

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2015/20107

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

H A. BERKOWITZ

28 MAY 2024

In the matter between:

KELLY COHEN

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Case Lines. The date and time for hand-down is deemed to be 10h00 on 28 May 2024

JUDGMENT

BERKOWITZ AJ

- [1] On 24 November 2013 at approximately 09h00 and on the R501 at Carletonville, a head on collision occurred between two motor vehicles. The plaintiff was seated in the rear of the motor vehicle behind the front passenger seat when a vehicle travelling in the opposite direction swerved into the path of the vehicle in which the plaintiff was being conveyed. Despite attempts by the driver of the plaintiff's vehicle to avoid the oncoming motor car, he was unable to do so and the vehicles collided head on.

- [2] The plaintiff sustained serious injuries as a consequence of the collision. Two individuals driving in the other vehicle were less fortunate. They perished as a consequence of the collision.
- [3] The plaintiff sustained, *inter alia*, a concussive head injury, a fracture to her left clavicle and an injury to her lumbar spine.
- [4] The defendant has conceded that it is liable for one hundred percent (100%) of the damages proved by the plaintiff at trial. It is in respect of quantum that the trial proceeded.

BACKGROUND HISTORY OF THE MATTER

- [5] Summons was served in this matter in June 2015. The defendant served its notice to defend and its plea, including a special plea, on 9 July 2015.
- [6] Since the close of pleadings, it has taken almost a decade to bring to its conclusion.
- [7] The plaintiff filed the following expert reports including:
 - 7.1. Dr Cor van Zyl – Ophthalmologist, dated 3 November 2015; Addendum report filed on 11 October 2017;
 - 7.2. Dr Menachem Mazabow – Clinical Psychologist, dated 22 August 2017; Addendum report filed on 4 September 2019; Second Addendum report filed on 13 November 2023;
 - 7.3. Mr Bruce White – Plastic and Reconstructive Surgeon; dated 21 July 2017;
 - 7.4. Dr Anton van den Bout – Orthopaedic Surgeon, dated 11 April 2016; Addendum report filed on 18 October 2017;
 - 7.5. Dr Tommy Bingle – Neurosurgeon, dated 31 August 2017; Addendum report filed on 19 October 2017;
 - 7.6. Michelle Doran – Occupational Therapist, dated 20 September 2017;
 - 7.7. EA Rossouw – Industrial Psychologist, dated 19 October 2017; Addendum report filed on 3 September 2019;
 - 7.8. Gregory Whittaker, Actuary, dated 20 October 2017; Addendum report filed 18 September 2019; and

7.9. Dr Lynette Nel – Psychiatrist, dated 17 January 2024.

[8] The defendant filed reports by the following experts:

- 8.1. Dr Pusuletso Dlukulu, Clinical Psychologist, dated 4 July 2017;
- 8.2. Dr Jaap Earle, Neurosurgeon, undated;
- 8.3. Mamotshabo Magoele, Occupational Therapist, dated 5 October 2017;
- 8.4. Dr Saul Braun, Plastic and Reconstructive Surgeon, dated 5 October 2017;
- 8.5. Tshepo Tsiu – Industrial Psychologist, dated 31 October 2017;
- 8.6. Dr VM Mandita – Neurologist, undated;
- 8.7. Dr Johannes Heymans – Orthopaedic Surgeon, dated 22 August 2017; and
- 8.8. Dr RTH Lekalakala – Psychiatrist, dated 31 October 2019.

[9] During 2017 the plaintiff's and the defendant's experts filed the following joint minutes:

- 9.1. 23 August 2017 between Drs Mazabow and Dlukulu;
- 9.2. 18 September 2017 between Drs Bingle and Earle;
- 9.3. 3 November 2017 between Drs White and Braun;
- 9.4. 5 November 2017 between Ms Rossouw and Mr Tsiu;
- 9.5. 6 November 2017 between Ms Doran and Ms Magole;
- 9.6. Undated between Drs Nel and Lekalakala; and
- 9.7. 27 August 2019 between Drs van den Bout and Heymans.

[10] The first pre-trial conference was held on 28 September 2017 and signed minutes record what was then agreed between the parties.

[11] The second pre-trial conference was held on 19 August 2019 and the following appears from the signed minutes:

- 11.1. That the joint minutes may be handed up in court to serve as evidence without the necessity to call the expert witnesses to verify the content.
- 11.2. That the plaintiff's injuries, treatment and sequelae are admitted to the extent that it is confirmed in the joint minutes.
- 11.3. That the injuries and clinical findings contained in the parties' respective expert reports that are similar/do not differ is placed out of dispute and will not have to be proven.
- 11.4. That the defendant would only call experts to testify to the extent that there is a difference in their opinions as expressed in the joint minutes.
- 11.5. That both parties were ready to proceed to trial and that the estimated duration was agreed on to be 3 to 4 days.
- 11.6. That either party may make use of affidavits in terms of the provisions of rule 38 (2).
- 11.7. That the documents contained in section "Index Quantum" is admitted and that the veracity and the correctness of the documents are not disputed and will serve as evidence of what they purport to be and shall be deemed to be admitted and accepted into evidence.

[12] On 22 August 2019, a case management meeting was held before Satchwell J. The plaintiff was represented by Mr Wiers from Adams and Adams and advocate Roxanne Blumenthal. The defendant was represented by Mr Sukwana from Kekana Hlatwayo Radebe Attorneys and advocate Morapedi. At that meeting the parties were directed to prepare a detailed document recording precisely "*the issues in dispute for determination by the trial court.*" That minute records that Satchwell J indicated to the parties that it is the responsibility of the case management court to set out clearly and succinctly for the trial court exactly what the factual and legal disputes in issue are.

[13] Over the course of the next week the parties worked diligently and prepared a detailed schedule referred to as annexure A. Annexure A is a fourteen page spreadsheet which records, in precise terms, what issues are agreed and what issues remain in dispute for determination by this trial court. It was upon the basis of that agreed document that Satchwell J certified the matter trial ready.

[14] On 29 August 2019 the matter was again called before Satchwell J. On that occasion the plaintiff was represented by advocate Ferguson. Satchwell J issued a certification on the following terms:

- 14.1. The matter is trial ready;
- 14.2. Merits and liability have previously been agreed 100% in favour of the plaintiff;
- 14.3. In respect of past medical expenses, the defendant has to date not admitted vouchers submitted as far back as 2017. This issue remains in dispute;
- 14.4. Past and future loss of earnings and general damages remain to be decided; and
- 14.5. Costs of the case management are to be costs in the cause.

[15] The matter was set down for trial on 15 October 2019. Despite, only six weeks prior, having gone through the exercise of preparing annexure A, the defendant, on the day of trial, requested a postponement in order to obtain a report from a psychiatrist. The postponement was granted on and the defendant then obtained a report from Dr Lekalakala. A joint minute was thereafter prepared by the two psychiatrists.

[16] A third pre-trial was held on 9 December 2021. The defendant was represented at the pre-trial by Ms Ameersingh on behalf of the State Attorney. The signed pre-trial minute notes, *inter alia*, the following:

- 16.1. The parties refer specifically to the pre-trial minutes of 20 September 2019 incorporating annexures A and B detailing admissions and points in contention on issues;
- 16.2. The following past medical expenses schedules had been submitted to the defendant:

Index to Medical Expenses 1, in the amount of R 363 524.16;

Index to Medical Expenses 2, in the amount of R 157 533.21;

Index to Medical Expenses 3, in the amount of R 210 552.28.

The defendant requested the plaintiff to engage with the bill review from the defendant's office.

- 16.3. That both parties were ready to proceed to trial with an estimated duration by the plaintiff of 3 to 4 days and 4 to 5 days by the defendant.

16.4. The defendant requested that the witnesses are available to present *viva voce* evidence.

16.5. It was agreed that the joint minutes may be handed up to serve as evidence without the necessity to call the expert witnesses to testify but the agreement will not infringe the rights of any of the parties to insist on calling any of the witnesses in respect of whom joint minutes have been obtained.

[17] On 23 August 2022 a second case management meeting was heard before Matojane J who certified the trial ready to proceed on the issue of quantum.

[18] A fourth and final pre-trial was held on 15 January 2024, one week prior to the trial. A signed minute of that meeting records what transpired during the course of that pre-trial. The minutes record, *inter alia*, the following:

18.1. The defendant is not bound by the contents of the previous pre-trial minutes and will argue the point at trial.

18.2. This statement was followed up with the following recorded:

"Plaintiff's reply: The Plaintiff requested the Defendant to seriously consider the above statement and places on record that in her view, this statement does not comply with the legal principles and such statement 5 clear court days before trial is obstructive in the most serious terms. The Defendant is advised that should it persist with this stance, it should not only employ the available procedural requirements, if any, and that the Plaintiff will seek a punitive cost order including costs de bonis propriis.

Plaintiff further places on record, that to date both parties have worked together to crystalise the real issues of which very few issues have remained in dispute in order to bring this long standing matter to finalisation.

Defendant's reply: This pre-trial conference should have been held earlier in terms of the practice directive.

18.3. Ms Ameersingh for the defendant also recorded that the State Attorney's offices would not be bound by admissions agreed to by the defendant's previous attorney of record and, despite disagreeing with the use of the term, went on to renege on the extensive and detailed written agreement reached between the parties prior to her engagement in the matter. That document, annexure A, was

prepared at the first judicial case management and formed the basis upon which the matter was certified trial ready.

- 18.4. The plaintiff recorded its intention to move an application in terms of rule 38(2) in order to admit the evidence of the plaintiff's experts onto the record by affidavit.
- 18.5. Ms Ameersingh went on to record that she intended opposing the rule 38(2) application and placed all the agreed issues in annexure A in dispute. Other than stating that she does not agree with all the admissions made previously, no reasons or particulars were given as to why she elected to disregard previous agreements reached between the parties.

THE TRIAL

- [19] The trial on quantum was set down before me for four days.
- [20] On the first morning of the trial Ms Ferguson for the plaintiff addressed me on certain housekeeping issues and that, *inter alia*, the plaintiff sought to amend the amount she sought for general damages from R1.8 million to R1.2 million.
- [21] At that point the plaintiff sought to move her rule 38 application. The defendant opposed the application but had failed to file an opposing affidavit. The application proceeded on the basis that the only evidence before me was contained in the plaintiff's affidavit.
- [22] The crux of the plaintiff's case was that it sought to adduce the evidence of its expert witnesses by way of affidavit. The basis of this application was that during this matter's lengthy history and as a consequence of being instructed to distil the issues in dispute, the parties had agreed upon the contents of annexure A and that the joint minutes produced by their respective experts showed agreement on almost all aspects. In addition, and because so much time had elapsed since the filing of its original expert reports, the plaintiff had, subsequent to the filing of the joint minutes, procured updated addenda from its experts. The defendant had elected not to do so which suggested to me that it those updated reports did not record anything contentious or raise issues which it intended to gainsay through the reports of its own experts.
- [23] Plaintiff's counsel took me painstakingly through the litigious history of this matter and particularly through the steps that both parties taken in producing annexure A, having been instructed to do so by Satchwell J for the sole purpose of narrowing the issues between the parties, as is the responsibility of a diligent case management court.
- [24] Ms Ferguson then drew my attention to the minute of the fourth and final pre-trial which took place one week prior to the date upon which this trial was set down for hearing.

The minute records that, after almost nine years of driving this matter relentlessly to trial and despite the efforts of both parties, the State Attorney sought to disavow itself of any agreements concluded between its predecessors and the plaintiff's legal representatives. It sought to do this, not only on the eve of the trial, but in spite of those agreements having been the very basis upon which two judges exercised their discretion to certify the trial ready to proceed.

- [25] During the course of its answer, the defendant continued to disavow itself from the agreements concluded between itself and the plaintiff. The argument presented in answer by the State Attorney was, at times, quite difficult to follow and disjointed. The high watermark of the argument was that it had only become involved in the matter in 2021 and that it had, only during the course of the plaintiff's address at trial, been "*put into the picture*" regarding the case management meetings before Satchwell J and the preparation of and express agreement upon the contents of annexure A.
- [26] The argument by the State Attorney concluded with submissions which included that it had not seen the notice of set down of the rule 38 application, that there were discrepancies in the experts' reports and that the case pleaded by the plaintiff did not compare to what was recorded in the expert reports.
- [27] The State Attorney concluded its argument in answer just prior to the lunch adjournment. I offered the State Attorney the opportunity to consider any further submissions she would like to make after the lunch adjournment before hearing the plaintiff in reply.
- [28] The trial recommenced after the lunch adjournment. Ms Ameersingh for the defendant was not present in court. In her stead was Ms Jivana, who informed me that she had been instructed by Ms Ameersingh to appear on the defendant's behalf. She further informed me that Ms Ameersingh would not be appearing for the defendant because she was, at that time, otherwise engaged in the court of Wanless J in a part heard matter.
- [29] Ms Jivana assured me that she was properly authorised to appear for the defendant. She had no further submissions to make in answer to the plaintiff's rule 38 application. At that point Ms Ferguson for the plaintiff conducted a short reply and moved for an order in terms of the draft, which I granted.
- [30] The trial was unable to continue on the afternoon of the first day because Ms Ameersingh was not present in court.
- [31] I requested Ms Jivana to inform Ms Ameersingh that, because one day of the trial had been taken up with the hearing of the application, it was my intention to begin at 9 am

on the second morning of the trial being Wednesday 24 January 2024. Ms Jivana assured me that she would apprise Ms Ameersingh of my instruction.

- [32] At 9 am the following morning I reconvened the trial. I was informed by Ms Jivana that Ms Ameersingh was stuck in traffic and I was asked to stand the matter down until 9:30 in order to afford her an opportunity to navigate the traffic. I agreed to stand the matter down.
- [33] Shortly before 9:30 am both sets of legal representatives presented themselves to me in chambers. Ms Ameersingh apologised for her late arrival. She then requested that I stand the matter down until the following morning in order for her to "*prepare her submissions.*" When I requested what she meant by her use of that phrase, she explained to me that she had not anticipated that I would grant the plaintiff's rule 38 application and that she needed time to prepare further submissions. I was unable to obtain any further clarity from Ms Ameersingh about the precise nature of these submissions.
- [34] I explained to Ms Ameersingh that because the matter had been set down before me for four days that I was obliged, insofar as was reasonably possible, to ensure that the matter was properly concluded and that, in the absence of good cause, I was not able simply to stand the matter down for reasons of further preparation which, properly speaking, ought to have been concluded by the start of the trial.
- [35] When I enquired whether the granting of the applicant's rule 38 application would affect the number of witnesses which the defendant intended calling or the order in which she intended calling them, Ms Ameersingh informed me that it was the defendant's intention not to call any witnesses.
- [36] At the opening of the plaintiff's case Ms Ferguson informed me that the issue of general damages had become settled between the parties in the sum of R800 000.00 (eight hundred thousand Rand). In addition, the parties had reached agreement on the contents of annexure A, as had been recorded in the joint minutes. Finally, the issue of future medical expenses had been settled by the tender by the defendant of an undertaking in terms of section 17(4) of the Road Accident Fund Act 56 of 1996 (as amended).
- [37] The only issues that remained in dispute and upon which the trial would proceed, were that of past medical expenses and loss of income.

Past Medical Expenses

- [38] The issue of the plaintiff's past medical expenses did not appear seriously to be disputed by the defendant. The sole basis for the defendant's opposition to this head of damages appeared to originate from the now infamous internal communique issued by its Acting Chief Claims Officer on 12 August 2022. The legal effect of that instruction has been dealt with, *inter alia*, by Cloete J in the consolidated matters of **Van Tonder v RAF** (case number 1736/2020) and **Le Roux v RAF**. (case number 9773/2021).
- [39] No positive averments of fact were adduced by the State Attorney to establish a basis upon which to dispute the plaintiff's claim for past medical expenses.
- [40] As part of her rule 38 application the plaintiff testified, *inter alia*, that:
- 40.1. She instructed her attorneys of record, Adams and Adams, to request accident-related vouchers and accounts relating to the treatment of her accident related injuries from Discovery Medical Scheme;
 - 40.2. Adams and Adams procured and thereafter served and filed on the defendant, under cover of rule 35(9) notices, the vouchers and indices thereto as follows:
 - 40.2.1. Index to medical expenses 1 (as revised), in the amount of R 283 794.81;
 - 40.2.2. Index to medical expenses 2, in the amount of R 108 848.13;
 - 40.2.3. Index to medical expenses 3, in the amount of R 138 039.81;
 - 40.3. She had scrutinised the enclosed accounts and confirmed that they were an accurate reflection of the treatment she had received, goods supplied and expenses incurred as a result of the injuries which she had sustained in the collision and the treatment of the sequelae thereof.
- [41] In addition, and as part of her rule 38 application, the plaintiff procured an affidavit from Mr Tsholofelo Tshidi, an administrator – MVA claims (Third Party Recovery Services) of Discovery Health Medical Scheme. In his affidavit Mr Tshidi confirms, *inter alia*, that he personally perused the schedule and vouchers relating to the medical expenses incurred by the plaintiff as well as the billed and paid amounts reflecting on the vouchers and that they are true and correct and directly related to the injuries sustained by the plaintiff in the motor vehicle in question.
- [42] In the circumstances and in the absence of any factual or legal reason why I should not, I find that the plaintiff has proved its entitlement to payment by the defendant of her past medical expenses in the total sum of R455 682.75, being the aggregate of those amounts recorded in the indices to her medical expenses.

Loss of income

[43] As appears from the joint minutes filed by the experts of both parties, the plaintiff suffered the following injuries, which were referred to collectively on discharge as "polytrauma":

- 43.1. A mild concussive brain injury. She was diagnosed with post-concussive syndrome;
- 43.2. A skull fracture;
- 43.3. A degloving injury to her head, stretching from her forehead to her face;
- 43.4. A neck injury;
- 43.5. A fracture of the left clavicle;
- 43.6. A fracture of the left radius;
- 43.7. She bruised both her knees as well as her left hip;
- 43.8. Severe emotional shock and was diagnosed with Severe Major Depressive Disorder and chronic post-traumatic anxiety as a result of the accident; and
- 43.9. a very mild traumatic optic neuropathy to the right eye.

[44] In consequence of her post collision injuries, the plaintiff underwent the following treatment (as recorded in annexure A):

- 44.1. Immediately after the collision, she was taken by ambulance to the Lesley Williams Hospital where she was stabilised before being transferred to Milpark Hospital for a period of 2 weeks where she remained hospitalised from 24 November 2013 to 2 December 2013 initially and before further admissions later on.
- 44.2. She was treated by a neurosurgeon in Klerksdorp for her severe headaches;
- 44.3. She was readmitted to hospital approximately 8 or 9 times for the severe headaches and underwent infiltrations as well as manipulations of the neck;
- 44.4. She wore a soft neck collar for a short time;

- 44.5. An open reduction and internal fixation was performed on the left clavicle and removed in a subsequent procedure;
- 44.6. An open reduction and internal fixation was also conducted on the left radius and which was similarly also later removed;
- 44.7. She underwent plastic surgery on her right forehead and attended follow-up consultations with her plastic surgeon;
- 44.8. She underwent physiotherapy during her hospitalisation.
- 44.9. After her discharge, the Plaintiff went back to Dr Botha, a neurosurgeon as well as Dr Rathi a neurologist.
- 44.10. The Plaintiff takes medication on a chronic basis for her headaches.
- 44.11. She receives medication for depression as well as insomnia, mid cycle insomnia and has difficulty falling asleep and staying asleep which leads to irritability. She stopped taking stilnox after it became apparent that she appeared to have become dependent on the medication which at the time caused "*huge conflict*" in her marital relationship;
- 44.12. Her lack of sleep, in the absence of medication, has resulted in her being fatigued in the daytime;
- 44.13. The Plaintiff has undergone 7 MRI brain scans to in an effort to identify the causes to her headaches and unidentified abnormalities on the scans;
- 44.14. She has been admitted more than 10 times for 3 to 5 days at a time for treatment of her debilitating headaches;
- 44.15. She consulted with Dr Botha, a neurosurgeon in July 2015 and April 2016 for neck pain, lower back pain and chronic headaches. The treatment consisted of infiltrations and epidurals;
- 44.16. Further hospital admissions of 3 to 4 days at the time, over and above doctors consultations followed repeatedly every year between 2014 and 2023;
- 44.17. During the Judicial Case Management before Satchwell J, conference the parties agreed on the plaintiff's treatment as recorded in annexure A at the time.

[45] I was taken through the plaintiff's persistent symptoms by Ms Ferguson as recorded in the joint minutes, annexure A and the affidavits of other collateral witnesses. I am unable to do better than recount the list of injuries as recorded by Ms Ferguson in her heads of argument.

- [46] It is clear that as a direct consequence of the injuries that she suffered in the collision, the plaintiff has suffered and continues to suffer from persistent and debilitating headaches. The headaches themselves render the plaintiff unable to sleep, which in turn causes her periods of anxiety and depression.
- [47] The headaches have caused her to seek the medical assistance of a neurologist for the past three years where she receives treatment under local anaesthetic and this includes pain blocks and nerve blocks in the base of the skull. The treatment makes her feel lightheaded resulting in her being less productive after treatment, the latter which she tries to schedule during lunch hours.
- [48] She suffers from concentration and short-term memory problems. She is forced to rely on lists. She forgets directions or information discussed with her husband. The neuropsychologists agree that she suffers from concentration difficulties. For this she uses Ritalin on an *ad hoc* basis.
- [49] She:
- 49.1. is emotionally affected, irritated as well as depressed.
 - 49.2. suffers from insomnia and gets flash backs and nightmares from the accident.
 - 49.3. becomes anxious and feels vulnerable in traffic.
 - 49.4. suffers from word finding difficulties.
 - 49.5. is self-conscious about the disfiguring scarring over her face and body.
 - 49.6. suffers from severe post-traumatic stress disorder.
 - 49.7. was diagnosed with significant psychological disturbances in the form of severe, chronic depressive disorder, together with residual post traumatic anxiety symptoms. The neuropsychologists agree in their joint minute.
 - 49.8. was evaluated and scores in the severe range of depression. Chronic sadness, discouragement, reduced capacity to experience pleasure, a sense of failure, guilt, self-criticism, suicidal thoughts, a desire to cry, restlessness, loss of social interest, reduced sense of self-worth, lowered energy, sleep disturbance, increased appetite, distractibility and reduced sexual interest.
- [50] According to Dr Bingle, no neurophysical deficit specifically due to the head injury she sustained in the accident was evident. She is diagnosed with a mild concussive brain

injury. Ongoing neurocognitive and psychological sequelae are not usually expected following a mild concussive brain injury, but the Plaintiff reported such sequelae. She falls within the 10-20% "miserable minority". In this regard Dr Bingle quotes from Youman's Fifth Edition Neurological Surgery:

"The miserable minority is composed of patients who suffer from different constolations of symptoms, not one unified post concussive syndrome. Some patients suffer from primarily neurological difficulties. For other, emotional issues are the driving force. No doubt in most cases, there exists a combination of physical, emotional and cognitive symptoms, which interact and sustain multiple and dysfunctional interactions."

- [51] Despite treatment, in the absence of improvement in her chronic pain symptoms and cosmetic improvement she will probably remain more vulnerable to depression and to its effects on her cognitive/behavioural and interpersonal functioning in the long-term.
- [52] According to the psychiatrist, Dr Nel the accident was a watershed incident in the plaintiff's life and the plaintiff met the criteria for chronic post-traumatic stress disorder with comorbid depressive illness in spite of treatment. This was confirmed and the joint minute by the clinical psychologists.
- [53] Dr Nel agreed with the clinical psychologists (their joint minute) that the plaintiff's PTSD, depressive disorder and cognitive behavioural effects are compounded by pain and undermine her vocational functioning and that she is performing considerably below her pre-accident level of functioning.
- [54] She is of the opinion that the plaintiff will never reach her pre-accident potential and will not be able to compete fairly in the open labour market bearing in mind the opinion of the industrial psychologist.

Loss of income

- [55] The plaintiff's work history was precisely set out in Ms Ferguson's heads of argument. There was no dispute regarding her work history and the positions she has held in that time.

Pre and post morbid work capacity

- [56] In order properly to understand precisely what effect the injuries sustained in the accident had on the plaintiff, I relied almost entirely on the evidence recorded in the expert reports of Ms Rossouw (including her addenda) and Mr Tsiu, as well as the joint minute prepared by them. Ms Rossouw's report included collateral evidence obtained from the plaintiff's co-workers. Mr Tsiu's report did not include collateral information.

In addition, the plaintiff's rule 38 application contained an affidavit from Mr Money which was very helpful.

- [57] From a proper conspectus of that evidence it is clear to me that, but for the accident, the plaintiff would probably have retained her pre-accident levels of physical, cognitive and psychological capacity. With intact productivity, she would in all likelihood have maintained her expected career trajectory in her chosen field.
- [58] Had the accident not occurred, it is highly probable that the plaintiff would have been competitive for upward progression in the open labour market.
- [59] It is postulated by Ms Rossouw that there is a high probability that the plaintiff would have remained in the corporate environment and pursued better opportunities and upward progression.
- [60] Collateral information obtained from Mr Money confirmed the plaintiff may well have advanced to the position of Executive: Global Network during 2021/2022 earning a package of R105 000.00, between the lower median quartile of D4 in 2019 terms.
- [61] It was submitted by counsel for the plaintiff that the aforementioned collateral information indicates that she may have subsequently been promoted to the position of Chief Country Officer at Stellr around 2024/2025 earning a package of R140 000.00 in 2019 terms, being D5.
- [62] Further, proposed counsel, if she remained at Stellr, she may have reached her career ceiling at the E band of the Paterson levels (average between the medians of E1 and E2 are recommended) at the age of 45, with only annual increases in line with inflation until the official retirement age of 65. These conclusions while potentially available to the plaintiff are speculative. I am unable to accept as a matter of fact that this is where the plaintiff would have ended her career.
- [63] According to the joint minute by the neuro psychologists the plaintiff was of above average cognitive intellectual ability pre- morbidly.

Post morbid work capacity

- [64] Evidence of the plaintiff's post-accident work capacity shows that she was unable to cope on the same level as her pre accident capacity.
- [65] Collateral information received from Mr Money confirmed this.
- [66] Upon her return to work, it took her longer to complete tasks because of her poor concentration and she found that previously automatic administrative tasks now

required deliberate effort. She experienced anxiety about her difficulty coping and had to work long hours including at night to remain on track and to alleviate her anxiety about failing to complete tasks.

- [67] The collateral information obtained by Rossouw from Mr Rowley at Stellr, indicates that the Plaintiff was not the same when she returned "*Kelly never came back*". According to him she was absent "*a huge amount of time*". Her emotional wellbeing and cognitive ability deteriorated and she struggled for physical difficulties all of which negatively impacted on her work performance.
- [68] According to Mr Rowley her repeated absenteeism became a major difficulty and as the company was working with "*live money*" mistakes could become very costly. He reported that her change in ability resulted in significant stress for him, so much so, that he had to employ a project manager "*to sweep up after her*". In addition, he indicated that he would return to office at night at least 2 or 3 times a week to go through everything that had been done and still needed to be done.
- [69] As a result, he could not justify promoting her or developing her growth to the same extent as he did for other staff.
- [70] He reported to Rossouw that had he not known the Plaintiff before the accident he would have tried to terminate her employment due to poor performance.
- [71] Mr Turkington, CEO of Open Gate, reported that they approached the plaintiff due to her professionalism, knowledge of the technology and work required for integration, thus she still evidenced a certain level of competitiveness for employment elsewhere in the open labour market.
- [72] Collateral information from Mr Turkington, indicates that "*Kelly has extended her working hours by at least 2 hours (daily) to cover her daily tasks... in January 2017 she was off for 10 days...*". Despite this he appears to be satisfied with her performance and even indicates that she will be considered for any relevant positions that may become available. He also feels that she would have growth prospects even if she were to leave Open Gate.
- [73] Her psychological condition probably will continue to impact negatively on her ability to handle the indicated stress load, feelings of being overwhelmed and not being able to cope on an emotional level. This could thus influence her involvement as partner in the business and thus percentage of shares she, in future, can cope with due to the requirements in such regard.

- [74] On the upside the Plaintiff indicates that she has a rare skill set having both technical and business skills. However, the difficulties outlined above which result in errors and longer hours would in all probability have a negative on her future progression.
- [75] The industrial psychologist is of the view that her combined and contributory difficulties and the extra time required to do her work makes it unlikely that she would be able to attain the occupational levels and earnings, that she could have earned had the accident not occurred. Future surgical and medical intervention further complicates career progression, as she will have to work half day or flexi time which her industry certainly does not tolerate.
- [76] According to the industrial psychologist the plaintiff's various difficulties remain combined and contributory and it is likely to remain the case in the future. She is likely to continue to perform below her premorbid levels.
- [77] It is therefore considered probable that she is likely to reach a lower earnings ceiling compared to what she would have been able to on the open labour market.

ACTUARIAL CALCULATIONS AND CONTINGENCIES

- [78] The second addendum report by the industrial psychologist was furnished to the plaintiff's actuarial expert. The defendant did not employ an actuary and, in the circumstances, I am able only to rely on the plaintiff's evidence provided by Mr Whittaker to determine the quantum of her loss of income.
- [79] The resultant capital value of the plaintiff's loss of income was determined by Mr Whittaker as at 1 December 2017.
- [80] For accidents occurring after 1 August 2008, section 17(4)(c) of the Road Accident Fund Act Amendment Act 19 of 2005 (**the Amendment Act**) imposes a limit on the annual loss of income of R160 000.00. Mr Whittaker's actuarial calculations illustrate the profound impact which the application of the statutory cap has on the plaintiff's past- and future loss of earnings i.e. R21 424 772.00 before the cap and after the cap R6 762 503.00.
- [81] In his report dated 5 November 2017, Mr Whittaker, for the plaintiff, valued the plaintiff's pre-accident loss based upon what was recorded in the joint minute prepared by the parties' industrial psychologists.
- [82] Three scenarios were furnished by Mr Whittaker taking into account what the plaintiff's losses would have been prior to the application of the Amendment Act, namely:

82.1. **Scenario 1** (Ms Rossouw) – plaintiff's current earnings at Paterson D1 level with career plateau at Paterson D5/E1 level. Using this scenario, the plaintiff's loss of income:

82.1.1. **before** the application of the Amendment Act is calculated as **R10 265 498.00**; and

82.1.2. **after** the application of the Amendment Act is calculated as **R7 551 841.00**.

82.2. **Scenario 2** (Ms Rossouw) – plaintiff's current earnings at Paterson D3 level with career plateau at Paterson D5/E1 level. Using this scenario, the plaintiff's loss of income:

82.2.1. **before** the application of the Amendment Act is calculated as **R11 121 218.00**; and

82.2.2. **after** the application of the Amendment Act is calculated as **R7 767 619.00**.

82.3. **Scenario 3** (Mr Tsiu) – plaintiff's career plateau at Paterson D1 level.

Using this scenario, the plaintiff's total net loss of income is **R3 758 457.00**.

[83] The primary difference in the expert opinions of Ms Rossouw and Mr Tsiu is that while Ms Rossouw opines that, had the accident not occurred, the plaintiff would in all probability, and by applying a linear progression, have reached her income ceiling at around the D5/E1 Paterson levels. Mr Tsiu's opinion is that she would have reached her career ceiling at the Paterson D1 level.

[84] Ms Rossouw's opinion is given in consideration of collateral information she acquired from the plaintiff's employers and colleagues. Mr Tsiu was unable to reach her manager telephonically and was therefore unable to confirm her employment information. He records in his expert report that he had wanted to conduct collateral interviews with her line manager and HR Personnel Officer the purpose of which would have been to obtain information on the following aspects:

84.1. Employment, occupation and earnings;

84.2. Work performance at the time of the accident;

84.3. Competitiveness with other colleagues in the same position;

84.4. Career path and promotional possibilities if any); and

84.5. Sense of job securing (having regard to the accident).

- [85] Mr Tsiu's report further records that he was unable to reach her manager telephonically and was therefore unable to confirm the bulleted aspects above. He states that he believes that her occupation and earnings at the time of the accident still require further investigation and he defers to the documentary evidence.
- [86] Ms Rossouw's report records that she interviewed three of the plaintiff's co-workers, one of whom, Mr Money, responded via email. In her addendum to her report filed on 3 September 2019 she confirms having consulted with Mr Money via video conference on 22 May 2018 and 8 August 2019. His affidavit was acquired later and was attached to the rule 38 application.
- [87] In his affidavit he confirms having consulted with Ms Rossouw virtually on 22 May 2018, 8 August 2019 and 22 November 2023. He further avers that he had seen and considered the reports of Ms Rossouw dated 4 September 2019 and 4 December 2023 incorporating their discussions and he verified the contents of those reports in as far as they pertained to the discussions that took place between them.
- [88] Having had the benefit of this critical collateral evidence, I must therefore place more reliance on Ms Rossouw's opinion.
- [89] In the circumstances I am persuaded that Ms Rossouw's proposed career progression must be favoured. I must, however, in the exercise of my discretion to do so be guided by caution. While I am satisfied that the injuries suffered by the plaintiff have significantly and permanently resulted in a loss of income to the plaintiff, I am enjoined to give proper consideration and weight to the opinions of the experts concerned.
- [90] I am not persuaded, as Mr Tsiu opines, that the career path of the plaintiff would have reached a ceiling on the Paterson level of D1. I am equally unconvinced that the plaintiff would, as a matter of fact, have attained the Paterson level E1 as the pinnacle of her career.
- [91] In his report dated 4 December 2023, Mr Whittaker, calculating the capital value of the plaintiff's loss of income based upon a second addendum furnished by Ms Rossouw, calculates the capital value of the loss to the plaintiff as being R6 762 503.00.
- [92] I am confronted, as are all arbiters of fact who are obliged to stare into the proverbial crystal ball, with the conundrum of having to come to a solution that is equitable for both parties. In the exercise of my discretion I believe it equitable to make an award for loss

of income which is higher than what has been calculated based upon Mr Tsiu's opinion but lower than what has been calculated based upon Ms Rossouw's opinion.

[93] I am satisfied that awarding the plaintiff sixty percent of the difference between what has been calculated (after the application of the statutory cap) by the plaintiff's expert based upon Ms Rossouw's reports and what was calculated by the plaintiff's expert based upon Mr Tsiu's report is equitable in the circumstances.

[94] I therefore make the following order:

- 94.1. The defendant is to make payment to the plaintiff in respect of the following heads of damage:
 - 94.1.1. In respect of her claim for general damages, the sum of R800 000.00 as agreed between the parties;
 - 94.1.2. In respect of her claim for past medical expenses, the sum of R455 682.75; and
 - 94.1.3. In respect of her claim for loss of income, the sum of R5 560 884.00.
- 94.2. The defendant is ordered in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 to reimburse 100% of the plaintiff's costs of any future accommodation of the plaintiff in a hospital or nursing home, or treatment or rendering of service to her or supplying goods to her arising out of injuries sustained by her in a motor vehicle accident on which the cause of action is based, after such costs have been incurred and upon proof thereof;
- 94.3. Interest thereon at the rate *a tempore morae*. Interest is to be calculated from fourteen (14) days after the date of judgment to date of payment.
- 94.4. The defendant is ordered to pay the plaintiff's reasonable taxed or agreed party and party costs of suit up to and including costs of the trial on the High Court scale which costs are to include:
 - 94.4.1. Costs of counsel;
 - 94.4.2. The reasonable taxable costs of obtaining all expert / medico-legal, and actuarial reports, including addendum reports from the plaintiff's experts which were furnished to the defendant in respect of the following experts:
 - 94.4.2.1. Dr Van Zyl (Ophthalmologist) (Konig);

- 94.4.2.2. M Doran (Anneke Greef Occupational Therapist INC);
- 94.4.2.3. I Janse van Rensburg (Anneke Greef Occupational Therapist INC);
- 94.4.2.4. T Bingle (Neurosurgeon);
- 94.4.2.5. E Rossouw (Industrial Psychologist);
- 94.4.2.6. Dr M Mazabow (Clinical Neuropsychologist);
- 94.4.2.7. Dr Van Den Bout (Orthopaedic Surgeon);
- 94.4.2.8. Dr B White (Plastic Surgeon);
- 94.4.2.9. Dr L Nel – (Psychiatrist);
- 94.4.2.10. Greg Whittaker.



A. BERKOWITZ

A handwritten signature in dark ink, appearing to be 'A. Berkowitz'.

Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 23-25 January 2024
Judgment: 28 May 2024

Appearances

For Plaintiff: R. Ferguson
Instructed by Adams & Adams

For Defendant: S Ameersingh
Instructed by the State Attorney