

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



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
4/5/2023

DATE

SIGNATURE

CASE NUMBER: 64934/2019

In the matter between:

KAMOGELO EDNA MASHEGO

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

OOSTHUIZEN-SENEKAL AJ:

INTRODUCTION

- [1] The plaintiff in this matter issued summons against the Road Accident Fund (“RAF”) for damages suffered as a result of the injuries she sustained in a motor vehicle accident that occurred on 13 October 2018. The matter came before me for trial on a default basis after the defendant’s defence was struck out.
- [2] Notice of setdown was served on the RAF on 1 March 2023.
- [3] On the day of the hearing, I requested counsel for the plaintiff, Mr Radebe, to contact the defendant in order to enquire as to whether there will be any participation by the RAF during the trial. The matter stood down and after some time Mr Radebe informed me, that he was unable to make contact with the claims handler as she was on leave. The matter therefore proceeded on default basis.
- [4] Merits and quantum are in dispute. However, counsel on behalf of the plaintiff informed me that the plaintiff will proceed on merits and in relation to quantum, on future medical and hospital expenses as well as past and future loss of income only. General damages to be postponed *sine die*.
- [5] At the outset, counsel for the plaintiff made an application in terms of rule 38(2) of the Uniform Rules of Court,¹ that this court accepts the expert reports compiled and confirmed as such as evidence on oath. Having regard to the nature of the claim and the nature of the proceedings, together with the fact that the affidavits of the various experts and their reports are filed on record, I exercised my discretion to accept the evidence on oath.

¹ Rule 38(2) provides:

“The witnesses at the trial of any action shall be examined *viva voce*, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.

[6] The defendant did not file any expert reports.

[7] As a result of the injuries which the plaintiff sustained, she claimed damages in the amount of R 4 480 000.00 (four million four hundred and eighty thousand rand) that have been calculated as follows as per the amended particulars of claim filed on 17 March 2023:

Non-medical expenses	R 20 000.00
Future medical expenses	Section 17(4)(a) Undertaking
Past loss of earnings	R 160 000.00
Future loss of earnings	R 3 000 000.00
General damages	R 1 300 000.00
Total	R 4 480 000.00

MERITS

[8] The plaintiff was the only witness to testify in the matter.

[9] The plaintiff's evidence, in summary was that on 13 October 2018 at 16h50 she was a passenger in an insured motor vehicle with registration number [...] travelling along the M1. At the Buccleuch offramp, the driver of the insured motor vehicle attempted to overtake a truck travelling in the same direction, as a result the insured motor vehicle collided with the rear of the truck.

[10] The plaintiff testified that the collision occurred due to the sole negligence of the insured driver because he was travelling at an excessive speed while talking on his cell phone. As a result, the insured driver lost control of the motor vehicle and struck the truck from behind. She further stated that the time of the collision it was raining.

[11] The plaintiff's evidence continued that she was then taken by ambulance to the LenMed Hospital in Tembisa. She suffered a laceration on her right eye lid and an abrasion and hematoma to her right knee. She remained in hospital for 4 (four) days, and was discharged on 18 October 2018.

- [12] There does not appear to be any reason to doubt, from the plaintiff's evidence that the injuries and the surgery that took place was as a result of the collision.
- [13] The plaintiff testified that before the accident she was employed as a laboratory clerk at Vermaak and Partners. Prior to the accident she worked night shift for which she received over time remuneration. However, due to the injuries she sustained during the accident she experienced various challenges with night shift duties and therefore she was transferred to day shift duties, which resulted in reduced remuneration.
- [14] The plaintiff stated that after the accident she experienced difficulties in capturing the correct details of patients and results of tests on the computer data base, which was a core function of her employment. Furthermore, she experienced difficulties in mobility, she was unable to move up and down stairs due to the injury to her right knee. As a consequence of her inability to go up and down the stairs, she had to rely on the security personnel at her place of employment to deliver documents and samples in various sections of the hospital where Vermaak and Partners were operating. She also testified that after the accident she experienced challenges with her eyes because of excessive screen time capturing data. As a result of the strain on her eyes she was prescribed eyeglasses, which was not the case prior to the accident. Since the accident she suffered from headaches which impacted negatively on her daily life.
- [15] The plaintiff stated that during her absence from work she received her monthly salary and she was allowed to take paid sick leave to recuperate from her injuries. However, because she was transferred to the day duty shift her salary was reduced, because she was unable to work night shifts.
- [16] In terms of Section 17 (1) (a) and (b) of the Road Accident Fund Act, Act 56 of 1996 as amended ('the Act'), the RAF has an obligation to compensate a plaintiff (third party) for loss or damages as a result of injuries sustained due to a motor vehicle accident.
- [17] *In casu*, the plaintiff was a passenger when the accident occurred and it is trite law that any person claiming from the RAF must only prove 1 % negligence to prove the RAF's liability.

[18] Counsel for the plaintiff referred me to the matter of *Prins v Road Accident Fund*,² Mojapelo DJP as he then was stated as follows:

“It is common cause that a passenger needs only to prove the proverbial 1% negligence on the part of an insured driver in order to get 100 % of damages that he is entitled to recover from the Fund.”

[19] Furthermore, the general approach when dealing with rear end collisions was set out by *H B Kloppers in The Law of Collisions in South Africa (7th Edition)*³ which reads:

“A driver who collides with the rear of a vehicle in front of him is *prima facie* negligent unless he or she can give an explanation indicating that he or she was not negligent.”

[20] In *Groenewald C v Road Accident Fund*⁴ Mavundla J said the following regarding rear end collisions:

“It is trite that the plaintiff, as a passenger claimant, need to prove only 1% negligence on the part of the insured driver in order to succeed with her claim against the defendant. It is equally trite that where a vehicle collides with another motor vehicle from behind, the presumption is that the driver of the vehicle which rear-ended the other vehicle was negligent in failing to keep a proper look out, failed to scan the road ahead and failed to avoid the collision in not applying his brakes timeously or at all. The merits were conceded by the defendant in court before plaintiff called any witness. I find this conduct on the part of the defendant extremely disturbing in the sense that the parties held a pre-trial much earlier during which merits were not conceded. The tendency on the part of the defendant in not conceding merits well in advance in matters where the plaintiff need only prove 1% is mind boggling, if it is not a deliberate stratagem to unnecessarily inflate litigation costs. Such conduct needs to be depreciated in the severest measures.”

² (21261/08) [2013] ZAGPJHC 106.

³ See page 78.

⁴ *Groenewald v Road Accident Fund* (74920/2014) [2017] ZAGPPHC 879 at para [3].

[21] In the present case it is clear that the RAF is liable for the plaintiff's damages because she was a passenger at the time of the accident and the insured driver collided with another vehicle from behind. On the evidence before me, the driver of the insured motor vehicle, registration number DF 99 FK GP was negligent and his negligence caused the injuries sustained by the plaintiff in the accident.

[22] Therefore, the defendant is liable for 100% of the plaintiff's damages suffered as a result of the motor vehicle collision that occurred on 13 October 2018.

QUANTUM - EXPERT REPORTS

Neurosurgeon

[23] Dr Mpanza assessed the plaintiff on 18 October 2022. In his report Dr Mpanza noted the following;

“10. Discussions

10.1 Accident related injuries:

The claimant probably sustained a **Mild head injury**, with a history of loss of consciousness of unknown duration. The recorded admission Glasgow coma scale is 15/15 with a forehead laceration which was sutured. On current examination, no neurological deficit detected, therefore I suggest no further management.

She also suffered a knee injury (Soft tissue injury). I therefore defer for an orthopaedic surgeon.

10.2 Post accident:

She complains of no Memory problems, but with personality changes which I therefore defer for both industrial and clinical psychologist assessment/opinion.

She suffers from post-traumatic headache; it becomes permanent in 20% of individuals at one-year post head injury. Provision for analgesia must be made.

17. Influence amenities education

- Amenities and enjoyment of life negatively affected by chronic headache.
- Clinical psychologist to assess and quantify neurocognitive deficits.

18. Impairment evaluation

Impairment rating: 6th Edition of AMA guide
Alteration MSCHIF — deferred for clinical psychologist
Headache-WPI is 3% (Table 13.8, Class 2)”

Orthopaedic Surgeon

[24] Dr Marule assessed the plaintiff on 15 August 2022. The following was noted in the said report compiled by Dr Marule;

“13. OPINION ON DAMAGES

13.1 PAIN AND SUFFERING

- She suffered acute pains during presentation to hospital.

13.2 CHRONIC PAIN

- She still has chronic right knee pain.

13.3 PROGNOSIS AND FUTURE EMPLOYABILITY

- For future employability defer to Occupational therapist and Industrial psychologist.

14.NARRATIVE TEST

Considering the HPCSA narrative test guidelines and AMA Guides 6w Edition my findings are: Her calculated WPI is 1%.

Her damages are less than 30% required by Law for Compensation,

“However the claimant qualifies for compensation for general damages under Narrative test 5,1 as indicated on the Selous Injuries Assessment report”.

She suffered right knee injury. Painful right knee when standing for prolonged periods.

14.1 LOSS OF AMENITIES OF LIFE

- She no longer enjoys singing and cooking

14.2 LIFE EXPECTANCY

- Not influenced by her injuries.

14.3 MEDICAL EXPENSES

FUTURE

- She will need pain medication for her right knee.

SURGERY

- No surgery anticipated.”

Neuropsychologist and Clinical Psychologist

[25] Dr Mphuthi assessed the plaintiff on 27 January 2023. Under the heading Clinical formulation, the following was stated by Dr Mphuthi;

“Impact of head/brain injury

Based on the foregoing, we conclude that the traumatic brain injury that Ms. Mashego sustained at the time of the accident has resulted in significant neurocognitive deficits. These negatively impact her ability to function both intellectually and socially.

Clinical psychological status and recommended psychotherapy

Ms. Mashego’s clinical psychological status is characterised by symptoms of post-traumatic stress mood dysregulation associated with diminished neurocognitive capacity as well as persistent pain and changed social functioning. If compensation is granted, we recommend that funds be set aside for 35 sessions of neuropsychological and psychotherapeutic to address both reactive psychological problems and vulnerability to neurocognitive deficits identified in this report. The number of sessions may also be left open to those appointed to assist him, especially where additional sessions may be required. At current medical aid rates, the cost of a session of psychotherapy averages R 1 200, depending on the practice. An amount of R 42 000 should therefore be set aside for psychotherapy.

Vocational consequences

From a neuropsychological perspective, her pattern of performances on cognitive testing and her clinical psychological profile have (*sic*) implications for her vocational functioning and prospects. She now performs tasks at a slower pace than prior to the accident, forgets important details, requires more time to comprehend complex tasks, and will have difficulty managing her levels of frustration in the workplace. We defer to the industrial psychologist regarding the loss of potential future income due to her diminished prospects of following a career path at a level of complexity and span of control that was possible before the accident.

Psychological capacity to manage own affairs

We believe Ms. Mashego has capacity to manage her own affairs with regard to activities of daily living but will remain psychologically vulnerable before and during the period that she undergoes the recommended psychotherapy. We recommend that provision be made for advisory support with complex decisions, especially where large amounts are awarded.”

Occupational Therapist

[26] Ms Sebatu evaluated the plaintiff on 30 November 2021. The following information provided in the said report is of importance;

“7.2. PRE-ACCIDENT OCCUPATIONAL INFORMATION

Ms Mashego indicated that she worked as a Laboratory Clerk. Her job functions and duties are detailed below:-

- Her work context encompassed the following:
 - She travelled by taxi for +30 minutes one way.
 - She worked two (2) shifts; from 08:00—16:30 and 18:00—06:00.
 - She worked seven (7) straight days and had seven (7) days off,
 - She worked alone.
- Her specific duties and work functions included;
 - Receiving specimens.
 - Analysing the specimen.
 - Billing the patients.
 - Answering the telephone.
 - Filling.
 - Collecting the slides from the bench & handing them to the pathologists.
 - Scanning the slides.
- The physical demands of the job entailed:
 - Handling weight of less than 5kg.
 - Frequent standing and walking.
 - Occasional sitting.
- The cognitive demands included good attention and concentration, problem solving, and decision making amongst others.

7.3. POST-ACCIDENT OCCUPATIONAL INFORMATION

The accident under discussion occurred on 13 October 2018. Ms Mashego reported that she was absent from work for thirteen (13) days. She was reportedly fully remunerated. She reported that she resumed her full duties. She reported that she was not coping with the twelve (12) hour shifts and asked to be moved to another branch which did not require night shifts (i.e., 12 hour shifts).

7.4. CURRENT OCCUPATIONAL INFORMATION

Ms Mashego is still working as a Laboratory Clerk, but has since been moved to the Lyttleton Branch. Her job description remains the same. However, she only works day shifts from 8:00 to 16:30. She is reportedly still earning R7 200.00 per month as she no longer works night shift.

7.5. CURRENT WORK-RELATED DIFFICULTIES

Ms Mashego reported the following difficulties:

- She suffers from migraines.
- She has neck / back pain when she sits for long.
- Her eyes get strained when using a computer,
- She struggles with remembering clients' names and medical aid details.

7.6. FUTURE PROSPECTS AND ASPIRATIONS

Prior to the accident, Ms Mashego reported that she wanted to do an Occupational Hygiene Course and pursue a career in the same field. Currently, due to her difficulties, she wants to do a Digital Marketing Course and pursue a career in the same field.

10.1. CURRENT COMPLAINTS AND PROBLEMS

Ms Mashego reported the following problems because of the accident under discussion: ~

Right eye:

- She has reduced vision.
- She squints repetitively.
- The eye is always teary,
- The eye gets sore when exposed to sunlight.
- She has difficulties when working at a computer interface.

Forehead:

- She has constant migraine headaches which become worse with loud noises.
- She gets itchiness over the scar area.
- She has numbness of the forehead during cold weather.

Cognitive:

- She has memory difficulties i.e.; she forgets peoples' names.
- She struggles with grasping information.

Neck / back:

- She has neck / back pain when sitting for extended periods.

13. COMMENTS ON LIFE AMENITIES

Ms Mashego was involved in a motor-vehicle accident on 13 October 2018 as a passenger in a minibus taxi. According to the available documentation, Ms Mashego suffered the following injuries:

- Deep forehead laceration
- Right knee soft tissue injury

From a physical point of view, Ms Mashego reported that she suffers from neck / back pain when sitting for extended periods (see section 10.1.). Dr M A Morule (Orthopaedic Surgeon) noted that the claimant still has chronic right knee pain (page 8). During the physical assessment, she presented with full and functional ranges of all joints, normal muscle strength and intact sensation (see section 11.2). She was able to participate in all activities during the formal assessment, but she was notably unhurried. She did not report any pain during the formal assessment and did not present with any objective pain behaviour. Dr M A Morule (Orthopaedic Surgeon) recommended conservative management.

Ms Mashego reported complaints of chronic headaches. It should be accepted that the headaches would affect her participation in activities and her general wellbeing. Dr P M Mpanza (Neurosurgeon) has recommended treatment for the headaches.

Ms Mashego also raised complaints about the eyes and reduced vision. This appears to be negatively affecting her functioning. Deference is made to the relevant experts for further comments.

From a cognitive point of view, Ms Mashego reported that she suffer(*sic*) from memory fallouts (see section 10.1.). During the formal assessment, the claimant presented with some cognitive difficulties (see section 11.6.). Dr P M Mpanza (Neurosurgeon) noted that Ms Mashego sustained a mild head injury. Thus, significant long term cognitive fallouts in line with the severity of her head injury would be expected.

From an emotional and psychological point of view, Ms Mashego raised some issues related to the accident under discussion (section 11.7.). The emotional fallouts may also have far reaching(*sic*) negative impact which may find expression in the home and other areas of the claimant's life. Having regard to these, the writer is of the opinion that the raised issues are justified, and would have a negative impact on Ms Mashego's emotional functioning. Further comments in this regard are deferred to the relevant experts.

Regarding self-care and personal management tasks, Ms Mashego reported that she is currently independent in tasks with some limitations due to headaches (see section 11.8.). The reported pain and difficulties are reasonable. She can be expected to remain independent, however, she will benefit from using the recommended assistive devices to facilitate functioning.

From a leisure/recreational point of view, the claimant reported some challenges due to headaches (see section 5). She also reported that she is reclusive. This is reasonable. It is the writer's opinion that the claimant has suffered due loss and prejudice to her leisure activities due to the accident.

In conclusion, the writer is of the opinion that the accident under discussion has thus resulted in negative effects in Ms Mashego's Activities of Daily Living (ADL) and life enjoyment as a result of the presenting difficulties. Due to the nature of her injuries, she has suffered long term functional fallouts. She will benefit from Occupational Therapy intervention, assistive devices and environmental manipulation to reduce the risk of deterioration of her current symptoms, as well as limiting pain aggravation in daily tasks. However, it is unlikely that the reported pain will be completely alleviated, and one would expect the pain to continue to be limiting to Ms Mashego in the long term.

In **conclusion**, Ms Mashego has suffered a reduction in her functional capacity. She has suffered loss of competitiveness as a result and will not be able to compete on the same level as her uninjured peers."

Industrial Psychologist

[27] Ms Ntsieni assessed the plaintiff on 30 November 2023 to evaluate the extent and impact of the accident and related injuries on the plaintiff's physical and cognitive functioning in order to predict her educability, employment prospects and earning potential, assuming that the accident had not occurred and having regard to the consequences of the accident.

[28] The following was noted in the report referred to;

"7. EMPLOYMENT PROSPECTS R. EARNING POTENTIAL

7.1 Pre-Accident

Ms. Mashego reported that she has Grade 12 level of education and IT End User Competing Certificate. Dr. R. Koch states that “it is well established that for purposes of the assessment of damages for loss of earning capacity the test is “likely” “probable” earnings and not what claimant could possibly have earned in an optimal scenario. (The Quantum yearbook, 2011:70). “The best guide to likely earnings is often what the victim was earning at the time of the accident”. (The Quantum yearbook, 2012:106). At the time of the accident Ms. Mashego was employed by Vermaak en Vennote Pathologist as a Laboratory Clerk earning basic salary of R6 450.00 per month, and R7 068.43 — R7 686.86 per month with overtime as per the pay slip provided below.

It is clear that in this capacity she relied on her cognitive, physical health, strength, and capabilities for gainful employment. Her reported earnings at the time of the accident were ranging within Paterson A1 (basic salary) of the 2018 Paterson-Derived Grading Scales in the formal sector.

In this capacity, at the age of 26 years as at the time of the accident, with a Grade 12 level of education, IT End User Computing Certificate and her work experience as indicated above, it is herein accepted that growth in her earnings was likely for Ms. Mashego who had 39 years still pending to retirement. It is the writer's view when considering her young age, educational background, work experience as well as collateral information from Ms. Thabisa Lemba, manager at Vermaak en Vennote Pathologist indicating that Ms Mashego was a hard worker and stood a chance of being promoted to a Laboratory Technician earning from R12 000 (gross per month) that she would have managed to progress her career and earnings to reach Paterson B3/B4 level, total package, through promotions, changes of jobs and employer for better prospects at the approximate age of 45 years. Thereafter further growth in her earnings was most likely going to be as a result of annual inflationary related increases till retirement age.

But for the accident, the writer is of the opinion that Ms. Mashego had the physiological and cognitive ability necessary for her to enjoy a working life which would have most probably ended in age-related retirement at 65 years depending on her employer’s retirement age at the time.

7.2 Post-Accident

Subsequent to the accident which occurred on 13 October 2018; Ms. Mashego was taken by an ambulance to Zamokuhle Private Hospital where she was discharged on 15 October 2018 (as per the RAF 1 Form). She reported that she attended check-ups. She also reported that

she stayed at home recuperating for 02 weeks. She further reported that she was paid for the period she was off from work, however she lost of overtime. She indicated that she is currently working at Gijima Technology People as a Laboratory Assistant and reportedly R10 000 (gross) per month. The writer defers to factual information in this regard.

It is thus evident from the experts' opinions above that the injuries sustained from the accident in question have had a negative and restrictive impact on Ms. Mashego's level of physiological, neurosurgical and occupational functioning.

Thus, the accident has had the following impact on her earnings:

- Ms. Mashego reported that she stayed at home recuperating for 03 weeks and was paid her salary, however she lost of overtime. Thus, past loss of earnings is noted.
- Taking into consideration all the available information, it's the writer' opinion that Ms. Mashego is no longer performing at her pre-accident potential as a result of the accident. She is therefore likely to suffer a future loss of earnings to be calculated as per the difference between her pre-accident earning potential discussed on 7.1 and her current earnings with inflationary related increases anticipated.
- Furthermore, noting the available information and the experts' opinions above, it is accordingly clear that her post-accident career is one that is likely to be characterised by some uncertainty, pains and restrictions as well as risk of loss of income. These risks should be further dealt with by way of a much higher than normal post-accident contingencies. The writer however acknowledges that the application of such contingencies remains the prerogative of the courts as well as a matter of negotiations by the legal experts.

There are incapacitating factors present that limit and will limit Ms. Mashego's employability, future career choices and income potential in the future. Ms. Mashego has sustained the nature of injuries that have compromised her health and therefore affecting her physiological and occupational abilities. The writer opines that considering these changes, Ms. Mashego is an unequal competitor at the open labour market compared with her healthier peers and that she will not be able to perform functions efficiently and effectively as compared to her counterparts. Thus, it is the writer's view that the injuries sustained from this accident would hinder Ms. Mashego's career and future employability in that regard. Thus, her progression

through her career is considered restricted and compromised as a result of the impact of the accident-related injuries.”

Actuary Report

[29] An actuary report was compiled by Munro Forensic Actuaries.

[30] The following calculations were put forward in the said report;

2.2 Capital Value of Loss of Earnings (no contingencies; RAF cap has no impact)

Capital Value

Past	R	154 500
Future	R	2 891 200
Total	R	3 045 700

“4. CALCULATION OF LOSS OF EARNINGS

4.1 Uninjured Earnings

The information provided indicates that the claimant’s career and earnings would have progressed as follows had the accident not occurred (2018) terms, before tax, unless stated otherwise):

- Date of accident - R 7 481 per month', straight line to
- December 2036 (age - Paterson B3/B4 at R 306 500 per year (2022 terms)
45)

We have allowed for earnings inflation until retirement age 65.

Average earnings from payslips dated 31 July, 31 August and 30 September 2018 per p.9-10 of IP report

4.2 Injured Earnings

The information provided indicates that the claimant’s career and earnings have and will progress as follows now that the accident has occurred (2018 terms, before tax, unless stated otherwise):

- Date of accident - R 6 450 per month, straight line to
- February 2022 - 2022 R 7 200 per month (2022 terms)
- March 2022 - No earnings
- April 2022 - R 10 000 per month from 19 April 2022 (2023 terms)

We have allowed for earnings inflation until retirement age 65.

Basic pay only

4.3 Contingencies

No contingencies have been applied. Contingencies may be applied as usual since the RAF Amendment Act cap does not have an impact on this scenario.”

FUTURE HOSPITAL, MEDICAL AND RELATED EXPENSES

[31] After the collision the plaintiff was transported by an ambulance to the Zamakuhle Private Hospital (LenMed). On admission at LenMed the plaintiff was conscious. As a result of the collision, she sustained the following injuries;

1. Mild brain injury,
2. A deep laceration on the right upper eyelid, and
3. Small abrasion of the right knee.

[32] The plaintiff remained in hospital for 4 (four) days and was discharged on 18 October 2018.

[33] It is evident that the plaintiff will need future medical treatment as a result of the injuries she sustained during the accident.

[34] Therefore, this head of damages should be dealt with on the basis of a statutory undertaking to be provided by the RAF to the plaintiff in terms of section 17(4) (a) of the Act, and I therefore intend granting an order to that effect.

PAST AND FUTURE LOSS OF EARNINGS/EARNING CAPACITY

[35] The approach to determining loss of earnings and applicable contingencies, was recently explained by the Supreme Court of Appeal in *Road Accident Fund v Kerridge*⁵ as follows:

“[40] Any claim for future loss of earning capacity requires a comparison of what a claimant would have earned had the accident not occurred, with what a claimant is likely to earn thereafter. The loss is the difference between the monetary value of the earning capacity immediately prior to the injury and immediately thereafter. This can never be a matter of exact mathematical calculation and is, of its nature, a highly speculative inquiry. All the court can do is make an estimate, which is often a very rough estimate, of the present value of the loss.

[41] Courts have used actuarial calculations in an attempt to estimate the monetary value of the loss. These calculations are obviously dependent on the accuracy of the factual information provided by the various witnesses. In order to address life’s unknown future hazards, an actuary will usually suggest that a court should determine the appropriate contingency deduction. Often a claimant, as a result of the injury, has to engage in less lucrative employment. The nature of the risks associated with the two career paths may differ widely. It is therefore appropriate to make different contingency deductions in respect of the pre-morbid and the post-morbid scenarios. The future loss will therefore be the shortfall between the two, once the appropriate contingencies have been applied.

[42] Contingencies are arbitrary and also highly subjective. It can be described no better than the oft-quoted passage in *Goodall v President Insurance Co Ltd* where the court said: ‘In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practiced by ancient prophets and soothsayers, and by authors of a certain type of almanack, is not numbered among the qualifications for judicial office.’

[43] It is for this reason that a trial court has a wide discretion when it comes to determining contingencies. An appeal court will therefore be slow to interfere with a contingency award of a trial court and impose its own subjective estimates. ...

[44] Some general rules have been established in regard to contingency deductions, one being the age of a claimant. The younger a claimant, the more time he or she has to fall prey to

⁵ 2019 (2) SA 233 (SCA) at para [40]-[44].

vicissitudes and imponderables of life. These are impossible to enumerate but as regards future loss of earnings they include, inter alia, a downturn in the economy leading to reduction in salary, retrenchment, unemployment, ill health, death, and the myriad of events that may occur in one's everyday life. The longer the remaining working life of a claimant, the more likely the possibility of an unforeseen event impacting on the assumed trajectory of his or her remaining career. Bearing this in mind, courts have, in a pre-morbid scenario, generally awarded higher contingencies, the younger the age of the claimant. This court, in Guedes, relying on Koch's Quantum Yearbook 2004, found the appropriate pre-morbid contingency for a young man of 26 years was 20% which would decrease on a sliding scale as the claimant got older. This, of course, depends on the specific circumstances of each case but is a convenient starting point."

[36] It is important to note that any enquiry into damages for loss of earning capacity is by nature speculative. All the court can do is estimate the present value of the loss whilst it is helpful to take note of the actuarial calculations, a court still has the discretion to award what it considers right.⁶

[37] In assessing the plaintiff's loss of earning capacity, I must consider what the plaintiff probably would have earned and not what she might have earned. At the time of the accident the plaintiff was 26 years. She completed grade 12 in 2009, whereafter she successfully completed a national certificate in Information Technology: End User Computing in December 2010. At the time of the accident the plaintiff was employed by Vermaak and Partners Pathologist as a Laboratory Clerk earning basic salary of R6 450.00 per month, and R7 068.43 - R7 686.86 per month with overtime as per the pay slip provided.⁷ During 2021 she resigned and took up a position as a Laboratory Assistant at Gijima Technology People, this was due to the fact that she was unable to cope with employment demands at Vermaak & Partners.

[38] It is evident that the plaintiff performs tasks at a slower pace than prior to the accident. She also forgets important details and she requires more time to comprehend complex tasks. She will have difficulty managing her levels of frustration in the workplace, which will lead to reduced productivity.

⁶ Southern Insurance Association V Bailey NO 1984 (1)98(AD) at 113 G

⁷ The Quantum yearbook, 2012:106 - "The best guide to likely earnings is often what the victim was earning at the time of the accident".

- [39] The plaintiff is not unemployable and is currently employed, however due to the injuries sustained during the accident and the sequelae thereto she had to seek employment which was not as strenuous and as a result she had to engage with less lucrative employment. It is well known that a person, who is constantly exposed to pain and discomfort, is unable to perform at their best and may thus be at risk of losing their employment. The plaintiff is currently earning R 10 000.00 per month.
- [40] Ms. Lemba, the manager at Vermaak en Vennote Pathologist, indicated that the plaintiff was a hard worker and stood a chance of being promoted to a Laboratory Technician earning from R12 000.00 (gross per month).
- [41] The Industrial Psychologist stated that the plaintiff's reported earnings at the time of the accident were ranging within Paterson A1 (basic salary) of the 2018 Paterson-Derived Grading Scales in the formal sector. However, taking in consideration the plaintiff's age, educational background, and work experience the Industrial Psychologist, Ms Ntsieni is of the view that the plaintiff would have managed to progress her career and earnings to reach Paterson B3/B4 level, total package, through promotions, changes of jobs and employer for better prospects at the approximate age of 45 years. Thereafter further growth in her earnings was most likely going to be as a result of annual inflationary related increases till retirement age
- [42] Furthermore, the Industrial Psychologist is of the opinion that the plaintiff is no longer performing at her pre-accident potential as a result of the accident. The plaintiff is therefore likely to suffer a future loss of earnings to be calculated as per the difference between her pre-accident earning potential and her current earnings with inflationary related increases anticipated. It is accordingly clear that her post-accident career is one that is likely to be characterised by some uncertainty, pains and restrictions as well as risk of loss of income. and her chances of promotion at Gijima Technology People are uncertain. These risks should be further dealt with by way of a much higher than normal post-accident contingencies.
- [43] It is *common cause* that, due to the accident the plaintiff's chances of employment have been limited.

[44] Counsel for the plaintiff made the following submission regarding calculation of the plaintiff's past and future loss of income and contingencies to be applied:

Past loss of Earnings

Uninjured earnings	R 526 500.00
Less 5%	R 26 325.00
Total	R 372 000.00
Injured earnings	R 372 000.00
Less 5%	R 18 600.00
Total Past loss	R 146 775.00

Future loss of Earnings

Uninjured earnings	R 5 394 500.00
Less 15%	R 809 175.00
Total	R 4 585 325.00
Injured Earnings	R 2 503 300.00
Less 35%	R 876 155.00
Total	R 1 627 145.00
Total future loss of Earnings	R 2 958 180.00
Plus total past loss of Earnings	R 146 775.00
TOTAL LOSS OF EARNINGS	R 3 104 955.00

[45] In assessing delictual damages it is the duty of the court to ensure that both objective and subjective factors are considered in such a manner that the assessment may be regarded as an application of "fair" mathematics.⁸

[46] The past reconstructed income of the plaintiff in the amount of R 146 775.00 is accepted as the necessary documentation was provided in this regard. Furthermore,

⁸ L Steynberg, "Fair" Mathematics in assessing delictual damages, Professor, Department of Private Law, Unisa

after the accident the plaintiff was unable to perform night shift duties for which she received overtime remuneration. I am, therefore of the view that applying normal contingencies of 5% is appropriate under the circumstances.

[47] Considering the plaintiff's age, educational background, employment history, injuries and all the expert opinions, I believe that a much higher than normal post-accident contingencies should be applied to pre- and post-morbid position. The plaintiff seems to be in a stable employment, in an environment that, for the most part, accommodates her difficulties. Thus, a contingency deduction on future loss of income pre-morbid of 25% and post-morbid of 42% would be fair and reasonable in the circumstances.

[48] I therefore conclude that a more appropriate award in respect of future loss of income would be the sum of R 2 740 736.00. (Two million seven hundred and forty thousand seven hundred thirty-six rand)

Uninjured earnings	R 5 394 500.00
Less 25% contingency deduction	R 1 394 625.00
Total	R 4 045 875.00
Injured Earnings	R 2 503 300.00
Less 42% contingency deduction	R 1 051 386.00
Total	R 1 451 914.00
Total future loss of Earnings	R 2 593 961.00
Plus, total past loss of Earnings	R 146 775.00
TOTAL LOSS OF EARNINGS	R 2 740 736.00

ORDER

[49] In the result the following order is made:

1. The Defendant is to compensate Plaintiff, KAMOGELO EDNA MASHEGO with RAF Link Number: 4879858, 100% of her proven or agreed damages in settlement of the issue of liability.

2. The Defendant is liable to pay the Plaintiff, the sum of R 2 740 736.00 (Two million seven hundred and forty thousand seven hundred and thirty-six rand) in respect of loss of earnings.
3. The total amount of R 2 740 736.00 (Two million seven hundred and forty thousand seven hundred and thirty-six rand), will not bear interest unless the Defendant fails to effect payment thereof within 180 (one hundred and eighty) days from date of this order, in which event, the capital amount will bear interest at a rate of 7.75% per annum, calculated from and including the 1st day, up to and including the date of payment thereof.
4. The Defendant shall pay the Plaintiff's taxed or agreed party-and-party costs on the High Court scale up to date hereof, subject to the discretion of the Taxing Master and subject thereto that:

4.1 In the event that the costs are not agreed:

4.1.1 the Plaintiff shall serve a Notice of Taxation on the Defendant;

4.1.2 the Plaintiff shall allow the Defendant 14 (fourteen) court days from date of the signed allocatur of the Taxing Master on the Plaintiff's taxed Bill of Costs, to make payment of the taxed costs;

4.1.3 should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 7.75% on the taxed or agreed costs from the date of agreement, alternatively, the date of the Taxing Master's allocatur, to date of final payment.

4.2 Such costs shall include:

4.2.1. the reasonable costs in obtaining payment of the amounts referred to in paragraphs 2 and 3 above; travelling to and spending time travelling to pre-trial conferences; video and telephonic consultations with Counsel, Plaintiff and Defendant;

4.2.2 Counsels' fees including preparations; previous Court attendances; and Court attendances on 24 February 2023; 24 April 2023; and 28 April 2023;

4.2.3 the taxable costs of obtaining the medico-legal reports of all the experts in respect of the quantum of the Plaintiff's claim, including consultation and costs of interpreter, of which the Plaintiff gave notice in terms of the provisions of the court rule 36(9)(a) and (b);

4.2.4 the taxable qualifying reservation and preparation costs of the experts hereunder, as allowed by the Taxing Master:

- a. Dr. Mamelang A Morule - Orthopaedic Surgeon;
- b. Dr. Phila M Mpanza - Neurosurgeon;
- c. Mr. Samuel F Mphuthi - Clinical Psychologist;
- d. Ms. Sagwati Sebapu -Occupational Therapist;
- e. Ms. Talifhani Ntsieni - Industrial Psychologist; and
- f. Alex Munro -Actuary.

5. The amount referred to in paragraphs 2 and 3 above, shall be paid to the Plaintiff's attorneys, Marisana Mashedi Incorporated, by direct transfer into their Trust Account details of which are the following: -

ACCOUNT HOLDER	-	MARISANA MASHEDI ATTORNEYS
NAME OF BANK	-	ABSA
ACCOUNT NUMBER	-	[...]
BRANCH NAME	-	MONTANA
TYPE OF ACCOUNT	-	TRUST ACCOUNT

6. The Defendant shall furnish the Plaintiff with an Undertaking in terms of Section 17(4)(a) of the RAF Act, 56 of 1996.

7. The issue of General Damages is postponed *sine die*.

8. There is a Contingency Fee Agreement entered between Attorneys and Client.

**CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 4 May 2023.

DATE OF HEARING: 28 April 2023

DATE JUDGMENT DELIVERED: 4 May 2023

APPEARANCES:

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Attorney for the Defendant: No Appearance