

REPUBLIC OF SOUTH AFRICA

13/9/17



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 46097/12

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

13 September 2017

DATE

SIGNATURE

In the matter between:

ANNIKIE GIFT NKUNA

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

J U D G M E N T

TEFFO, J:

INTRODUCTION

[1] On or about 25 August 2011 the plaintiff was a passenger in a motor vehicle bearing registration letters and numbers unknown to her (the insured

vehicle) and driven at the time by a person whose identity was also unknown to her (the insured driver). The insured driver lost control of the motor vehicle and it eventually collided with a tree. The accident took place at approximately 17h00 at the Mabopane Highway.

[2] According to the RAF 4 form signed by Dr T J Enslin the plaintiff sustained the following injuries: whiplash neck injury, mechanical back pain, tender C5, 6 and 7, positive Jackson test, all movements were painful and tenderness on the mid thoracic and lower lumbar region. The clinical records from the hospital mention the following injuries: soft tissue injury to the neck, odontoid fracture, the Glasgow Coma Scale (GCS) was recorded at 15/15 upon her arrival at the hospital and the motor fall out was L1-distally. A neck collar was applied for five days. She was treated conservatively with anti-inflammatories and analgesics. A CT scan was processed to exclude fractures.

[3] The defendant has admitted 100% liability for the cause of the collision. I was advised that the defendant was still to lodge a formal objection to the plaintiff's claim for general damages and that the determination thereof will be referred to the HPCSA for purposes of a decision whether the plaintiff's injuries can be categorised as "*serious injuries*" in terms of section 17(1A) of the Act.

[4] The defendant has furnished the plaintiff with an undertaking in terms of section 17(4) of the Road Accident Fund Act 56 of 1996 in respect of future medical and hospital expenses.

[5] The only issue for determination relates to plaintiff's claim for future loss of earnings and/or loss of earning capacity. The defendant did not file any medico legal reports. All the medico legal reports filed were those of the plaintiff.

APPLICABLE LEGAL PRINCIPLES

[6] The general principles applicable to the assessment of damages under this head of damages were summarised by Van Heerden J (as she then was) in *Bridgman NO v Road Accident Fund (C) Corbett & Honey The Quantum of Damages* in Bodily and Fatal Injury cases 2007(5) Case No. 5622/98 at B4-1, B4-5 as follows:- Before there can be a quantification of a claim for loss of earning capacity the plaintiff must, as a first requirement, prove that '*the reduction in earning capacity gives rise to pecuniary loss*' (*Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) 241H-242B). The general principle applicable in this regard has been succinctly stated by Chetty J in *Prinsloo v Road Accident Fund* 2009 (5) SA 406 (SE) with reference to the leading cases of *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 (2) SA 146 (A) 150B-D and *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) 917B-D as follows:

"A person's all round capacity to earn money consists, inter alia, of an individual's talents, skills, including his/her present position and plans for the future, and, of course, external factors over which a person has no control, for instance, in casu considerations of equity. A court has to construct and compare two hypothetical models of the plaintiff's earnings after the date on which he/she sustained the injury. In casu, the court must calculate, on the one hand, the total present monetary value of all that the plaintiff would have been capable of bringing into her patrimony had she not been injured and, on the other, the total present monetary value of all that the plaintiff would be able to bring into her patrimony whilst handicapped by her injury. When the two hypothetical totals have been compared, the shortfall in value (if any) is the extent of the patrimonial loss ... At the same time the evidence may establish that an injury may in fact have no appreciable effect on earning capacity, in which event the damage under this head would be nil."

(See also *Griffiths v Mutual & Federal Insurance Co Ltd* 1994 (1) SA 535 (A) at 546F-G.) The reasoning of, as well as the finding by Chetty J in *Prinsloo* that the claimant had failed to discharge the *onus* of proving that she suffered a loss of reduction of earning capacity was approved and confirmed on appeal (see *Prinsloo v The Road Accident Fund* (unreported)).

[7] In case number 139/2009 delivered on 25 February 2010 by the Full Court of the Eastern Cape High Court (Jones J, Pillay J and Makaula AJ concurring) the following was said:

"As for the plaintiff it must undoubtedly be accepted that the sequelae of the injuries he suffered from, results in a diminution of his ability to optimally perform in the workplace. But, the enquiry, as I have shown, does not end there. The question remains whether as a result of the disability, he will suffer any pecuniary loss."

[8] The court in *Rudman v Road Accident Fund* held that in a claim for loss of earnings past or future and earning capacity – the plaintiff must prove not

only physical disabilities resulting in loss of earning capacity but also actual patrimonial loss.

[9] Rumpff JA articulated the principle in *Dippenaar v Shield Insurance Co Ltd* as follows:

"In our law under the lex Aquilia, the defendant must make good the difference between the value of plaintiff's estate after the commission and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate."

THE EVIDENCE

[10] Four different experts, namely, Dr Z Iqbal (the Neurologist); Ms Elfriede Tromp (the Neuro-Clinical Psychologist); Ms Abida Adroos (the Occupational Therapist) and Ms Esther Sempene (the Industrial Psychologist) testified in support of the plaintiff's case while no witnesses were called on behalf of the defendant. The witnesses' expertise and qualifications were not placed in dispute.

[11] Before evidence was led a document entitled 'Statement of Results, National Senior Certificate' for the plaintiff dated 5 October 2010 was handed up in court by agreement. According to the document the plaintiff did not pass matric. She wrote seven subjects in 2009 and the marks in each of the subjects were as follows: Sepedi Home Language 54, English First Additional Language 63, Mathematics 20, Life Orientation 72, Geography 47, Life

Science 39 and Physical Science 21. She qualified to write the supplementary examination.

[12] Dr Z Iqbal (Neurologist) testified as follows: He assessed the plaintiff on 6 May 2015 (3 years and 9 months after the accident) and compiled a report. The report appears on pages 70 to 78 of the Quantum bundle. When he consulted with the plaintiff, she had the following injuries: Neck injury – tenderness over the cervical spine area, back injury – tenderness over the thoracic spine and initially according to the clinical records, she was unable to move both legs. She reported that she developed a headache after the accident which is episodic. It happens 3 to 4 times a week. Once it comes it lasts for a few hours in less than a day and it disappears. She usually wakes up from her sleep because of the headaches. Its severity is 8/10. The headache affects her whole head, its throbbing in character and it is associated with photophobia and phonophobia. When she has the headache she cannot continue with her daily activities. As regards the neck and back pain, she reported that the pain is continuous. It becomes worse when she is involved in any physical activity like walking and lifting heavy objects. The pain results in her disturbed sleep because of the movement at the back and she will then have to wake up in her sleep.

[13] In respect of her forgetfulness and inability to focus, Dr Iqbal testified that the plaintiff reported to him that she was busy with a diploma in Traffic Management and Policing at the time of the accident. She could not finish the diploma because she had memory problems. She also reported that when

given tasks at home, she forgets them and ends up not doing them. Her family members accommodate her. She also reported behavioural changes in that since the accident she is not able to live her normal life. She is scared of travelling and even going out of the house. She gets flashbacks of the accident. She is not able to sleep normally because of the scary dreams related to the accident. She is irritable, feels low and sad all the time. She avoids interacting with people and the family tries not to leave her alone as they find her in tears when they return home.

[14] As regards her higher mental function, he testified that during the consultation every time he asks her something it made her sad. It was difficult to interact with her because the entire part she was crying.

[15] After examining her, he found that she had a severe headache, disturbed sleep, mood disorder, forgetfulness, etc (post-traumatic headache). He also found some post-traumatic behavioural changes and stress disorder and deference was made to the Neuropsychologist. As a neurologist, they screen the patient for the cognitive functions but that is not an in-depth assessment and idea tool to access the cognitive functions. He concluded after examining the plaintiff that as a result of the accident she suffers from a traumatic brain injury which has resulted in neurological and neuropsychological disorder. She suffers from post-traumatic headache which is severe and frequent even though she takes strong analgesics. She also suffers from post-traumatic stress disorder and he deferred to the Neuropsychologist. The plaintiff also suffers from a spinal injury which results

in severe neck pain and backache. He then deferred this to the Orthopaedic Surgeon and an Occupational Therapist.

[16] Under cross-examination he explained that neuropsychologists deal more with the in-depth analysis of behavioural disorders and that neurologists deal with diseases related with the nervous system. He testified that as a neurologist he does not deal with the trauma at the beginning of the accident but he deals with the assessment at a later stage and the consequences thereof. He investigated the nervous system of the plaintiff and made his findings on the basis of the information he got from the plaintiff and his objective finding. The findings made related to the post-traumatic headache. Neurological and neuropsychological disorders were based on the information he received from the plaintiff and he made an objective finding about the tenderness on the cervical and lumbar spine. When asked whether he was qualified to comment on these injuries, he testified that after observing the injuries he deferred to the Orthopaedic Surgeon. He further testified that all the complaints reported to him by the plaintiff were his subjective findings and that her behavioural changes were deferred to the Clinical Psychologist as they do not fall within his area of expertise. He conceded that he concluded that the plaintiff sustained a brain injury because of the neurological and neuropsychological disorders that he found on her.

[17] He was asked whether he had an opportunity of looking at the hospital records to check what the GCS of the plaintiff was on her admission at the hospital. He testified that the GCS helps most of the time to determine the

head injury but it is not always the case that when an injury like this is incurred one has to use it to access the consciousness of a patient. When a patient who has been examined, did not lose consciousness, it does not follow that such a patient will not suffer a brain injury. He explained that he refers to the possibility of a post-traumatic headache and behavioural changes which are traumatic to the brain. He was referred to page 75 of the quantum bundle, under the heading 'cranial nerves' and asked whether that falls under his area of expertise and he said yes. He was further asked whether he found anything wrong in that area on examination of the plaintiff and he testified that the examination was normal and he found nothing wrong. The same applied to what he discussed under the heading 'motor system, sensory system and co-ordination' whereas what he mentioned under the heading 'abdomen' did not form part of his area of expertise.

[18] Ms Elfriede Tromp (the Clinical Psychologist who has a special interest in Neuropsychology) testified that she consulted with the plaintiff on 13 May 2015 (three years and nine months after the accident) and compiled a report that appears from page 79 of the quantum bundle. She was furnished with the hospital records from Kalafong hospital stating amongst others that the plaintiff presented with a neck and spine injury and she was unable to walk. The plaintiff reported to her that she sustained the following injuries as a result of the accident: whiplash injury, spinal injury and neck injury. During the interview the plaintiff was mostly tearful, became emotional and cried in the entire interview. She showed signs of anxiety especially when she related the events of the accident. She reported that her mood has changed and she

experienced emotional and behavioural problems after the accident. Neuropsychological symptoms were reported to her and confirmed by her sister telephonically. She is socially withdrawn, has increased levels of irritability, a short temper, regular anger outbursts, feelings of sadness and severe depression on a daily basis. She displayed post-traumatic signs of anxiety and depression, restlessness and difficulty in making decisions. She reported flashbacks that formed part of the diagnosis for post-traumatic stress disorder. She reported feelings of fatigue and low energy levels that can also form part of her depression symptoms. She also reported that she is always tired and mentally drained, her sleeping patterns have been disrupted post-accident and she struggles to fall asleep.

[19] When asked whether there is a connection looking at the outcome of her assessment taking into account the injuries the plaintiff sustained and the head injury taking into account that it is common cause between the parties that she did not sustain a head injury at the time of the accident, she stated that that question has to be answered by a neuropsychologist or a neurosurgeon. She was asked to explain what she calls diffuse traumatic head injury and she testified that the plaintiff was involved in a high impact collision. In her opinion the plaintiff's brain moved slightly most likely with the scalp due to high impact of the accident hence the neck and the spinal injury. It is common knowledge among the neurosurgeons and neurologists that the brain and spinal cord are linked. An injury to the neck can result in blood cutting off lack of oxygen in a brain that can lead to damage.

[20] The neuropsychological and neurological symptoms on the plaintiff have an impact on the family and the community. Neurocognitive symptoms like memory problems, lack of concentration, feelings of tiredness, etc, have an impact on the person's work at the workplace. It forces a person not to feel like going to work.

[21] Under cross-examination she testified that the prognosis for a person like the plaintiff who has been taking medication at the age of 24, is poor because they are dealing with symptoms of traumatic brain injury which has been regarded as permanent, post-traumatic stress disorder which is regarded as permanent if the patient has not received counselling or psychotherapy treatment after the exposure to the traumatic event. They are dealing with psychological symptoms like depression and anxiety which have been described as severe and chronic. The symptoms are linked to a traumatic brain injury and chronic post-traumatic stress disorder condition.

[22] She was referred to page 110 of the quantum bundle para 9(e) which reads: "*Ms Nkuna should be referred to a neurosurgeon for a comment on the possibility of a brain injury and the extent of her brain injuries*" and asked why does she testify about a definite permanent brain injury while in her report she has referred the possibility of a brain injury and the extent thereof to a neurosurgeon. She testified that a final diagnosis of a brain injury has to be made by a neurosurgeon or a neurologist. She is just a Clinical Psychologist who has specialised in the field of Neuropsychology. In terms of her expertise she can only give an opinion of the injuries sustained which relate to the brain

injury (neurocognitive and neuro-behavioural symptoms caused by the brain damage.

[23] The symptoms of the Post Traumatic Stress Disorder (PTSD) were not physically displayed by the plaintiff during the interview. They were related to her verbally by the plaintiff and her sister confirmed them. When asked whether that piece of evidence was contained in her report, she testified that she was not sure if she wrote it. She maintained that that was reported to her and confirmed by the plaintiff's sister. She further testified that she would refer the plaintiff to a psychiatrist for prescription of medication. The psychiatrist could be of assistance but she cannot comment if the medication would manage the plaintiff's condition because people react differently to medication. Only the psychiatrist would be able to see after prescribing the medication and after sometime if the medication manages the condition. She has not recommended in her report that the plaintiff should be referred to a psychiatrist. When asked whether her prognosis excludes the possibility of referring the plaintiff to a psychiatrist for the prescription of the medication, she was adamant that the plaintiff's prognosis was poor and that even if the medication can be prescribed for her, she was not sure if it can manage her condition because the symptoms of a traumatic brain injury have never been cured by psychiatric medication. She testified that the intervention of the neurosurgeon or neurologist together with the Clinical Psychologist who could assist her to cope with the environment and teach her skills to improve her functioning, could be necessary. She has referred the plaintiff to the Clinical

Psychologist, Neurosurgeon, Occupational Therapist, Industrial Psychologist and a Physiotherapist for pain management.

[24] She opined that the brain damage cannot be cured and that anxiety and depression are all part of traumatic damage. She was asked whether there are any other causes of anxiety and depression other than brain damage and she testified that in the present case there is brain damage, anxiety and depression are part of it and the pain aggravates the feelings of depression. She further testified that she does not know if it has been confirmed that the plaintiff suffered a brain damage. She admitted that she recorded in her report that the plaintiff passed matric and a diploma.

[25] Ms Abida Adroos (the Occupational Therapist) testified that she consulted with the plaintiff on 12 May 2015 (3 years and 8 months after the accident) and compiled a report. She was in possession of the RAF 4 form completed by Dr T J Enslin, the medico-legal reports compiled by the Neurologist, Dr Z Iqbal, the Orthopaedic Surgeon, Dr H B Enslin, the Clinical Psychologist, E Tromp, the RAF 1 form, Clinical records and a copy of the plaintiff's identity document.

[26] She was referred to para 6 of her report on page 115 of the quantum bundle where she discussed the vocational activities of the plaintiff. She testified that the plaintiff reported to her that she attained Grade 12 in 2009 at Hlanganani High School and proceeded to study for a diploma in Traffic and

Police Management at Central College from 2010 to 2011. No documents were furnished to her in respect of the Grade 12 certificate and the diploma.

[27] The plaintiff further reported to her that at the time of the collision she was in college, studying for the diploma. The accident occurred in her second year of study in August 2011. She wrote her final year exam in November 2011 but did not attend classes between August and November. She passed but her marks were not good. She mentioned to her that since she qualified, she has not found any work and she believed that she cannot work due to pain.

[28] In her report she made a summary of the plaintiff's cognitive ability where she noted the findings of the Neurologist and the Clinical Psychologist, E Tromp who indicated that the plaintiff may have sustained a head injury without loss of consciousness, due to the nature of the accident and she recommended that a neurosurgeon should comment further on the aspect. She stated in her report that the plaintiff complained of poor concentration since she was preoccupied by the accident. During the assessment she was internally distracted by her own thoughts which affected her focus to the tasks at hand, especially when she has to work without direct supervision from the therapist. She testified that if the cause of the plaintiff's lack of concentration is not treated and she is not rehabilitated, it will have a serious impact on her working environment.

[29] After being told that the Clinical Psychologist testified that the plaintiff has neuropsychological and cognitive defects which are permanent, she was asked what this means to her in a work environment. She testified that when they look at the severity of the brain injury, they also work with a Neurosurgeon who can make a conclusion regarding the prognosis. Her focus is on the plaintiff's emotional function and the chronic pain syndrome. The diagnosis of the chronic pain was made by Dr Enslin. Chronic pain is a very difficult condition to treat. It has physical and emotional components. The plaintiff's emotional and chronic abilities have been limited according to her. If that is not well managed, then the concentration will continue to be affected.

[30] As regards the plaintiff's physical work ability the test results reveal that she did not reach her maximal abilities. She gave up quickly. She was crying even though she had to perform movements. She had to give the plaintiff rest periods in order to enable her to continue with the tests. There were brief periods where she improved momentarily but her efforts declined again. She was pre-occupied and afraid. Dr Enslin mentioned the chronic syndrome and the Clinical Psychologist mentioned depression and anxiety. On that basis she concluded that the plaintiff had emotional limitations which limited her efforts.

[31] She was requested to look at her assessment in line with the type of career the plaintiff chose. She testified that her assessment of the plaintiff was based on what she presented at the time. It was not based on her true potential since she had her emotional limited behaviour. As regards the

diploma in Traffic Management according to her the plaintiff did not meet the demands of that job at the time but her abilities could improve. Her view was that even if the plaintiff could improve because she was diagnosed with chronic pain and emotional limitation she will always be limited with her performance at work.

[32] As regards the plaintiff's work competence, she testified that the fact that the chronic pain lasts longer than six months has an emotional and physical component. As an Occupational Therapist and Rehabilitation member they have to have some value to assist the plaintiff to cope and relieve pain. There are various modalities of treatment from the Occupational Therapist's perspective. They do cognitive and behavioural therapy to allow patients to do more than they currently can. The prognosis is variable and they cannot compete with those who do not have the pain.

[33] In relation to the plaintiff's work ability she opined that from a physical perspective, she will be able to perform components of her job as a traffic officer, but will have difficulty with certain duties, such as directing vehicle traffic, especially if she has to do this for prolonged periods of the day. She will also struggle to deal with resistant suspects, and will have difficulty to apprehend or chase suspects if required, due to reduced agility. She will cope better with functions where she is allowed to sit for periods of the day, and where she will be able to intermittently change positions to allow for postural relief to her spine. She will have difficulty with fulfilling the full spectrum of her duties due to pain. When asked what she meant in her report about the

above, she testified that she looked at what the plaintiff could do after treatment.

[34] She was referred to the plaintiff's statement of her matric results and told that the plaintiff failed matric. She was asked whether her assessment would be different taking into account that in her report she stated that the plaintiff has matric while she does not have it. Her evidence was that they would not be any different because the same tests will be performed and the same conclusion will be reached, however in her view the plaintiff will be able to do sedentary and light work as her future work options could be curtailed and he deferred this for comment by the Industrial Psychologist.

[35] Under cross-examination she confirmed her evidence-in-chief that when she consults with a patient who has a brain injury, she also consults with a neurosurgeon the reason being that her experience is that the neurosurgeon deals with the trauma in the brain. She further testified that at the time of the assessment in most instances, not all the reports shall have been received. She looks at the clinical records, the GCS, etc, and when she compiles her report, she checks all the expert reports and thereafter consults a neurosurgeon. When she consulted with the plaintiff the neurosurgeon report was not there. She was referred to para 10 of her report on page 120 of quantum bundle where she stated that she notes the findings of the Neurologist and the Clinical Psychologist who indicated that the plaintiff may have sustained a head injury without a loss of consciousness due to the nature of the accident and her statement that a neurosurgeon should

comment further. She was asked as to why she wanted the neurosurgeon to comment further. Her response was that the expert to comment on the severity of the head injury is the neurosurgeon.

[36] She admitted that when she compiled her report she already had the report of the Clinical Psychologist, E Tromp. She was referred to page 110 of Ms Tromp's report, para 9(e), where she also stated that the plaintiff should be referred to a neurosurgeon for comment on the possibility of a brain injury and the extent thereof. She testified she also noted the recommendation when she compiled her report. She was asked after having been referred to page 114 of her report that deals with the plaintiff's personal and social background, whether she also had a discussion with the plaintiff about her mother and she testified that she did not. She further testified that she considers losing a parent a traumatic experience and that that would affect a person emotionally.

[37] Her view is that the plaintiff could do better physically based on her tests. She was asked to explain her evidence that she cannot say the plaintiff is a person who cannot do anything. She testified that the plaintiff has not had the benefit of any rehabilitation. Her current physical abilities have not reached the maximum. After being referred to the last but one para in her report on page 130 of the quantum bundle which reads:

"She will also be able to perform alternate sedentary and light work. She should be educated on proper movement patterns, pacing techniques and biomechanic principles. Deferment is given to the

opinion of an industrial psychologist to comment on alternate work options when considering her educational level."

She testified that in her opinion from an orthopaedic perspective the injuries on the neck and back which were regarded as significant, will not disable the plaintiff to do sedentary and light work.

[38] She further testified that employers are encouraged to reasonably accommodate people like the plaintiff. People who are already employed are more likely to be accommodated than someone who is still to apply for a job. Employees who are disabled or known to their employer could be employed sympathetically than those without a job. Reference to sedentary and light work would include jobs in managerial and administration capacities from a physical perspective.

[39] The plaintiff informed her that she passed matric and a diploma when she consulted with her.

[40] Ms Esther Sempene (the Industrial Psychologist) also testified. Her evidence was as follows: She also consulted with the plaintiff in May 2015 and compiled a report which appears on pages 138 to 151 of the quantum bundle. She was referred to para 3.2 on page 142 of the bundle where she discussed the educational history of the plaintiff and asked whether the information was given to her by the plaintiff and she responded in the affirmative. According to her educational history, the plaintiff failed Standards 8 and 9 and passed them on second attempt. She reported that it was her

intention to upgrade her matric results in 2010 but she did not write the examinations as she lost her mother the same year. The plaintiff also reported to her that she registered for a diploma in Traffic and Police Management and she was still busy with it at the time of the accident. She wrote the special examination and passed. She was not shown the certificate for the diploma during the consultation.

[41] When she consulted with the plaintiff she had the following documents in her possession: the RAF 1 form completed by Dr S Bismina on 13 October 2011, the RAF 4 form completed by Dr T Enslin on 12 May 2015, hospital records from Kalafong hospital, a copy of the plaintiff's identity document, medico-legal reports compiled by Dr H B Enslin (the Orthopaedic Surgeon) dated 29 April 2015, Dr Z Iqbal (the Neurologist) dated 6 May 2015, E Tromp (the Clinical Psychologist) dated 14 May 2015 and that of A Adroos (Occupational Therapist) dated 3 September 2015 together with the x-ray reports. The complaints recorded on para 4.4 on page 144 of the bundle were reported to her by the plaintiff.

[42] As regards her loss of earnings disregarding the accident as discussed on page 149 para 8.1 the plaintiff reported that she completed Standard 9. She considered her level of education. She states in her report that Ms Nkuna reported that she failed matric and that she completed a 1 year diploma in Traffic Management. She was asked whether she considered her to have attained a 1 year diploma even though she did not have matric and whether that would make a difference in her assessment. She testified that

the plaintiff has completed a Standard 9. There is no way she could have continued with a diploma with a Standard 9. She could have entered the open labour market as a general worker and could have relied on her good physical state in securing jobs. She could have supplemented and/or improved her matric results and passed in two to three years. She could have reached her ceiling at Paterson level B3/4 at the age of 45 years if one takes into account that she obtained a diploma. She could have realised that what she did previously would not have enabled her to get the job that she wanted. She was 21 years old at the time of the accident. After passing her matric that could have enhanced her chances of getting a better job and that is the reason why she stated that she could have been in the formal sector. She started with a lower paid job and indicated that the plaintiff was motivated if one takes into account that in her schooling, she repeated some of her grades and ultimately passed them. She could see that the plaintiff progressed and wanted to do a better job and would retire at 65 years.

[43] At para 8.2 of her report on page 150 of the bundle she discussed the plaintiff's situation having regard to the accident. She stated the following:

"Ms Nkuna sustained injuries which have comprised her mental and physical health. She remains with pain and treatment is recommended for her. Post-accident she is not expected to cope with work of a physical nature and is reported to be confined to work of a sedentary nature. Ms Nkuna has however not completed matric and would enter the open labour market with Standard 9. She would have relied on her good level of physical ability in securing any type of work on the open labour market. Post-accident she would require being selective in her choice of future positions but is however not equipped with skills to compete for the type of jobs she is suitable for. She has been rendered less competitive as a result of the accident."

[44] She testified that according to her the plaintiff was going to be compromised in terms of acquiring any position because of the head injury. The Neurologist, Dr Iqbal stated that she has neurocognitive problems and he was supported by the Clinical Psychologist, Ms Tromp. She also has orthopaedic injuries. According to the Occupational Therapist she will no longer be in a position to perform physical work. She will be selective in whatever type of job she will be applying for. Considering the market in our country, she will struggle to get a suitable job. She might end up not working. Her evidence was further that she could not say that the plaintiff was unemployable because she still retains her residual work ability but considering job restrictions that she could be faced with, she has to make a choice in whatever job she will be applying for. Taking into account that she can do light or work of a sedentary nature, she has to compete with people who have matric which she does not have. The Occupational Therapist indicated that in her current situation, she is precluded from any type of work. She will only be able to get into the labour market after treatment. The Occupational Therapist indicated that during her assessment of the plaintiff, she presented with emotional limitations in her functioning. She recommended that the plaintiff required counselling.

[45] In her view even after counselling she will still remain with orthopaedic challenges which relate to her physical functioning. With these problems she would still be suitable for initial positions which the Occupational Therapist has highlighted that she would be able to cope with.

[46] Under cross-examination she testified that she is not a job analyst. She was asked as to where does she classify the diploma or certificate in terms of the NQR qualifications that she states the plaintiff has in relation to matric and she testified that whether she calls it a diploma or certificate it is not in the level of matric. She conceded that an N3 qualification from a TVET (FET) college is equivalent to matric and with it one can proceed to college and register for a diploma. She admitted that she commented in her report about a brain injury and this was based on the neurologist's report. She conceded that the neurologist is not qualified to comment on the brain injury.

[47] After confirming her evidence that she would not say the plaintiff is unemployable as she still retains her residual capacity, she was referred to para 4.5 on page 154 of the quantum bundle (the calculations by the actuary) and asked whether that tallies with her opinion. She testified that she did explain that the plaintiff will struggle to get a suitable position based on her level of schooling, the nature of her injuries and the finding of the Occupational Therapist regarding the job she would be able to do. She is not unemployable because she is not crippled. She could still work but has to select what she can do. She does not understand how calculations are done. It was put to her that her report is sent to the actuary and if the actuary says '*no income in the future*' and she states in her report that the plaintiff can do residual work, that does not accord with her findings. In reply to this she testified that given her condition, for her to secure a light and sedentary work is going to be a problem. She was further asked whether her report was properly interpreted by the actuary taking into account that she mentions that

the plaintiff could do sedentary and light work and the actuary says she will not get an income, whether the income that she has referred to in her report was not supposed to have been included in the actuarial calculations. Her response was that she is not sure if the plaintiff will get a job but if she gets it with a Standard 9 and her physical limitations, she will not cope because the job will be a physical type of a job.

[48] When asked whether she knows what the plaintiff's progression would be if she gets intervention or assistance from the other experts, she testified that she was not present when the Orthopaedic Surgeon testified but in his report, the Orthopaedic Surgeon mentioned that probably the plaintiff would need surgery of the back. She would not say anything about the plaintiff's prognosis because it is not known what will happen after the operation. There could be changes. She cannot say how the plaintiff is going to progress in the type of work she might do in the future.

[49] She conceded that she decided not to include the diploma qualification in her analysis of the plaintiff's educational qualifications. No one can have a diploma without matric. She does not know if the college where the certificate comes from is recognised by the Department of Education. She did not communicate with the college to find out how the plaintiff was admitted. She also does not know if the college is properly registered. When she consulted with the plaintiff, she told her that she has a diploma. *When asked what kind of a job the plaintiff will get with the certificate that she has, she testified that in her opinion the document will not enhance any of her chances of getting a*

job. She would get a job if the diploma was recognised and would have been combined with a matric certificate. The plaintiff completed the diploma in 2011. She has been unemployed since then. It did not help her to find a job. She testified that the kind of the economy and the nature of the diploma contribute to her not being able to find a job.

[50] Coupled with this evidence there is also a report of an Orthopaedic Surgeon, Dr H B Enslin, who did not testify. A summary of his report states the following: The plaintiff sustained the following injuries: *'an injury to her lumbar spine, an injury to her cervical spine, an injury to her thoracic spine. Spinal cord shock. She had motor weakness when she was initially seen, but she has completely recovered in respect of the spinal shock. Reports no epilepsy or memory problems ... panic attacks if she sees an accident ... depressed. ...was conscious and shocked. ...diagnosis ... soft tissue injury to her cervical spine, thoracic spine and lumbar spine. Definitive signs of a fracture of the odontoid process cannot be confirmed as most recent x-rays show no signs of a healed fracture of the odontoid process. ...anxiety disorder and depression. ... Has not yet secured work ... being trained in traffic control... might have difficulty performing standing work tasks the entire day ... would preferably be employed in a work environment where she can alternative between sitting and standing ... chronic pain syndrome. ... Use of prescription drugs beyond the recommended duration... Excessive dependence on her health care providers (frequent visits to Kalafong hospital). Secondary physical deconditioning due to disuse and/or fear avoidance. Withdrawal from social milieu, including work and recreation. He*

recommended that the plaintiff should be evaluated by an Occupational Therapist for an assessment of her work speed, working ability and the workload that she can safely tolerate on her neck and back and can advise her on ergonomical principles to be instituted at the workplace. He also recommended that she should be evaluated by a Clinical Psychologist for an assessment of her present depressive disorder and anxiety and a recommendation regarding appropriate future treatment and the costs involved. Dr H B Enslin further recommended an evaluation by an Industrial Psychologist to calculate an increased post-morbid contingency deduction in terms of her future earning capacity using her age, training, education, long-term pain, limitation in standing and/or prolong sitting and the whole person impairment.

[51] The Orthopaedic Surgeon concluded that an allowance should be made for loss of earnings due to chronic pain in her neck and back based on disability index of 10%. He opined that if the plaintiff was to find work, her loss of earnings would be decreased by 10% over the last ten years of her life for accident-related reasons. I will deal with this report later in the judgment.

[52] I have difficulties with the different expert reports of the plaintiff and the evidence presented. The plaintiff reported to all of them except the Industrial Psychologist that she passed matric in 2009. All the reports are premised on the basis that she passed matric and that at the time of the accident she was busy studying for a diploma in Traffic and Police Management. The Industrial Psychologist states in her report that it was reported to her that the plaintiff

completed a one year diploma. All these experts never saw any of the certificates of the plaintiff when they assessed her. They only relied on the information they received from her. It was only at the commencement of the trial that the plaintiff produced a document purporting to be a statement of her matric results which indicates that she did not pass matric.

[53] On page 157 of the quantum bundle there is document stating that the plaintiff has complied with the requirements of a diploma in traffic and police management on 2 December 2011. It is a document from Central College of Business and Computer Studies. There is no indication from the experts' reports in particular, the Occupational Therapist and the Industrial Psychologist that they inquired or investigated the status of this so-called diploma and whether the institution from where it was obtained has been accredited with the Department of Education or not. As I am writing this judgment the status thereof is not known.

[54] Ms Sempene, the Industrial Psychologist testified under cross-examination that whether the plaintiff refers to that qualification as a certificate or a diploma, it is not in the level of matric. I agree with Ms Sempene but the difficulty that I have with this qualification is that it could be from an Institution that is not accredited by the Education Systems Act. We do not know its status and what courses the plaintiff took. There is no educational value to evaluate the certificate and obviously the syllabus thereof has not been approved by Government.

[55] According to her evidence and her report, Ms Sempene stated that she assessed the plaintiff as a person who only passed Standard 9 (Grade 11). This in my view does not tally with the evidence of the other experts who assessed her as a person who had matric and a two year diploma. Taking the matter further Ms Sempene indicates that she was told that the plaintiff completed a one year diploma while the evidence and the reports of the other experts state that she completed a two year diploma. Strange enough in Dr Iqbal, the Neurologist's evidence, he testified that the plaintiff reported to him that she was busy with the diploma at the time of the accident, she did not finish it because she had memory problems. We know for a fact that in almost all the reports it is stated that the plaintiff was involved in an accident in 2011 while she was in her second year of study and she was able to complete her so-called diploma at the end of the year. His evidence is not realistic as it is not in line with the evidence. It seems as if he exaggerated the situation of the plaintiff.

[56] Dr Iqbal concluded that the plaintiff suffers from a traumatic brain injury which has resulted in neurological and neuropsychological disorder and he deferred to the neuropsychologist. He conceded under cross-examination that he is a physician. His further evidence was that as a neurologist he does not deal with the trauma at the beginning of the accident but at a later stage and the consequences thereof. He testified that he made findings relating to the post-traumatic headache after investigating the nervous system of the plaintiff and also relying on what the plaintiff reported to him. When he was asked whether he had an opportunity of looking at the hospital records to

check the GCS of the plaintiff on admission at the hospital, he came up with a long explanation trying to justify his conclusion. It is not within his expertise to deal with the trauma of the brain and determine a brain injury. That falls within the expertise of a neurosurgeon. This is evident from the fact that after he had deferred the neuropsychological *sequelae* of the injuries the plaintiff sustained to the neuropsychologist, the Neuropsychologist stated in para 9(e) of her report on page 110 of the quantum bundle that the plaintiff should be seen by a neurosurgeon for comment on the possibility of a brain injury and the extent thereof. After noting the findings of the Neurologist and the Clinical Psychologist who indicated that the plaintiff suffered a traumatic brain injury, the Occupational Therapist also deferred the issue to the neurosurgeon for further comment.

[57] Although the Clinical Psychologist, the Occupational Therapist and the Industrial Psychologist regarded the plaintiff as having sustained a head injury and assessed him as such, she was never taken to a Neurosurgeon for assessment. The brain injury has therefore not been confirmed. The explanation given by Ms Tromp as to why she did not make such a recommendation in her report is very strange and not sound.

[58] Ms Tromp, the Clinical Psychologist, when she was confronted with the question under cross-examination as to why she was testifying that the plaintiff suffered a definite permanent brain injury while in her report she deferred the comment on the possibility of a brain injury to the neurosurgeon, she conceded that a final diagnosis of a brain injury has to be made by a

neurosurgeon or a neurologist. She conceded that it was not within her expertise to make a final diagnosis on the brain injury. She also tried to justify her conclusion that the plaintiff suffered a diffuse traumatic head injury by stating that the plaintiff was involved in a high impact collision and that in her opinion her brain moved slightly more likely with the scalp due to the high impact of the collision hence the neck and spinal injury. No evidence was adduced to that effect. It was very strange for Ms Tromp to mention that she would refer the plaintiff to a psychiatrist for prescription of the medication in relation to her PTSDO and to give an opinion that the psychiatrist could assist the plaintiff but not to refer her. It is unrealistic for her to comment about what that medication would do to her while she did not refer her as that opinion should be from the psychiatrist who shall have examined the plaintiff and prescribed whatever medication to her.

[59] It is an undisputed fact in this matter that the plaintiff's mother passed on a year before she was involved in an accident and she was not able to write her matric supplementary examinations as a result thereof. The Occupational Therapist correctly and realistically so conceded that losing a parent is a traumatic experience that would affect a person. Ms Tromp was adamant when asked whether there were no other causes of anxiety and depression other than brain damage that the plaintiff suffered a brain damage that has not been confirmed. The issue of losing a parent is nowhere referred to in her report as having also contributed to the plaintiff's anxiety, depression or having also affected her to a certain extent. The plaintiff is young. There is reason for her to be depressed after being involved in an accident.

[60] I find Ms Tromp's report wanting for the reasons advanced above. There was also something strange about her evidence. While she deferred comment about the possibility of a brain injury and the extent thereof to the neurosurgeon, she testified that she did not know if the brain injury was confirmed. She was not candid with the court. Experts are there to assist the court to understand the issues before it and arrive at a just and proper decision.

[61] The plaintiff's attorneys decided to continue with the trial without the neurosurgeon's report. In my view given my reasoning *supra*, I find that the argument by the plaintiff's counsel that it was proven that the plaintiff suffered a brain injury based on the opinion of Dr Iqbal, the Neurologist, and Ms Tromp, the Neuropsychologist misplaced. It is clear from the hospital records that on admission at the hospital immediately after the collision, the GCS of the plaintiff was recorded as 15/15. No head injury was diagnosed. She was conscious and stayed at the hospital being conscious for 6 days. No further evidence was presented to prove that she indeed suffered a brain injury.

[62] As regards the plaintiff's educational history, on page 142 of the quantum bundle, it is indicated that she passed Standard 8 and 9 on second attempt. If one compares these results, her matric results and the diploma, there is no indication that she has suffered irreparable intellectual ability after the accident. She prepared herself for more than 12 years to write matric and two years to write the diploma and the background of more than 12 years as against the two years shows that she is a below average student. She does

not even come from a family of achievers if one looks at her family background information on paragraph 3.1 on page 141 of the quantum bundle. Among her siblings there is only one who passed matric and he is unemployed while the other one has Standard 8 and is employed as a Security Officer. It is recorded that her father is literate and works as a bus driver. There is no motivation at all from her family. Her employment progression cannot be said to be determined solely by her intellectual ability because it is wanting.

[63] I am not persuaded on the evidence that the plaintiff has succeeded in proving that she suffered a brain injury which has resulted in her neurocognitive deficiencies which would render her employable in the future.

[64] I accept from the evidence that the plaintiff has sustained orthopaedic injuries as a result of the accident as referred to in the Orthopaedic Surgeon's report, such injuries have compromised her physically because of the chronic pain and that she has lost some capacity to earn income although according to the Occupational Therapist and the Industrial Psychologist she retains a residual capacity to earn an income. The Orthopaedic Surgeon made a finding that an allowance should be made for loss of earnings due to chronic pain in her neck and back based on disability index of 10%. According to him if the plaintiff is to find work, her loss of earnings would be decreased by 10% over the last ten years of her life for accident-related reasons.

[65] The evidence proves that the plaintiff only passed Standard 9 at school. Without matric she could have entered the open labour market at the informal or semi-formal sector as a General Worker pre-accident and could have relied on her good physical state in securing jobs. I accept the progressions made by the Industrial Psychologist that she could have started earning about R3 500,00 to R4 000,00 per month and could have earned within the recommended minimum wage for unskilled workers, which is from R7 300,00 – R18 600,00 – R53 500,00 per year. Given her educational history of having passed Standard 8 and 9 on second attempt, I am persuaded that she could have improved her matric results in that there is evidence in the reports which has not been contested that it was her intention to write the supplementary examinations in 2010 (a year after she sat for the matric examinations) but could not write because that was the year her mother passed on. According to Ms Sempene considering her motivation to study further she could have supplemented and passed her matric in about 2 to 3 years' time.

[66] She could have then secured a position in the semi-skilled or formal sector around the age of 24 and could have earned about R6 000,00 per month. Her earnings would have increased with time and she might have probably reached her career ceiling at B3/4 level around the age of 45 years. She could have then enjoyed annual inflationary increases until she retired at the age of 65 years (para 8.1 of the Industrial Psychologist's report).

[67] Having regard to the accident – The Occupational Therapist and the Industrial Psychologist are clear that she is not unemployable. She is reported to be confined to work of a sedentary nature. She would enter the open labour market with a Standard 9. Reference here is made to paragraph 61 of my judgment in particular, what the Orthopaedic Surgeon said in relation to the plaintiff finding work, that her loss of earnings would be decreased by 10% over the last ten years of her life for accident-related reasons. The plaintiff is not in a vegetative state. She has physical limitations which are not absolute.

[68] In *Southern Insurance Association v Bailey* NO 1984 (1) SA 98 (A) the following remarks were made:

"Where the method of actuarial computation is adopted in assessing damages for loss of earning capacity, 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'. One of the elements in exercising that discretion is the making of a discount for 'contingency' or 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. The rate of 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."

[69] After considering the evidence and all the plaintiff's reports before me I am of the view that the most appropriate and fair deduction should be calculated as follows:

Past loss	R 210 600, 00
Less 20% contingency	<u>42120, 00</u>
Past loss of earnings	R 168 480, 00
Future loss	R3 449 800, 00
Less 60% contingency	<u>R2 069 880, 00</u>
Future loss of earnings	R1 379 920, 00
Add past loss of earnings	<u>R 168 480, 00</u>
Total loss of earnings	R1 548 400, 00

[70] The award to be made for future loss of income or loss of earning capacity is R1 548 400, 00.

[71] Accordingly I grant judgment in favour of the plaintiff against the defendant as follows:

71.1 The defendant is ordered to pay the capital amount of R1 548 400, 00 to the plaintiff in respect of her loss of earning capacity or future loss of earnings on or before 15 October 2017.

71.2 Should the defendant fail to pay the said amount to the plaintiff as ordered above, the defendant will be liable to pay interest to

the plaintiff on the said amount at a rate of 15,5% per annum, calculated from the date of this order to date of payment thereof.

71.3 The defendant is ordered to provide the plaintiff with an undertaking in terms of section 178(4)(a) of the Road Accident Fund Act, 56 of 1996, for 100% of the plaintiff's costs in a hospital or nursing home, or treatment or the rendering of a service to him or supplying of goods to him, arising out of the injuries sustained by him in the motor vehicle collision that occurred on 25 August 2011, in terms of which undertaking the defendant is obliged to compensate the claimant in respect of the said costs.

71.4 The issue of general damages is postponed *sine die*.

71.5 The defendant is further ordered to pay the plaintiff's taxed or agreed party and party costs which costs shall, *inter alia*, include:

71.5.1 costs consequent upon the obtaining of all the medico-legal reports of the plaintiff's experts, namely:

71.5.1.1 Dr H B Enslin (Orthopaedic Surgeon)

71.5.1.2 Dr Z Iqbal (Neurologist)

71.5.1.3 Ms E Tromp (Clinical Psychologist)

71.5.1.4 Ms A Adroos (Occupational Therapist)

71.5.1.5 Ms E Sempene (Industrial Psychologist)

71.5.1.6 Munro Forensic Actuaries (Actuaries)

71.5.2 the reasonable and necessary preparation, qualifying, attendant and reservation fees, which will include the meetings in respect of meetings between plaintiff's attorneys and the abovementioned experts (if any) of all the plaintiff's abovementioned experts, excluding the experts mentioned in 69.5.1.1 and 69.5.1.6;

71.5.3 the trial costs of 8 and 9 September 2016;

71.5.4 the costs attendant upon the obtaining of payment of the amounts and undertaking referred to in this order.



M J TERFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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