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: 2088/2023

In the matter between:

MASEBATA MELITA BULANE Plaintiff

and

ROAD ACCIDENT FUND
[LINK: 5288883]
Claim Number: 560/1288088503/1404/0 Defendant

Neutral citation:	MM Bulane v Road Accident Fund (2088/2023)
Coram:	Van Zyl, J
Heard:	4 and 6 September 2024
Delivered:	6 March 2025
Summary:	

Damages – Motor vehicle accident. Loss of Earning Capacity and General Damages. Payment of damages ordered.

ORDER

---

1. The defendant is liable to pay 80% 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 services 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 23 August 2021, after such costs have been incurred and submission of proof thereof.

3. The defendant is ordered to pay the plaintiff the amount of R1 000 000.00 as general damages.

4. The defendant is ordered to pay the plaintiff for loss of earning capacity in the amount yet to be calculated in terms of paragraph 5, *infra.*

5. The plaintiff's attorney of record is ordered to forthwith request the actuary to prepare an updated actuarial calculation in respect of the plaintiff's total loss of earning capacity on the same basis as set out in the second calculation in the actuarial report, calculated as at 1 April 2025. The following contingencies are then to be applied:
   a. 5% in respect of pre-morbid and post-morbid past loss of earning capacity.
   b. 20% in respect of pre-morbid future loss of earning capacity.
   c. 50% in respect of post-morbid future loss of earning capacity

   An apportionment of 80/20% is subsequently to be applied.

6. Leave is granted to the plaintiff to approach Van Zyl, J in chambers with a Draft Order 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 JK Duze (Orthopaedic Surgeon)

7.1.2 Ms L Delport (Occupational Therapist);

7.1.3 Ms S van Jaarsveld (Industrial Psychologist); and

7.1.4 Mr JCC Sauer (Johan Sauer 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.

7.3 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 in order for it to be made an order of court.

Van Zyl, J

[1] The plaintiff issued summons in this matter for damages she suffered as a result of a motor vehicle accident which occurred on 23 August 2021. At the time of the accident the plaintiff was a pedestrian when she was knocked over by the insured vehicle.

[2] The merits of the action have been settled on the basis that the defendant has accepted 80% liability for the damages to be proven by the plaintiff. The defendant also accepted liability for the Future Medical Expenses of the Plaintiff and has tendered an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996.

[3] I am therefore called upon to adjudicate the plaintiff's claims for loss of earnings/earning capacity and general damages. I am consequently also called upon to determine the appropriate contingency deductions in respect of the plaintiff's loss of earning capacity.

[4] The plaintiff obtained reports from four experts, namely an Orthopaedic Surgeon, an Occupational Therapist, an Industrial Psychologist and an Actuary. The said reports, excluding that of the Industrial Psychologist, were admitted into evidence on affidavit, as envisaged in terms of Rule 38(2). The expert reports are contained in the plaintiff's expert bundle and were handed in as exhibits. The

plaintiff's Industrial Psychologist was called as a witness on behalf of the plaintiff and she testified with reference to her medico-legal report. The plaintiff was the first witness.

Ms Masabata Melita Bulane (the plaintiff)

[5] The plaintiff, Ms Masabata Melita Bulane, was born on 6 August 2000. She was 21 years of age at the time of the accident and 24 years old when she presented her evidence.

[6] At the time of the accident she was a student at Motheo TVet College at Thaba'Nchu and had obtained her N4 diploma in Business Management in June 2021. She was studying towards her N5 diploma when the accident occurred.

[7] The plaintiff testified that she was in hospital for months. Initially she was admitted to the Moroka Hospital in Thaba'Nchu after the accident, where after she was transferred to Pelonomi Hospital in Bloemfontein and thereafter to Medi-Clinic Hospital in Bloemfontein. After two months she was transferred to Hillandale Stepdown Facility in Bloemfontein where she stayed for the remainder of 2021.

[8] The plaintiff went back to Motheo College in July 2022 to take up her studies towards a N5 diploma in Business Management. She studied until December 2022, but did not attain her N5 qualification. She failed one of the four required modules. She testified that she did not go back to continue with her studies in January 2023 because "it was just too much, the college had stairs, it was just too much for me".

[9] The plaintiff testified that the accident and the injuries she suffered as a result thereof had a huge impact on her. Her evidence was that she cannot do the things she used to do. She used to do modelling, running and play cricket. She is now unable to perform any of those activities.

[10] The plaintiff further explained that she can't stand for too long, she can't walk long distances and she can't sit for too long. She has to change positions. She can't climb stairs properly, in that she has to climb with two feet on one step at a time.

[11] According to the evidence of the plaintiff she can't do anything without pain. She takes painkillers every day.

[12] In respect of scars, the plaintiff testified that her right foot has a long scar and so does her left knee. She also has scars behind her right thigh, on her pelvis and at the back of her head. She testified that the scars make her feel uncomfortable and that they remind her of the pain she suffered and is still suffering.

[13] The plaintiff testified that her dream was to open a small retail business where she could create employment for others. In respect of her social life, the plaintiff testified that the injuries have also had an impact on her social life, since she cannot go out and dance with friends anymore because of the pain from which she is suffering. She does not socialize in the same manner she used to do.

Cross-examination of the plaintiff:

[14] The plaintiff matriculated in 2019. She explained that in 2020 she took 'n gap year during which she assisted her mother who has a small business which she runs from home where she sells food and she also used to sell clothes. The plaintiff did not earn an income, since she felt that her mother should not need to pay her.

[15] In cross-examination it was clarified that the plaintiff obtained her N4 diploma in June 2021. The course for N4, N5 and N6 is one year and six months. The N5 course is presented during the second half of a year. That is why she only went back in July 2022 to again take up her studies for her N5 diploma. As previously mentioned, she was there until December 2022, but failed one of the four modules and therefore did not obtain her N5 qualification. She did not return to complete that one module and she testified that she wanted to go back, "but for financial reasons" she was unable to do so. The plaintiff explained that NFSAS did not want to pay any further. Once one fails, they do not provide any further funding. The plaintiff once attempted to apply for another bursary, but when her application was rejected, she did not make further applications. She explained that she has not lost interest in the course, but that they did not have money for her to go back to college.

Should she receive a payment from the defendant, she will "most definitely" complete her studies.

[16] The plaintiff testified that once she completed her studies, she wanted to manage the family business. That is still her intention, but she would also like to do other courses while managing the business.

[17] Since April 2024 she joined the Botlebuhle Brand. Items sold by the said brand are being advertised in a booklet. She sells the items to her customers, collect the parcels and distribute it amongst her customers. (Before the plaintiff joined the said business, she was at home from since she left college.) The plaintiff works on a commission basis and she does not receive any basic salary. Her commission, on average, is approximately R500-00 per month.

[18] The plaintiff testified that she has not applied for other jobs, "because God has other plans for me".

[19] According to the plaintiff she will feel better should her scarring be removed. When she wears a skirt, one can see the scar on her knee and on her foot. The rest of the scars are covered by clothes.

[20] In further cross-examination the plaintiff testified that she did not go back to college both by reason of the difficulty she experiences with the stairs and the consequent pain she suffers as a result thereof and also because of financial reasons. She testified that she uses Panado as a painkiller.

[21] As indicated in the report of the Occupational Therapist, the plaintiff confirmed that prior to the accident she also struggled with joint pain in her knees and her elbows and that the doctor could not establish what the cause thereof was. She, however, testified that the said joint pains do not affect any of her day-to-day tasks.

[22] According to the plaintiff she suffered from depression when she went home from hospital but has since overcome same.

[23] Although she is not limping, when the plaintiff sits for a longer period of time and she stands up, she is unable to walk immediately after she got up. She first has to stand for a while before she can continue walking. I also observed this in court when the plaintiff left the witness box. She sometimes even uses crutches to assist her left leg, since she can't put much weight on it.

[24] The plaintiff testified that she can work for a full day, but because of the pains she can only perform work slowly. Everything she does is accompanied by pain. The plaintiff explained that she is not referring to the joint pains from which she previously suffered – she is referring to the pain which she is suffering as a result of the injuries she sustained in the accident. She testified that her joint pain feels different to the pain she is suffering as a result of the injuries.

[25] According to the plaintiff she still meets friends, but they visit at each other's homes. She does not go out to public entertainment places, although also due to financial challenges.

Report of Dr JK Duze (Orthopaedic Surgeon):

[26] Dr Duze noted in his report that after the accident the plaintiff had loss of consciousness and his report corresponds with the evidence of the plaintiff that she was hospitalized in three different hospitals.

[27] According to Dr Duze the plaintiff suffered the following injuries:

1. Fractured pelvis – open book.
2. Acetabulum fracture left.
3. Bi-lateral femur fractures.
4. Right knee dislocation.
5. Scalp de-gloving injury right temporal area.

[28] Dr Duze further listed the treatment received by the plaintiff to have been the following:

1. She was taken to theatre for several debridement and operations.

2. Orif pelvis and acetabulum.
3. IM nail femur.
4. EX/FIX right knee.
5. Scalp-sutured.
6. Extensive scarification lower limbs pelvis from trauma and surgery.
7. She got septic on symphysis pubis and hardware pressing on bladder and had to be removed.
8. She was taken to Hillandale Rehabilitation Hospital for several months.

[29] Dr Duze noted as follows in his report at paragraph 2 thereof, under the heading 'Current Clinical Signs and Symptoms':

'**MS MASEBATA BULANE** has severe un-resolving headache almost all the time and body pains, lives on pain medication. She is forgetful and partial memory impairment. She does have flashback memories of accident and occasional nightmares with anxiety episodes. She has difficulty sleeping on her right side. The left eye has redness. She is a student and can't climb stairs, gets dizzy coming up and can't attend some classes. The left leg pain is worse with cold weather. She has pain in her right knee and can't bend or squat. She can't bend to the floor and can't carry anything from floor. She has pain on her back and radiates down the legs, especially the right side. She can't carry heavy objects, only less than 5kg. She can't perform activities of daily living. She has been a-social and withdrawn from society, school and back home only. She has good bladder and bowel control. She has been doing follow-ups at Medi-Clinic Bloemfontein Hospital.' (My emphasis)

[30] Under 'Clinical Assessment' Dr Duze recorded the following:

'• Tenderness on the pelvis and both lower limbs anteriorly.
- No swelling.
- Fixed flexion deformity right knee side.
- Severe rotational and varas deformity right knee.
- No shortening.
- Wasting quads and calf muscles.
- BMI is low.
- General examined well.
- Scalp healed laceration.
- Deep scarring both lower limbs and pelvis areas.'

[31] From paginated p. 7 to p. 9 of Dr Duze's report it is evident that the left hip of the plaintiff is not on the same functional level as her right hip. Her left knee and left ankle are also not on the same functional level than those on the right.

[32] In respect of the plaintiff's 'Current Treatment Response and Compliance', Dr Duze stated the following in his report:

> 'MS MASEBATA BULANE has very severe injuries to both lower limbs, pelvis and head injury. She is on pain medication and no further treatment. She has returned to school but still struggling to walk and climb stairs. She has un-resolving headaches and body pains. She has reached her maximal period of recovery and her symptoms are persistent too.' (My emphasis)

[33] Dr Duze further noted the following in respect of "Future Treatment Options" and "Secondary Complications":

> 'MS MASEBATA BULANE has not gained full functions and made very poor recovery. She has stabilized her condition with severe physical impairment and moderate cognitive functional limitations. She can't carry heavy objects and stand for long, legs get tired and painful. She needs review on yearly basis on the implants. [She] is not for further treatment and current functional limitations are permanent.' (*sic*)

[34] Under the heading 'Opinion on Injuries and Prognosis' Dr Duze opined as follows:

> 'MS MASEBATA BULANE has severe significant injuries of head, both lower limbs and pelvis. She has persistent headaches and body pains she can't carry heavy objects. She is not for work in open labour market and can work perhaps limited work hours or light duty. . . . She is permanently impaired and dependent.'

[35] In respect of 'Scars and Disfigurement' Dr Duze stated that the plaintiff has significant scarring of both lower limbs, right scalp temporal area and all of which are trauma and operation related.

[36] Under the heading 'Occupation and Future Employability' Dr Duze recorded as follows:

> '. . . She can't stand for long as her lower limbs swell up and [are] painful. She needs a friendly environment to work as she is not skilled, still studying. She is not open for labour market and not employable, on hard labour.'

[37] Under the heading 'Permanent' Dr Duze opined as follows:

> '**MS MASEBATA BULANE** has severe significant injuries of head, both lower limbs and pelvis. She has reached maximal time for recovery past one year and chances of recovery to baseline are very slim. She has constant pain on her lower limbs and headaches. She can't carry or lift heavy objects from the floor. She has stabilized and needs pain control. There is no need for further intervention at this stage.'

[38] Dr Duze opined that the injuries the plaintiff sustained will not affect her life expectancy but rather her quality of life.

[39] According to Dr Duze the Whole Person Impairment of the plaintiff is 41%. This appears not to be only an orthopaedic Whole Person Impairment, since the scalp laceration of the plaintiff was also taken into consideration. It therefore seems to be a general Whole Person Impairment.

Report of Ms L Delport (Occupational Therapist):

[40] It is evident from the report of Ms Delport that she had the x-ray reports of Drs Van Dyk & Partners available when she drafted her report. This is not specifically reflected in the report of Dr Duze. Ms Delport consequently described the nature of the injuries as follows:

> '• Comminuted fracture left iliac wing, involving SI joint.
> • Bilateral superior pubic ramus fracture.
> • Left inferior pubis ramus fracture.
> • Bilateral femur fractures.'

[41] Ms Delport recorded the following under the heading 'Current Complaints' which the plaintiff reported as a result of the accident:

'• **Head**

The client reported headaches from her neck and back of her head. Neck spasms and stiffness of the neck occurs. Panado helps for the stabbing pain. The pain is spreading from posterior to her eyes.

• **Left eye**

The client complains that her left eye is red and teary. The client indicated that she uses reading glasses since 2015.

• **Face**

The client reported that the left side of her face feels puffy.

• **Emotions**

The client reported typical symptoms of her PTSD since the accident. Her nightmares of the accident decreased to some extent. She indicated that she thinks about the accident and gets flashbacks when she sees a car.

• **Neck**

The client reported back pain experience. She experiences pain her lower to middle back, which remains painful all the time. She experiences difficulty to bend repetitively.

The back discomfort limits sitting, standing and walking for extended periods.

• **Elbows**

The client complains of weak feeling in the elbows and a sharp pain when carrying something. She prior to this accident experienced joint pains for which she consulted medical professionals. No diagnosis could be made.

• **Right knee**

She indicated the right knee locks when walking far. The knee also tends to give way underneath her.

• **Scars**

The client has numerous scars, which affects her self-image negatively. She avoids wearing shorts or skirts, due to the appearance of the scars.

- **Right foot:**
  The right foot is swollen and painful at times. After longer periods being in a sedentary position, she experiences difficulty to bear weight on the foot.

  The client cannot wear high heel shoes as prior to the injury. She did modelling as hobby, which she cannot do anymore.

- **Upper legs**
  Squatting causes pain in the upper legs and knees.'

[42] According to Ms Delport the plaintiff reported that she has a decreasing ability to run or jump and that she experiences difficulty to sit, stand or walk for long periods of time.

[43] The report of Ms Delport contains photo's which reflect the respective scars of the plaintiff.

[44] Ms Delport observed that the plaintiff presented with consistent behaviour typical of pain/discomfort at the time of the interview and physical assessment. She further observed as follows:

'During my assessment, the client did not present with prominent cognitive impairments. No marked anxiety or depressed mood could be observed.'

[45] During the assessment by Ms Delport, the plaintiff reported the following pain:

Neck.
Left shoulder muscles.
Middle back.
Lower back.
Right elbow.
Pelvic area.
Both knees.

Right foot.

[46] In her report Ms Delport indicated the following 'Brief Pain Inventory':

'• 40% relief indicated with using pain medication.
• Pain affects mood negatively.
• Walking ability is affected by pain.
• Pain affects relationships with others.
• Pain affects sleeping pattern.
• Pain affects enjoyment of life negatively.'

[47] Ms Delport recorded the following in respect of the plaintiff's motivation:

'The client showed motivation for general functioning and work. She is a driven individual who wants to expand her knowledge and secure an income for her family. Currently the challenges the client experiences as well as the impairment in function is not prominently affecting motivation negatively.'

[48] In respect of 'Interpersonal Relationships', Ms Delport noted that the plaintiff is not experiencing any relationship problems, she has meaningful relationships with friends, family and community members. During the assessment, the plaintiff showed sensitivity towards others, the ability to be a leader, the ability to handle conflict and criticism effectively on her level of functioning. to socialize with ease and to give and take in a relationship.

[49] Although the plaintiff contributes to the household management tasks, she does so in a limited manner, due to pain. Her family members assist her in all cleaning and heavier household tasks.

[50] Ms Delport reported on the assistive devices/special equipment which the plaintiff was in need of at the time of her assessment. Ms Delport, however, opined that the plaintiff will remain dependent to some extent, despite the use of the recommended assistive devices and alternative methods of tasks performance.

[51] In respect of 'Loss of Earning Capacity' Ms Delport, *inter alia*, opined as follows:

'With evaluation results taken into consideration, I am of the opinion that this client has physical challenges, which currently does limit her to participate in the open labour market in work with physical demands.

Categories of work:

Heavy to medium work – Physical work

The client will be a risk for injury in placement in a physically demanding work. Heavy and medium work is not recommended for her.

Light to sedentary work:

From a physical level the claimant, in my opinion, would be able to perform sedentary to light type of work for full workday, with reasonable accommodation put in place.

When working in a sedentary capacity, she would require the following reasonable accommodation:

- She would be required to change posture as needed when experiencing discomfort.

- The workplace must be ergonomically structures, especially during sedentary work.

In order to receive the above-mentioned reasonable accommodation, she would have to declare her physical challenges and this might lead to discrimination.

The reality remains that there is a large number of unemployed individuals in South Africa. The client with her challenges in function, will experience difficulty to secure employment.'

[52] In respect of 'Pain and Suffering' Ms Delport stated as follows:

'After the accident, the client experienced pain and suffering for some time. She to date experiences difficulty to perform certain tasks, due to her discomfort and pain.

The impairments the client at present experience is affecting her self-worth.'

Evidence and report of Ms. S Van Jaarsveld (Industrial Psychologist):

[53] Ms Van Jaarsveld dealt in paragraph 5.1.1 of her report with the present complaints of the plaintiff, which are similar to those listed by the other experts and I am consequently not going to repeat same.

[54] In respect of the occupational history of the plaintiff, Ms Van Jaarsveld dealt with the studies of the plaintiff at Motheo TVET College. It is now common cause that the studies of the plaintiff followed the cause as testified by the plaintiff during cross-examination.

[55] In paragraph 6.3 of the report of Ms Van Jaarsveld stated the following with reference to the approach she followed in making her respective postulations:

> 'Given the many difficulties that arise when attempting to determine the vocational prospects of someone having been injured whilst still in the process of obtaining a qualification and having to establish a career, it is advisable to provide guidelines that would be reasonable, broader based rather than specific and which do not assume a dogmatic approach to the task at hand. On this basis, the following scenarios is considered to be feasible in terms of Ms Bulane's **pre-accident** occupational and income attainment.'

[56] Before I deal with Ms Van Jaarsveld's postulation in respect of the plaintiff's career trajectory, I should mention that in the report Ms Van Jaarsveld referred to a qualification of NQF5, but in her postulation as such where she referred to the qualification levels, it is evident that she based her postulation and figures on a NQF4 level. Ms Van Jaarsveld, at the time when she drafted her report, was unaware that the plaintiff had not successfully obtained her NQF5 qualification. Ms Van Jaarsveld recorded the following pre-accident postulation:

- 'Following the successful completion of a National Diploma (NQF5), Ms Bulane would probably have worked as an intern for a period of 1 – 2 years before securing permanent employment. During this period her earnings would have been between the lower quartile and median of a semi-skilled worker in the non-corporate sector.

- Thereafter Ms Bulane would probably have entered the corporate sector of the open labour market with earnings equivalent to the median (total remuneration package) of Paterson B1 level. Over time and having gained experience, Ms Bulane would have been able to progress to the Paterson total earnings Level B4 with earnings equivalent to the 50th percentile (median of total remuneration package). For quantification purposes, Ms Bulane would probably have reached this level by the age of 45 years, following a straight-line approach. This would have represented her career ceiling until retirement. Provision should be made for annual inflationary increases until the retirement age of 65 years. . . . '

[57] Ms Van Jaarsveld extensively referred to certain extracts from the medico-legal reports of Dr Duze and Ms Delport respectively. Based on that, she recorded the following in her report with regard to the post-accident future work potential and earning capacity of the plaintiff (unfortunately it is an extensive quote but I deem it essential in the circumstances):

'6.6 . . . Ms Bulane's post-accident income **potential career scenario** will thus be the same as her pre-accident income potential.

6.7 When considering Ms Bulane's **future work potential and work earning capacity**, the extent of her injuries, her residual work capacity and its impact on her future career and possible future medical treatment, the writer is of the opinion that Ms Bulane will be able to compete within the open labour market in her chosen career field, with the necessary accommodation, albeit in pain and discomfort and with a decline in productivity and which may have a negative influence on her career progression. The possibility also exists that Ms Bulane will not be able to work until normal retirement age due to the injuries she sustained in the accident and will thus be required to go on early retirement.

6.8 During the **calculation of monetary compensation for this claim**, the following must therefore be noted:

- A contingency calculation must be made for the fact that Ms Bulane will not be able to work at the same rate as prior to the accident and that her productivity will be negatively affected by the injuries she sustained in the accident which

can also impact negatively on her salary and career progression as indicated in paragraph 6.3. . . .

- Although Ms Bulane is employable, her productivity will be negatively affected by the injuries she sustained in the accident which can result in her being retrenched/dismissed or not being able to generate the same income, as prior to the accident. . . .

- A contingency calculation must also be made as Ms Bulane will enter the labour market a year later than would initially have been possible.

- If Ms Bulane is to lose her work, for whatever reason, once employed, her chances to secure and maintain employment will be hindered by her physical restrictions as highlighted by the medical expert. Ms Bulane's career options will thus be narrowed down and she will have to secure employment from a sympathetic employer who will be willing to accommodate her, by i.e. allowing her to work at a slower rate, not lift and carry heavy objects, and not stand for extended periods. . . . A contingency calculation must be made in this regard as Ms Bulane will be an unfair competitor in the open labour market, which will result in longer stints of unemployment, which will increase with age and can ultimately result in permanent unemployment at the age of 45 years.

- A contingency calculation must also be made, as the possibility exist that Ms Bulane will not be able to work until normal retirement age due to the injuries she sustained in the accident and will thus be required to go on early retirement. If Ms Bulane is thus required to go on early retirement, she must be compensated for what she could have earned until the retirement age of 65.'

Cross-examination of Ms Van Jaarsveld:

[58] Ms Van Jaarsveld was extensively cross-examined by Ms Gouws, who appeared on behalf of the defendant. However, part of the cross-examination was directed at the basis of the two calculations in respect of the plaintiff's loss of earning capacity as contained in the report of the actuary, Mr J Sauer.

[59] Both the calculations made by Mr Sauer are based on the projections as contained in the report of Ms Van Jaarsveld. The first calculation is based on the following post morbid scenario:

> 'According to the report of Susan Van Jaarsveld (Industrial Psychologist), dated 2022/10/21, paragraph 6, we assume the same post-morbid earnings as in the pre-morbid scenario, that with the delay of one year and only until age 45. From then on we project no further income, as she is expected to remain unemployed from age 45.'

[60] In respect of the second actuarial calculation, Mr Sauer also assumed the same post-morbid earnings as in the pre-morbid scenario and with delay of one year. However, the calculation is made up to the age of 65 years. Mr Sauer states as follows in his report in respect of this scenario:

> 'We illustrate a higher future post-morbid contingency deduction to allow for increased employment vulnerability, labour incapacity, uncertainty, possible long periods of unemployment and early retirement.'

[61] During cross-examination Ms Van Jaarsveld conceded that the second actuarial calculation, therefore calculated to the age of 65 years, would be the appropriate calculation to utilize. Furthermore, Ms Gouws herself, in her heads of argument, based her submitted loss of earning capacity of the plaintiff on the same basis as the second calculation by the actuary. It is consequently evident that the calculation itself is no longer in contention, but that the percentage contingency deduction in respect of the plaintiff's pre-morbid and post-morbid future loss of earning capacity is the bone of contention. The amount to be awarded in respect of general damages, also remains in dispute.

[62] I will now deal with the cross-examination of Ms Van Jaarsveld in view of what is stated in the preceding paragraphs under the heading of 'Cross-examination'.

[63] With reference to the absence of reports by an education psychologist and a clinical psychologist, Ms Van Jaarsveld responded that in her experience such reports are only obtained when a particular plaintiff suffered from a head injury. Further to that, a report from an education psychologist is generally not obtained when a particular plaintiff has already passed Grade 12.

[64] With reference to the matric results of the plaintiff, Ms Van Jaarsveld testified that she considers them to be of average nature.

[65] Ms Van Jaarsveld explained that because the plaintiff was very young when the accident occurred and she was still studying, Ms Van Jaarsveld used broader guidelines in her approach to the projection regarding the plaintiff's pre-morbid future and her post-morbid future.

[66] She explained the difference between an occupational therapist and the role of an industrial therapist. She testified that an occupational therapist enquires from a patient what the future plans of that patient are, whilst the role of the industrial psychologist is to link the patient's qualifications, experience and ability to the patient's income potential for purposes of forming a postulation.

[67] Ms Van Jaarsveld testified with reference to her postulation that the plaintiff would reach a B4 level, Ms Van Jaarsveld testified that it is highly likely that the plaintiff would have reached the B4 level. She explained that the B4 level entails positions such as a receptionist, a secretary etc. It entails entry level of administration positions for semi-skilled employees. She made use of Paterson B1 to B4 and linked that to the qualifications of the plaintiff. Ms Van Jaarsveld explained that the pre-morbid postulation and the post-morbid postulation are the same, which means that the plaintiff will still qualify for the same position, but that other factors will impact on her career as a result of the injuries she sustained. Those are the factors she mentioned in her report for which contingency deductions should be provided for, such as the fact that it may take longer to secure employment, there is a bigger possibility that she may lose her employment, early retirement is a possibility (referring to early retirement as at the age of 55 years), etc. Her employment positions may fall within the high quartile or low quartile for which reason Ms Van Jaarsveld postulated the career path of the plaintiff on the 50th percentile.

[68] Ms Van Jaarsveld testified that pain and discomfort have an impact on a person's productivity and performance.

[69] With regard to the issue of early retirement (retirement at the age of 55 years), Ms Van Jaarsveld testified that early retirement is a possibility due to the physical limitations of the plaintiff. She further testified that based on the evidence of the two experts who indicated that the plaintiff's endurance is not on the same level as that of an uninjured person, it has the result that the plaintiff has some limitations. In this regard Ms Van Jaarsveld pointed out that light to sedentary work also encompasses a percentage of physical work performance.

[70] Ms Van Jaarsveld explained that she makes provision for possible dismissal of the plaintiff, since employers sometimes accommodate an employee up to a point in respect of the limitations of that employee, but when the employee is unable to duly perform his/her duties, the employer commences with disciplinary action without such an employee being declared medically unfit. She conceded that Government is a sympathetic employer, but also explained that it depends on who the line manager is, since there are still rules, codes of conduct, etc. which regulates absence or under-performance.

[71] Ms Van Jaarsveld testified that a contingency deduction should be applied in respect of possible early retirement, since an employee then receives a reduced amount of pension on early retirement. The same position pertains when an employee is declared medically unfit.

[72] A contingency deduction should be applied in respect of retrenchment, since on retrenchment an employee only receives one month's salary for every four years of work.

[73] According to the evidence of Ms Van Jaarsveld an average employee usually reaches level B4, being the plateau between 42 and 45 years old, with a straight-line approach. It is therefore highly unlikely that the plaintiff would not have reached the said plateau at 45 years old with a straight-line approach had the accident not occurred.

Loss of earning capacity:

[74] There is no evidence to contradict the basis of the calculation in respect of the plaintiff's loss of earning capacity other than on the basis of Ms Van Jaarsveld's postulations. The actuary calculated the value of the plaintiff's pre-morbid past earning capacity to be R75 628 and her post-morbid past earning capacity to be R22 872.00. The actuary further calculated the pre-morbid future earning capacity of the plaintiff to be R6 637 304.00 and her post-morbid future earning capacity to be R6 424 594.00.

[75] The aforesaid figures are as calculated without the consideration of any contingency deduction and without the 80/20% apportionment.

Contingency deductions:

[76] The determination of a suitable contingency deduction falls within the discretion of the court.

[77] 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 Association 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.
>
> . . .
>
> 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.

. . .

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:

> "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.'"

[78] 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.'

See also: *Road Accident Fund v Reynolds* (A5023/04) [2005] ZAGPHC 19 (18 February 2005).

[79] 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.

[80] 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.'

[81] In *SL v The Road Accident Fund* 2021 JDR 2010 (GP) at paras 91-92 the following was stated in respect of differential contingencies:

> '[92] He referred me to the research conducted by Mr. Pretorius where Gregory Whittaker, which indicates that a "higher" contingency deduction generally implies a 20% differential and "substantially higher" a 35% differential.
>
> [93] In this regard, he referred me to the judgment in the matter of *Lighthelm v RAF* par [35] where a similar expert opinion was expressed that a "substantially higher" post-accident contingency ought to be applied. Having heard evidence from the Industrial Psychologist in that matter that "substantially higher" would imply a differential "over 30%" the court ultimately applied a 40% contingency differential (i.e., 15% pre and 55% post).'

[82] The actuary applied a 5% contingency deduction in respect of both the plaintiff's pre-morbid and post-morbid past earning capacity. Ms Gouws also conceded to this percentage of contingency. As already indicated, I am not bound to apply the same contingency. However, I consider the deduction of 5% as fair and reasonable in the circumstances.

[83] In respect of the plaintiff's future earning capacity, the actuary applied a 20% contingency deduction in respect of the pre-morbid scenario and 61% in respect of the post-morbid scenario. Ms Gouws, in her heads of argument, suggested a 30% contingency deduction in respect of the plaintiff's pre-morbid future earning capacity and a percentage of 37,5% contingency deduction in respect of her post-morbid future earning capacity.

[84] Although the plaintiff struggled with joint pain in her knees and her elbows prior to the accident, she specifically testified that the said pains did not affect her day-to-day tasks and that the pain she is daily suffering from, is different and as a result of the injuries she sustained in the accident.

[85] One of the factors Ms Gouws relies on in her heads of argument as to why the pre-morbid future earning capacity should be as high as 30%, is that the plaintiff may not have completed her N5 qualification. However, as pointed out earlier, the basis of the calculation as postulated by Ms Van Jaarsveld, is based on a N4 qualification, irrespective of the fact that she referred to a N5 qualification in her report. Ms Gouws further submitted that considering that the plaintiff failed her N5 qualification prior to the accident, it may also happen now subsequent to the accident, as 'there was no evidence that the injuries and the *sequelae* thereof caused her to fail one module'. I cannot agree with this submission. The assessment by Dr Duze was done on 28 August 2022, hence, at the time when the plaintiff was studying towards her N5 qualification. He mentions twice in his report that she experienced difficulties at the college as a result of her injuries. He mentioned that the plaintiff is a student and cannot climb stairs, gets dizzy coming up and cannot attend some classes. Later in his report he again mentions that she went back to college after the accident but that she is still struggling to walk and climb stairs. The plaintiff herself testified that subsequent to the accident the stairs at the college was 'just too much' for her.

[86] In cross-examination the plaintiff testified that she wants to return to college to complete her studies in Business Management, but that financial constraints are preventing her from doing so. The line of cross-examination of Ms Gouws in this respect was to the effect that it is financial reasons that prevent her from completing her studies and not due to the accident. However, she testified that NFSAS terminated funding her studies after she failed one module of N5. If one considers the immediate preceding paragraph that her injuries did impact negatively upon her studies, the termination of NFSAS funding is also directly connected to the injuries she sustained; hence, so is her financial constraints.

[87] According to the report of Ms Delport the plaintiff is a motivated and driven individual who wants to expand her knowledge and secure an income for her family.

[88] There is, consequently, in my view no reason why a higher pre-morbid contingency than 20% should be deducted in respect of the plaintiff's pre-morbid future earning capacity.

[89] In respect of the plaintiff's post-morbid future earning capacity, the uncontradicted evidence of Ms Van Jaarsveld is that there are a number of applicable factors in respect of which a contingency deduction or calculation is to be made. I have dealt with the contents of her report and her *viva voce* evidence in this regard. This includes the following:

1. A decrease in productivity which can impact negatively on her salary and career progression.
2. Possible retrenchment or dismissal due to her decrease in productivity.
3. She will enter the labour market a year later.
4. Slimmer chances of securing and maintaining employment.
5. The plaintiff will be an unfair competitor in the open labour market, which will result in longer stints of unemployment.
6. Possible early retirement (at the age of 55) due to the injuries she sustained.

[90] Taking the aforesaid factors into consideration, as well as all the facts and circumstances in this matter, I deem a contingency differential of 30% appropriate. Therefore, a contingency deduction of 50% in respect of the plaintiff's post-morbid future earning capacity is to be applied.

[91] The calculation date of the second calculation reflected in the report of the actuary was 1 June 2023. The calculation is consequently to be updated. The actuary is therefore to be requested to prepare an updated actuarial calculation in respect of the plaintiff's total loss of earning capacity on the same basis as set out in the second calculation in the actuarial report, calculated as at 1 April 2025. The following contingencies are then to be applied:

1. 5% in respect of pre-morbid and post-morbid past loss of earning capacity.
2. 20% in respect of pre-morbid future loss of earning capacity.
3. 50% in respect of post-morbid future loss of earning capacity.

An apportionment of 80/20% is then to be applied. Once the calculation is available, I am to be approached in chambers with a Draft Order to make an order accordingly.

General damages:

Legal principles:

[92] 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.'

[93] 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 a 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. . . . .'

[94] 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.

[95] 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 . . .'

[96] In *Du Pisanie-supra*, the court held at para 56 that a plaintiff is entitled to fair compensation, but that the amount of such compensation must also be fair towards the defendant.

[97] In *Litseo v Road Accident Fund* (5637/2016) [2019] ZAFSHC 52 (2 May 2019) at para 25 the court summarized the relevant principles as follows:

> '[25] In considering the amount to be awarded for general damages it is acceptable to have regard to awards issued in comparative cases, although it is immediately recognized that it is hardly possible to find a case or cases that are on all fours with the particular set of facts. Ultimately, in determining general damages a broad discretion is exercised by the court based on what it considers fair and adequate compensation. The nature, severity and permanency of the injuries sustained, together with pain and suffering, disfigurement, permanent disability and the effect thereof on the person's lifestyle are aspects to be considered. . . . '

Comparative awards:

[98] Mr Bahlekazi, on behalf of the plaintiff, submitted that general damages in the amount of R1 700 000.00 would be fair and appropriate in the circumstances, whilst Ms Gouws submitted that an amount of R800 000.00 would be fair and reasonable compensation.

[99] The case law referred to in the plaintiff's heads of argument, all include claims for moderate to severe traumatic brain injuries. As correctly pointed out by Ms Gouws in her heads of argument, the plaintiff was not diagnosed by an appropriate and relevant expert with a brain injury. She was diagnosed with a de-gloving injury to the scalp at the right temporal area. She was not diagnosed with a brain injury as such. The cases referred to on behalf of the plaintiff do therefore not find application in the present matter.

[100] In the heads of argument filed on behalf of defendant a number of relevant authority were referred to and I also researched some additional authority.

[101] In *Kgopyane v Road Accident Fund* (43235/2014) [2016] ZAGPPHC 872 (22 September 2016 a 22-year old female was involved in a motor vehicle accident. She sustained a pelvic fracture, a fracture of the right superior rami fracture, as well as a left inferior rami fracture, a chest contusion, injury to her right foot and soft tissue injuries to her neck and shoulder. The court awarded general damages in the amount of R600 000.00, the present value of which is R897 000.00.

[102] In *Litseo v Road Accident Fund, supra,* an amount of R700 000.00 with a present value of R947 000.00 was issued as general damages. The principal injuries were 'Femur, right, shaft, fracture' and 'malleoli, right, bi-malleolar fracture' and 'tibial plateau, left, lateral, depressed fracture'. Scarring was present over the lower leg and ankle and visible atrophy of the calf muscles.

[103] In *Smit v Padongelukkefonds* 2003 (5E3) QOD 11 (T), the court awarded R320 000.00 with a present day value of R1 005 000.00. The matter dealt with a 24- year old pregnant plaintiff with injuries of a fracture of the left femur (compromising the left knee) as well as right femur, pelvis, left arm and left ankle with internal fixation in both femurs and left arm. She had sepsis in the right femur requiring insertion of a new pin, but sepsis recurring. The left knee became stiff and developed osteoarthritis. She initially suffered unbearable pain and spent five days in intensive care unit, about six to seven weeks in hospital, six months in a wheelchair and five months on crutches, and had to re-learn to walk with the aid of physiotherapy. She walks slowly and with a limp and still experiences pain, unable to squat or kneel. She has difficulty playing with the children, climbing stairs, into a car, standing or walking too far and have forfeited pre-accident enjoyment of cycling, camping and needle work.

[104] In *Masemola v Road Accident Fund* (53419/2014) [2017] ZAGPPHC 1202 (3 April 2017) a male was involved in a motor vehicle accident. He sustained a left compound tibia fracture, a closed injury of the pelvis, a fracture of the right acetabulum, a fracture of the pubic rami, an injury to the left knee and an unspecified soft tissue injury of the neck. General damages in the amount of R1 102 000.00 were awarded, the present value of which is R1 556 800.00.

[105] I have duly considered the relatively comparative awards referred to above. It is important to be mindful of the fact that the plaintiff has a total Whole Body Impairment of 41%. The plaintiff was temporarily disabled for six months during her admission to hospital in August 2021 to her eventual discharge from the rehabilitation Hospital in December 2021. According to the report of Dr Duze the plaintiff has 'significant scarring of both lower limps, right scalp temporal area'. The numerous scars affect the self-image of the plaintiff negatively. Dr Duze also stated

that the plaintiff will not receive further treatment and current functional limitations are permanent. She is permanently impaired. Her condition has stabilized 'with severe physical impairment'. I repeat that under the heading 'Permanent Disability' Dr Duze noted as follows:

> 'MS MASEBATA BULANE has severe significant injuries of head, both lower limbs and pelvis. She has reached maximal time for recovery past one year and chances of recovery to baseline are very slim. She has constant pain on her lower limbs and headaches. She can't carry or lift heavy objects from the floor. She has stabilized and needs pain control. There is no need for further intervention at this stage.'

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 impacting her daily life and her future, also in respect of her future employment. As stated by Dr Duze, the injuries affect the plaintiff's quality of life. There is no indication in the evidence that the plaintiff's condition can be eradicated by surgical revision.

[106] Taking into consideration all the facts and circumstances of this matter, I consider an award of general damages in the amount of R1 000 000.00 to be fair and reasonable to both the plaintiff and the defendant.

Costs:

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

[108 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:

[109] The following order is made:

1. The defendant is liable to pay 80% 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 services 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 23 August 2021, after such costs have been incurred and submission of proof thereof.

3. The defendant is ordered to pay the plaintiff the amount of R1 000 000.00 as general damages.

4. The defendant is ordered to pay the plaintiff for loss of earning capacity in the amount yet to be calculated in terms of paragraph 5, *infra.*

5. The plaintiff's attorney of record is ordered to forthwith request the actuary to prepare an updated actuarial calculation in respect of the plaintiff's total loss of earning capacity on the same basis as set out in the second calculation in the actuarial report, calculated as at 1 April 2025. The following contingencies are then to be applied:
   a. 5% in respect of pre-morbid and post-morbid past loss of earning capacity.
   b. 20% in respect of pre-morbid future loss of earning capacity.
   c. 55% in respect of post-morbid future loss of earning capacity

   An apportionment of 80/20% is subsequently to be applied.

6. Leave is granted to the plaintiff to approach Van Zyl, J in chambers with a Draft Order 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 JK Duze (Orthopaedic Surgeon)

7.1.2 Ms L Delport (Occupational Therapist);

7.1.3 Ms S van Jaarsveld (Industrial Psychologist); and

7.1.4 Mr JCC Sauer (Johan Sauer 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.

7.3 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 in order for it to be made an order of court.

[redacted]

C. VAN ZYL, J

For the Plaintiff: Adv. NM Bahlekazi
Instructed by: Mlozana Attorneys
BLOEMFONTEIN
E-mail: ndlebe.bahle@me.com
sebastian@ma-inc.co.za
andile@ma-inc.co.za

For the Defendant: Ms J Gouws
Instructed by: Office of the State Attorney
BLOEMFONTEIN
E-mail: johandig@raf.co.za