IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case no: 4436/2020

In the matter between:

HONONO, ESIMPHIWEYO Plaintiff

and

ROAD ACCIDENT FUND
[LINK: 4437358] Defendant

Neutral citation:	Honono, E v Road Accident Fund (4436/2020)
Coram:	Van Zyl, J
Heard:	14 August 2024
Delivered:	10 January 2025
Summary:	

Damages – Motor Vehicle Accident. Loss of Earnings and General Damages. Payment of Damages Ordered.

ORDER

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1. The defendant is liable to pay 100% of the plaintiff's proven or agreed damages.

2. The defendant shall furnish the plaintiff within 180 (one hundred and eighty) days of date of this order with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, to compensate the plaintiff for 100% of the costs of future accommodation of the plaintiff in

a hospital and/or nursing home or the treatment of or rendering of service to her or the supplying of goods to her arising out of the injuries sustained by her in the motor vehicle collision which occurred on 9 January 2018, after such costs have been incurred and submission of proof thereof.

3. The defendant is ordered to pay the plaintiff the amount of R900 000.00 as general damages.

4. The defendant is ordered to pay the plaintiff loss of earnings in the amount yet to be calculated, which calculation is to make provision for the following contingencies:

    4.1 5% in respect of past loss of earnings;
    4.2 17% in respect of pre-morbid future loss of earnings; and
    4.3 35% in respect of post-morbid future loss of earnings.

5. The plaintiff's attorney of record is ordered to forthwith request the actuary to prepare an updated actuarial calculation on the basis of the calculation in respect of the capital value of loss of earnings of the plaintiff as set out in the actuarial report, but with contingencies as ordered above and all updated to date of this order.

6. Leave is granted to the parties to approach Van Zyl, J in chambers once the aforesaid calculation is received to obtain a further order for the payment by the defendant to the plaintiff in the amount calculated accordingly.

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

    7.1 The reasonable qualifying fees of the following experts:

        7.1.1 Dr SK Mafeelane (Orthopaedic Surgeon);
        7.1.2 Dr AM Lalbahadur (Plastic and Reconstructive Surgeon);
        7.1.3 Ms K Gela (Occupational Therapist);

7.1.4 Ms B Pepu (Industrial Psychologist); and

7.1.5 Munro Forensic Actuaries.

7.2 Counsel's fees, including, but not limited to, the costs of the drafting of heads of argument, to be taxed on scale B.

8. The aforesaid costs are also to include the additional costs for obtaining the newly calculated and updated report from the actuary as well as any consequential costs incurred for it to be made an order of court.

JUDGMENT

Van Zyl, J

[1] The plaintiff issued summons against the defendant for payment of damages which she suffered as a result of a motor vehicle accident which occurred in the jurisdiction of this court on the N3 road near Warden on 9 January 2018. At the time the plaintiff was a passenger in a Toyota Quantum vehicle, driven by Mr M Sifiso, and while overtaking a truck, the accident occurred.

[2] The merits of the action have been settled and the defendant has accepted 100% liability for the damages proven by the plaintiff. The parties have further settled the aspect of Future Medical Expenses as the defendant has tendered an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996.

[3] The remaining issues to be decided are the general damages and the past and future loss of earnings suffered by the plaintiff. With regard to the last-mentioned issue, I am also called upon to determine the appropriate contingency deductions in respect of the plaintiff's loss of earnings. In this regard, Ms Banda, on behalf of the defendant, indicated at the commencement of the trial that she does not hold instructions to dispute the calculation of the loss of earnings, but that she will argue the applicable contingencies to be applied.

[4] The plaintiff is claiming damages in an amount of R7 600 000.00 made up as follows:

Past and Future Loss of Earnings	R6 600 000.00
General damages	R1 000 000.00
TOTAL	**R7 600 000.00**

[5] By agreement between the parties the plaintiff provided the court with reports of the following experts on behalf of the plaintiff:

1. Dr SK Mafeelane (Orthopaedic Surgeon);
2. Dr AM Lalbahadur (Plastic and Reconstructive Surgeon);
3. Ms K Gela (Occupational Therapist);
4. Ms B Pepu (Industrial Psychologist); and
5. Munro Forensic Actuaries.

[6] The plaintiff gave evidence and also called the plaintiff's industrial psychologist to testify.

[7] The defendant appointed two experts:

7.1 Ms H Tomu (Industrial Psychologist);
7.2 Ms S Tom (Occupational Therapist).

[8] The defendant, however, did not call its experts to testify, but there are Joint Minutes which were filed by the occupational therapists and the industrial psychologists, which were handed in as Exhibits 'A' and 'B' respectively.

Evidence of the plaintiff:

[9] The plaintiff was born on 31 August 1994. She resides in Midrand, Johannesburg. She is currently unemployed. The plaintiff is originally from Mount Frere in the Eastern Cape.

[10] On 9 January 2018 on the N3 near Warden she was involved in a motor vehicle accident. At the time she was a passenger in a taxi. After they passed Harrismith, there was a truck driving in front of the taxi and the taxi hit the truck at its back on the corner thereof with the front left corner of the taxi. The plaintiff was seated at

that very corner on the passenger front seat of the taxi. When the corner of the taxi collided with the corner of the truck, the plaintiff's arm got stuck between those two corners. The plaintiff started crying in court whilst explaining what happened. She further explained that she could not pull her arm from where it was stuck. The truck had to be pulled away from the taxi for her arm to be released, although her arm thereafter still remained stuck on the dashboard of the taxi.

[11] She explained her injuries in court and also the fact that her left index finger had to be amputated and that she cannot open her left thumb. She showed her injuries to the court and it is evident that her left arm and hand are severely disfigured and scarred. She spent four months in hospital.

[12] The plaintiff passed grade 11, after she failed once. She moved to grade 12, but failed it twice. She obtained the qualification of NQF Level 2 in 2015 and progressed to NQF Level 3 in 2016 and NQF Level 4 in 2017 in Hospitality. She obtained her NQF Level 4 qualification at Thekwini TVET College in 2017, although she had two subjects outstanding which she failed. Later in 2018, after the accident, she returned to Esayedi TVET College in an attempt to complete the two outstanding subjects, but she experienced challenges to write since she is left hand dominant and was therefore not able to finish writing all her exams in the prescribed time, even though additional time was granted to her.

[13] During the rest of 2018 and 2019 she was unemployed. In 2020 she was employed by a retirement village in Durban, which employment was in the form of work integrated learning, which was for a period of 6 months. Her duties were to assist the other employees in the kitchen to prepare food for the elderly, which duties were in line with her qualifications. She had to clean the kitchen and also assist at the pantry. Since she was still learning what should be done, she had to assist the chef on duty.

[14] Because there were many people for whom they had to prepare food, they used big pots which the plaintiff was unable to pick up. Some of her other duties she could also not perform due to her injury and her co-employees had to assist her.

[15] Considering her qualification, the cutting of vegetables has to be done in a specified manner, which she had difficulty doing. Due to the lack of grip of her left hand she was unable to chop the vegetables. She also experienced difficulty to operate the appliance which were used to cut meat.

[16] The plaintiff further explained that under the umbrella of a qualification in Hospitality, one can also be employed as a receptionist at a hotel, be involved in housekeeping at a hotel, be a runner at a hotel or even a porter. She testified that due to the deformity of her arm and hand, she will not be able to work at reception of a hotel or quest house. To be able to work at reception, one has to be presentable and speak to people, which she feels she is no longer able to do. Furthermore, although she can write, she cannot write properly. Although waitressing is also an option, she is unable to carry a tray to serve people.

[17] Due to the injuries she suffered and the deformity of her hand and her arm, her self-esteem has been broken down. It is a challenge for her to seek and find employment.

[18] With regard to house chores, she is able to do same, but is not able to pick up any heavy items. She also finds it difficult to do her laundry. She is presently staying alone.

[19] Since she finished her training at the retirement village in July 2020, she has been unemployed. She relocated to Johannesburg in order to find employment, but has been unsuccessful up to now. She has no source of income. Her mother is a pensioner and is assisting her financially.

[20] The plaintiff testified that before the accident she wanted to become a professional chef, but she will not be able to do that anymore.

[21] When asked how the accident has impacted upon herself and her life, she again cried. She testified that she has become a different person. She knows that she has to accept her present condition, but she finds it very difficult. She used to like to do things on her own, now she has to constantly request assistance from

people. It makes her feel that people may think that she is seeking attention, but that is not her intention and not her personality type.

[22] Besides liking cooking, before the accident she enjoyed going to the gym and loved to speak to the youth and help other people. She feels that she cannot do it anymore, because of the way people are looking at her and at her deformed and scarred arm and hand. She also feels ashamed about her weight. Although she is of bigger built, she used to encourage other people of similar built to keep their weight intact. Now, after the accident, she has picked up a lot of weight and is wearing clothes of bigger sizes.

[23] During cross-examination the plaintiff again testified that she completed NQF Level 4 in 2017 and actually obtained her certificate. The two subjects which she did not pass are just not included in the certificate. She is still allowed to prepare food with the qualification she has. With her present qualification she cannot become a chef, but she can become a chef assistant. After obtaining Level 4, one can study further, for example, to obtain a diploma or at the International School of Hotels.

[24] When asked whether she has considered studying towards something else, the plaintiff testified that she has become discouraged. She does not even try because she loves Hospitality. Prior to the accident she considered Hospitality to be her future.

[25] When cross-examined about her self-esteem issues and why she does not seek professional help, she testified that firstly she cannot afford it. Secondly, at the government hospitals it takes about six to eight months to get an appointment, which lengthy time periods discouraged her. She further explained that because of her Xhosa culture, she believes that she has to fix herself and obtain inner peace before she can in any event consult a psychologist. She actually does not believe in psychology due to her culture.

[26] When confronted with the certificate of competence she obtained in first aid and why she does not attempt to obtain employment in that field, she testified that

because she is not able-bodied, she will not be able to perform CPR and will therefore not be able to provide proper first aid to a patient.

The report of Dr Maleefane (Orthopaedic Surgeon):

[27] According to the report of D Maleefane, the orthopaedic surgeon, the plaintiff suffered an amputation of her left index finger and a severe open degloving fracture of her left humerus. 'Degloving' can be described as follows:

> 'Degloving occurs when skin and the fat below it, the subcutaneous tissue, are torn away from the underlying anatomical structures they are normally attached to.'

[28] As a result of the injuries the plaintiff has a non-functional left upper limb. At the hospital, she received the following treatment:

'1. X-rays;
2. Analgesic and antibiotics;
3. ATT injection;
4. Wound debridement and external fixator left elbow;
5. Left radial heeled replacement;
6. Skin graft;
7. Physiotherapy;
8. Arm sling.'

[29] The orthopaedic surgeon also recorded the following in his report:

'Elbow and forearm

1. 14 x 11 cm scar on her left arm posterior aspect.
2. 7cm scar on the left forearm volar aspect.
3. 10° left elbow fixed flection deformity (FFD).
4. Left elbow flection only 10° (normal is 100°).

Hand and wrist

1. 10cm L-shaped scar on the left wrist dorsal aspect.
2. 4cm scar on the left wrist dorsal aspect.

3. Left index finger amputation trans-metacarpal.
4. Complete stiffness metacarpo phalangeal joints (MPJ) of the middle, ring and pinky finger.
5. No hand grip.'

[30] She has never been pain free since the accident.

[31] With regard to the impact of the injuries, the orthopaedic surgeon noted that the plaintiff has great difficulty lifting and carrying heavy objects, great difficulty lying on the affected side and she has poor hand grip. The plaintiff will not return to her pre-accidental level of activity as a result of the complications she experiences emanating from her injuries.

[32] With regard to disability and impairment, the plaintiff has the following permanent impairment:

'1. 10% upper extremity impairment – amputation.
2. 14% upper extremity impairment – multiple fingers motion.
3. 13% upper extremity impairment – radial head arthroplasty.
4. 20% upperextremity impairment – elbow motion.
5. 9% whole person impairment – scars.

Using the combined values, the plaintiff has 36% whole person impairment.'

[33] With regard to future medical treatment, the plaintiff will probably for the rest of her life need to purchase analgesics, consult an orthopaedic surgeon and physiotherapists. She will also need surgery for radial head revision.

[34] In respect of her retirement and employability, the orthopaedic surgeon stated that the plaintiff is unemployed and that in his considered opinion she will never be able to work. He however deferred to the occupational therapist to comment in more detail.

Report of Dr AM Lalbahadur (Plastic and Reconstructive Surgeon):

[35] In his report Dr Lalbahadur, the plastic surgeon, described the present condition of the plaintiff in respect of her left upper extremity as follows:

'Clinical examination confirmed that she has the following areas of scarring:

1.) A 7 x 5 cm scar on the lateral aspect of the left lower arm.
2.) 3 puncture scars on the anterior aspect of the left arm representing the site of the insertion of the pins for the external fixator.
3.) A 14 x 11cm scar on the posterial lateral aspect of the left distal arm and elbow.
4.) A 7cm scar on the volar aspect of the left forearm.
5.) A 10cm L-shaped scar the dorsal aspect of the left wrist.
6.) A 20 x 20cm skin graft donor site on the left anterior thigh.

The scars are irregular nodular, adherent, hyper pigmented and tender or deep palpitation. She complains that she experiences scar irritability by way of persistent itching in the scars and has to constantly massage the affected areas with emollient moisturising creams supplemented with antihistamine and inflammatory medication to control the discomfort. Clinical examination also confirmed a 10-degree fixed flexion deformity (FFD) at the left elbow. Flexion is only possible to 10°.

There has been a left index finger trance metatarsal amputation. There is a total ankylosis (fixed deformity) at the metacarpal phalangeal joint of the middle, ring and little fingers on the left hand. As a result of this she has no pinch grip in this hand.'

[36] The plastic surgeon stated that the injuries the plaintiff sustained are extensive and she will probably need to continue with some form of analgesia for the rest of her life especially for the control of the called intolerance of the scar areas.

[37] In respect of disability, the plastic surgeon noted that currently the left hand function of the plaintiff is severely compromised and she is unable to engage in bimanual activities due to the restricted movement at the joints and the amputation of the index finger. The plaintiff has now reached maximum medical improvement in terms of the injuries sustained. However, her disability is very complex and she needs to be assessed by an occupational therapist.

[38] Under the heading 'disfigurement' the plastic surgeon recorded the following:

'The scars from the injuries sustained are now fully matured and completely healed. No further aesthetic improvement can be anticipated.

The scars are symptomatic and need both topical and oral treatment.
There is a significant interference with her activities of daily living.
The scarring involves entire left upper extremity and covers less than 10% of the total body surface area.
These scars cannot be completely covered by normal clothing and they cannot be improved by surgical revision.
They should therefore be accepted as a serious permanent disfigurement.'

[39] With regard to future employment, the plastic surgeon noted that the plaintiff has recovered from the injuries sustained with significant disability.

[40] Under the heading 'narrative test' the plastic surgeon recorded as follows:

'From the injuries sustained and the treatment undertaken she is left with significant scarring involving the left upper extremity.
The resultant disfigurement is ugly and unsightly.
This has affected her self-esteem and personal confidence impacted negatively on the quality of her life as she is often teased and ridiculed by friends and peer groups because of her appearance.
Aesthetic/cosmetic impairment is a subjective clinical entity that is very difficult to quantitate as there are no established objective indices that can be used to accurately assess the impact of the condition on the individual psyche.
As a clinical sequela is related to personality and behavioural aspects of the individual's life resulting in a condition akin to a post-traumatic stress disorder (PTSD assessment and opinion of a psychologist is recommended).
As her condition cannot be eradicated by surgical revision it should be accepted as a serious permanent disfigurement.'

The Joint Minute of the occupational therapists:

[41] The two occupational therapists noted the following residual limitations suffered by the plaintiff:

'Physically, Ms Gela noted slightly increased muscle tone on the left elbow joint. Mildly reduced range of motion in abduction and adduction of the left shoulder, moderate reduction of the left elbow and mild to moderate reduction in wrist movement, moderate to severely reduced muscle strength of the left upper limb;

severe impairment in the left hand grip strength, moderately reduced quality hand function, moderately reduced manual dexterity skills and moderate impairment in weighted and unweighted elevated work.'

[42] With regard to activities of daily living the plaintiff is independent with mobility and personal care. She is independent for feeding and dressing activities as she has learned alternative techniques in rehabilitation. She participates in meal preparation but has difficulty chopping vegetables so she makes use of cutters and twisters. She uses her right hand for stirring and to manipulate can openers, whilst stabilising with her left hand. She requires assistance with pushing a heavy trolley and with carrying shopping bags.

[43] Both therapists noted that the plaintiff reported some emotional or behavioural changes since the accident as she now presents with body image issues due to the appearance of her left arm.

[44] I will refer to further aspects reported in the Joint Minute of the occupational therapists and with the contents of the Joint Minute of the industrial psychologists, as well as the evidence of Ms Gela, hereunder when I deal with loss of earnings specifically.

Loss of earnings:

Contingencies:

[45] Munro Forensic Actuaries calculated the capital value of the plaintiff's loss of earnings based on, *inter alia*, the report by Ms Pepu, the plaintiff's industrial psychologist. The said capital amounts, without any contingencies applied, are the following:

Past pre-morbid earnings	R 11 700.00
Future pre-morbid earnings	R7 539 500.00
Minus Post-morbid earnings	R 972 300.00
Total loss of future earnings	R6 567 200.00
Total loss of earnings	**R6 678 900.00**

[46] Contingencies discount the vicissitudes of life and it is a method used to arrive at fair and reasonable compensation. The question of contingencies was dealt with in *Southern Insurance Assocation Ltd v Bailey NO* 1984 (1) SA 98 (A) at 113G and 116G to 117D:

> 'Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.
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> . . .
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> Where the method of actuarial computation is adopted, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations". He has "a large discretion to award what he considers right" (*per* HOLMES JA in *Legal Assurance Co Ltd v Botes* 1963 (1) SA 608 (A) at 614F). One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the plaintiff may in the result have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. See *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd* 1980 (3) SA 105 (A) at 114 - 5. The rate of the discount cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case.
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> . . .
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> It is, however, erroneous to regard the fortunes of life as being always adverse: they may be favourable. In dealing with the question of contingencies, WINDEYER J said in the Australian case of *Bresatz v Przibilla* (1962) 36 ALJR 212 (HCA) at 213:
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> > "It is a mistake to suppose that it necessarily involves a 'scaling down'. What it involves depends, not on arithmetic, but on considering what the future may have held for the particular individual concerned... (The) generalisation that there must be a 'scaling down' for contingencies seems mistaken. All 'contingencies' are not adverse: All 'vicissitudes' are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune? Each case depends upon its own facts. In some it may

seem that the chance of good fortune might have balanced or even outweighed the risk of bad.'"

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

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

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

[48] In *Road Accident Fund v Reynolds* (A5023/04) [2005] ZAGPHC 19 (18 February 2005) the full court held as follows:

'Contingencies may consist of a wide variety of factors. They include matters such as the possibility of error in the estimation of a person's life expectancy, the likelihood of illness, accident or employment which in any event could have occurred and therefore affects a person's earning capacity. . .'

[49] In *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd* 1980 (3) SA 105 (A) at 115C – D the court held that it has a discretion in allowing contingencies. The said discretion must be based upon the circumstances of the particular case.

[50] In *Dlamini v Road Accident Fund* (59188/13) [2015] ZAGPPHC 646 (3 September 2015) at paras 30 – 31 the court dealt with and applied some guidelines referred to by Koch in *The Quantum Year Book*:

> '[30] Koch refers to the following as some of the guidelines as regards contingencies:
>
> > "Normal contingencies" as deductions of 5% for past loss and 15% for future loss.
> > "Sliding scale": 1/2 % per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in the middle age and relies on Goodall v President Insurance 1978 (1) SA 389.
> > "Differential contingencies" are commonly applied, that is to say one percentage applied to earnings but for the accident, and a different percentage to earnings having regard to the accident.'

Pre-morbid future loss of earnings:

[51] According to the plaintiff's industrial psychologist, Ms Gela, as set out in the relevant Joint Minute, the plaintiff would have completed the National Certificate Vocational Level 4 in Hospitality. In 2021, it is likely that the plaintiff would have secured employment on the open labour market earning at Paterson Level B1 (25th percentile). The plaintiff would have taken advantage of on-the-job training opportunities in order to qualify for progression and promotion opportunities over the course of her career. According to the industrial psychologist, it is consequently likely that she would have progressed at a 3 to 5-year interval to earning at the 50th percentile to Paterson Level C4 in 2024 and inflation adjusted until retirement age of 65. Although the defendant's industrial psychologist, Ms Tomu, postulated the pre-morbid career of the plaintiff differently, it is in my view irrelevant for purposes of the calculation since the defendant is not disputing the calculations of the actuary, but only the contingencies to be applied.

[52] Ms Banda pointed out that in the Joint Minute of the occupational therapists the plaintiff's occupational therapist, Ms Gela, opined that in view of the plaintiff's previous school performance and post-school training results, an opinion by an educational psychologist and an industrial psychologist is deemed necessary to deal with the plaintiff's pre-morbid career path, employment prospects and

progression. Ms Gela, however, further opined that pre-morbid the plaintiff was physically competent to execute all types of physically based work across the spectrum of manual intensive labour occupations.

[53] As previously indicated, the industrial psychologist of the plaintiff, Ms Pepu, did indeed testify in court. During her cross-examination she denied that the opinion of an educational psychologist is necessary in the circumstances, since one only makes use of such an expert where a plaintiff was still attending school at the time of the relevant accident, but not when a plaintiff has already completed school at the time of the accident. She opined that an education psychologist would not have been able to provide any relevant opinion in the circumstances of this matter.

[54] In the joint minute of the occupational therapists the following is stated:

> 'Further, Ms Gela indicated that there is uncertainty regarding her ability to work till normal retirement age of 65 years given the pre-accident history of arthritis in the left knee and lymphoma in the left foot. However, deference is made to the relevant experts for comment in terms of the lymphoma, mild arthritis and life expectancy.'

[55] In her report as such Ms Gela dealt with the aforesaid aspects as part of the pre-morbid medical history of the plaintiff and stated the following:

> 'In 2003, she was diagnosed with mild arthritis in the left knee and had the excess fluid removed through an operation. In 2007 she had her tonsils removed in hospital. In 2010, she was diagnosed with lymphoma on the left foot, she had a removal surgery to treat this and she reported *no residual side effects as a result of any of the above medical problems.*' (Emphasis added]
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> Significantly, at the very same paragraph 6.2 of the said report, it is indicated that pre-morbid the plaintiff did not take any medication.

[56] Ms Banda stated in her heads of argument that none of the plaintiff's experts commented on these pre-existing conditions and its likely to effect on the plaintiff's employability in future. She further submitted that a higher than normal pre-morbid contingency should be applied particularly when considering that arthritis is a progressive condition which affects physical capacity over time. These aspects

have indeed not been raised by either the orthopaedic surgeon or the plastic surgeon. Furthermore, the defendant failed to cross-examine the plaintiff and the industrial psychologist on these aspects and in the absence of any medical evidence with regard to the possible effect these previous conditions could have on the employability of the plaintiff, I cannot take it into consideration as it would be mere speculation.

[57] Ms Banda also submitted that a higher than normal pre-morbid contingency should be applied considering the plaintiff's failures at school and during her studies at college. However, the plaintiff's industrial psychologist testified that she and the defendant's industrial psychologist agreed that pre-morbid the plaintiff would have completed the National Certificate Vocational Level 4 in Hospitality and would probably have obtained a diploma thereafter. However, I do agree that it is *one* of the factors which should be taken into consideration in determining a fair and reasonable contingency pre-morbid.

[58] Ms Banda submitted that a contingency of 65% should be applied to the plaintiff`s pre-morbid loss of earnings. Mr Skoti submitted that the 'usual' contingency in respect of such loss, namely 15% is to be applied. It is to be noted that although Mr Skoti suggested 15%, he made his calculation in his heads of argument incorrectly and only applied a 5% contingency, I accept accidentally so. Be that as it may, in view of the totality of the evidence, I am of the view that a slight upward adjustment from the so called usual contingency is necessary and just in the circumstances, considering the plaintiff`s academic history.

[59] I am consequently of the view that a contingency of 17% will be fair and reasonable in the circumstances to be applied to the plaintiff`s pre-morbid future loss of eaarnings.

Post-morbid future loss of earnings:

[60] In the Joint Minute of the occupational therapists, the following is recorded in respect of the plaintiff`s vocational potential in the injured state:

'Post-morbidly, the therapists agree that [the plaintiff's] scholastic and vocational capacity have been significantly compromised by noted physical challenges as confirmed by the experts in their respective reports.

Ms Tom opined that post-accident, the claimant cannot fully cope with the physical demands of work within a Hospitality industry without the provision of reasonable accommodations and sympathetic employer. She further opines that the claimant 's promotional prospects are diminished.

Both therapists agree that the claimant has residual earning capacity at the low-semi-skilled level within the sedentary light, medium labour levels. She was still a student at the time of their assessments. Ms Gela is of the opinion that she will struggle to secure and sustain consistent employment in the open labour market and recommends consideration for application of higher than normal unemployment contingencies.'

[61] Although both occupational therapists agreed that the plaintiff has residual earning capacity at the low semi-skilled level with the sedentary, light, medium labour levels, the plaintiff's industrial psychologist, Ms Gela, testified that although she made the projection that the plaintiff would have entered the open labour market, post-morbid in 2021, it is now clear that the plaintiff has to date not been able to do so. She testified that it is evident that the plaintiff has a very weak chance of being able to enter the open labour market at this stage. She will be unable to compete with able-bodied competitors. She concluded that considering the plaintiff's 36% whole person impairment, it may have been an error of judgement to have placed her in the able-bodied category. The plaintiff actually has a minimal chance of possessing a residual capacity to earn an income.

[62] Both the plaintiff and the industrial psychologist were challenged under cross-examination that a residual earning capacity could be settled in the fact that the plaintiff has a first aid certificate which may enable her to earn an income. The plaintiff satisfactorily responded to this question by stating the obvious, namely that in order to perform proper first aid, one has to be an able-bodied person. She will, for example, not be able to perform CPR on a patient.

[63] The plaintiff's industrial psychologist was also challenged on the availability of sectoral employment for disabled bodies as encouraged in the government sector. In her response, she testified that the plaintiff will form part of the 5% of disabled employees striving to fill a very restricted percentage of positions and will have to undergo a strict screening process to fit this employment.

[64] During further cross-examination it was posed to the plaintiff's industrial psychologist that the plaintiff can be employed with an assistant who can assist her with her relevant duties. The industrial psychologist responded that one does not enter a job level and obtain the services of an assistant. If at all, the plaintiff will only be employed by a sympathetic employer, probably at NGO level.

[65] The plaintiff's industrial psychologist also testified that in addition to the limited employment opportunities, it is likely that the plaintiff will struggle to obtain employment and that she will retire between the ages of 40 and 45. She therefore suggested that allowance for early retirement at the age of 42 is recommended and that higher contingencies are also for this reason recommended.

[66] Ms Banda submitted that a contingency of 35% will be fair and reasonable in respect of the plaintiff's post-morbid future earnings, whilst Mr Skoti submitted that 20% would be fair and reasonable. It is evident from the evidence of the experts that they actually concluded that the plaintiff has a very minimal chance of possessing a residual capacity to earn an income. In fact, Ms Gela testified that it may have been an error to even have categorised the plaintiff in the able-bodied category. The plaintiff has a very weak chance, if any, to enter the open labour market. The probability of early-retirement is also to be taken into consideration. The contingency to be applied to the plaintiff's post-morbid loss of earnings is in the circumstances justified to be increased accordingly.

[67] In the circumstances I agree with Ms Banda that a contingency of 35% in respect of the plaintiff's post-morbid future loss of earnings is fair and reasonable.

Past loss of earnings:

[68] The parties are in agreement that a contingency of 5% is to be applied in respect of the plaintiff's past loss of earnings and I am in agreement with them that it will be a fair and reasonable percentage.

Calculation:

[69] The calculation by the actuary was done on 15 April 2019. The actuary is consequently to be requested to prepare an updated actuarial calculation in respect of the capital value of loss of earnings of the plaintiff as set out in the actuarial report and with contingencies as set out in the order hereunder, updated to date of this order. I can then be approached in chambers with a Draft Order to make an order accordingly.

General damages:

Legal principles:

[70] In *D v Road Accident Fund* (15/24390) [2017] ZAGPJHC 61 (3 March 2017) at para 17 the court confirmed the following principle:

> '[17] In determining general damages the court is called upon to exercise its discretion to award what it considers to be fair and adequate compensation having regard to a broad spectrum of facts and circumstances connected to the plaintiff and the injuries sustained by him including their nature, permanence, severity and their impact on his lifestyle.'

[71] In *Road Accident Fund v Marunga* 2003(5) SA 164 (SCA) at para 23 the court also stated this principle as follows:

> '[23] This Court has repeatedly stated that in cases in which the question of general damages comprising pain and suffering, disfigurement, permanent disability and loss of amenities of life arises at trial Court in considering all the

facts and circumstances of a case has a wide discretion to award what it considers to be fair and adequate compensation to the injured party. . .'

[72] Previous comparable awards, adjusted to reflect current values, are also considered as guidelines as to what would be a fair and reasonable award. However, although comparable cases offer some guidance in assisting a court to arrive at its award, it should not be viewed as an absolute standard. In *Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A) at 535H – 536A it was stated that the comparison of the plaintiff's general damages with that of previous awards need not take the form of a meticulous examination of awards made in previous cases in order to fix an amount of compensation and nor should the process be allowed to dominate the enquiry so as to fetter the general discretion of the court. See also *De Jongh v Du Pisanie NO* [2004] 2 All SA 565 (SCA) at para 64.

[73] In the ***Marunga***-judgment *supra*, at paras 27 to 28 the Supreme Court of Appeal also considered the following approach as instructive:

'[27] In the *Wright-case* (*Corbett and Honey Vol. 4 E3-36)* Broome DJP stated:

> 'I consider that when having regard to previous awards one must recognize that there is a tendency for awards now to be higher than they were in the past. I believe this to be a natural reflection of the changes in society, the recognition of greater individual freedom and opportunity, rising standards of living and the recognition that our awards in the past have been significant lower than those in most other countries.'

[28] The Wright-case at E3-34 – E3-37 is instructive . . .'

[74] As pointed out by Ms Banda, on behalf of the defendant, in *Du Pisanie-supra*, the court noted the tendency towards increased awards in respect of general damages, but also reaffirmed at para [60] that conservatism is one of the multiple factors to be taken into account in awarding general damages. At para [56] the court held that a plaintiff is entitled to fair compensation, but that the amount of such compensation must also be fair towards the defendant.

Comparative awards:

[75] *Nxumalo v SA Eagle Insurance Co. Ltd* 1995 (4G5) QOD 1 (N):

Plaintiff 20-year old lady. Disfigurement. Extensive degloving injury of right lower limb from foot to groin leaving plaintiff with severe scars of upper thigh and lower leg and permanent deformity and disability. Disfigurement of knee and upper leg consisting of a hyper-pigmented indented scar in the medial aspect of the knee and thigh approximately 40mm wide medial to the knee and 80mm wide in the medial thigh area. Some improvement possible through use of tissue expander procedure and skin grafts which would be lengthy and unpleasant. Loss of mobility and feeling with impairment of muscle power. Hospitalised for three months and on crutches for one and a half month thereafter. Pre-accident sport curtailed and modelling terminated. The court awarded general damages in the amount of R90 000.00, the current value of which is R477 720.00.

[76] *Dlamini v Road Accident Fund* 2023 (8D4) QOD 1 (KZP)

The plaintiff, a 33-year old male general worker with Grade 12, was a scholar of 14 years at the time of the accident. Fracture of the right humerus at the junction of the middle and distal thirds sustained during an accident on 20 September 2004. Admitted to hospital. His arm was immobilized with a U-slab. The fracture was deemed unsatisfactory and he was taken to theatre on 14 October 2004. The fracture was reduced and internally fixed with medial and lateral Tens nails. Post-operatively his arm was immobilized with a collar and cuff. He was noted to have a right radial nerve palsy post-operatively and was fitted with a cock-up splint. According to the orthopaedic surgeon his permanent disabilities are as follows: pain in the right elbow with strenuous physical activity; stiffness in the elbow, which precludes him from doing certain physical activities; permanent loss of range of movement in the right elbow joint. Impaired manual dexterity, handwriting ability, motor co-ordination, finger dexterity and aiming. Impaired grip strength in the dominant right hand; strength and lifting capacity limited to tasks of sedentary to light nature. An

award of R550 000.00 was made in respect of general damages, the present value of which is R578 050.00.

[77] *Goodall v President Insurance Co. Ltd* 1977 (2D4) QOD 717 (W)

Destruction of right elbow joint. Fourteen surgical operations with two or three to follow. Prothesis inserted to replace joint but such a failure and it had to be chiselled out again. Infection and operations to remove bone and glue. Left with a flail right fore-arm, arm obviously deformed. Except for very limited use of hand to all intends and purposes a one-handed person, all the worst because he was right-handed. Comparable with amputated fore-arm cases. The award for general damages was R12 500, the present value of which is R647 875.00.

[78] *Viljoen v Minister of Police* 2023 (8D5) QOD 1 (GSJ):

The plaintiff, an adult male, as shot through his right hand/fingers. He sustained a traumatic amputation of right ring and middle fingers. He was admitted to the emergency room. The hospital records indicated that he sustained a gunshot wound to the middle finger on the right hand and was diagnosed with an open comminuted fracture of the right hand. He was treated with debridement of the wound on his right hand and amputation of the right middle and ring fingers. He remained in hospital for one week. He suffered acute pain for four weeks which became moderate for further two months. At the date of the trial he complained of residual symptoms of the right hand and pain. The injuries sustained had a profound impact on his amenities of life and will continue to do so in future. This is exacerbated by the fact that he is right hand dominant and the injury had resulted in functional limitations that have severely impacted his daily life and work. He presents with Major Depressive and Post-Traumatic Stress Disorder and require psychotherapy intervention. The award for general damages was R700 000.00, the current value of which is R735 700.00.

[79] *Mthembu obo S.S.Z v RAF* [2023] ZAGPPHC 462; 81106/2017 (9 June 2023):

In this matter the plaintiff suffered a traumatic amputation of the left middle finger, full thickness with extensive destruction, necrosis of damage to muscle, bone, all supporting structure. Abridgement of the left ring finger, full thickness, and volume damage to, or necrosis of subcutaneous tissue, may extend to both through facia. Lacerations to both lips and mouth with skin loss. A mild concussion. The impairment evaluation is given at 12% whole body impairment. The plaintiff is left-hand dominant. The healed scar on the left ring finger, and left middle finger amputation, healed 2.5 inches' stump from the MCP point. Pain and suffering. Damages in the amount of R800 000.00 was awarded, the present value of which is R840 800.00.

[80] *Pietersen v Road Accident Fund* (08/19299) [2011] ZAGPJHC 73 (11 August 2011):

The minor who was involved in this motor vehicle accident suffered a head injury, an injury of both feet and degloving injuries of the buttocks, the right shoulder, the right side of the face, the right forearm and the right side of the scalp and occiput. He underwent a debridement procedure which were done by a pediatric surgeon and certain debridement procedures and split skin graft procedures as well as a scalp flap were done some time later.

The CT brain scan was noted to be normal and the x-rays of the cervical spine were also reported to be normal. The ultrasound of the abdomen was also noted to be normal.

There is, however, a difference between the said case and the present matter. In the said case the minor also suffered a moderate brain injury with its sequelae, which is not present in the matter at hand. The amount of general damages awarded was R750 000.00, the present value of which is R1 457 250.00. At paragraph [22] of the judgment the following remarks are stated, which are also applicable to the matter at hand:

'[22] Degloving injuries are unsightly and will result in the minor child living with these scars for the rest of his life. The degloving injuries to the feet are of a serious nature that they affect the manner and

type of shoes that the minor will be forced to wear and there is no indication that his unsightly scars will disappear or that they will not affect the minor as he progresses through life. ...'

Conclusion:

[81] Ms Banda submitted that an amount of R700 000.00 is a fair and reasonable award for general damages in this case. Mr Skoti submitted that R950 000.00 would be fair and reasonable in this instance.

[82] I have duly considered the comparative awards the parties referred me to in their respective heads of argument. Although none of them is on all fours with the facts of this case in respect of the plaintiff's injuries, I consider the *Mthembu*-judgment above as *relatively* similar to the present case. However, in my view the fact that the plaintiff has 36% whole person impairment, is already more serious than the 12% whole body impairment in the *Mthembu*-judgment. Furthermore, the plaintiff's degree of permanent disability, permanent scarring and disfigurement is very severe, considering the totality of the evidence. The severe impact the plaintiff's injuries have on her life as a whole, is evident from the evidence. Considering that an award of general damages comprises the consideration of the pain and suffering, disfigurement, permanent disability and loss of amenities of life a plaintiff suffered, I consider the present case as very serious in respects of those aspects. The injuries had a profound impact on the plaintiff's life amenities and will continue to do so. It resulted in functional limitations that are severely impacting her daily life and her future. It has also impacted upon her emotionally and has affected her self-esteem and confidence. The plaintiff's condition cannot be eradicated by surgical revision and I accept it to be, as suggested by the expert evidence, a serious permanent disfigurement.

[83] Ms Banda submitted that an award of R700 000.00 for general damages would be fair and appropriate in the circumstances. Mr Skoti submitted that an amount of R950 000.00 would be fair and reasonable.

[84] In my view an award of R900 000 as general damages would be fair and reasonable to both the plaintiff and the defendant.

Costs:

[85] There is no reason why costs should not follow the outcome of the case.

[86] In view of the totality of the facts to be considered in terms of Uniform Rule 67(A)(3)(b), as well as the facts and circumstances of the present matter, I consider scale B to be the appropriate scale for counsel's fees.

Order:

[87] The following order is made:

1. The defendant is liable to pay 100% of the plaintiff's proven or agreed damages.

2. The defendant shall furnish the plaintiff within 180 (one hundred and eighty) days of date of this order with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, to compensate the plaintiff for 100% of the costs of future accommodation of the plaintiff in a hospital and/or nursing home or the treatment of or rendering of service to her or the supplying of goods to her arising out of the injuries sustained by her in the motor vehicle collision which occurred on 9 January 2018, after such costs have been incurred and submission of proof thereof.

3. The defendant is ordered to pay the plaintiff the amount of R900 000.00 as general damages.

4. The defendant is ordered to pay the plaintiff loss of earnings in the amount yet to be calculated, which calculation is to make provision for the following contingencies:

    4.1 5% in respect of past loss of earnings;
    4.2 17% in respect of pre-morbid future loss of earnings; and
    4.3 35% in respect of post-morbid future loss of earnings.

5. The plaintiff's attorney of record is ordered to forthwith request the actuary to prepare an updated actuarial calculation on the basis of the calculation in respect of the capital value of loss of earnings of the plaintiff as set out in the actuarial report, but with contingencies as ordered above and all updated to date of this order.

6. Leave is granted to the parties to approach Van Zyl, J in chambers once the aforesaid calculation is received to obtain a further order for the payment by the defendant to the plaintiff in the amount calculated accordingly.

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

   7.1 The reasonable qualifying fees of the following experts:

      7.1.1 Dr SK Mafeelane (Orthopaedic Surgeon);
      7.1.2 Dr AM Lalbahadur (Plastic and Reconstructive Surgeon);
      7.1.3 Ms K Gela (Occupational Therapist);
      7.1.4 Ms B Pepu (Industrial Psychologist); and
      7.1.5 Munro Forensic Actuaries.

   7.2 Counsel's fees, including, but not limited to, the costs of the drafting of heads of argument, to be taxed on scale B.

8. The aforesaid costs are also to include the additional costs for obtaining the newly calculated and updated report from the actuary as well as any consequential costs incurred for it to be made an order of court.

[redacted]

C VAN ZYL, J

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