

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**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: 3368/2018

In the matter between:

**NTHABISENG MADIKOE**

Plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

Link No: 4330584

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**CORAM:** VAN ZYL, J

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**HEARD ON:** 10 & 12 MAY 2023; 14 JUNE 2023

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**DELIVERED ON:** 30 JANUARY 2024

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- [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 district of Bloemfontein on 5 October 2017 at Maitland Street, Bloemfontein, between a motor vehicle – with registration letters and –number [...] FS (“the insured vehicle”), at the time driven by Mr B Masilela (“the insured driver”), and the plaintiff, who was a pedestrian at the time.
- [2] The trial was on the roll for trial on 9, 10 and 12 May 2023 for the determination of both the merits and the *quantum*.
- [3] The trial was initially allocated to my brother, Mhlambi, J. However, he became seized with another matter and this matter was re-allocated to me. On 9 May 2023, Ms Bornman, who appeared on behalf of the defendant, requested that the trial stands down to 10 May 2023, for a possible settlement, the wasted costs of 9 May 2023 to be costs in the cause. Mr Marx, who appeared on behalf of the defendant, did not have an objection to the said request.

#### **AD MERITS:**

- [4] At the commencement of the trial on the morning of 10 May 2023, I was informed by the parties that they have reached a settlement in respect of the merits on the basis of 90/10 percent apportionment in favour of the plaintiff.

**AD QUANTUM:****Particulars of claim:**

[5] In the particulars of claim the plaintiff claimed damages in respect of the following:

- “6.1 Pain and discomfort.
- 6.2 Loss of amenities of life.
- 6.3 Had to undergo medical treatment.
- 6.4 May have a loss of earnings/earning capacity in future.”

[6] On 10 May 2023, the plaintiff filed the amended pages to the plaintiff’s particulars of claim with regard to the total sum of the damages claimed to be R6 735 454.00. In terms of the amended particulars of claim this amount is calculated as follows:

|      |                                    |               |
|------|------------------------------------|---------------|
| “7.1 | Past medical and hospital expenses | R5,000.00     |
| 7.2  | Estimated future medical treatment | R250,000.00   |
| 7.3  | Past loss of income                | R764,412.00   |
| 7.4  | Estimated future loss of income    | R4,716,042.00 |
| 7.5  | General damages                    | R600,000.00”  |

[7] At the commencement of the trial on 10 May 2023, I was advised by the parties that the defendant tendered a certificate in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, in respect of compensation for the plaintiff’s future medical

expenses, limited to 90% thereof, which tender has been accepted by the plaintiff.

- [8] The plaintiff did not present any evidence in respect of her past medical and hospital expenses, probably because she was treated at provincial facilities, with no consequential damages in respect of past medical and hospital expenses.
- [9] The issues which consequently remain in dispute between the parties regarding the quantum of the plaintiff's claim which I have to adjudicate, are the plaintiff's past and future loss of income and the amount of general damages to be awarded to the plaintiff.
- [10] At the end of the trial on 12 May 2023, it was agreed that the parties will file their respective heads of argument on 19 May 2023 and 26 May 2023, with replying heads of argument on 31 May 2023. The matter was postponed to 14 June 2023 for the hearing of oral arguments.

**The Plaintiff's witnesses in respect of quantum:**

- [12] **Dr M B Deacon**, an **orthopaedic surgeon** presented oral evidence and his report was handed as in exhibit "B". He examined the plaintiff on 13 August 2019.
- [13] Dr Deacon testified that for purposes of the present matter the plaintiff can be considered to have been a healthy individual prior to the accident, with no existing injuries.

### A: Initial treatment

[14] After the accident the plaintiff was transported to Pelonomi State Hospital, Bloemfontein, where she was fully conscious on arrival at the hospital. On examination the following was noted:

1. The right lower limb was significantly swollen and bruised over the foot and ankle.
2. The limb was warm to touch and extremely tender.
3. The patient was unable to actively move the limb and passive movement actively elicited pain.

[15] X-rays of the right lower leg, ankle and foot were conducted, which revealed a right medial malleolus fracture. The plaintiff was admitted to the ward and provided with analgesics. A back-slab was applied to the right lower leg.

[16] The plaintiff was discharged the following day, 6 October 2017, with a prescription for analgesics and elbow crutches to aid immobility. A follow-up appointment was scheduled for 26 October 2017.

[17] On 26 October 2017 x-rays of the right lower leg were taken. The x-rays confirmed the right medial malleolus fracture and also noted the presence of talar shift at the ankle joint. The plaintiff was informed of the need to perform an open reduction and internal fixation of the right ankle. According to the hospital records, the plaintiff signed a Refusal of Hospital Treatment (RHT) form and did not receive the recommended surgery. Dr Deacon explained that

the word “refusal” is actually too strong a word and it should be understood to mean that she declined operative management and preferred conservative treatment. He further explained that nothing actually turns on this choice as surgery would not have had a different outcome. The back-slab was re-applied to the right lower leg for a further two weeks. The plaintiff was discharged with no follow-up appointments.

B: Acute pain and suffering

[18] With regard to acute pain and suffering, the plaintiff stated to Dr Deacon that she experienced acute pain in her right ankle immediately after the accident. The pain remained acute for two weeks. Thereafter she experienced moderate pain for a further month. The medication administered only provided limited pain relief.

C: Chronic pain and suffering

[19] In respect of chronic pain and suffering, the plaintiff stated to Dr Deacon that she continued to experience pain in her right ankle. According to her the pain gradually increased over time. Weight-bearing aggravated the pain in her right leg. Standing and walking for long periods of time was difficult to endure.

D: Interim symptoms

[20] With regard to interim symptoms of the right ankle injury, the plaintiff stated to Dr Deacon that she wore a Plaster of Paris (POP)

cast for approximately six weeks. She mobilized with a pair of crutches for approximately two months after the accident. She then began to mobilize independently. According to what the plaintiff told Dr Deacon, the following symptoms persisted after she started weight-bearing and mobilizing independently.

1. Pain in her ankle when walking or standing for prolonged periods.
2. Limping.
3. Inability to squat due to pain and weakness.
4. Increased pain in her ankle during inclement weather.
5. Stiffness of her ankle.
6. Weakness of her ankle.
7. Frequent swelling of the ankle.
8. Pain and weakness when lifting heavy objects.

The aforesaid symptoms continued to persist.

#### E: Current symptoms

- [21] During his consultation with the plaintiff, the plaintiff explained her current symptoms to be the following: She was still experiencing pain in her ankle. She stated that the movement of her ankle is limited, weak and painful. The pain is even more aggravated by physical activity. Physical activities such as walking/standing for long periods of time and lifting heavy objects are difficult and painful to endure. She also continues to experience stiffness and swelling in her ankle. Cold weather also aggravates the pain.

### F: Physical examination

[22] During the physical examination Dr Deacon noted significant swelling of the ankle. The plaintiff showed pain on palpation over the medial and lateral aspects of the ankle. It was also painful over the subtalar joint. There was also restricted range of movement of the ankle.

### G: Radiological examination

[23] Dr Deacon also had x-rays taken on the date of his physical examination. He perused the radiological report and noted the following;

1. There is a subtle talar tilting identified with some widening of the lateral ankle mortise and concomitant narrowing of the supra medial mortise.
2. On lateral assessment, also slightly wider at tibia talar joint space posteriorly than anteriorly.
3. Prominent soft tissue prominence noted medially as well as laterally.
4. Impression of previous undisplaced yield injury at the base of the medial malleolus.
5. Early narrowing of the medial ankle mortise may reflect some early degeneration at this level. Dr Deacon explained that



with this type of injury a patient normally develops early post-traumatic arthritis.

6. Subtalar joint slightly sclerotic but no cysts, spurs or other signs of significant degeneration.

#### H: Diagnosis

[24] Dr Deacon made the following diagnosis:

1. Medial malleolus fracture and talar shift/tilt of the ankle joint with:
  - 1.1 residual pain and swelling;
  - 1.2 restricted range of movement of the ankle;
  - 1.3 post-traumatic osteoarthritis of the ankle-joint.

#### I: Recommended treatment

[25] Dr Deacon recommends conservative treatment with non-steroidal anti-inflammatory drugs (NSAIDS) and analgesics, physiotherapy and an ankle brace.

[26] Should the aforesaid treatment fail or not offer effective relief, the plaintiff will require local steroid injections in theatre.

[27] Dr Deacon testified that the plaintiff has a probability of greater than 75% for the degeneration in her ankle to progress to end-stage osteoarthritis. That will necessitate arthrodesis of the ankle

joint. This means fusing of the ankle joint to prevent it from moving, which results in a stiff ankle joint.

[28] After surgery, the plaintiff will require physiotherapy and long-term rehabilitation across the plaintiff's total lifespan.

[29] Dr Deacon also stated that due to the fact that the plaintiff would need to take the analgesics and anti-inflammatories on a regular basis, she may experience serious side effects, for which she will also have to receive treatment.

#### J: Productivity

[30] With regard to productivity, Dr Deacon stated the following:

1. According to him the injuries sustained had a profound impact on the plaintiff's productivity, working ability and amenities of life and will continue to do so in the future.
2. The plaintiff was at the time of the examination, a 25-year-old single mother of 1 child. She was being employed as a Coffee Shop Assistant. The plaintiff stated to Dr Deacon that she struggles with many of her duties at work due to the pain and symptoms associated with the injury she sustained. She is unable to stand and walk for long periods of time as these aggravate the pain in her right ankle. Lifting heavy objects is difficult due to pain and weakness in the plaintiff's right ankle. The plaintiff explained that she was struggling to perform daily

activities and household chores due to the pain and limitations acquired after sustaining the injury.

3. With successful treatment, the plaintiff's productivity will improve. However, according to Dr Deacon, as the degeneration in her right ankle progresses, her productivity will decrease again.

[31] Dr Deacon opined that the plaintiff must be **accommodated in a permanent light duty/sedentary working environment**, as determined by an Occupational Therapist. Dr Deacon noted that the plaintiff is going to be absent from work on a regular basis for conservative and/or surgical intervention.

#### K: Retirement

[32] In respect of retirement, Dr Deacon noted that the plaintiff stated that she would have been able to work to the retirement age of 65 years old if not for the accident and injury sustained.

[33] According to Dr Deacon the plaintiff must not do physical labour anymore due to the injuries sustained and resultant degeneration.

[34] Even if accommodated in a **permanent light duty and sedentary position**, Dr Deacon opined that provision must be made for 5 (five) years earlier retirement.

[35] Dr Deacon stated his reasons for the suggested earlier retirement of the plaintiff to be the following:

Disease and pain:

1. Progression of the degeneration in her right ankle.
2. Progression of pain.
3. Progression of disability
4. Psychological and physical effects of chronic pain.

Future treatment/potential complications:

1. Regular conservative and/or surgical treatment.
2. Major surgery foreseen.
3. The potential for developing complications due to future major surgery.

Work capacity/employer expectations:

1. Inability to maintain responsibilities.
2. Loss of workdays due to pain and treatment.
3. Psychological strain due to working expectations and progressive disease.
4. The inability of the employer to adopt to the reduced working capacity.

L: Longevity

[36] According to Dr Deacon, the injury will not have a detrimental effect on the plaintiff's life expectancy.

M: Miscellaneous and cross-examination

[37] Dr Deacon opined that the plaintiff's current occupation is not permanent light duty and is not sedentary, which would lead to even more damage and deterioration of the ankle joint. The

plaintiff will not be able to continue with her current employment. According to Dr Deacon he agrees with the opinion of the occupational therapist that the plaintiff will only be able to do sedentary work with minimal light duty. Even if she is to obtain a purely sedentary occupation, it would still cause her ankle and leg to swell, which could lead to further complications.

[38] During cross-examination Dr Deacon testified that the weight increase the plaintiff has suffered, is directly connected to the injuries she sustained. Where she used to do different forms of exercise prior to the injury, she does not do exercise anymore, because after a day's work her ankle is already painful to the extent that she does not find it possible to put even more pressure on her ankle. Exercise, will in any event, aggregate the injury.

[39] Dr Deacon conceded during cross-examination that physiotherapy and other treatment will slow down the arthritis process. However, it will not turn the degeneration process around, since cartilage does not heal.

[40] Mr Marx applied that the evidence of the **Occupational Therapist, Ms Luna Greyling**, be presented via virtual hearing. The defendant consented to the granting of the application and I consequently granted the application. She presented oral evidence and her report was accepted as exhibit "A".

[41] Ms Greyling assessed the plaintiff on 5 August 2019. At that stage she was, but for the ankle injury, a healthy individual.

[42] Ms Greyling referred to the injuries which the plaintiff sustained as also testified to by Dr Deacon and the treatment she received.

A: Complaints on date of the assessment

[43] The plaintiff reported the following complaints on the day of the evaluation:

1. Standing for more than ten minutes causes a moderate burning pain from her knee down to her right foot.
2. Walking more than fifteen minutes causes a moderate burning pain over her right ankle and her right ankle gets weak.
3. The right ankle gets swollen when she is standing or walking for a long time.
4. Running is limited to short distances.
5. Difficulty walking up a steep incline.
6. Avoid walking over uneven terrain, as it causes right ankle pain and weakness.

B: Employment at the time of the assessment

[44] Ms Greyling dealt with the history of the plaintiff's employment, which, at the time of the assessment, was when the plaintiff worked on an *ad hoc* basis as a beverage mixer/maker at Torado Coffee Shop for four days a month. Based on the description provided by the plaintiff her work could be categorized as **light physical work**. The plaintiff described her physical difficulties which she experienced at work as the following;

1. Her right lower limb is swollen at the end of the working day.
2. Moderate pain experienced in her right ankle causing great discomfort after work and the following day.
3. Right lower limb fatigue after work when walking to the taxi stop. The plaintiff voiced that she has to assist her leg using her hands to climb into the taxi.

#### C: Lifting strength

[45] In respect of lifting strength, Ms Greyling testified that the plaintiff did not manage to reach her maximum capacity during task performance as noticeable by physiological and biomechanical indicators. Protective behaviour, i.e. decreased right lower limb weight bearing when lifting and carrying weights resulting in an asymmetrical posture. The plaintiff reported right lower limb fatigue and weakness when handling weights within her heavy to maximum weight handling capacity. The plaintiff displayed the ability to handle loads falling within the light physical demand category. Frequent load handling is however not advised due to restrictions in postural and mobility abilities.

#### D: Psychosocial functioning

[46] With regard to the plaintiff's psychosocial functioning, Ms Greyling noted the following concerns:

1. Remaining travel anxiety.

2. Reported to be socially withdrawn and having a low self-esteem.
3. Voiced experiencing aggression and reduced frustration tolerance.
4. Noted experiencing symptoms of extremely severe anxiety and depression and severe stress.

Ms Greyling advised that a clinical psychologist should do further investigation and comment regarding the plaintiff's psychosocial functioning.

#### E: Cognitive abilities

[47] During the evaluation the plaintiff was able to follow a conversation without difficulty, recalling relevant information and answering questions posed.

[48] Concerning the plaintiff's cognitive abilities, the plaintiff's reported psychosocial distress, could have a deleterious effect on her attention and concentration span, influencing her ability to attend, retain and recall information. Ms Greyling again suggested that the plaintiff should consult a clinical psychologist for further investigation.

#### F: Domestic activities

[49] Prior to the accident the plaintiff reported no difficulty attending to domestic tasks (medium work). She said that she was responsible for the laundry tasks, washing the dishes and occasionally



assisting her mother with meal preparation. Her mother has always been responsible for all the cleaning and shopping tasks.

[50] Following the accident, the plaintiff said that she has been unable to do the laundry. She said that standing for prolonged periods to hand wash the laundry and fetching the water from the yard tap causes right lower limb discomfort and therefore her mother has been doing the laundry as well.

[51] The plaintiff presented with some limitations in standing and walking and her load handling ability is limited to handling light loads (maximum of 9kg) on an occasional basis. Therefore, her reported difficulties are justified.

[52] The plaintiff's mother is unemployed and has taken over the more strenuous domestic tasks. Therefore, no domestic assistance is currently foreseen.

[53] Should the plaintiff become solely responsible for all the domestic tasks including heavy cleaning tasks, Ms Greyling would then recommend domestic assistance once per week/eight hours per week to assist the plaintiff with the more strenuous domestic tasks (medium work).

#### G: Transport

[54] The plaintiff does not have a driver's licence and is reliant on public transport. Ms Greyling repeated the fact that the plaintiff reported

travel anxiety and hypervigilance when traveling or walking on public roads.

[55] Should the plaintiff obtain a driver's licence in the future and her right lower limb continues to be symptomatic, the plaintiff could experience right lower limb discomfort during driving. She may require regular rest periods, should she drive for long periods to manage her right lower limb oedema and discomfort.

[56] Should the plaintiff undergo future surgery to her right ankle as recommended by Dr Deacon, her right lower limb could be immobilized and she may rely on mobility aids. Should the plaintiff still be reliant on public transport, she may have difficulties accessing and using public transport as she has to walk for distances far to the taxi stop and she may need to stand in a queue for a taxi. If the plaintiff obtained a driver's licence by then, she will be unable to drive as her right lower limb could be immobilized. Private transport should thus be foreseen and remunerated during the recovery period of approximately six weeks.

#### H: Loss of amenities

[57] According to Ms Greyling the plaintiff stated that she does not have difficulty attending to her personal care prior and following the accident in question.

[58] In respect of leisure (sport and recreation), Ms Greyling stated that prior to the accident the plaintiff enjoyed going to the gym five days

per week and playing in the community netball team twice per week. Her ability to participate in these activities have been affected as a result of the symptoms in her right lower limb. As a result of the accident she is no longer engaging in any physical exercises.

[59] The plaintiff displayed musculoskeletal impairments in her right ankle which is restricting her postural abilities and mobility. She also walks with a slight antalgic gait with decreased weight bearing onto her right lower limb. Physical agility is required to play netball, thus the plaintiff's report of no longer playing netball is justified.

[60] The aforesaid loss of amenities is in addition to the psychosocial issues which have already been dealt with above.

[61] Ms Greyling consequently concluded that the injuries sustained during the accident in question had a negative influence pertaining to transport, household activities, recreational activities and psycho-social aspects of the plaintiff's life. She has therefore suffered loss of enjoyment as a result of the accident in question.

#### I: Earning capacity

##### *Previous employment:*

[62] The plaintiff was at the time of the assessment a 25-years old. Her highest level of education is Grade 12, obtained in 2013. The plaintiff has no other tertiary education or informal skills training.

[63] The plaintiff was unemployed until 2015, when she managed to secure permanent employment at a biltong shop, World of Meat, Woodlands, Bloemfontein.

[64] Prior to the accident the plaintiff worked as a cashier and shop assistant in the said Biltong shop and earned approximately R4 000.00 per month. Their salaries were always paid in cash. She described her job task and functions as a cashier and shop assistant as follows:

1. Operates cash register to itemize and total customers' purchases.
2. Reviews price sheets to note price changes and sale items.
3. Collects cash, cheque or change payments from customers and gives change for cash transactions.
4. Unload biltong deliveries (weight between 8 to 10 kg), stocks shelves and marks prices on items.
5. Counts money in cash drawer at beginning and end of work shift.
6. Record daily transaction amounts from cash register to balance cash drawer.
7. Weigh and cut biltong as per the customers' requests.
8. Use electronic scanner to record price.
9. Cleaning of biltong machines and shop at the end of the shift.

[65] Based on the description provided by the plaintiff, her pre-accident work, according to Ms Greyling, can be categorized as **light work with the occasional execution of medium work.**

- [66] After the accident the plaintiff was on sick leave for two months during which she did not receive a monthly salary and therefore had a loss of income.
- [67] Following the sick leave, the plaintiff returned to work, working in a reduced capacity. Her work tasks were limited to cashier work. She was also provided with a high chair to sit on during working hours. The plaintiff explained to Ms Greyling that she no longer assisted customers, unload the delivery crates or perform cleaning tasks. She said that her monthly salary was reduced to R3 500-00 as she worked in a reduced capacity.
- [68] When considering her post-accident job description, it is to be categorized, according to Ms Greyling, as **sedentary work with the occasional execution of light work**.
- [69] The plaintiff resigned at the end of February 2018, because of the difficulties she experienced at work. Her right lower limb got swollen at the end of a working day. This caused her great discomfort and limited her mobility. The plaintiff voiced to Ms Greyling that she could only walk short distances as her right leg fatigued sooner compared to her left leg. She also experienced a burning pain from her right knee down to her foot.

*Employment at date of the assessment:*

- [70] The plaintiff told Ms Greyling that she works as a beverage mixer/maker at Torado Coffee Shop in her community on an ad hoc

basis. She works about four days in a month. She has to weigh and measure ingredients according to a recipe and place it into a mixer. She then operates the mixer by putting it on a specific setting. The plaintiff then hands over the beverage to the customer. The plaintiff said that her cleaning tasks are limited to cleaning spills, she does not have to clean the shop as such. According to Ms Greyling the aforesaid job description can be categorized as **light work**.

[71] The plaintiff reported that she experiences the following difficulties at work:

1. Her right lower limb is swollen at the end of her working day.
2. Moderate pain experienced in her right ankle, causing great discomfort after work and the following day.
3. Right lower limb fatigue after work when walking to the taxi stop. She again voiced that she has to assist her leg using her hands to climb into the taxi.

[72] Considering the plaintiff's functional assessment findings, her reported difficulties were, according to Ms Greyling, justified.

#### J: Residual work capacity

[73] In respect of the aforesaid, I deem it necessary to quote directly from the report of Ms Greyling:

"12.4 RESIDUAL WORK CAPACITY

- 12.4.1 Physical limitations: a) mildly restricted active range of motion and reduced muscle strength in right ankle; b) reduced muscle strength in right knee; c) oedema in right lower limb; d) reduced dynamic standing balance; e) reduced functional lower limb strength and endurance, as well as symptoms of moderate aching pain in her right lower limb, impact negatively on her functional performance.
- 12.4.2 Postural abilities such as standing, walking, forward bend standing, elevated work, kneeling, crouching and stair climbing were restricted to occasional performance (up to 33% of her work day).
- 12.4.3 The plaintiff displayed the ability to lift and carry loads falling within the light work category. Frequent load handling is not advised due to restrictions in postural abilities and mobility.
- 12.4.4 When considering the aforementioned, the plaintiff is **currently restricted to sedentary with the occasional execution of light work**. Noted that even within the sedentary category she presents with slight limitations i.e. limited sitting tolerances requiring intermittent resting periods to alternate between postures to manage her right lower limb oedema) and she can only lift and carry loads in the light work category on an occasional basis.
- 12.4.5 The plaintiff's current residual work capacity does not meet her **pre-accident work** working as a cashier and shop assistant, categorised as **light work with the occasional execution of medium work**.
- 12.4.6 Her current residual work capacity meets her post-accident work demands, working in a reduced capacity as a cashier, which is categorised as sedentary work with the occasional execution of light work. The plaintiff however, did not cope with the work

demands as she returned to work using two elbow crutches and she was in the process of recuperating from the injuries she sustained. Therefore, the writer would expect that the plaintiff would have had difficulties to cope with her work demands at that point in time.

12.4.7 Currently the plaintiff works as a beverage maker on an ad hoc basis at a coffee shop. Her work is categorised light work. The plaintiff reported that she experiences accompanying discomfort whilst working, after working and the following day. It is therefore evident that the plaintiff would not be able to sustainably perform light work over a five-day work week.

12.4.8 The plaintiff's **current residual work capacity** is thus restricted to **sedentary work with the occasional execution of light work**, with load handling limited to handling light loads on an occasional basis.

12.4.9 She is thus considered not suited for full light, medium, heavy and very heavy work.

12.4.10 The plaintiff voiced that prior to the accident she was in the process of applying to get accepted to the National Police Academy for training. She said that she passed her theory exam, but following the accident she terminated the process. She said that she realised she does not have the residual physical abilities to pass the fitness exam.

12.4.11 When considering the physical demands required to become a field police officer, categorised as medium work, the plaintiff currently does not have the residual work capacity to train and become a field police officer.



12.4.12 The writer opines that it is justified, that the plaintiff had to forego her future plans applying to the National Police Academy for training to become a police officer, considering her current residual work capacity.”

[74] Ms Greyling clearly opined, also in court, that currently the plaintiff’s residual work capacity is limited to **sedentary work with the occasional execution of light work**.

[75] Should the plaintiff’s right ankle becomes more symptomatic as expected with aging and further joint degeneration, her residual work capacity could in the long run be **further restricted to sedentary work**. She could also acquire occasional rest periods to alternate between various postures to manage the symptoms in her right ankle (pain and oedema) which could in turn have a negative impact on her productivity.

[76] Considering the aforementioned, Ms Greyling opined that the plaintiff is not an equal competitor in the open labour market, compared to her uninjured peers.

#### K: Cross-examination and miscellaneous

[77] When Ms Greyling was advised that the plaintiff now works full time as a beverage maker, five days a week, she opined that she will not be able to sustain five days a week for a full work day. She further opined that it was in any event not advised, since it can result in deterioration of the right ankle with consequential severity

in the pain. According to Ms Greyling, the plaintiff will therefore not be able to perform her current work on a sustainable basis.

[78] When asked to explain certain categories of the work, she referred to her report and testified that **sedentary work** involves sitting most of the day, most of the time, but may involve walking or standing for brief periods of time. **Sedentary work with light physical work** entails to be seated for five hours a day and performing light occasional physical work for less than three hours per day.

[79] I deem it apposite to first deal with the evidence of **the plaintiff** before I deal with the expert evidence of Mr Moodie.

[80] The plaintiff testified that she is currently 29 years old, resident in Freedom Square, Bloemfontein.

[81] She confirmed that before the accident she worked at the biltong shop at Woodlands, as testified by Ms Greyling, where she earned R3 900-00 per month. She confirmed the correctness of her duties at the time as explained by Ms Greyling.

[82] The plaintiff testified that at the time of the accident, she was looking for better employment, preferably within the government environment. She applied at Mangaung Police Station to become a police officer. After she applied, she was informed that she had to write a written test in relation thereto. After she wrote the written test, she received a SMS that she passed the test and that she had to go for a physical training test. In her evidence she referred

to a document contained in Volume 2 of the Notices, p. 103, which reflects the results of psychometric tests in relation to the plaintiff and which indicated that the tests were done on 1 June 2017 and the results were uploaded on 28 August 2017. The said document indicates that the plaintiff successfully completed the relevant psychometric tests. This document was provisionally allowed in evidence.

[83] Due to the accident the plaintiff was unable to attend the required physical testing.

[84] The plaintiff testified that at the time of the accident she was healthy, fit and she wore clothing of about the sizes 34 and 36, whilst since the accident she has gained weight and now wear clothes of sizes 42 and 44. She explained that before the accident she used to go to the veld where they used to do exercises at the location after work where she did running, squats etc. However, since the accident she has not been able to perform the said exercises.

[85] At the time of the accident the plaintiff was also busy preparing herself to obtain her learners driver's licence, but after the accident she was unable to obtain her licence.

[86] Since the accident she wanted to apply for other positions within the government sphere, but she will be unable to perform same, since she cannot work for long hours on end. The plaintiff applied at Woolworths, but somebody whom she knew who worked at

Woolworths, told her that she will have to be able to stand for long hours, which she cannot do.

[87] Presently she is employed as a barista at a coffee shop and she works 7am to 5pm. It is the Vida-e-Café at Preller Square, Dan Pienaar, Bloemfontein. When they are not that busy, they have to take the eats and drinks to the customers, but during the busy times, the customers collect the eats and drink themselves from the counter. The plaintiff explained that their busy times are during the mornings between 7h00 and 9h00, later the day during lunchtime and then again between 15h00 and 17h00. She further explained that they rotate during rush hours, by either working at the cash register or by making coffee.

[88] The plaintiff is earning a basic salary of R3 900-00 per month without overtime and Sunday payments. On average she earns about R4 500-00 per month.

[89] The plaintiff explained that when she returned to the biltong shop after the accident, she could only do cashier work. Therefore, where she previously earned R4 200-00 per month, she afterwards only earned about R3 700-00 or R3 800-00 per month, depending on whether she worked on Sundays. She explained that they were paid in cash and therefore she does not have any proof of her salary at the time. The biltong shop has since closed down some time ago already.

[90] The plaintiff testified that she is the breadwinner in the house and there is no one else who can provide if she is to sit at home.

- [91] She has no training to work on a computer or a switchboard.
- [92] The plaintiff has not applied at a supermarket for employment, since the hours she will have to sit as a cashier will be too long for her ankle to endure. In this regard she explained that when she sits all the time, her ankle builds up fluid and swells excessively. Even if she sits for only half an hour, her ankle starts swelling.
- [93] The plaintiff testified that at her present employment, she explained her situation to the employer and they are sympathetic towards her. They accommodate her with regard to sitting and standing in-between her work. According to her if she was to lose her present job, she does not think that she will easily obtain other employment, other than also with a sympathetic employer.
- [94] With regard to transport, the plaintiff explained that she uses two taxis to travel to work and back to her home. Luckily both taxis pick her up near her house and drops her off near to her place of employment. At this stage she is able to make use of this transport, since she does not have to walk long distances, since walking causes her pain and causes her ankle to swell even more.
- [95] When asked about her dreams, she testified that she would like to open her own business in order to make a better living for her kids and her loved ones. She loves the restaurant business and would like to open her own restaurant. She would be able to do that if she has people to assist her at the restaurant.

- [96] She testified that she can't just wear any shoes, since a particular shoe would fit her left foot, but then not her right foot, because of the swelling. She therefore normally has to wear open shoes so that she can just push her feet in. She used to like wearing shoes with high heels, but since the accident she is unable to do so.
- [97] The plaintiff also testified that after work her leg and her ankle will be swollen, with the result that where she used to do exercises after work, she does not see her way open to do it anymore. It feels like she just wants to get home and elevate her leg in order to get the swelling down. She explained that elevation of her leg, decreases its swelling. However, at work she cannot elevate her leg, since the business area is too small and people has to be able to pass by her.
- [98] Before cross-examination the legal representatives indicated to me that the matric qualification of the plaintiff is not in dispute.
- [99] During cross-examination the plaintiff testified that she works at the coffee shop from 7h00 to 17h00. In a 7-day week they are two or three days off per week. When she started working there, they worked in shifts from 06h00 to 13h00 and then the following day from 13h00 to 20h00. However, it has now been a year since they have not been working in shifts.
- [100] In cross-examination the plaintiff again testified that at the biltong shop she used to earn R4 200-00 per month as a basic salary prior to the accident, and following the accident she received approximately R3 700-00 per month.

[101] She explained that since the accident, she has not applied for any other jobs, since all the jobs she hears about require her to work for long hours, which she is unable to do due to her injury.

[102] The plaintiff was cross-examined on the aspect of the Torado shop which Ms Greyling testified about. The plaintiff explained that she received her training there, since Torado Shop is part of her present employer. Torado Shop is situated at the Pitstop Garage on the N1. She worked there only on an ad hoc basis.

[103] During re-examination she testified that she uses Grandpa pain stiller about twice a week. She experiences the most pain and uncomfortableness after work. She cannot wait after work to get home in order to elevate her leg and ankle.

[104] With regard to her mental state, the plaintiff testified that prior to the accident she suffered from no mental problems. However, since the accident she suffers from depression and she easily forgets things and feels that she will not be able to have the future she dreamed of before the accident. She experiences anger because of her injured condition and it has a negative impact on her work and at home. Where the plaintiff previously enjoyed socializing, she does not want to socialize anymore. She, however, conceded that she has not consulted any specialist in respect of her mental feelings and -problems.

[105] Mr **Ben Moodie**, an **Industrial Psychologist**, also presented oral evidence in court and his report was received as exhibit "C". He performed his evaluation of the plaintiff on 6 August 2019.

[106] Mr Moodie testified that he postulated the plaintiff's future career path based on her pre-accident career. He explained that it is not an exact science since one can only work on the facts you have and based on those facts one has to postulate an unknown future.

[107] With regard to the plaintiff's pre-accident income potential, Mr Moodie referred to the fact that the plaintiff has a Grade 12 level of education and no further formal training. He also dealt with her work at the biltong shop prior to and after the accident and the difference in her income and working conditions between the two time periods.

[108] Mr Moodie dealt with the complaints the plaintiff voiced when he performed his evaluation. In this regard he recorded the following:

1. Her right lower limb is swollen at the end of her working day.
2. She experiences constant pain in her right ankle causing great discomfort after work and the following day.
3. The pain is worsened by physical activity.
4. Right lower limb fatigue after working when walking to the taxi stop. She voiced that she has to assist her leg using her hands to climb into the taxi.
5. Memory forgetting often and quickly.
6. Aggression – getting angry easily.
7. She is very emotional.



8. She states that the movement of her ankle is limited, weak and painful.
9. She also continues to experience stiffness and swelling in her ankle.
10. Cold weather aggravates the pain.

[109] Mr Moodie testified that was shocked to see in court how the size of the plaintiff's ankle has increased since he evaluated her and also how much her weight has increased.

[110] Mr Moodie dealt with the plaintiff's career history prior to the accident. In this regard he also obtained collateral information from the store manager at the biltong shop who, *inter alia*, advised him that he did not have any problems with the plaintiff's work, both prior and following her accident. Although he denied that the plaintiff received a lesser income after the accident, Mr Moodie testified that he does not find it strange that the employer would not admit having decreased the plaintiff's salary, since it is against the law to have done so. The store manager confirmed that at the time when the plaintiff resigned, she was earning plus minus R3 900.00 per month in cash.

[111] Much of what Mr Moodie testified has already been testified by the other expert witnesses and the plaintiff herself and are not in dispute, wherefore I am not going to repeat such aspects.

[112] Mr Moodie testified that the fact that the plaintiff resigned and stayed at home without an income, whilst she was the sole

breadwinner, is indicative of the degree of pain and uncomfortableness she was experiencing.

[113] Mr Moodie testified that the biltong shop closed down in June 2018. Therefore, with regards to her pre-accident work, Mr Moodie postulated that but for the accident, she would have been able to continue working in her pre-accident capacity at the biltong shop, earning plus minus R3 900-00 per month as she did prior to the accident.

[114] Regarding the plaintiff's application to be employed at the SAPS in her uninjured capacity, Mr Moodie opined that she would have been successful in all her assessments, which would have allowed her to be sent to the police college by January 2018. He explained that with regard to the physical test that she was still due to perform prior to the accident, fitness is no longer a requirement, in order not to discriminate between applicants. When he considers her as a person, he is sure that she would have progressed to the position of warrant officer. Furthermore, whilst doing her training at the police college she would have received a stipend salary.

[115] In his report Mr Moodie referred to collateral information which he obtained from the Personal Manager at SAPS Bloemfontein:

- “1. The recruitment process is as follows:
2. First you do a psychometric assessment, where after an integrity assessment is done on the same day.
3. Successful candidates then get scheduled for a Physical/Fitness test.
4. After being successful in the Physical/Fitness test, you get scheduled for a formal interview.

5. Upon successfully passing the interview, you are then sent for a medical assessment.
6. After completing the above-said successfully, you qualify to become a Student Constable. However, this will only apply if you form part of the number of intakes for the year as they can only take in a certain number of successful candidates based on available funds.
7. Student constables earn a monthly Stipend of R4 500.00 per month.”.

[116] The psychometric result was already provisionally accepted as exhibit “D” subject to later argument.

[117] With regard to the postulation of her future career path, Mr Moodie testified that the applied contingency should be a lesser one, since she already successfully completed matric and also successfully completed the psychometric tests. **He opined that it is 99% sure that she would have been successful in her application to become a police officer.**

[118] With regard to her probability to have become a warrant officer, he testified that warrant officer level is not an officer level, it is still a junior level. Candidates do not go through selecting processes and interviews in order to become a warrant officer. It is only for purposes of the ranks higher than warrant officer that a stricter selection process is applied in order to obtain the rank of officer.

[119] Mr Moodie testified that he is “*absolutely sure she would have gone to warrant officer level*”.

[120] In his report Mr Moodie noted the following:

“5.4 Writer notes that progressing through the different ranking she would have progressed through the rankings as follows:

5.5 From Band A Constable to Sergeant.

5.6 From a Sergeant to a Band B1 Warrant Officer.

5.7 From a Band B1 Warrant Officer to a Band B2 Warrant Officer. This has been confirmed with Col. Mynhard from Performance Management Systems in the SAPS in Bloemfontein.

5.8 Noting the above-said, writer notes that Mrs Madikoe would have been aged 24 at the time she started working as a Band A Constable functioning on Nodge 1, i.e. R175 586.00 plus the normal government benefits (Providend Fund, medical aid, housing allowance, etc.). Writer therefore opines that it is reasonable to accept that she would have been able to at least progress in a straight line to the rank of Band B1 Warrant Officer, by age 45, i.e. R278 631.00 Nodge 1. Note that this does not include any of the normal government benefits associated with that of a Warrant Officer. This would have been her career ceiling and she would have only benefited from nodge and inflationary increases until retirement age.

5.9 But for the accident, Mrs Madikoe would have been able to work until the normal retirement age of 60. This is the confirmed said retirement age as per Col. Mynhard.”

[121] With regard to the plaintiff’s post-accident income potential, Mr Moodie referred to the comments by the previous manager at Vida-e-Café:

“6.6.1 Mrs Madikoe’s leg was swollen constantly and she could not stand through-out her shifts.

- 6.6.2 She was unable to wear tekkies because of her foot being swollen, she was therefore allowed to wear fish flops to work.
- 6.6.3 Mrs Madikoe always complained about pain in her leg.
- 6.6.4 She tried to accommodate Mrs Madikoe by allowing her to stay behind the till point most of the day and not to do any work in the floor, i.e. serving customers, preparing drinks, etc.
- 6.6.5 Vida-e-Café is a small shop therefore no promotional possibilities is available for her and this is not accident related.
- 6.6.6 Staff consists of 8 Baristas, one manager and the owner.
- 6.6.7 The said manager stopped working at Vida-e-Café in December 2019.”

[122] Mr Moodie also referred to the respective aspects of the medical report of Dr Deacon, especially the fact that with successful treatment, the productivity of the plaintiff will improve, but as degeneration in her right ankle progresses, her productivity will decrease again. He also referred to the fact that Dr Deacon opined that Mrs Madikoe must be permanently accommodated in a sedentary to light work environment and that in her uninjured capacity she would have been able to work until the normal retirement age of 65, but as a result of her accident related injuries, provision must be made for 5-years earlier retirement.

[123] Mr Moodie also referred to the opinions of Ms Greyling.

[124] Mr Moodie testified that due to the fact that the plaintiff is presently the only breadwinner at home, she is not in a position to stop working without having an alternative source of income to live off. Mr Moodie therefore opined that the plaintiff would in all probability continue working as a cashier who is required to remain seated for most of the working day. He further opined in his report as follows:

“6.10 ... This will probably take her up to two years, still earning on par with her current earnings, as indicated above under point 6.3. Thereafter, she would progress in the non-corporate sector between earning a monthly basic salary of R8 000-00 – R10 000-00 within 5–seven years as she gains experience. This, would probably, have been sufficient work experience for her to secure employment in the corporate sector, therefore she would by this time be able to secure employment, where she could function on par with a median of Patterson level B1.

6.11 Noting that she will now only enter the corporate sector much later, she will likely now only reach her career ceiling much later than what she would have in her uninjured capacity. Writer therefore opines that she will now progress to the Patterson level B3/B4 by age 55 - 58. These earnings are on par where the entry level earnings of a Band 1 Warrant Officer. Thereafter, only inflationary increase will apply.”

[125] Mr Moodie further opined as follows in his report:

“6.12 A contingency deduction should be applied to cater for future pain related symptoms and the psychological effects that pain will have on her ability to sustain employment until retirement. It is a common fact that chronic and ongoing pain have an adverse

effect on a person's ability to be motivated, hardworking and goal driven in order to give one's utmost best.

- 6.13 If her pain is of such a nature in future that it effects the overall motivation and drive to compete and sustain her work, then she will be seriously disadvantaged in the open labour market for any other type of job that would be available at that stage. It is for this reason that even in a sedentary or clerical type of work, provision should be made for the possibility/probability that pain related symptoms will affect her ability to work until the normal stipulated retirement age. This however falls outside the scope of writer's expertise and therefore defers to the orthopaedic surgeon for further comments."

[126] The Actuary report of the **actuary, Mr Johan Sauer**, dated 3 May 2023, was handed in as Exhibit "E", by agreement between the parties.

[127] The calculations in the said report are based upon the career of the plaintiff pre-accident and post-accident, past income and future income, as testified by the plaintiff herself and the plaintiff's witnesses.

[128] That concluded the case for the plaintiff. The defendant closed its case without the presentation of any evidence.

### **Evaluation of the evidence:**

[129] I have thoroughly dealt with all the evidence and do not intend to repeat same in my evaluation of the evidence. The question is whether the plaintiff presented a *prima facie* case, which, in the

absence of evidence to the contrary, becomes proof on a balance of probabilities. In this regard Mr Marx referred to the judgment of **Prince v Road Accident Fund** (CA143/2017) [2018] ZAECGHC 20 (20 March 2018) at paras [55], [56] and [59]:

[55] Sufficient proof is established when an inference can be drawn about the fact in issue, providing that the inference is consistent with all the proven facts. In civil matters, it suffices if the inference is the most probable inference.

[56] Further, once *prima facie* proof or evidence has been provided, that is proof calling for an answer. This becomes conclusive proof on the point in issue usually if no evidence is produced to rebut it. The fact of the matter is, however, that the Court must at the end of the case review all the evidence and evaluate this according to the applicable primary criterion.

...

[59] It must be accepted, of course, that where, for example, a Defendant fails to produce evidence, this does not mean necessarily that the opponent's version in the case, falls to be accepted. The acceptance of Plaintiff's case depends on the probative strength of Plaintiff's case, being whether or not it is sufficient to cast, an evidential burden on the Defendant to present evidence."

[130] The plaintiff testified in English and presented her case in a chronological, well-structured manner. She impressed me as a witness and her evidence turns out to be substantiated by the evidence of the expert witnesses, both in relation to her career to date and her injuries and the sequelae thereof. There is no reason why her evidence is not to be accepted.



[131] Both Mr Marx and Ms Bornman addressed the issue of the function of expert witnesses and the evaluation of their evidence, with reference to relevant case law.

[132] The expertise of the relevant expert witnesses is not in dispute.

[133] In **Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung Mbh** 1976 (3) SA 352 (A) the following was stated at 371:

“As I see it, an expert's opinion represents his reasoned conclusion based on certain facts on *data*, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.”

[134] The following relevant principle was reiterated in **Road Accident Fund v Zulu and Others** (50/11) [2011] ZASCA 223 (30 November 2011), which Ms Bornman also referred to:

“[14] I have already alluded to the fact that the learned judge in the court below relied heavily on the evidence of Dr Holmes, an expert witness. A useful guide to the approach of expert evidence is found in *Michael v Linksfeld Park Clinic (Pty) Ltd* where the court stated:

‘. . . what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning.’”

[135] Ms Bornman stated as follows in her heads of argument and also presented the same argument during her oral argument:

- “6. With regards to the loss of earnings component, the main point of contention is the plaintiff’s pre-morbid career path. The plaintiff wants the court to rule that she would have succeeded in her alleged application to SAPS, and that she would have been appointed as a Student Constable and would have progressed to the rank of Band B2 Warrant Officer.
  
7. The defendant will argue that the plaintiff- was not appointed in any position at SAPS at the time of the accident, and there is no evidence to show on a balance of probabilities that the plaintiff would have been successful in her application to SAPS”

[136] Ms Bornman also referred to the collateral information from the SAPS Personnel Manager which Mr Moodie reflected in his report and submitted that at best for the plaintiff she had only passed one of the four stages of the recruitment process, being the psychometric and integrity test. Ms Bornman further submitted that there was no evidence as to how many recruits would have been taken in that year – or the number of positions that were available and the number of successful candidates.

[137] In response Mr Marx submitted that the uncontested evidence before court was not to prove on a balance of probabilities that the plaintiff would have been successful in her application to SAPS, but on a balance of probabilities that the plaintiff had all qualities and qualifications to be successful and to be one of the candidates to be accepted as a member of SAPS **or any other career in line**

or on par with a similar career path. Mr Marx used the comparison which is daily argued and accepted by our courts, in similar type of matters, where a court accepts a postulated career path of what a scholar would have been able to achieve post-morbidly, if he/she was to finish matric or even obtain a degree or diploma without that scholar having started with a career yet.

[138] In further support of Mr Marx`s argument he submitted that the uncontested evidence shows the plaintiff as a person who:

1. obtained a grade 12 qualification;
2. successfully applied for a position at two businesses, one pre-morbid and the other post-morbid, and managed to keep her employment despite great adversity and harm to herself;
3. applied at the SAPS and successfully completed and passed a very important part of the admission process;
4. testified in English in court, whilst English is not her mother tongue, despite which she presented her evidence and herself in an impressive manner;
5. keeps on working and earning an income in her current job, although being employed sympathetically and accommodated within her workplace, a job which causes her daily pain and uncomfortableness and which the experts advise against for the sake of her own health.

[139] I have to agree with the contentions of Mr Marx. The plaintiff is clearly a proverbial “go-getter” who does not easily back off in adverse circumstances. She has also shown her attitude of having wanted to better her life for the sake of herself and her loved ones.

[140] What is also very important is the evidence of Mr Moodie of his experience as Chief Psychologist in the SAPS which was extracted during his evidence in chief and cross-examination. Mr Moodie testified that he holds a master degree in Industrial Psychology. He started his career in the defence force and then he was employed by the SAPS Psychology Department where he achieved the rank of Captain. He was employed by the SAPS as Chief Psychologist for the Witwatersrand District for two years, during which time he assisted with the development of the Psychometric tests for the Police. Consequently, he has intimate knowledge of the nature and purpose of the said tests and how important they are considered to be in the recruiting process. This factor, as well as the character, motivation and determination of the plaintiff, caused him to testify that he is sure that she would not only have been successful with the recruitment process, but also that she in all likelihood would have reached the rank of warrant officer.

[150] In any event, Mr Moodie also testified that if she would not have followed the SAPS route pre-morbid, but the corporate route, she would have in any event earned a pre-morbid income which equates Patterson B3/B4, which is similar to that of warrant officer with the rank of Band B1.

[160] I consequently accept Mr Moodie's report, evidence and opinions which completely complied with the requirements for expert evidence to be reliable and acceptable. The same goes for the two other expert witnesses. I will return to an additional part of Mr Moodie's evidence when I deal with the contingencies.

## **Contingencies:**

[161] It is trite that it is for the court to determine the percentage of contingencies to be applied in a matter such as this.

[162] 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 N.O.** 1984 (1) SA 98 (A) at 113G and 116G – 117A:

“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.'

[163] In the judgment of **Gillbanks v Sigournay** 1959 (2) SA 11 (N) the following was stated at 17 E – 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.”

[164] In the judgment of **Dlamini v Road Accident Fund** (59188/13) [2015] ZAGPPHC 646 (3 September 2015) at paras [30] – [32] 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.

[31] When a court is called upon to exercise an arbitrary discretion that is largely based on speculated facts it must do so with necessary circumspection. In the absence of contrary evidence, the court can assume that a reasonable person in the position of the plaintiff would have succeeded to minimize the adverse hazards of life rather than to accept them. Both favourable and adverse contingencies have to be taken into account in determining an appropriate contingency deduction. Bearing in mind that contingencies are not always adverse, the court should in exercising its discretion lean in favour of the plaintiff as he would not have been placed in the position where his income would have to be the subject of speculation if the accident had not occurred.”

[165] Ms Bornman submitted that the so-called “normal contingencies” cannot apply in this instance, specifically so because the “*uninjured scenario is speculation upon speculation*”.

[166] Mr Marx pointed out that in the actuarial calculations by Mr Sauer, dated 3 May 2023, the contingencies that were used, were 5% deduction for past earnings, both pre-morbid and post-morbid, and 15% deduction for future earnings pre-morbid and 35% deduction for future earnings post-morbid.

[167] Firstly, I cannot agree with the submission of Ms Bornman regarding “speculation”, for the reasons already dealt with above.

[168] With regard to post-morbid future loss of earnings, Mr Marx correctly pointed out that after Mr Moodie attended court and listened to the evidence of Ms Greyling, Dr Deacon and the plaintiff. He testified that the plaintiff`s position is much worse than he originally projected in his report. He testified that her injuries did not improve, but worsened. She did not progress as he initially projected. He is of the opinion that she will now only be able to find a suitable job much later and that he does not think that she will be able to outperform her colleagues, considering her injuries and her present position and consequently Mr Moodie does not think that the plaintiff will be able to proceed beyond R8 000 per month. Therefore, a higher contingency should be applied. Mr Marx submitted that 15% pre-morbid and 55% post-morbid should be applied.



[169] In principle I agree with the submissions by Mr Marx, except that I am of the view that a 50% contingency for future earnings post-morbid will be fair and reasonable in all the circumstances. This fact is also specifically confirmed by the remark of Mr Sauer that the higher future post-morbid contingency deduction is “*to allow for increased employment vulnerability, labour incapacity uncertainty possible long periods of unemployment and early retirement*”, which is 100% in accordance with the opinion of Mr Moodie in this regard.

[170] Mr Sauer will consequently be requested to prepare an actuarial calculation on the present postulations, but with a 50% contingency for future losses post-morbid, and updated to date of this order.

### **General damages:**

#### **A: Principles applicable to the quantification of general damages**

[171] 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.”

[172] Furthermore, previous comparable awards, adjusted to reflect current values, are considered as guidelines as to what would be a fair and reasonable award towards both the plaintiff and the defendant in the circumstances of a particular case. See **Road Accident Fund v Marunga** 2003 (5) SA 165 (SCA) at para [23].

[173] Although comparable cases offer some guidance in assisting a court to arrive at its award, it should not be viewed as an absolute standard. This principle was affirmed in **Protea Assurance Co. Ltd v Lamb** 1971 (1) SA 530 (A) at 536, where, as pointed out by Mr Cross, it was stated that a 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 at paras [64] – [65]

[174] In the **Marunga**-judgment, *supra*, at para [27] 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 recognise 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 significantly lower than those in most other countries.'

[28] The *Wright* case at E3-34 - E3-37 is instructive. ...”

B: Nature, extent and seriousness of the injury and its sequelae

[175] The nature, extent and seriousness of the injuries, as well as the sequelae thereof, are already on record and I approach this matter based on the evidence of the respective experts in this regard.

C: Comparable case law

[176] In the amended particulars of claim the plaintiff is seeking payment of R600 000.00 in respect of general damages.

[177] I have duly considered the comparable case law which the parties referred to in their respective heads of argument, namely:

1. The plaintiff:
  - 1.1 **Mafulako v Road Accident Fund** (18338/2017) [2020] AGPPHC 477 (28 August 2020)
  - 1.2 **Tlhakane v Road Accident Fund** (29632) [2015] ZAGPPHC 853 (24 November 2015)
  - 1.3 **Abrahams v Road Accident Fund** (1531/2010) [2012] ZAECPEHC 37 (29 May 2012)
  - 1.4 **Nyawose v Road Accident Fund** (14546/2018) [2021] ZAGPPHC 506 (10 August 2021)
2. The defendant:

- 2.1 **Usuf Sabodien v Road Accident Fund** [2021] LNQD 4 (WCC)
- 2.2 **Gatya v Member of the Executive Council, Department of education, Eastern Cape** [2019] LNQD 69 (ECP)

[178] Based on the aforesaid comparative cases, Mr Marx submitted that R575 000.00 would be fair and reasonable, whilst Ms Bornman submitted that R350 000.00 would be a fair and reasonable amount in relation to the plaintiff's general damages.

[179] In my view an award of general damages in the amount of R450 000 is fair and reasonable in the totality of the relevant facts and circumstances of this matter.

**Costs:**

[150] There is no reason why costs should not follow the outcome of this matter.

**Order:**

[151] I consequently make the following order:

1. The defendant is liable to pay 90% (Ninety Percent) of the plaintiff's proven damages.
2. The defendant shall furnish the plaintiff with an Undertaking, in terms of Section 17(4)(a) of Act 56 of 1996, limited to 90% (Ninety Percent) in respect of future accommodation of the

plaintiff in a hospital or nursing home or treatment of or the rendering of a service or supplying of goods of a medical and non-medical nature to the plaintiff (and after the costs have been incurred and upon submission of proof thereof) arising out of the injuries sustained in the collision which occurred on 5 October 2017.

3. The defendant is awarded the sum of R450 000.00 (Four Hundred and Fifty Thousand Rand) in respect of general damages, 90% (Ninety Percent) of which amount the defendant is ordered to pay to the plaintiff, namely R405 000.00 (Four Hundred and Five Thousand Rand).
4. The plaintiff's attorney of record is ordered to forthwith request the actuary, Mr Johan Sauer, to prepare an actuarial calculation on the present postulations, dated 3 May 2023, but with a 50% contingency for future earnings post-morbid, and updated to date of this order.
5. Leave is granted to the parties to approach Van Zyl, J in chambers, once the aforesaid calculation is received, with a draft order to obtain a further order for the payment by the defendant to the plaintiff of 90% (Ninety Percent) of the amount calculated as aforesaid.
6. The defendant is to pay the plaintiff's taxed or agreed party and party costs of the action, which costs shall include, but not be limited to the following:

- 6.1 Previously reserved costs.
  - 6.2 The reasonable qualifying, preparation- and reservation fees and costs of obtaining reports and the evidence, where applicable, of the following experts:
    - Dr MB Deacon, Orthopaedic Surgeon;
    - Ms Luna Greyling, Occupational Therapist;
    - Mr Ben Moodie, Industrial Psychologist; and
    - Mr Johan Sauer, Actuary.
  - 6.3 Counsel`s fees, including, but not limited to, the costs of drafting heads of argument.
7. The aforesaid costs are also to include the additional costs for obtaining the newly calculated and updated report from Mr Johan Sauer, referred to in paragraph 4 above, as well as any consequential costs incurred for it to be made an order of Court.
  8. The above-mentioned payment with regard to costs shall be subject to the following conditions:
    - 8.1 The plaintiff shall, in the event that costs are not agreed, serve a notice of taxation on the defendant's attorney of record.
    - 8.2 The plaintiff shall allow the defendant 14 (fourteen) calendar days to make payment of the taxed costs.
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**C. VAN ZYL, J**

On behalf of the plaintiff:

Adv DJ Marx  
Instructed by:  
Du Plooy Attorneys  
BLOEMFONTEIN  
Ref: Du Plooy/V652

On behalf of the defendant:

MS C Bornman  
Instructed by:  
Offices of the State Attorney  
BLOEMFONTEIN  
Ref: Link 4330584 /  
Ms C Bornman.