **she has neuropsychological deficits**. She also has auditory processing difficulty which would explain many of her problems. All these were said to be brain injury related. All also evaluated considering what was Ms Angus's evidence in court, that Ms R's short term memory was not functioning properly, however her old learning was still stable. The stuff that she already knew will remain, so she will not have a problem with that since it is something that she has lived with. It is significant that from the reports it was apparent that as of date of trial she was back at work employed in the same position as a machinist. A point she was candid about in court. She dishonestly presented that she is still employed to what she initially referred to as a cleaner when in truth she cleaned off the threads form the finished garments.

General Damages (disfigurement, pain & suffering)

[63] Ms Angus also reported that MJ's R's had double vision but this cleared up in 2012. **Her vision is now normal after the operation except for the peripheral vision which she reported to have been affected**. She however uses glasses. She also indicated that she now presents with mood symptoms. **Also that depression as well can impact on cognitive functions**. In the symptoms identified as depression can mean in fact symptoms of organic brain damage. Ms Angus concurred with Dr Shivel that Ms R is suffering from an organic (gradual) brain damage. **She concluded that**

she has neuropsychological cognitive deficits, mood and personality changes as a result of the moderate to severe brain injury sustained in the accident in question. She also has various physical problems and fatigue as a consequence of the accident. She recommended that she undergo supportive therapy for her depression and anxiety. Forty sessions recommended at a cost of R900 a session. It is not suggested that any therapy is curative. She said R will always have neuro stigmata as a result of the accident but it should assist in improving the quality of life and provide support in time of crises. The report is noted except the conclusion that the brain injury was moderate to severe. No justification had been submitted for holding an opinion that Ms R's injury was not slight but moderate to severe.

[64] Dealing with her cognitive deficiencies, it is noted that there was conflicting evidence regarding her level of education. Ms Angus reports that she has a grade 8 level of education, however in concluding her report and in court Ms Angus testified that Ms R has finished school and has a matric. Other reports also continue to refer to her as having only a Grade 8 education. This is of significance since it will impact on the evaluation of her earning capacity as well. Since also on the tests conducted by Ms Angus she noted that many of Ms R's neuropsychological scores are lower than expected.

[65] Ms R is said to have suffered from body pain as well. Angus confirmed that it is well documented that patients with pain often have reduced attentional capacity processing speed and psychomotor speed. Performance in these areas was probably affected to some extent by her pain and discomfort but that the range and severity of her difficulties cannot be explained by pain alone. The combination of neuropsychological deficits special concentration and slowed work speed, headaches and constant dizziness have understandably had a significant impact on her capabilities. Therefore the sentiments that her pain and suffering had undergone a significant change in her ability to cope and handle her own life should be viewed with some circumspection. She is said to have been a capable independent decisive and confident woman and now she has to deal with cognitive mood personality and physical changes impacting negatively on her life. Du Plessis noted that she used to make her own clothes before the accident and says she is no longer able to do it because she struggles to read the patterns. The opinion is viewed with circumspection since there is

no sufficient credible evidence proving that. She has since been working as a machinist seamstress again.

Loss of amenities of life

[66] Ms R indicated to Dr Linde that she used to play basketball as a member of the community team. She was also a member of a church choir. She used to read the bible and magazines now she forgets and unable to do any of the activities anymore. She still attends church every Sunday. She has completed Grade 10 and computer literate and she could not complete school she got pregnant. To Ms Angus she said she went up to Grade 12. Dr Linde said during the interview she displayed problems with memory, she was unable to recall her Id number. She was unsure about the date of her accident. When asked for her birth date she recited her full Id number that she could not remember before. She spoke softly avoiding eye contact. All this was something new now. She took pain medication to relieve her headache during the interview.

[67] As regards the severity of her reported cognitive difficulties and its impact to her productivity or earning capacity as a seamstress, Du Plessis **deferred** to the neuropsychologist and **industrial psychologist, however not ruling out** a chance of recurrent episodes of absence from work due to falls as a result of dizziness. Also unlikely that she would recover fully from her dizziness in the long term **suggesting that more information be obtained from her employer.** She could not function at the level she did before and regarded as fortunate that her visual problems have improved through surgery and only peripheral vision left. Also that she was lucky that she was already working in a sheltered employment. If she does not work for Secure Products she would cope at a similar structure or routine supervised environment where employer understands her physical and mood problems. According to him she is considered unemployable in the open market. This opinion should be viewed against the fact that Ms R is back at the sheltered employment in her previous position as a machinist paid accordingly. In Du Plessis' report he makes no mention of any other work she performed besides her formal work as a seamstress. He also concluded his report without verifying with the employer the information of Ms R's condition post the accident, even though such verification is suggested in his report. Ms Angus's outlook is that the post- accident conditions that could impact on **Ms** R's ability to sustain her business are

her cognitive mental functional problems, like depression, anxiety, physical condition entwined with inability to stay focused. She at the same time said she regarded Ms R's mood as euthymic (which is a normal non-depressed reasonably positive mood). This is contradictory.

[68] It is again of importance to point out that Ms R in court did not mention that as of that time she was reinstated to her position as a machinist and testified that she still is employed as a cleaner. So it would be difficult to establish with certainty as to exactly what Ms R can or cannot do. **Once more that would not have been as a result of the injuries she sustained from the accident as indicated that the episodes of dizziness and headaches were alleged to be there in another set-up of her scheme.**

[69] I had, inter alia considered the Industrial psychologist, Dr Louis Linde's report who consulted with Ms R on 9 May 2014 and reported that according to the RAF 1 Form the injuries sustained by Ms R were **a mild head injury and pain on elbow and face.** Understandably that might have been completed probably prior to the hospital records being obtained. Linde noted that on 4 May 2012 Dr Kaplan noted her current complains to be double vision right eye that is now better after operation. Sore right breast, **extreme fatigue, anxiety, tends to be confused and poor cognitive and executive ability.** The diagnosis being a head injury and brain injury chronic subdural, right 6th nerve palsy on and cognitive and executive dysfunction and loss of life roles. Whilst a RAF 4 Form that was concluded by Dr van den Bout on 4 April 2013 is indicated to have noted the injuries suddenly to be a **severe head injury, severe facial injury, right eye injury, injury to both knees, abrasions and emotional shock and 45% whole person impairment.** It is strange how the mild head injury and a soft tissue face injury had developed from date of accident, 3 years thereafter to be a severe head and face injury. The differences on such factual matters is frightening.

[70] Dr Linde's report record that **Ms R had a sinus operation as well as an operation for carpal tunnel syndrome before the accident, information Ms R did not divulge to any of the other experts.** She also revealed information of the surgery she underwent on her right wrist and the precondition of hypertension. After the accident besides an operation to her right eye she according to him fell into a gutter in

2013. She complains of chronic dizziness, had stopped socializing and her strength depleted. **She cannot stand for long and has chronic pain in her legs.** The chronic pain on her legs was also revealed only to Linde. She has a poor memory and stated that she often forget things. She is afraid of travelling in a taxi and always has got somebody to come with her. **She is still in the same employment in the same position as prior the accident and still uses the taxi to go to work.** She has constant headaches and takes pain medication regularly throughout the day. She report problems with her eyes and always disoriented therefore needs someone with her all the time. She does not indicate if this person accompanies her in a taxi every day to work and back. Always there at home and work as well. She is of the opinion that she is depressed.

Management of funds

[71] Dr Linde reports that the family history as re-counted to him was that Ms R met her ex-husband when still at school and had a child. They later married. **She was divorced between 2007 and 2009** prior the accident. Whilst the article from the tearsheet indicate that she was divorced a very long time ago. So even this information is not reliable. **She signed over her house to her aunt** while she was in hospital. However Ms R's younger daughter told him in an interview he conducted with her before compiling his report in March 2015 that the aunt has now moved out of the house. The only people who were staying in the house was her and Ms R. They were busy with a process of retransferring the house back to Ms R. All these facts were not presented on trial. The court was informed of the takeover by the aunt and seven other people.as the prevailing status quo on the date when matter was on trial and Ms R and her daughter still staying in a room. Why would Ms R want to present a picture of delusional and stressed person? The issue of a curator bonis was premised on those facts by the experts.

[72] Her ex-husband is a principal. Her 41 years old son is an IT specialist. Her one daughter is 32 years old and working at the UIF Department within the Department of Labour and her younger daughter 20 years old and a full time student at Milpark Business College. Her immediate family is of capable and educated people. This indicates that her children would also be knowledgeable with regard to the importance

of keeping records or books of accounting of a business and SARS tax information. She also testified that her daughter assisted her in keeping proper financial statements and with tax issues.

Amenities

[73] It should be noted that the Industrial psychologist took into consideration the report by Gous that a moderate to severe asymmetrical sensory-neural hearing loss was reflected in both ears. Her hearing difficulty does not affect her own perceived functional communication abilities at present in quite environments. However with possible cognitive disabilities and poor environmental acoustics and or noise she may find it harder to cope in communication situations. Ms R may make use of coping strategies such as withdrawal which may result or contribute to a form of depression she may experience at present. She also noted that Ms R reflected difficulties in the sensory and motor output systems that contribute to a postural balance disorder and the dizziness difficulties she is experiencing. Her hearing and related balance and the dizziness she is experiencing places her at a high risk of falling. Hatting' opinion noted that the dizziness and balance difficulties affect and have a significant impact on her quality of life and she is at an increased risk for secondary injury as a result of her propensity for tripping and falling.

[74] Linde recorded that as a result of the head injury she suffered, Ms R has lost her sensori-neural hearing loss in both ears (Ms Gaus) as well as a cochlear lesion. As a result her hearing loss as well as problems with motor ability and dizziness is at high risk for falling when doing activities where motor planning and integration are involved. As a result she is at increased risk for a secondary injury. It is noted that she has suffered a loss of amenities and life enjoyment. Such loss however cannot be regarded as severe to justify the amount claimed but moderate.

[75] Her legal employment history that was recorded is that between August 1994 - 2005 she was employed at Transvaal Mattress & Furnishing Company trading as Sealy as a seamstress and machinist earning R641. 67 weekly by 2005 she was earning R909.06. She worked for the company for 10 years. In 2002 - 8 November 2010, she established a business in 2002 as a sole member" Ka Wena Nka Phela General

Construction CC which she conducted while employed at Sealy until 2005 when she then registered it and started to focus on it. She was responsible for catering and earning an amount of R10 000 per month from the business. She continued the business on a part time basis when she obtained work at Secure Products in 2010. **She obtained the job as a sense of security after the divorce. One of the managers was a friend and asked if she wanted to work there. She started there on 9 June 2010.** The medical certificate dated 22 June 2010 she obtained from Khumalo indicated that she was diagnosed with hypertension, osteoarthritis, right eye short sightedness and peptic ulcer disease prior to being employed at Service Products. For that reason she was placed in the sheltered employment company. It falls under the Labour Department and makes government uniforms, sheets and blankets. Her monthly salary indicated in her payslip as varying between R 2 767.89 and R3 308.57. They would also be paid for overtime.

[76] Further information was obtained by Dr Linde from Ms R's employment that indicated that her supervisor could not explain why she was employed there. On a scale of 1 to 10 her work was rated or scored to be 9/10 by Coetzee. The personnel officer indicated to him that people employed there have disabilities so they are employed there to be assisted. He was told through ethical concerns he would not be told why Ms R was in their employment. She however confirmed that to be employed there one needs a medical certificate. The retirement age there is 65 years old. By 25 March 2015 she was earning as a machinist a salary of R 4 500.53 per month.

[77] For purpose of quantification Linde recommended 3 to 5 years from the date of accident. As I have indicated this employment would not be considered. **Dr Linde however opines that should Ms R have lost this job she would be in a position to enter the formal open labour market.** She has to be assessed in that capacity. With regard to her business, **Dr Linde took into consideration that no proof of the income was provided and suggested a positive contingency.** After the accident she feels physically and mentally unable to work at her businesses and her circumstances have impacted negatively on her ambition. She thinks she might not produce the same quality of work. This would be regarded as speculative since it is what she thinks and not factual. Coetzee's report indicates otherwise, indicating that her work was now rated 9/10. **At the time of Linde's report 25 March 2015, it was confirmed that Ms R is**

employed 100% as a machinist and earning R4850.53 with a housing subsidy. On speaking with Coetzee again he was told that when it was enquired from the supervisor Ms Kubheka about Ms R's work she was told that her work has not changed she performs the same and remained employed as a machinist. He also records that prior to the accident she enjoyed good health, if Dr Khumalo's letter is to be ignored Dr Linde reckons she would have been able to retire at 65.

[78] However when Kubheka was contacted directly she said her opinion was that Ms R's work was no longer the same post the accident. That is the reason she worked as a cleaner when she came back to work, although she is now placed back into her position she is not as fast as she was prior the accident, saying her performance is now 5/10 and her employment not guaranteed. It was therefore noted Ms R is not a candidate for work within the light to medium work categories, which requires fast and accurate fine motor work such as working with a sewing machine. She is restricted to work that falls in the Sedentary Work Category, such as that of Garment cleaner. This is not accurate, the information that was presented conflicting. Ms R testified in court that she is still employed as a cleaner when she was not. For the purpose for recovery the information would be considered.

[79] She would also need to be employed in a supportive emphatic environment. This is also not accurate as Coetzee responsible for personnel has not received any report that indicates her performance to be less than before the accident which has been rated as 9/10. It is accepted as noted that pre-accident her potential has been negatively affected by the accident and *sequelae* such as her cognitive, emotional and physical problems and she may struggle with alternative employment, but not that she is found unemployable.. Regarding her business it is noted that she will not be able to continue her business activities. It is recommended a higher contingency deduction be applicable due to the uncertainty of Ms R's business. It has already been indicated that the sheltered employment will be disregarded for that purpose.

[80] Now having taken into consideration and assessed all the evidence as collated in the reports by the experts and the testimony of the Plaintiff's witnesses, it is largely the discretion of the court to determine an appropriate award for the general damages, which account for pain and suffering, disability, disfigurement and loss of amenities of

life. Placing a monetary value on these factors in attempting to arrive at an appropriate award is a very difficult task that has been described in *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199 as follows:

'in determining the award of damages to be made under the heading general damages there are of course no scales upon which one can weigh things like pain and suffering and loss of amenities of life, nor is there a relationship between either of them and money which make it possible to express that in terms of money with any approach to certainty. The broadest general consideration and the figure arrived at must necessarily be uncertain, depending upon the judge's views of what is fair in all the circumstances of the case.'

[81] The general practice of the courts is to obtain guidance from previous awards made in comparable cases. It is to be cautioned that such awards could only offer broad and general guidelines in view of the differences that inevitably arise in each case and should not interfere with the court's general discretion; see *Protea Assurance v Lamb* 1971 (1) SA 530 (A) at 535H- 536A. Of utmost importance is that each decision should be influenced by the distinctiveness of the facts of each case. The principle however remaining that the award should be fair to both sides- it must give just compensation to the Plaintiff, but not pour out largesse from the horn of plenty at the defendant's expense,' as pointed out in *Pitt v Economic Insurance Company Limited* 1975 (3) SA 284 (N) at 287. I have therefore painstakingly considered the comparable authorities as a guideline and most of all the facts in relation to what I have to consider as the general effect of the injuries sustained by Ms R to her general life.

[82] It is evident that she has endured a measure of suffering due to the head injury affecting her moods, concentration and causing her a considerable amount of pain. The severity of the injury is taken into account that it was graded as a mild injury and that other experts had referred to as moderate to severe and severe. The fact that it has resulted or caused retrograde amnesia and organic traumatic amnesia. Also neuro cognitive difficulties and neuro behavioural problems also arising from depression. Her physical performance was said to be somehow limited in normal life circumstances. She will still be able to attend church and read the bible and magazines It is all also in

fairness that her condition prior to the accident should have an impact on the contingency to be applied that she already suffered from the headaches, dizziness and had a problem with her vision as well. Her pain intensity also appeared to be exaggerated or out of kilt with the injuries suffered or her prevailing status. The injuries sustained and prior ailment were only revealed in 1 or 2 reports that indicate that her post tiredness was also caused by previous manifestation of pre- existing ailments that where not taken into account by other experts. In the final analysis taking into account the nature of the injuries sustained by Ms R and their sequelae, the awards in previous comparable cases and the decline in the value of the currency, I am of the view that an amount of R450 000.00 for general damages would constitute a fair and adequate compensation.

[83] As indicated above there were challenges that the court was confronted with in dealing with Ms R's evidence in order to arrive at a fair assessments of the facts and award to be made. As for the Plaintiff to succeed in a claim for loss of earnings, she is required to provide a factual basis that allows for an actuarial calculation. A process designed to assess actuarial /mathematical calculations on the basis of the evidence as well as overall assumptions vesting or depending on evidence, known as the actuarial approach): see *Southern Assurance Association Ltd v Bailie NO 1983 (3A4) QOD 351 (A) (1984) (1) SA 98* at 358-359 (112E-114F. This approach seeks to determine the loss of earnings as realistically as possible to what may be the Plaintiff's actual loss. The approach comprises of (a) providing a factual basis upon which the loss of earnings is to be calculated and only then (b) by applying appropriate contingency deductions. That is what the court has done in this instance. I have indicated the challenges encountered by Ms R in establishing the factual basis upon which the loss of earning capacity would be calculated and as a result indicated that her earnings in relation to the sheltered employment will be disregarded and a contingency deduction of 40 % to be applied to her self- employment earnings. The contingency deductions are within the discretion of the court and dependent upon the Judge's impression of the case.

[84] The Plaintiff has not exhibited a need or made a sufficient case for the appointment of a curator *ad litem*. With the family support that she is getting such an appointment would seem not necessary. However a formal application may be brought if the Plaintiff still insist that such a need exist.

[85] As a result, the earnings of the sheltered employment for reasons of public policy are disregarded and on the future loss, a contingency deduction of 40 % is applied on the value of the uninjured self-employment as per actuarial calculation. On the value of the injured self-employment of R378 881 less 40% equals an amount of R113 664.20 deduction. **The net future loss of earnings amount awarded is R 173 684.60**

[86] Past loss of earnings on uninjured self-employment amount of R493 774.00 as per actuarial calculations applying a contingency of 40 %, the amount payable is R296 264.40 less R130 001.80 the value of uninjured income equals a **net past of loss of earnings amount of R166 263 .50.**

[87] The total of Ms R's damages is R789 948.10 made up as follows:

Future medical treatment	An undertaking in terms of s 17(4) (a) of the Act
General damages	R4 <u>5</u> 0 000.00
Past loss of earnings	R166 263.50
Future loss of earnings	R173 684.60

[88] It is therefore ordered that:

[88.1] The Defendant pay damages to the Plaintiff, in a total amount of R739 948.10 (Seven Hundrend and Thirty Nine Thousand Nine Hundrend and Forty Eight Rand and Ten Cents) within 14 days of the date of this order. Interest shall accrue thereafter at the rate of 9% per annum from the date of order to date of final payment.

[88.2] The Defendant is to furnish the Plaintiff with an undertaking in terms of s 17 (4) (a) of the Road Accident Fund Act, Act No 56 of 19996, covering

100% treatment or rendering of a service, or supplying of goods or related expenses as, inter alia, set out in the Plaintiff's medico legal reports, in respect of injuries sustained by the Plaintiff in a motor vehicle collision which occurred on 8 November 2010, after such costs have been incurred and on proof thereof:-

[88.3] Payment of the Capital amount is to be made into the following account:-

Account Name:	Edeling Van Niekerk Incorporated
Bank:	NEDBANK
Branch:	Business Westrand
Account Number:	[...]
Branch Code:	128605

[88.4] The Plaintiff's attorney will be entitled from the aforesaid funds held by them for the benefit of the Plaintiff, to make such payment of expenses incurred in respect of accounts rendered by the following expert witnesses, namely:

[88.4.1] **Dr** Cathy Angus, Clinical Psychologist

[88.4.2] Counsel employed on behalf of the Plaintiff;

[88.5] The Plaintiff's attorneys shall be entitled to payment, from the aforesaid funds held by them for the benefit of the Plaintiff of their fees in accordance with their written fee agreement OR as taxed of an attorney and own client bill of costs;

[88.6] The Defendant pays the Plaintiff's taxed or agreed party and party costs on the High Court Scale which costs will include, *inter alia*, the following:

[88.6.1] The cost of junior/senior counsel;

[88.6.2] The medico legal reporting costs as well as preparation and reservation costs, if any, of the following experts

[88.6.2.1] Dr J J du Plessis, Neurosurgeon;

[88.6.2.2] Cathy Angus, Clinical Psychologist

[88.6.2.3] Ida Marie Hatting (Speech / Language pathologist & Audiologist)

[88.6.2.4] Dr D Shevel, Psychiatrist

[8.6.2.5] Alison Crosbie, Occupational Therapist

[88.6.2.6] Louise Linde, Industrial Psychologist

[88.6.2.7] Mr G Whittaker, Algorithm

[88.6.2.8] Rialette Gaus, Speech/ Language Pathologist & Audiologist

[89.7] The costs occasioned in respect of 28 April 2015.

NV KHUMALO J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

On behalf of the Plaintiff:

Adv E Kromhout

Instructed by:

Edeling Van Nijkerk Incorporated Attorneys

Ref:

Ms L De Souza

On behalf of the Defendant:

Adv L Tyatya

Instructed by:

Tau Phalane Incorporated Attorneys

Ref:

Mr Rachuene