

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



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION
PIETERMARITZBURG**

Reportable/Not Reportable

CASE NO: 1036/12

In the matter between: -

GLORIA PILLAY

PLAINTIFF

and

SAVE WHOLESALERS CASH & CARRY CC

DEFENDANT

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 16h00 on 31 January 2022

ORDER

The following order do issue:

1. The defendant is directed to pay to the plaintiff the sum of R631 100.02 (six hundred and thirty-one thousand one hundred rand and two cents) as part payment of the plaintiff's claim, which sum shall be paid within fourteen (14) days of the date of this judgment by electronic funds transfer into the trust account of the plaintiff's attorneys Kooben Chetty & Associates:

Account name: Kooben Chetty & Associates Trust account

Bank: Nedbank

Branch: KZN Inland

Account no.: 1165 035 960

Branch code: 116 535

2. The following directions are issued in respect of future medical expenses:
 - 2.1 Future medical expenses are to be computed by an actuary in respect of the following interventions/ treatments:
 - (a) medication - R200 per month
 - (b) orthopedic surgeon - 1 consultation per annum
 - (c) wedge for the heel
 - (d) knee brace
 - (e) evaluation by a biokineticist
 - (f) evaluation and diet plan by a dietitian
 - 2.2 It is to be assumed that the plaintiff's life expectancy remains unaffected.
 - 2.3 Contingency of 20% is to be applied.

3. The following directions are issued in respect of future loss of earnings:
- 3.1 Future loss of earnings are to be actuarially calculated from 1 November 2021 to date of retirement of plaintiff at age 60 years.
 - 3.2 It is assumed that life expectancy has not been compromised.
 - 3.3 The plaintiff's average income as demonstrator/manager is R5 464 per month as at end of 2019. The average income will also apply as at 1 November 2021.
 - 3.4 It is assumed that the plaintiff will not work as a demonstrator but will continue to manage the shows and sale of leather care products. Therefore there is a residual earning capacity.
 - 3.5 Future income from 1 November 2021 accruing to the plaintiff will increase in accordance to inflation and to be capitalised.
 - 3.6 25% contingency to be applied.
 - 3.7 All other considerations normally taken into account in actuarial calculations of this nature to be taken into account.
4. Costs are reserved.

JUDGMENT

Moodley J

Introduction

[1] While shopping for ice-cream at the defendant's supermarket on 31 December 2009, the plaintiff slipped and fell onto the ground. She subsequently instituted an action against the defendant for damages in the sum of R5 009 850.87 which she allegedly

suffered consequent to injuries to her left knee and back sustained in her fall in the supermarket. Liability was settled between the parties with the defendant accepting an agreed apportionment of 90% of the plaintiff's proven and/or admitted damages. The trial therefore proceeded only on quantum.

[2] The plaintiff alleges that she suffered torn cartilage and internal derangement to her left knee joint and injuries to her back, the nature and effects of which are set out in a letter dated 21 April 2010 written by Mr MM Raghavjee, a Specialist Orthopaedic Surgeon. In that letter, the contents of which are not in dispute, Mr Raghavjee states that:

- (a) The plaintiff was referred to him on 3 March 2010, after treatment by Dr NS Mahomed and the physiotherapist Mr J Gopal.
- (b) When she consulted Mr Raghavjee she was in a wheelchair and subsequent examination confirmed that she had a painful limp on her left leg.
- (c) The left knee joint had an effusion (collection of fluid) with stiffness in the knee and tenderness on the inner aspect of the joint. Her spine also showed muscle spasm on both sides of the spines. However x-rays of the thoraco-lumbar spine showed no abnormality.
- (d) Mr Raghavjee diagnosed 'an internal derangement of the left knee' and treated it as a matter of urgency. Under general anesthetic in theatre, he removed fluid from the left knee and repaired the torn cartilage. She was discharged after two days on crutches.
- (e) Mr Raghavjee saw the plaintiff subsequently on 8 March 2010, 17 March 2010 and 21 April 2010. At each consultation, the doctor prescribed anti-inflammatories and pain killers and referred her to Mr J Gopal for physiotherapy.
- (f) When the plaintiff was last treated by Mr Raghavjee, the wounds around her left knee had healed and she was recovering from the injury and the surgery. He advised her to take an anti-inflammatory and painkiller.

[3] The plaintiff alleges that as a direct consequence of the injury she sustained, she required the aforesaid hospitalisation and treatment by Dr Raghavjee and suffered and will suffer in the future:

- (a) pain, discomfort and inconvenience;
- (b) a loss of earnings;
- (c) temporary disablement, as she is unable to walk properly and is on crutches.
- (d) a diminution of the enjoyment of the amenities of life, in that from the date of her fall, she has not been able to participate in any physical recreational activities and to perform housekeeping duties.

[4] The plaintiff alleges that as further consequences of the injury suffered by her:

- (a) she will incur future medical expenses including:
 - (i) performance of a left knee arthroscope, debridement, meniscal repair and/or synovectomy together with further and future medical expenses in the sum of R657 390; and
 - (ii) domestic assistance and assisted devices in the sum of R327 840.
- (b) she will require the following future medical treatment under general anesthetic:
 - (i) an arthroscopy; and
 - (ii) a debridement at an estimated cost of R20 000.

[5] The plaintiff therefore alleges that she suffered loss and damages arising from the injuries in the sum of R5 009 850.87 constituted as follows:

- | | | | |
|-----|---|---|------------|
| (a) | past hospital and medical expenses | - | R94 820.87 |
| (b) | future hospital and medical expenses | - | R985 230 |
| (c) | past loss of earnings | - | R928 900 |
| (d) | future loss of earnings | - | R2 500 900 |
| (e) | general damages inclusive of shock, pain and suffering, | | |

discomfort and loss of amenities of life and temporary		
disablement	-	R500 000
Total		<u>R5 009 850.87</u>

[6] At the commencement of the trial, Mr *V Naidoo SC* who represented the plaintiff, listed the following as issues remaining for determination by this court:

- (a) past medical expenses for which the plaintiff produced a schedule from her medical aid;
- (b) future medical expenses which need to be identified and computed for the knee replacement and for the devices and expenses required as a result of the injuries to the plaintiff's back;
- (c) loss of earnings: the business which the plaintiff had been working for shut down in the same month that she was injured. In 2011 she started her own business which she is still running. The loss of earnings is based solely on the substituted labour where the plaintiff was compelled to employ a driver from 2011 onwards, and to employ additional promoters to assist her from 2016. The experts would testify on this issue; and
- (d) general damages.

[7] Mr *M Maharaj* who represented the defendant, advised the court that the defendant accepted that the plaintiff required a knee replacement but disputed the injury to her back. In respect of the loss of income claim, the defendant submitted that the plaintiff required additional promoters because her business had grown. The defendant also disputed the need for a driver and the alleged cash payments to her employees.

The trial: The plaintiff's case on quantum

[8] Three lay witnesses and three experts were called by the plaintiff. The plaintiff, Mrs Gloria Pillay, who was born on 20 May 1966, described how she fell on 31 December 2009: as she was approaching a freezer containing ice-cream, she slipped

on water on the floor which she had not noticed and fell on her left knee. When she tried to get up, she slipped and fell onto her back. She tried to get up again, but again slipped and fell onto her back. She then grasped a rail and stood up. Four days after the fall, the plaintiff was treated by Dr Mahomed with anti-inflammatories for her knee and back pain. On 3 March 2010, she found herself incapacitated. Dr Mahomed referred her to Dr Raghavjee who operated on her the same day.

[9] After the operation, the plaintiff was treated by Dr Mahomed several times, at times for her backache, at times for the knee, sometimes for both, as listed in Exhibit "A118". She testified that prior to the accident, she did not have back pain and was able to bend and crouch without a problem, but now she is unable to stand for a long time and employs domestic help. A physiotherapist Mr Gopal also treated her knee which helped with the pain. The plaintiff who was 43 years old when she fell, testified that the fall impacted adversely on her both emotionally and physically, and on her marriage. Nevertheless she refused categorically to have a knee replacement because despite the assurances of the doctor, there was no guarantee that her knee would improve.

Past medical expenses

[10] On a schedule of claims for medical expenses submitted to her medical aid ("A113" – "A117") the plaintiff highlighted the claims that related to her knee and back. She had also drawn up a schedule herself in which she correlated her treatment and expenses with the relevant claims extracted from the medical aid schedule ("A103-106"). However she was unable to obtain any vouchers or invoices to verify the claims from the doctors or the medical aid.

Loss of earnings

[11] The plaintiff testified that she previously worked for a company that sold leather care products. With the help of an assistant she would set up a stand, demonstrate the product and bank the day's proceeds. When demonstrating the product, they polished one shoe so that the customer could compare it with the other shoe. She therefore crouched regularly to polish shoes. She earned R9 000 per month net until 31

December 2009 when the company closed down. She did not work in 2010. Thereafter the plaintiff established her own business under the name Indigo Rain CC, and in 2011 commenced selling the same products at exhibitions in cities throughout South Africa, including Cape Town, Bloemfontein and East London. She attended all the exhibitions until the last one in March 2020.

[12] The plaintiff testified that after the accident she could not drive long distances. Therefore when she started the business, she employed a driver who assisted her to load the vehicle, drive to the venue, set up the stand and promote the products. She paid him in cash. She stated that 'her health started deteriorating in 2016' by which she meant she had problems with her knee and back and she could no longer bend to demonstrate the products. So she employed another promoter, Meril, which increased her business expenses. The plaintiff stated that she had to be present at all shows as it was a direct marketing business and she could still do handbags and 'boost the business'. There were sometimes one or two exhibitions per month and payments to the promoters were commission based. She pays the driver +/-R6 000 commission per show, R1 000 per trip and R1 500 for longer trips. Meril is paid +/- R8 000. The plaintiff herself earns R13 000 per month. She has no office expenses as she works from home. She believes that she should have earned +/- R20 000 a month and therefore she is claiming R7 000 per month loss of income.

[13] The plaintiff confirmed that Exhibit "E" contained bank statements which reflected some of the business expenses incurred for each exhibition including toll fees, and reconciliation statements for all the exhibitions from 2012-2016 ("E180" – "E265"), each of which showed a profit and therefore the business was profitable. She also confirmed that in 2016 she attended a number of shows and generated income. She paid salaries/ commission in cash at the end of each exhibition and the amount was dependent on the number of shows. The annual financial statements (from "E266" onwards) and the schedule of staff salaries (at "E368") were submitted to the South African Revenue Services via her accountant.

[14] With reference to the 'Schedule of Staff Salaries' ("E368") the plaintiff confirmed that she did not draw a salary in 2012. In 2013 she drew a salary of R63 000. Although the statement reflects a salary/commission payment to staff as 'Nil', she stated that she paid Mr Govender in cash. In 2014 she drew R65 000 as her salary and paid Mr Govender although no salary is reflected in the schedule. In 2015, 2016, 2017, 2018 and 2019 she paid staff salaries in the amounts of R150, R6 530, R83 605, R49 990 and R180 000 respectively. For those years she drew a member's salary of R69 000, R69 000, R50 000, R68 000 and R75 000 respectively. She stated that the salaries increased when there were extra exhibitions and all the figures in the schedule were submitted to SARS.

[15] Under cross-examination, the plaintiff confirmed that although she slipped, fell and injured her right knee in 2017, and consulted a doctor (whose name she could not recall) for that injury the right knee was fine and 'it's more on the left.' She also confirmed that she told the defendant's expert, Ms Sonia Hill, that she employs three people: two promoters and a driver as she had counted herself as a promoter, although she conceded she could not employ herself. She also admitted that she had not disclosed to any of the experts that she employed her daughter Meril as the second promoter because she did not think it was relevant. She also confirmed that she has a warehouse in Pietermaritzburg to store her stock, but no office. The plaintiff admitted that she also did not tell Ms Hill that that she was running a tuck-shop, again because she did not think it was relevant. She thereafter alleged that her niece runs the tuck-shop but she is involved in its operation as the tuck-shop is at her house but only to the extent that if her husband or niece are not at home, she serves customers.

[16] The plaintiff confirmed that she and her two employees worked in 2019, and that she paid her two employees in cash after every exhibition, and kept a record of her expenses and reconciliations which proved how much each show cost. The plaintiff confirmed that before she started her own business in February 2011, she earned R9 000 per month and thereafter she first drew a salary of R12 000 a month and subsequently R13 000 per month from Indigo Rain CC. She was unable to explain how

this constituted a loss of income and conceded that in fact she was suffering no loss and that she received an average income of R20 000 a month. In response to the proposition that she employed staff because her business grew and the cost of the employment of staff was therefore part of the costs of running her business, she confirmed that she needed to be present to ensure that the business was run properly and to collect the cash. She did however admit that as a result of employing staff, her business grew and that she could not on her own achieve the income figures which increased annually, except for 2017 (as reflected in "B78"), and that extra staff was employed to cope with the business growth. However under re-examination she back tracked and stated that she need the extra staff because of the growth of the business and her injury.

[17] The plaintiff confirmed that although the success rate for knee replacements was between 80%-95%, she would not undergo the operation even if the defendant paid for it and she had not authorised that claim which could therefore be deleted. I shall deal with further relevant aspects of her cross-examination in the discussion that follows.

[18] Under re-examination, despite her attempts to explain why she told Ms Hill she employed three assistants, the plaintiff's reasons remained unclear. She alleged that she was never told to register her employees. She confirmed that she demonstrated at between one to three exhibitions per month (not more), and that her average monthly income was R13 000 from 2011 to present. She however testified that she required additional staff both because of her injury and growth of the business. She had required two assistants for the last exhibition in March 2020 and if she had more than one exhibition at the same time, she would employ casual staff.

[19] Mr Kenneth Govender ('Mr Govender'), who worked for her as a driver and promoter from 2011, testified that he drives the plaintiff to the shows wherever they are held because she is unable to drive. He also sets up the products for the exhibition and promotes the products. He initially stated that he was paid R1 000 for driving and +/- R6 000 commission per show which usually extended over four days, for which the plaintiff

paid him in cash. There were no shows held in 2020. Mr Govender testified that from 2011 until Meril commenced working in 2016, he was the only assistant employed by the plaintiff.

[20] Under cross-examination, Mr Govender revealed that he is the plaintiff's nephew. Although he initially stated that he earned a commission of between +/- R5 000 – R6 000 per show, he thereafter estimated his commission to be between R4 000 – R5 000. Similarly although he initially stated that he was paid R1 000 for driving, he added that he would at times be paid R100 per day to drive to Durban. If he drove to East London, it would be R1 500. He had not received an increase since 2011 and was always paid in cash. He confirmed that the plaintiff had only one vehicle, 'a Peugeot kombi'. Mr Govender reiterated that he could set up the stall on his own without supervision, but the plaintiff was always with him during the shows, and that she never stopped working. If they were busy, she would assist because although she was unable to bend down to demonstrate, she could demonstrate the product on a handbag. After Meril was employed as a promoter in 2016, the three of them attended every show. Before Meril started, he was the only assistant, and no one else was employed by the plaintiff. To his knowledge the stock of the products sold by them were only stored in the plaintiff's home and not in a warehouse.

[21] Meril Pillay ('Meril'), the plaintiff's daughter, testified that she lived with her parents. In 2016 the plaintiff could no longer cope and asked her to assist. The plaintiff trained her as a promoter, and she joined the plaintiff and the driver in the business. Meril was unable to give the exact amount that she earned but she confirmed that commission was R20 – R25 per unit and she earned between R6 000 – R8 000 per show. She confirmed that the plaintiff attended to all the administration and arrangements for each exhibition, and that from the time she joined the business in 2016 until March 2020, only she and the driver worked with the plaintiff; there were no other employees.

[22] Under cross-examination, Meril listed the 11 – 12 shows that normally took place every year. She stated that although she and Mr Govender were capable of doing the shows on their own, the plaintiff always attended. The plaintiff kept the record of the stock and proceeds generated at each show. Meril did not know about stock kept in a warehouse. She confirmed their income fluctuated because her commission was dependent on the sales, and stated that she received approximately R6 000 per show, sometimes less depending on sales. The plaintiff always paid them in cash after each show. Meril confirmed that she was not registered as an employee but was paid by Indigo Rain CC, and that there is a single business vehicle.

The plaintiff's experts

[23] Dr Ravine Yachad, a Spine and Orthopaedic Surgeon who examined and assessed the plaintiff on 12 January 2015 and 16 March 2018, testified on his report dated 19 January 2015. He consulted with the plaintiff about the injuries to her left knee and lower back (lumbar). Although there was no abnormality to her neck and thoracic spine, her lumbar spine displayed a tenderness over both para-vertebral musculature of the lumbar area extending from L-2 – S1 region and movements were decreased due to pain. In respect of her lower limbs, specifically with the left knee, the plaintiff had a surgical scar but no deformities or muscle atrophy. She had sensory deficit over the lateral arthroscopic scar, marked tenderness over the medial joint line suggestive of a meniscal injury, confirmed by the positive medial McMurray test. The plaintiff had full range of movements although pain with full flexion. The remaining left lower limb and the right lower limb and her central and peripheral nervous system were normal.

[24] Dr Yachad confirmed that he had not recommended a knee replacement. However, he opined that as a result of increasing dysfunction, medication would no longer help and degeneration would occur if the plaintiff refused surgery. He warned that there was the risk of long term side effects to constant consumption of medication. The report on the x-rays done on 8 January 2015 recorded specifically that there was 'Grade 1 anterolisthesis on L4 and L5' of the lumbar spine and no abnormalities. He opined that the anterolistheses on L4 and L5 was associated with normal degeneration

of the lumbar spine and not as a result of injury, and therefore agreed with Dr Osman that 'the L4/5 spondylolisthesis is pre-existing and she sustained a soft tissue injury over this, which has resulted in her having back pain at this present moment in time.'. He could not opine if her back pain was a sequela of the injury or an existing pain which was exacerbated by the injury.

[25] Dr Yachad confirmed that because of the plaintiff's injuries to her back and knee, she would have problems with sitting and standing. The knee injury would exacerbate the lower back pain and her excessive weight will have an influence on the pathology of both the knee and the lower back. He explained that the osteoarthritis is the same as degeneration, to which the weight and age and injury of the patient would contribute. I shall revert to Dr Yachad's comments on the future medical expenses listed in his report.

[26] Under cross-examination, Dr Yachad stated that although the plaintiff had been working despite the knee injury, her ability to work may have been facilitate by medication and her ability to cope with the injury. He concurred with Dr Osman's opinion that the knee replacement operation has a high level of success and the plaintiff would be more functional. Although every surgery has complications, he would recommend a knee replacement. Nevertheless, it was a prerogative of the patient to decide whether she wanted the operation or not.

[27] Ms Guinnevere Reddy an Occupational Therapist assessed the plaintiff on 8 June 2015 and compiled a report. She subsequently assessed the plaintiff again 28 September 2016 and compiled a supplementary report. Ms Reddy also filed a joint minute with Ms Debbie Stirton, the Occupational Therapist instructed by the defendant. She confirmed the contents of her first report viz that according to Beck's Depression Inventory, the plaintiff presents with severe depression which indicates clinical intervention, she has no cognitive issues and; her 58% score on the Oswestry Low Back Pain Disability Questionnaire (which is used to measure a patient's permanent

functional disability) indicates a severe disability. The score suggests 'that pain remains the main problem... but activities of daily living are affected.'

[28] Ms Reddy testified that the defendant's expert had in fact indicated that the plaintiff's lower back pain was more severe and described her as crippled. However she was mistaken - it was the plaintiff who described herself as crippled to Ms Stirton, as corrected under cross-examination. Ms Reddy opined that even if the plaintiff had no problems with her back as a result of her injured knee, there would be an impact on her back as over the years she would develop back pain and there may also be additional pressure on her right knee. While there were certain chores that the plaintiff could not perform including climbing a ladder or crouching and stooping or lifting a heavy load, she was able to perform light domestic tasks. While the plaintiff was able to perform some tasks of a promoter, she could not bend down and therefore she could not perform all the responsibilities as a result of the physical sequelae of her injuries.

[29] However as the Epic Spinal Function Sort Test indicated at the second assessment, the plaintiff met most of the requirements for sedentary work, Ms Reddy recommended a sedentary half day post, with an earlier retirement of eight to ten years. She also recommended physiotherapy to manage lower back pain and a biokineticist evaluation to provide exercises to strengthen the knee and lower back and to manage pain, which would also assist with the weight loss program. When Ms Reddy assessed the plaintiff on 28 September 2016 the plaintiff informed her that she suffered increased pain and had left work, she had stopped working as a promoter.

[30] Ms Reddy reported that according to the Matheson Functional Pain Scale, the pain reported by the plaintiff is 'a present pain which is not yet at a level that prevents performance of the current activity'. In the second evaluation of the plaintiff, Ms Reddy recorded that on Oswestry Disability Index which is used to measure a patient's permanent functional disability, the plaintiff scored 54% for the following reason: 'There is a measure of functional disability due to lower back and lower limb pain as the Oswestry is designed to test pain related disability.'

In the same evaluation of the plaintiff in 2015, she scored within the range of severe disability with a score of 58%. (Therefore there appears to be an improvement from the earlier score of 58% to the later score of 54%.)

[31] Under cross-examination, Ms Reddy confirmed that her assessment that the plaintiff had a 'severe disability' was based on the answers tendered by the plaintiff to questions on a standard questionnaire which was not specifically adapted to the plaintiff. She confirmed that she estimated a retirement age being eight to ten years earlier because the plaintiff told her that she had left work. However she was not aware that the plaintiff in fact had been working when she was assessed in 2016 or that she runs a tuck-shop. Ms Reddy did not disagree with Ms Hill's assessment and observation of the plaintiff. She agreed that if the plaintiff had to work on a phone or computer, she could continue to work and earn a living. She also agreed that while the plaintiff may not be able to work as a promoter, she could work half a day, and if she had a knee replacement, she would be functional and able to cope better and to work. Ms Reddy confirmed that if the plaintiff had two assistants and a driver, she would be able to continue working in a supervisory capacity.

[32] Ms Shaida Bobat, an Industrial and Clinical Psychologist assessed the plaintiff on 31 July 2015 and compiled a report dated 26 August 2015. She confirmed the contents of her report, specifically her recommendations and suggestions in respect of the earnings of the plaintiff ("A82") and that she had compiled a joint minute with Ms Hill (Exhibit "C18") and that they agreed that had the incident not occurred, the plaintiff would still be self-employed. She explained the manner in which she calculated the salary and the earnings of the plaintiff:

'9.1 Pre-incident functioning

...The claimant runs the business from home but also attend shows and other events for *15 days in a month*. She currently earns *commission of R12, 000 per month*. It is *probable* that she would have employed one staff member and she would have driven to and from work. Therefore, her monthly earnings would have been R12000 + R7000 (*monthly average that she*

pays her staff) + R1000 (the amount she pays for the driver). Ms Pillay's total earnings would have been R 20 000 a month....

9.2 Post incident functioning

- ...She earns commission of R12 000 per month.
- ...She has 2 staff who earn between R 5000 and R 9000 per month in commission (average R7000 each). A driver is used to transport them to events for R1000 per month. Ms Pillay explained that *she is forced to employ two staff as she cannot manage the work with one staff member* and she is forced to employ a driver as she cannot drive distances as she used.

...

Having regard to the above, the following applies with respect to loss of earnings:

- The claimant should be compensated for the difference between her potential pre incident earnings and her post accident earnings from 2011 until retirement age ie pre-incident: *R20000 per month and post incident R12000 per month. Annual inflation linked increases apply.* (My emphasis.)

[33] Therefore Ms Bobat's view was that a fair and just way in which to calculate the loss would be the payment to the driver and the average commission paid to the promoters, and she based her calculations on the figures given to her by the plaintiff. She concluded that the plaintiff's monthly earnings would have been R12 000 + R7 000 + R1 000, a total of R20 000. Ms Bobat found it relevant that the plaintiff lost her job but opened her own business, succeeded as a result of her commitment and strong work ethic and remained motivated despite her injury. She added that even if the plaintiff's business was booming and she had to hire additional staff, the plaintiff's own skills were important as she had the knowledge and was the goodwill of the business. She opined that had the incident not occurred, the plaintiff would have had to get an assistant but she would have driven around herself. She was not aware of the current status of the plaintiff's work or income. She was aware that the plaintiff had employed only a driver as at 2015.

[34] Under cross-examination by Mr *Maharaj*, Ms Bobat confirmed that plaintiff always had the intention and commitment to return to work. Mr Maharaj put to Ms Bobat that the plaintiff had to employ further staff because of the substantial growth of her business every year from 2011, and further that the plaintiff always had an assistant, even when she was employed by Pepper Fish as a demonstrator. In response Ms Bobat conceded that the plaintiff's earnings should be increased only by the R1 000 per show that she paid the driver. However in response to the proposition that the plaintiff's capacity to earn had not diminished, Ms Bobat reiterated that had the plaintiff not been injured, she would have been able to drive herself and she needed an assistant because she was unable to play a more active role.

Defendant's case

[35] The defendant called three experts to testify. Dr Afzal Aboobaker Osman, a Specialist Orthopaedic Surgeon, who examined and assessed the plaintiff on 17 October 2019, confirmed the contents of his report. He testified that the plaintiff's main complaint was her left knee which showed the most consequences of the injury and she also reported back pain. She took medication for pain after the knee surgery and advised him that her back pain was aggravated by driving long distances. Dr Osman accepted that the plaintiff's inability to attend shows, run and dance is the sequelae of the knee injury. He also testified to limits of her physical activities such as walking sitting, kneeling and driving. Dr Osman testified that because of the spondylolisthesis or osteoarthritis which is unrelated to her fall and her activities being restricted, there is a further compromise in the spinal area which causes pain. He explained that it was unusual for an injury of the nature described by the plaintiff to cause traumatic spondylolisthesis of L4 and L5 as the fall would have had to be a very high velocity injury like one sustained in an accident. His opinion was that the fall of the plaintiff would have contributed to a very small percentage of the lumbar pain she reported.

[36] Dr Osman referred to his radiological examination of the x-rays of the plaintiff's lumbar spine, pelvis and both knees which were taken on 17 October 2019 on which he had commented:

'Lumbar spine shows grade 1 spondylolisthesis of L4/L5.

Reviewed some previous x-rays on the 16.03.2018, which was labelled as no patellofemoral joint problems, which I believe to be incorrect. X-rays done presently reveals severe narrowing of the medial compartment and widening of the lateral compartment of the left knee, which is something that is expected as a result of medial meniscectomy.'

He clarified that the reduced bone mineralization which had nothing to do with the spondylitis or the fall, was also as a result of the plaintiff's age. He pointed out that the early bilateral facet joint arthrosis in respect of L3 and L5 were quite high and there would have been no exposure on this part of the spine during the fall by the plaintiff. He pointed out that the facet joint arthrosis was also quite extensive and consistent with the spondylolisthesis and that the most common cause is degeneration. The x-rays also show degeneration of the hip and hip joints which may be treated but the mobility of the rigid joints would cause pain.

[37] Dr Osman opined that the knee replacement which would not only assist with the back pain, there would also be a progression of abnormal alignment of the spine after the injury. Without the knee replacement, the degeneration would continue. There would be more pain and the more active the plaintiff, the greater the degeneration. Dr Osman was confident that the progression of the degeneration could nevertheless be controlled through simple conservative treatment, such as the application of a wedge to a heel of a shoe. This would help with the pain and allow the patient to move more easily and she would therefore become more functional as her alignment is corrected. The progression of the disease will also be slowed.

[38] Dr Osman opined further that although the plaintiff will have increased mobility and ability to stand, walk and drive as a result of the knee replacement, she will still have pain and difficulty in crouching. In respect of assessment of the success rate of the knee replacement injury being 85% to 90%, he admitted that there was a 10% chance that the procedure could go wrong; there could be a residual of discomfort in some

people; the procedure may not be carried out properly; the most general complication was an infection but the risk was 0.5%. He emphasised that nevertheless the benefits far outweigh the risk. I shall revert to Dr Osman's comments on the future medical expenses.

[39] In response to the proposition by Mr *Naidoo* that the injury caused the spondylolisthesis to the plaintiff's lumbar spine, Dr Osman firstly stated that the spondylolisthesis would become symptomatic at some stage, even if it was not disputed that the plaintiff had back pain prior to the accident. He opined that when she complained of back pain to Dr Mahomed, she merely had a topical injury to her back. She did not mention back pain to Dr Raghavjee four months later. Therefore he only treated her knee and sent her for physiotherapy for her knee. Dr Osman stated that during his clinical examination, he found nothing drastic or unrelated to the spondylolisthesis and all his findings were consistent with the spondylolisthesis to the spine of the plaintiff. The symptoms that she complained of were secondary. He opined that the fall would have aggravated the sub-tissue injury and inflammation but it did not progress the spondylolisthesis nor would any access to the spine have impacted on the hip. The plaintiff had even degeneration of the hip - the changes in her hip are symmetrical, and therefore she was not favouring the right side which would accelerate the degeneration to the right knee.

[40] Dr Osman agreed that as a result of the manner in which the plaintiff works and her physical state, she may get back pain. Referring to the radiological examination in respect of the lumbar spine (on B8) Mr *Naidoo* put to Dr Osman that the trauma could cause anteriorlisthesis and after the plaintiff fell on her knee, her fall on her back could have led to the spondylolisthesis. However, Dr Osman disagreed with this, he stated that there has to be severe trauma. The plaintiff fell on her back when she tried to get up. Although she fell twice on her back, these were not severe falls because she had not raised herself high enough to fall with forceful impact on her back.

[41] The following aspects of Dr Osman's report remain undisputed:

'SHOCK PAIN AND SUFFERING

Severe – 2 to 3 weeks immediately after the accident.

Moderately severe – 6 months.

Pain would have improved for several years. However, progressively got worse because of the increasing narrowing of the medial compartment of the left knee.

Now has pain, discomfort and disability.

LOSS OF AMENITIES OF LIFE

Difficulty with driving long distances due to back pain.

Difficulty standing, sitting and walking long periods of time, bending, kneeling and squatting, and unable to run and do dancing due to left knee pain.

FUTURE EARNING CAPACITY

Over the last 1-2 years there would have been 25-50% reduction in ability to be at the stands to promote her products. However, this will need to be assessed by the relevant expert in terms of future earning capacity following the total left knee replacement, if it is successful (90-95% chance that it will be successful) then she will be able to be more functional.'

[42] Dr Osman reported that the plaintiff had advised him that her financial status was as follows:

'Independent. Owns a company called Renapur products which is used to nourish a variety of leather products. Unable to attend shows like she used to do, which has resulted in a slight drop in her earning ability'.

Dr Yachad agreed with Dr Osman's assessment that:

'FUTURE MEDICAL EXPENSES

I believe once the left knee problem has settled down, the back problem can be treated conservatively and if she develops severe spinal claudication, then she would require an MRI scan and depending on the findings, further treatment can be anticipated. In my opinion the L4/L5 spondylolisthesis is preexisting and she sustained a soft tissue injury over this, which has resulted in her having back pain at this present moment in time.'

[43] Ms Danielle Stirton, an Occupational Therapist who also assessed the plaintiff confirmed that as recorded in her report dated 12 March 2020, the plaintiff advised her that she had stopped working as a promoter or attending exhibitions in 2016 and was only attending to the administration and financial records of her company from home. Ms Stirton testified that in 2020, the plaintiff was capable of working flexible working hours so that she could rest when needed and she had no difficulty performing purely sedentary work. She stated that the aforesaid duties performed by the plaintiff and her knowledge of the business and of the products she promoted, made her essential to the business. However the plaintiff could train and employ staff to perform her responsibilities 'which will result in increased expenditure and lower profits, and her ability to grow and expand her business may therefore be somewhat limited, which could cause future loss of earning capacity.... In light of her apparent mood disturbance, her motivation to run a business, and ability to do so effectively as she would have had she had not been injured, is however likely to be somewhat undermined.'

[44] However Ms Stirton was unaware that the plaintiff employed her nephew and her daughter in the business and the plaintiff did not disclose that she was running a tuck-shop. Ms Stirton was of the view that if the plaintiff was able to sit, stand and talk to customers at an exhibition, she had the physical capabilities of running a tuck-shop. Ms Stirton confirmed that the plaintiff's rating of herself as a cripple was purely subjective, as it was how she perceives her pain and disability. The intention was to test whether the client's perception of injury and pain is congruent with the actual injury. Ms Stirton testified that the plaintiff would be able to work on a sedentary capacity if she received a knee replacement surgery and physio for the back pain, the symptoms would be alleviated. She pointed out further that as the plaintiff would be self-employed, she can sit and stand and determine her own working hours, thereby not exacerbating her condition and avoid further degeneration of her injuries.

[45] Under cross-examination, Ms Stirton confirmed that the only problem that the plaintiff indicated to her was that she was unable to work as a promoter because she could not bend or crouch, and had to employ staff as promoters. Ms Stirton agreed that even if the plaintiff had a knee replacement, she would not be able to work as a

promoter as the degeneration would persist, and early retirement would be necessary. Ms Stirton confirmed her recommendations in the addendum to the joint minute that provision should be made for eight hours of domestic assistance twice a week at R20 an hour and the listed assistive devices (Exhibit "C13 – "C14"). Ms Stirton also confirmed that:

'Following surgical intervention to the knee and with post-operative rehabilitation, Mrs Pillay's pain should reduce and her physical competencies improve, especially as her back pain can then be treated more aggressively. Any residual pain present thereafter will however probably prevent her from ever returning to active promotional work full time and she will thus require a larger staff compliment than she would have had had she not been injured.'

[46] Ms Sonia Hill an Industrial Psychologist confirmed that her report dated 4 March 2020 was intended to provide an opinion on the plaintiff's vocational potential and her potential loss of future income. Her report was based on information given to her by the plaintiff in person and subsequent information obtained via emails and telephonic consultations, and a perusal inter alia of reports of other experts, bank and annual financial statements for Indigo Rain CC, income tax returns submitted to SARS and reconciliation statements furnished by the plaintiff.

[47] Ms Hill had calculated from the records provided, that the plaintiff's average monthly salary during the last year she was employed by Pepper Fish Marketing was R8 250 and not R9 000, and there were no records to substantiate any cash payments in addition to these payments. The plaintiff told Ms Hill she did not have an office only a warehouse for her stock and employs three members of staff: two promoters who earn R5 000 – R6 000 each and a driver who also does promotional work and receives a total salary of between R5 000 – R7 000 per month (driving plus commission). They loaded the stock and set up the stands because she no longer attended shows from 2019. Ms Hill did not agree with Ms Bobat's calculation of loss of income, stating that Ms Bobat had not perused any financials. Ms Hill opined that the employment of assistance and additional staff was a business expense or cost of sales and not a loss of income to the plaintiff.

[48] Ms Hill noted that there are no shows in January, November and December and limited shows in February and June, but there are deposits for those months. Business bank statements from September 2016 – 15 December 2018 were not provided to Ms Hill with no explanation tendered. The FNB statements for the period 15 February 2011 –15 September 2016 reflected unexplained 'batch deposits. The plaintiff told Ms Hill that the profitability of her business dropped in 2018 drastically (about 6%) because she was unable to do shows. The plaintiff did not say anything about a tuck-shop at her home until Ms Hill noted deposits into the plaintiff's bank account which she queried. The plaintiff then explained that her niece who lived with them operated a tuckshop; but she has since moved out. But Ms Hill also ascertained that the plaintiff opened the tuck-shop 20 years ago and after her niece left the plaintiff and her husband were operating the tuck-shop, which included purchasing stock. Ms Hill noted that the plaintiff claimed personal or home expenses from the business.

[49] Ms Hill also noted the discrepancies in the annual financial statements between gross income and total expenses also the plaintiff's monthly salary/ drawings on her tax returns and her actual monthly drawings transferred into her personal account. She declared R63 000 for 2013, R65 000 for 2014, R69 000 for 2015 and for 2016, R50 000 for 2017, R68 000 for 2018 and R75 000 for 2019. This translated to an average monthly drawings/salary of R5 250 for 2013, R5 417 for 2014, R5 750 for 2015 /2016, R4 167 for 2017, R5 667 for 2018 and R6 250 for 2019. However actual drawings transferred into her personal cheque account was R12 000 per month in 2013 to 2016 and only from March 2016 she started drawing R13 000. (Per tables 4,5 and 6 of the report.)

[50] Under cross-examination Mr *Naidoo* challenged Ms Hill on her statements that as the plaintiff's business grew she needed to employ more staff, and that consequently the cost of sales must increase, and that the commission paid to the promoters and payment to the driver are cost of sales and do not impact on the plaintiff's income. Ms Hill explained that she did not dispute that the plaintiff was injured and that she was 'slightly' physically compromised. She also did not dispute that the plaintiff required staff

whether a promoter or driver to assist her. However she persisted that the extra staff were required because of the business needs not the injury. Ms Hill pointed out that when the plaintiff commenced her business two years after sustaining the injury she knew her limitations and diminished capacity would affect her income.

[51] She reiterated that she did not agree with Ms Bobat's opinion that the payment of staff must come off the plaintiff's income as it was a business expense. Indigo Rain CC is a registered business and therefore staff employed by the business cannot be an expense of the plaintiff. Ms Hill pointed out that the salaries of the plaintiff and the employees are reflected in the annual financial statements albeit discordant with the calculations. Further the plaintiff is drawing a higher salary than the salary she has declared. Ms Hill therefore concluded that this is no loss, just the contingency because pre and post-morbidity is the same.

Discussion

[52] Although the defendant had conceded liability as aforesaid, the plaintiff bore the onus to establish the quantum of her claims. In order to discharge this onus, she not only had to testify on the relevant issues herself and call witnesses to sustain her claims but also to place satisfactory documentary corroboration or collateral for her testimony before the court, inter alia vouchers, receipts, bank statements, financial statements, and expert reports. Mr *Naidoo* stressed repeatedly that there was 'direct evidence by the plaintiff herself' on the contentious issues. However it is trite that oral evidence albeit under oath is not enough to discharge the plaintiff's onus on a balance of probabilities without corroboration. Proven facts are required to establish a foundation for the assessment of quantum.

[53] In this case, there was a need for convincing corroboration not only because of the serious shortcomings in the plaintiff's testimony during the trial but also in the manner in which the plaintiff conducted her litigation. Although the particulars of claim were amended at some stage to provide further details of the damages claimed, the

deficiencies that remained are an appropriate starting point, specifically the failure to comply with the provisions of Uniform rule 18(10) which provides:

'(10) A plaintiff suing for damages shall set them out in such a manner as will enable the defendant reasonably to assess the quantum thereof: Provided that a plaintiff suing for damages for personal injury shall specify his date of birth, the nature and extent of the injuries, and the nature, effects and duration of the disability alleged to give rise to such damages, and shall as far as practicable state separately what amount, if any, is claimed for-

- (a) medical costs and hospital and other similar expenses and how these costs and expenses are made up;
- (b) pain and suffering, stating whether temporary or permanent and which injuries caused it;
- (c) disability in respect of-
 - (i) the earning of income (stating the earnings lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff will in future be able to do) ;
 - (ii) the enjoyment of amenities of life (giving particulars) ;and stating whether the disability concerned is temporary or permanent; and
- (d) disfigurement, with a full description thereof and stating whether it is temporary or permanent.'

[54] Fortunately for this court, the merits in this case had been resolved prior to the trial. Nevertheless the failure to comply with rule 18(10) and the failure to furnish corroboration and collateral for the quantum the plaintiff persisted with, remain to be deprecated. At the rule 37(4) conference on 23 September 2020, the plaintiff furnished an undertaking to provide the defendant with a schedule and copies of past hospital and medical expenses substantiated by invoices by 30 September 2020. Subsequently the defendant filed a notice in terms of rule 35(3) requesting details of the plaintiff's past hospital and medical expenses, employee contracts and proof of payment of their salaries. In response the plaintiff deposed to an affidavit on 25 November 2020 stating that she was unable to produce any documents, hospital tax invoices or vouchers

depicting the date of treatment, the treatment she received, the cost of the treatment, the name and details of the attending physician and the dates of her hospitalisation and the cost thereof. She also admitted that she has no proof of payment to her staff except for the payments in the SARS returns. One is compelled to question how the claims for past medical expenses and loss of income were in fact computed when the particulars of claim were drafted, when at this late stage there was a clear inability to furnish the documentary evidence therefor. The documents eventually delivered are in my view inadequate, and I will elaborate upon my view in the discussion that follows.

[55] I noted further that on 9 November 2020 the defendant filed a notice of objection to the plaintiff's notice in terms of rule 28 dated 28 October 2020 in which the plaintiff intended to amend details of the quantum in the particulars of claim. It would appear therefrom that the defendant did in fact object to the lack of compliance with rule 18(10). However on 16 November 2020 the matter was merely adjourned by consent to March 2021 for trial, and the costs were reserved. However there was nothing in the court file to assist me and some of the previous orders issued were not in the file.

[56] It will become apparent from the analysis of the evidence which follows, that the plaintiff's case evolved during the trial because of the lack of particularity in the pleadings, especially with regard to her claim for loss of earnings. This loss is regarded as special damage and has to be specially pleaded and proved according to the requirements specifically set out in rule 18(10). The particulars of claim do not state that the plaintiff claims for a substitute driver and demonstrator as an alternative to her claim for loss of earning capacity, but this is the basis on which her case was presented in court. In *HAL obo MML v MEC for Health, Free State*¹ Wallis JA expressed his disquiet about the approach of the appellant to the conduct of the trial, and pointed out the failures of the draftsman to comply with the provisions of rule 18, stating: 'This diffuse, unfocussed approach to the conduct of complex litigation is to be deprecated. If the issues are not properly and clearly defined the conduct of the trial cannot be controlled in a properly efficient manner.'²

¹ *HAL obo MML v MEC for Health, Free State* [2022] 1 All SA 28 (SCA).

² *Ibid* para 198.

[57] This comment is not only pertinent to the approach of the plaintiff to the litigation prior to the trial, but also to the manner in which documents were handed in by the plaintiff during the trial. When I requested a list of only the relevant documents in bundle “E” which consisted of 370 pages, I was provided with a list of all the documents in the bundle although only a few were in fact proved or referred to in the trial. It would appear that the plaintiff’s attorney was either unable to identify the documents relevant to his client’s case, or unwilling to do so, preferring instead to burden the court. This practice of simply burdening the court with unnecessary and unproven documents is unacceptable and is in my view disrespectful to the court.

Assessment of the evidence

[58] In *Road Accident Fund v Kerridge*³ Nicholls AJA held:

‘The role of experts in matters such as these and the opinions they provide can only be as reliable as the facts on which they rely for this information. Too readily, our courts tend to accept the assumptions and figures provided by expert witnesses in personal injury matters without demure. The facts upon which the experts rely can only be determined by the judicial officer concerned. An expert cannot usurp the function of the judicial officer who is not permitted to abdicate this responsibility – the court should actively evaluate the evidence.’⁴ (Footnote omitted.)

In *MV Pasquale della Gatta; MV Filippo Lembo; Imperial Marine Co v Deiuemar Compagnia di Navigazione Spa*⁵ Wallis JA held:

‘[25] ...In a trial action it is fundamental that the opinion of an expert must be based on facts that are established by the evidence and the court assesses the opinions of experts on the basis of “whether and to what extent their views are founded on logical reasoning”. It is for the court and not the witness to determine whether the judicial standard of proof has been met. ...

[26] In my view the court must first consider whether the underlying facts relied on by the witness have been established on a prima facie basis. If not then the expert’s opinion is worthless because it is purely hypothetical, based on facts that cannot be demonstrated even on a prima facie basis. It can be disregarded. If the relevant facts are established on a prima

³ *Road Accident Fund v Kerridge* 2019 (2) SA 233 (SCA).

⁴ *Ibid* para 50.

⁵ *MV Pasquale della Gatta; MV Filippo Lembo; Imperial Marine Co v Deiuemar Compagnia di Navigazione Spa* 2012 (1) SA 58 (SCA).

facie basis then the court must consider whether the expert's view is one that can reasonably be held on the basis of those facts. In other words, it examines the reasoning of the expert and determines whether it is logical in the light of those facts and any others that are undisputed or cannot be disputed. If it concludes that the opinion is one that can reasonably be held on the basis of the facts and the chain of reasoning of the expert the threshold will be satisfied. This is so even though that is not the only opinion that can reasonably be expressed on the basis of those facts. However, if the opinion is far-fetched and based on unproven hypotheses then the onus is not discharged.' (Footnote omitted.)

[59] Accordingly, I move on to an evaluation of the evidence of the three lay witnesses in order to determine the factual basis for the consideration of the expert evidence. In a recent judgment of *HAL obo MML v MEC for Health, Free State*⁶ Molemela JA set out the apposite test for the evaluation of a witness's testimony.

'[90] ...The proper test for evaluating a witness' testimony is not whether a witness is truthful or indeed reliable in all that he or she says, but whether on a balance of probabilities, the essential features of the story which he or she tells are true. Courts engaging in the analysis of evidence adduced in a trial must be careful not to fall into the trap of evaluating it in a piecemeal fashion; rather, the mosaic of the evidence that was adduced, must be considered as a whole.

[91] It is important to bear in mind that the credibility of witnesses and the probability of what they say should not be regarded as separate enquiries to be considered piecemeal, as they are part of a single investigation into the acceptability or otherwise of the appellant's version. In that investigation, the importance of any discrepancies or contradictions is assessed. The story presented by a litigant "is tested against facts that cannot be disputed and against the inherent probabilities, so that, at the end of the day, one can say with conviction that one version is more probable and should be accepted, and that therefore, the other version is false and may be rejected with safety".

[92] In *S v Mkhle*, this Court held that not all contradictions affect a witness' credibility. The court cautioned that in each case, the trier of fact has to make an evaluation, taking into account such matters as the nature of the contradictions, their number and importance and their bearing on other parts of the witness' evidence...'. (Footnotes omitted.)

⁶ Above fn 1.

[60] While bearing in mind the aforesaid guidelines, it is impossible to ignore the innumerable material discrepancies and contradictions in the plaintiff's testimony which impacted adversely on her credibility. It was also impossible to test her version against facts when the supporting documentation was either not furnished or not traversed or proven. Further no attempt was made to address or obtain the plaintiff's responses to her glaring misrepresentations and omission of information to some of the experts who interviewed her during her testimony. Specifically, although the report of Ms Hill was available when the plaintiff testified, she was not taken through the contents by her counsel to respond under oath to the contentious issues. There were obvious serious shortcomings in the collateral provided to Ms Hill. Yet the failure to provide the relevant documents was not explained, or the failure to reflect cash deposits from the promotions and payments in the annual financial statements. Instead the plaintiff's testimony on the bank statements, annual financial statements and reconciliations she relied on to establish the quantum for her loss of income claim was superficial. I proceed to deal with the shortcomings in the plaintiff's testimony and her case.

[61] The particulars of claim state that the plaintiff slipped and fell thereby sustaining serious injuries to her knee and back. The plaintiff testified that she fell backwards twice when she attempted to raise herself up after she fell on her left knee. She then grasped a rail and stood up. When asked under cross-examination why the plaintiff's sister who was with her did not assist her when she fell, the plaintiff responded that her sister did help her get up, but only after she had fallen three times. The plaintiff reported to Dr Yachad on 12 January 2015 that she fell backwards once and to Ms Reddy on 8 June 2015 that she fell backwards twice. However the x-rays ordered by Mr Raghavjee showed no injury to her spine, only a muscle spasm on either side of the spine in the lumbar region. Dr Osman also testified that given the height from which the plaintiff fell backward and even if she fell backwards twice, she could not have suffered serious injury to her back.

[62] The plaintiff told Ms Hill that she has a warehouse in Pietermaritzburg to store her stock, which she confirmed under cross-examination. Both her assistants, Mr

Govender who has helped her load and unpack stock from 2011 and Meril who lives with the plaintiff testified that there was no warehouse. Mr Govender was very clear that all the stock for the exhibitions was kept at the plaintiff's house. The plaintiff's motive for giving Ms Hill this information is unclear, unless she intended to impress upon Ms Hill the substantial size of her business which would impact favourably on her claim for loss of earnings.

[63] The plaintiff testified that she initially employed only Mr Govender as driver and promoter in 2011 and in 2016 she employed Meril. All three of them testified that no one else but the three of them demonstrated at the shows and that the plaintiff had never employed anybody else besides Mr Govender and Meril. Only under re-examination did the plaintiff allege that if she had more than one exhibition at the same time, she would employ casual staff, contradicting her initial evidence that she only ever employed two people, and also the evidence of both Mr Govender and Meril. It was also not put to Mr Govender or Meril that the plaintiff employed other casual staff when she had more than one exhibition.

[64] The plaintiff however told Ms Hill that she employed three people: two assistants and a driver. When cross-examined about the three employees, the plaintiff stated that she had counted herself as an employee. However this cannot be true because according to Ms Hill's report the plaintiff told Ms Hill she employs two promoters who earn R5 000 – R6 000 each and a driver who also does promotional work and receives a total salary of between R5 000 – R7 000 per month (driving plus commission). These three promoters loaded the vehicle and set up the exhibition. Therefore the plaintiff could not have been referring to herself as the third employee.

[65] Further she told Ms Hill that she was not attending shows since February 2019 but only worked at home, which is contradictory to her own admission that she attended every show until 2020. Ms Hill drew attention to the number of shows and pointed out that some overlapped which would have made it impossible for the plaintiff to manage with one assistant. The salaries reflected on the annual financial statements are minimal

and there is no correlation between the annual financial statements, the reconciliations and the schedule of salaries and the oral evidence nor is there a proper record of the payments for the driver as claimed by the plaintiff.

[66] The plaintiff also omitted information during her interviews with the experts. She did not disclose to the experts that Meril who she employed as a promoter from 2016 was her daughter and lived with her. She explained that she did not think it was relevant. However in her report Ms Hill records that the plaintiff told her that Meril works in sales for an events company, Mathiesdah & Sons. Yet when Ms Hill conducted the interview in March 2020, according to the plaintiff and Meril herself, Meril was employed as a promoter by the plaintiff. This relationship was only discovered when an affidavit deposed to by Meril in response to the defendant's rule 35(3) request for particulars of the plaintiff's employees, revealed that her address was the same as the plaintiff.

[67] The plaintiff also did not divulge that she was running a tuck-shop until Ms Hill picked up deposits from the plaintiff's husband into the business account of Indigo Rain CC. She then told Ms Hill that her niece used to run the business but was no longer living with her and she and her husband were running the business, which meant buying stock and operating the tuck-shop daily. This was in 2020. Yet when asked about the tuck-shop during her testimony in court over a year later the plaintiff testified that the tuck-shop was run by her niece and she merely served customers in the absence of her niece and husband. However Ms Hill pointed out that the funds associated with the tuck-shop were going through the bank account of Indigo Rain CC. A reasonable inference to be drawn from the caginess of the plaintiff about this business being run from her home and the funds from it going through her bank account or that of her business, is that she was in fact the proprietor of the tuck-shop and involved fully in its operations, but she wanted to keep her additional income under wraps as it may impact on her claim in this matter.

[68] The plaintiff was also not truthful about her alleged forced early retirement from actively participating in the shows. Although she confirmed that in 2016 she attended a

number of shows and generated income, she also testified that her health started deteriorating in 2016 and she was compelled to hire another promoter. When Ms Reddy assessed the plaintiff on 28 September 2016 the plaintiff informed her that 'she stopped working 3 months ago as the pain was affecting her performance at work and affected her physically'. However, this was not true because the plaintiff travelled to exhibitions and demonstrations in 2016 and continued to do so until 2020, as confirmed by both Mr Govender and in great detail by Meril. As already noted the plaintiff told Ms Hill that she stopped attending shows from 2019.

[69] As recorded under social history in Ms Reddy's report, the plaintiff informed Ms Reddy that she:

'resides with her spouse, her daughter, grandson and her niece. Her niece resides with them to assist the claimant with chores at home, as the claimant is limited in her functional abilities. ... Mr Pillay [the spouse] does not work as he is ill... He collects a disability grant for approximately 6 years'.

It is apparent that not only did the plaintiff not divulge to Ms Reddy that she, her husband and her niece were operating a tuck-shop at her home, she also did not inform Ms Reddy that the promoter she hired in 2016 was her daughter.

[70] Relying on the information provided by the plaintiff, Ms Reddy reported under 'Occupational History' that the plaintiff left her position as promoter with Indigo Rain CC because she was 'unable to cope'. Under 'Reason for Leaving Work' Ms Reddy recorded that the claimant stopped work from June 2016 as she is unable to manage with the pain and fatigue, and is unable to travel long distances. Under 'Financial Impact on the Business' Ms Reddy recorded:

'The claimant's business is still running. Since she is not at the shows [she did not attend the last 4 shows], she is unable to push for sales which increase the profits. In order for business to run smoothly and effectively for the claimant to reap the same rewards, she will need to hire an additional staff member to promote sales. Currently she asserts that there is no budget to allow her to hire another employee. Furthermore, everyone receives a commission for the products that they sell. The commission is seen as an additional income. Now she is unable to earn this additional income. She estimates this commission to be between R4000 and R8000 per show.

She asserts that the business income has decreased since she is not at the shows. She could not give an amount for this income but has paperwork to support this.'

It is therefore apparent that the plaintiff was disingenuous when assessed by Ms Reddy, who concluded that she cannot return to work. The information in this excerpt is contradicted in every aspect by the evidence of the plaintiff herself. Even the estimated commission is not consistent with financial records filed by the plaintiff and her testimony.

[71] There are also material anomalies in Ms Bobat's report, when compared with the plaintiff's evidence. Ms Bobat assessed the plaintiff on 31 July 2015 and recorded in her report that she accepted the information given by the plaintiff as fact where there was no corroborating evidence. The plaintiff did not tell Ms Bobat that her niece who helped with household chores ran a tuck-shop at her house or that she and her husband were involved in its operation, or that funds related to the tuck-shop were going through her accounts. She told Ms Bobat that she has a daughter who 'is also involved in promotions.' She also told her that she had two staff who earn between R5 000 and R9 000 per month in commission, which caused Ms Bobat to calculate an average commission of R7 000. However the evidence led in the trial was that she employed Meril in 2016 only and prior to that Mr Govender was the only other promoter and employee. This calls to attention the payment noted by Ms Hill of R15 000 to Meril in 2015, which was not explained. Further none of the financial records produced by the plaintiff reflect the figures given by her to Ms Bobat in 2015, which renders Ms Bobat's calculations unreliable.

[72] The plaintiff testified that she had to employ the driver because she was unable to drive long distances after her fall. This was not disputed by the experts. In her particulars of claim there is a bare allegation that she suffered and will suffer a loss of earnings in the future and no indication how the amounts claimed were computed. However in her testimony she stated that she computed her loss of earnings to be R7 000 per month being the R1 000 for the driving and R6 000 for the commission paid to

the driver, which she paid from her earnings of R20 000. It was apparent that she was relying on the computation by Ms Bobat.

[73] She also testified that she paid the driver R1 000 per trip and for longer distances R1 500. However under cross-examination when asked to clarify whether this payment was per trip or per show, she stated it was *per show* and that it depended on the distance. When Mr *Maharaj* pointed out to her that in her schedules she also reflected a payment of R750, she initially responded that she paid the driver a standard R1 000 per venue but if the venue was a distance away she would pay him R1 500. However, she then stated that there was no set figure paid to the driver. It could be R500 or R800 if he drove to Durban and she may have forgotten to mention that she paid him per venue. Mr Govender too started off with the figure of R1 000 and R1 500 for longer trips, but eventually admitted he was sometimes paid R100 per day to drive to Durban, and not per show. Yet in a letter dated 22 November 2020 annexed to the affidavit of Mr Govender the plaintiff stated that he 'earned *additional* driving fee of R1 000 *per trip*.' However in his affidavit Mr Govender merely states that he was employed as a driver and promoter and earned approximately R6 000 per month which he was paid in cash.

[74] To compound her contradictory evidence, when questioned about the several toll debits on the same route on the same date on her bank statement the plaintiff persisted that she only had one permanent driver and one motor vehicle for the business. However she eventually reluctantly stated that the second driver 'may be' her son-in-law who assisted at times and that she may have paid him about R100, not as salary but to buy food. The reconciliation statements which were relied on by the plaintiff to provide the factual foundation for her loss of income claim do not sustain the payments of R1 000 per month in cash that the plaintiff alleges she paid Mr Govender from 2011. There is either no provision at all for driving or fluctuating figures such as R200, R1 150 and R2 220 which are not consistent with the oral evidence tendered in court. There is no reason why the payment in cash for driving could not have been included in the reconciliations prepared by the plaintiff. I am satisfied that the amount claimed as past loss of income is nothing but a 'thumb-suck' figure as there could never have been a

proper computation based on the reconciliations or the annual financial statements. It is significant that Ms Bobat did not peruse the financials provided by the plaintiff but based her calculations on the unsubstantiated information provided to her by the plaintiff.

[75] Ms Hill noted that there are no shows in January, November and December and limited shows in February and June, but there are deposits for those months. This was not challenged or disputed by the plaintiff. However the plaintiff presented her claim based on an average monthly income, and her statements show deposits for those months. There is no explanation of the source of the funds if indeed there were no shows in those months. Business bank statements from 15 September 2016 – 15 December 2018 were not provided to Ms Hill although they would not have been difficult to access from the bank. If cash deposits were made into the Indigo Rain CC bank account from the tuck-shop as well, it would appear that the plaintiff was operating these two businesses together. Ms Hill testified that the FNB statements for the period 15 February 2011 – 15 September 2016 reflected unexplained 'batch deposits'. The plaintiff told Ms Hill that the profitability of her business dropped in 2018 drastically about 6% because she was unable to do shows. This was clearly not true.

[76] There are similar problems in respect of the plaintiff's evidence that she *always* paid her two employees in cash after every exhibition, and she had a record of her expenses and a reconciliation which reflected the cost of each show, which would corroborate her loss of earnings. This is not true. There is also no proper accounting or figures correlating to her evidence in the annual financial statements, although the plaintiff also deposed to an affidavit in which she stated that 'Payment to my staff was *often* made in cash which is reflected in the Financial Statements provided to the South African Revenue Services.' There is no explanation why Meril was paid in 2015 when she only started working for the plaintiff in 2016, as noted by Ms Hill. When the plaintiff was asked for an explanation for the annual salary to employees in the sum of R6 530 for 2016, which approximates to R544 per month, she offered a convoluted, completely illogical and unsatisfactory explanation, and ended by repeating that she paid employees in cash. She dithered about whom the salary of R6 530 was paid to and

eventually stated that the money was paid to Meril but she was unable to say if it was per month or per show although from a perusal of the statement it appeared to be per annum.

[77] The plaintiff's evidence was that she had two employees in 2016, Govender and Meril. Yet the plaintiff reflected R6 530 as employee's salary in the tax returns rendered to SARS for that year, which is completely at odds with her evidence. It is also relevant to note that the plaintiff testified that she was too ill to work in 2016 and therefore employed Meril. However she also testified that there were two shows at the same time in Bloemfontein and in Cape Town; so she went to one and sent Meril to the other. Further if she did pay the employees in cash and did not reflect it, it does not explain why some payment of salary is recorded from 2015-2019, as reflected in Ms Hill's report in table 7 drawn from the annual financial statements and in the plaintiff's schedule at "E368".

[78] There were also serious difficulties in reconciling the plaintiff's varying versions about her own salary. The discrepancies in the annual financial statements between gross income and total expenses also the plaintiff's monthly salary/ drawings on her tax returns and her actual monthly drawings transferred into her personal account have already been set out in para 49 supra. The plaintiff's own uncertainty was evident when she stumbled over her responses to Mr *Naidoo's* question about what salary she was drawing from 2011. She stated it was R13 000 previously but presently it was about R5 000 – R6 000 per month. Then she said that it was R20 000 per month. However when Mr *Naidoo* again asked again 'What is your salary?' the plaintiff stated it was R13 000 until the lockdown. However, according to the plaintiff's own evidence, in February 2020, she attended two exhibitions and in March 2020, one exhibition. Thereafter she had no earnings or income because of the lockdown and no exhibitions were held. So the source of the current salary of R13 000 or even R5 000 or R6 000 was not identified or explained.

[79] The schedule of staff salaries ends in 2019. The plaintiff was unable to explain the way the salaries were calculated as reflected on the schedule although she alleged that the schedule of salaries was submitted to her accountant. In the rule 37(4) minute there is an undertaking to furnish proof of payment of amounts paid to all employees of the plaintiff's business. The schedule and the annual financial statements do not sustain the oral evidence. Therefore the plaintiff's 'direct evidence' does not cure the deficiencies in her case or her poor credibility. Her accountant was not called to shed any light on the financial records before court. In any event, even an accountant would have been hard pressed to answer the obvious problems as there is no need for any expertise in accounting or forensic accounting skills to note the obvious miscalculations and the discrepancies in the figures when compared with the plaintiff's testimony.

[80] As the plaintiff was unable to provide proper reconciliations and explanations and did not address the problems identified by Ms Hill, the cross-examination of Ms Hill on whether the payments claimed by the plaintiff was reasonable and whether the salaries should be an expense against the business or the plaintiff's personal drawings, really served only as a deflection from the plaintiff's failure to provide reliable financial records. There is also little to persuade me that the plaintiff's misrepresentations and omissions were not deliberate, which must undermine her credibility. I have however not lost sight of the fact that liability has been conceded and that there is no dispute that the plaintiff's fall and injury to her knee have relevant sequelae which will impact on her for the remainder of her life. I also acknowledge that the plaintiff displayed exemplary entrepreneurship in founding her own businesses, the tuck-shop before her injury and the sale of leather care products post-morbidity. However this is not the basis on which her case must be determined, nor can a court determine her case on the basis that her claims are reasonable.

The injury to the plaintiff's back

[81] Before proceeding to determine the appropriate award in respect of the plaintiff's claims it is necessary to determine whether the defendant should be held liable for the alleged injury to the plaintiff's back. The expert witnesses who testified in respect of this issue are Dr Yachad and Dr Osman. Although there were no serious disputes of opinion

between them, I remain mindful of the comments of Wallis JA in *AM & another v MEC for Health, Western Cape*:⁷

'The opinions of expert witnesses involve the drawing of inferences from facts. The inferences must be reasonably capable of being drawn from those facts. If they are tenuous, or far-fetched, they cannot form the foundation for the court to make any finding of fact. Furthermore, in any process of reasoning the drawing of inferences from the facts must be based on admitted or proven facts and not matters of speculation.' (Footnote omitted.)

[82] The plaintiff has alleged that she slipped and fell thereby sustaining serious injuries to her knee and back. She testified that she sustained the injury to her back when she fell backwards while attempting to get up. The only evidence of the nature of the injury close to the date of the fall is in the x-rays ordered by Mr Raghavjee which showed no injury to her spine, only a muscle spasm on either side of the spine in the lumbar region. Dr Osman opined that when she complained of back pain to Dr Mahomed, she merely had a topical injury to her back, an inference he drew from Dr Raghavjee's report and the fact that Dr Raghavjee only treated the plaintiff's knee four months after the injury and also sent her for physiotherapy only for her knee. He also only prescribed anti-inflammatories and analgesics for the pain she complained of. Dr Osman also testified that given the height from which the plaintiff fell backward and even if she fell backwards twice, she could not have suffered serious injury to her back.

[83] The x-rays subsequently examined by both Dr Yachad and Dr Osman also reveal no serious injury and they both agreed 'the L4/L5 spondylolisthesis is pre-existing and she sustained a soft tissue injury over this, which has resulted in her having back pain at this present moment in time.' Dr Osman testified that all his findings were consistent with the spondylolisthesis to the spine of the plaintiff and that the fall did not progress or cause the spondylolisthesis because the nature of her fall on her back was not severe trauma nor would it have caused anteriorlisthesis, as suggested by Mr *Naidoo*. He stated that the back pain that the plaintiff complained of was secondary and not primary in nature and that the spondylolisthesis would become symptomatic at some stage. However the pain has been aggravated by the fall. Dr Yachad stated that an MRI scan

⁷ *AM & another v MEC for Health, Western Cape* 2021 (3) SA 337 (SCA) para 21.

of the lower back is indicated which he expected would find lumbar disc pathology and aid long-term prognosis of the lower back. However the plaintiff has not had an MRI scan.

[84] Mr *Naidoo* postulated that the fall on her back caused the asymptomatic spondylolisthesis of the plaintiff to become symptomatic. Firstly, this is a concession that the plaintiff did not sustain severe or serious injury to her back as alleged. Secondly, there is no evidence to sustain Mr *Naidoo's* argument, and Dr Osman's was emphatic that the fall did not progress the spondylolisthesis. Although the plaintiff may suffer back pain due to various causes including the pathology to her knee, I am satisfied that the plaintiff has failed to prove on a balance of probabilities that she sustained a serious injury to her back when she fell in the defendant's supermarket. This conclusion is relevant to the determination of her claims for future medical expenses and general damages.

Past medical expenses

[85] I have already referred to the failure of the plaintiff to provide documents, vouchers or tax invoices to prove her past medical expenses, and the consequent questionable computation of her claim for such expenses. As the event occurred on 31 December 2009 and summons was issued in 2012, there appears to be no cogent reason why the plaintiff did not make the necessary request to the medical aid timeously or retain the documentation in her possession. Instead she relies on a reconstruction of the claimed amounts from medical aid schedules and 'consulting with Medical Practitioners'.

[86] Mr *Naidoo* described this claim as the least contentious and submitted that the court should accept the plaintiff's schedule as proof of her claim. Mr *Maharaj* on the other hand submitted that the plaintiff had failed to prove the claim. He pointed out that the plaintiff's schedule and the documentation she relied on were grossly inadequate as there was no indication as to the nature of treatment and/or medication that was administered and whether in fact it related to the plaintiff's alleged injury. Therefore

there is no correlation between the payment allegedly made by the medical aid and the treatment which pertains to the injury sustained by the plaintiff in the fall. Mr *Maharaj* also contended that the amount claimed in respect of past medical expenses or the payment thereof has not been confirmed by the Chief Operational Officer of the Medical Aid Scheme, which confirmation could have been obtained.

[87] There is merit in Mr *Maharaj's* contentions. Further an interrogation of the schedule reveals several amounts which do not correlate with the plaintiff's evidence or the bases for her schedule. The plaintiff testified that she was treated by Dr Mahomed four days after the fall with anti-inflammatories for her knee and back pain. On 3 March 2010, she found herself incapacitated. Dr Mahomed referred her to Dr Raghavjee who operated on her the same day. She was also treated subsequently by Dr Mahomed for her backache and knee.

[88] The plaintiff relied on a handwritten schedule from Dr Mahomed dated 3 October 2020 for proof of treatment by him for consultations in connection with treatment for her knee and back from 2010 ("A118"). Dr Mahomed's schedule does in fact only show that he treated her on 4 January 2010 for lower backache and knee and thereafter for backache only on 22 February 2010 and 8 March 2010. This is consistent with her testimony, although she did not testify that she consulted Dr Mahomed again before 8 March 2010. However on her schedule she claims for medical expenses for consultations with Dr Mahomed on 4, 14, 15, 28 January 2010 and 3 February 2010, some of which according to the medical aid schedule were not paid because they were duplicate claims, and the claims are not included in Dr Mahomed's schedule.

[89] Further, although she did not testify that she had physiotherapy until Mr Raghavjee referred her to a physiotherapist for her knee, the plaintiff's schedule reflects claims for Mr Gopal in January and February 2010. However Dr Mahomed's letter dated 20 March 2010 states that he consulted with the plaintiff on 4 January 2010, and thereafter referred her to Mr Raghavjee and physiotherapist J Gopal. There is no explanation from the plaintiff or Mr Gopal why he has not furnished a schedule of

relevant treatments and fees. Therefore despite the plaintiff's testimony that the physiotherapist has treated her back and knee, I am unable to find that she has proved all the claims on her schedule for physiotherapy. The plaintiff has provided one statement from Midlands Medical Centre which reflects a subtotal of R13 737.96 but she has also included the individual amounts as separate claims although they are all included in the subtotal. She has effectively duplicated the claim.

[90] It is apparent from these obvious 'errors' that her legal representatives have not perused the schedule before filing it and amending the particulars of claim in accordance with the schedule. It is also inconceivable that the court should be urged to accept the defective and unsubstantiated schedule in its entirety as proper proof of past medical expenses. Undoubtedly, the plaintiff's evidence and her schedule of past medical expenses must also be treated with much circumspection.

[91] Consequently, as it is common cause that the plaintiff was treated by Dr Mahomed four days after the fall and by Mr Raghavjee on 3 March 2010, and that she had an operation on her knee on the same day I have only considered those claims. I have noted the dates of further consultations in Mr Raghavjee's letter dated 21 April 2010 but there are no payments of claims on all those dates. I have also considered the claims based on the statement from Midlands Medical Centre for 3 March 2010 and noted that the procedure was orthopaedic surgery and Mr Raghavjee and Dr M Essack were the doctor and anaesthetist respectively. Subsequent claims for treatment by Dr Mahomed according to his schedule have been considered. Claims by the physiotherapist have been considered only immediately after the referral by Dr Mahomed and Mr Raghavjee at the beginning of 2010, although there is no letter of confirmation by Mr Gopal and therefore the treatment and reason for the treatment remain unproven. I have then compared those claims with the medical aid schedule and only accepted claims as legitimate expenses if there is a correlation.

[92] Past medical expenses:

Dr NS Mahomed

4 January 2010	226
22 February 2010	226
8 March 2010	226
27 January 2015	320
9 June 2016	333
21 July 2016	333
5 December 2017	354
22 January 2018	374
22 May 2018	377
27 November 2019	374
16 September 2020	417
Subtotal	3 560
<i>Mr Raghavjee (per his letter dated 21 April 2010)</i>	
3 March 2010	915
	503.70
	604.43
	75.50
Subtotal	2 098.63
<i>Midlands Medical Centre</i>	
3 March 2010	13 737.96
<i>Mr Essack</i>	
3 March 2010	216.88
	188.76
	1372.42
Subtotal	1 778.06

Jitesh Gopal (physiotherapist)

1 February 2010	128
	47.75
	31.85
Subtotal	207.60
Total	<u>R21 382.25</u>

Future medical expenses

[93] The plaintiff claims the sum of R985 230 for future medical expenses. Mr *Naidoo* pointed out that as per their joint minute, the occupational therapists have agreed to the assistive devices as well as domestic assistance. The actuarial computation based on their list is the sum of R327 840 (“A101”). The actuarial computation for future medical expenses based on the reports Dr Yachad and Ms Reddy is R657 390 (“A90”). Mr *Naidoo* submitted that the plaintiff should not be penalized for refusing to have a knee replacement. He submitted that an appropriate contingency deduction to be applied is 20%, resulting in the sum of R525 912. According to these calculations the award for future medical expenses should be in the sum of R853 752. Mr *Maharaj* submitted that although Dr Osman suggested a total knee replacement, the plaintiff indicated that the cost thereof can be deleted as she would not undergo such surgery. He drew attention to the divergence in opinion between Dr Yachad and Dr Osman as to the future medical costs.

[94] There is no dispute in respect of the recommendation by the occupational therapists as far as the domestic assistance and assistive devices are concerned and no alternative computation has been offered by the defendant. Consequently an award for the actuarial computation of R327 840 is appropriate. In respect of the future medical expenses he estimated in clause 16 of Exhibit “A18”, Dr Yachad stated that there was no time limit for the medication because the plaintiff may require medication even after a successful knee operation. He admitted that the three monthly visits for the first year

and the review by the orthopaedic surgeon, per clause 16.10 would depend on the healing of the individual patient. He was of the view that the plaintiff would require the left knee joint MRI and left knee arthroscopy, debridement, meniscal repair or meniscectomy, especially if she does not have the knee replacement which she could not be forced to consent to. He had not recommended a knee replacement because at the time when he assessed the plaintiff he did not find it appropriate.

[95] When Dr Osman was referred to Dr Yachad's report and the actuarial calculation based on that report at "A90", he opined that medical expenses at R1 500 per month for analgesics and anti-inflammatories was excessive, and suggested a figure of R150 per month which he substantiated by reference to specific appropriate medicines. He was also of the view that three visits to the orthopaedic surgeon in one year was excessive. He opined that the plaintiff should see an orthopaedic as the need arose only, and one visit per annum would be sufficient. Dr Osman pointed out that as Dr Yachad saw the plaintiff about five years before Dr Osman, his recommendations preceded Dr Osman's recommendation that the plaintiff has a knee replacement. He opined that an MRI of the left knee was not necessary and the plaintiff will not need the left knee arthroscopy, debridement meniscal repair or meniscectomy if she were to have the knee replacement. It was significant that the meniscectomy under anaesthetic would not give the plaintiff any permanent or prolonged relief. An alternative to the knee replacement would be to give the patient a wedge for the heel to correct her alignment which would cost between R350 - R500 and a hinge knee brace which would cost about R1 500. With that intervention the need for excessive analgesia would be significantly reduced and cause fewer renal and other complications for the patient.

[96] Dr Osman stated that physiotherapy will not help the knee and recommended topical treatment such as applying heat or cold or a topical medication such as Voltaren. She may benefit from physiotherapy for back pain. He testified further that the MRI of the lumbar spine, the epidural anaesthesia and neurologist consultation related to the spondylolisthesis and not injury to the lumbar spine, and would not be necessary, and did not form part of the injury that was sustained by the plaintiff during the fall. Dr

Osman agreed that the plaintiff would benefit from a consultation with a biokineticist and recommended that she also consult a dietician because excessive weight would put pressure on the injured knee.

[97] Having considered the complete refusal of the plaintiff to have a knee replacement and her evidence that she did not authorise the claim therefor and the alternative suggested by Dr Osman, I am of the view that the future medical expenses should be re-computed by an actuary in respect of the following interventions/treatments:

- (a) medication - R200 per month
- (b) orthopedic surgeon – 1 consultation per annum
- (c) wedge for the heel
- (d) knee brace
- (e) evaluation by a biokineticist
- (f) evaluation and diet plan by a dietitian

It is to be assumed that the plaintiff's life expectancy remains unaffected. The contingency of 20% suggested on behalf of the plaintiff is to be applied.

Loss of earnings

[98] This claim constituted the major dispute between the parties. Mr *Naidoo* submitted that the joint minutes by the experts are instructive:

- (a) The orthopaedic surgeons confirm that the plaintiff's ability to stand and work is affected by the left knee pain.
- (b) The occupational therapists confirm that she would require a driver and that she will be unable to return to work as a promoter. Additionally, they both noted a decrease in profits as more staff was hired.
- (c) The industrial psychologists both confirm that the plaintiff worked albeit at a reduced capacity and Ms Bobat notes that she now employs more staff to assist her than she would have had the incident not occurred. It is not disputed that her loss pertains to the additional staff that she employs, viz a driver and a promoter.

[99] In regard to the loss of earnings and the evidence of Ms Hill, Mr *Naidoo* submitted that the plaintiff relies on the majority decision in the case of *Bee v Road Accident Fund*.⁸ As in the present case, the appellant worked for Bee Painters & Waterproofing CC (BPW) and he held a 50% member's interest in the close corporation with his brother Mr Russ Bee. The evidence was that the work previously conducted by the plaintiff was taken over by his nephew and that he earned a salary of R25 000 per month. In distinguishing the case of *Rudman v The Road Accident Fund*⁹ the majority held that this was an appropriate case in which to assess the appellant's loss of income with reference to the financial affairs of BPW. In *Rudman*, the court concluded that he had not suffered a patrimonial loss and the appeal court agreed with the factual analysis. In paragraph 82 of the *Bee* judgment, the following is recorded:

'In the present case, by contrast, the very facts agreed by the experts established that the appellant had suffered a loss and that such loss was directly related to the impaired performance of BPW. Whether that was so was a factual question, not a legal one. The experts agreed on the facts. They differed on three aspects affecting the quantification, not the existence, of the appellant's loss'.

[100] Mr *Naidoo* also pointed out that whilst in *Rudman* the plaintiff's function was that of the Chief Executive Officer which he still performed and remained a driving force behind the company, the present case is distinguishable in that the plaintiff's injuries precluded her from continuing in her function as a promoter. The concomitant loss (as per the judgment in *Bee*), even though a loss to the close corporation, is a loss which the plaintiff suffers. Accordingly, and even though the loss was that of the close corporation, it equated ultimately to a loss for the plaintiff. The judgment proposed and applied a 25% contingency deduction for future loss of earnings. Mr *Naidoo* pointed out further that as already indicated by Ms Hill in her evidence, the loss is that of the close corporation. He submitted that the following paragraph is therefore instructive in determining whether the loss equates to a loss suffered by the plaintiff:

⁸ *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA).

⁹ *Rudman v The Road Accident Fund* 2003 (2) SA 234 (SCA).

[95] There was thus ample evidence, quite apart from the forensic accountants' joint minute, that the appellant's reduced abilities had negatively affected BPW's operations. Because he had a 50% membership of BPW, and because he had his brother shared BPW'S net profits (whether by way of salary or distributions), a decrease in BPW's net profits translates into a loss of income for the appellant.'

Mr *Naidoo* accordingly argued that the loss of earnings of the close corporation is a loss suffered by the plaintiff in respect of the amount for the costs of a promoter and driver.

[101] While Mr *Naidoo* submitted that the plaintiff's evidence was reliable, Mr *Maharaj* contended that the plaintiff's evidence on the facts relevant to loss of earnings was far from satisfactory. He pointed out the inconsistencies in the plaintiff's evidence about her employment of Mr Govender and Meril and the evidence of the employees themselves. According to Meril the shows took place between February to October only. He pointed out that the testimony in court was not sustained by the documents the plaintiff relied on and she was unable to answer questions on the financial statements including the turnover, the salaries reflected on the schedule and whether it was per month or per annum. He also pointed out that the salary reflected on the statements is a far cry from the plaintiff's testimony but she claimed to be confused and did not answer the relevant questions. She also did not make full disclosure to the experts. Mr *Maharaj* pointed out that the plaintiff admitted that she employed extra staff 'not just because of the injury but because business was growing', and she conceded that if she had two exhibitions which clashed she had to employ casual staff, and she and Meril ran each of the exhibitions.

[102] Mr *Maharaj* acknowledged that the cost of substituted labour, in this case a driver and a promoter, may in principle be awarded. He referred to *President Insurance Co Ltd v Matthews*¹⁰ in which Smalberger JA said:-

'There is no reason in principle why, in an appropriate case, the cost of employing a substitute should not form the basis of a claim for damages arising from a plaintiff's inability to carry on his pre-collision trade or profession.'¹¹

¹⁰ *President Insurance Co Ltd v Matthews* 1992 (1) SA 1 (A).

¹¹ *Ibid* at 5E-F.

Mr *Maharaj* submitted further that the cost of employing an additional promoter is however not limited to measuring the decrease in the plaintiff's future earning capacity. He contended that a distinction must be drawn between the decrease in the plaintiff's future earning capacity and the increase of the volume of her turnover. The increase in her turnover would always have required the employment of additional personnel. The plaintiff's evidence is that she was always present at the shows and she had to employ additional people to cope with the increase in the workload and when shows clashed.

[103] Mr *Maharaj* relied on *Rudman* as authority for his contention. The appellant appealed against the dismissal of his claim for past loss of earnings and loss of earning capacity by the Provincial Division on the ground that, although the appellant had proved disabilities which, potentially at any rate, could give rise to a reduction in his earning capacity, he had failed to prove that this had resulted in patrimonial loss since the loss of earnings and earning capacity he had suffered was a loss to the company and not to his private estate. The court held that his future loss could in these circumstances be quantified by the cost of employing substitute labour to do the work which the appellant would have done had he not been injured. It went on to hold that the court a quo correctly emphasised that where a person's earning capacity was compromised:¹²

” That incapacity constitutes a loss, *if such loss diminishes his estate*” and “he is entitled to be compensated *to the extent that his patrimony has been diminished.*”

[104] The court found that the view of the court a quo that the evidence did not establish that the appellant's diminished earning capacity had resulted in a diminution of his estate was also correct. It held that it was therefore fallacious to assume that the appellant had suffered a loss once he had proved that the physical disabilities brought about a reduction in his earning capacity and thereafter all that remained was to quantify the loss. This assumption could not be made since a physical disability that impacted on his earning capacity did not necessarily reduce the estate or the patrimony of the injured person; there had to be proof that the reduction in earning capacity indeed

¹² *Rudman v The Road Accident Fund* 2003 (2) SA 234 (SCA) para 11.

gave rise to pecuniary loss, in this instant case such proof was absent.¹³ The Court therefore concluded that the appellant had failed to discharge the onus of proving that he had suffered a diminution in the value of his patrimony.

[105] Mr *Maharaj* argued further that it is well established in our law that “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.”¹⁴ He contended that as both Mr Govender and Meril testified that they were employed and paid by Indigo Rain CC, the additional expense of substituted labour for the two employees was borne by Indigo Rain CC and not the plaintiff. Mr *Maharaj* contended further that the plaintiff has not demonstrated that these payments reduced the income and/or profits of Indigo Rain CC and that such reduction of income filtered down to her, in that she received a reduced and/or lower member’s dividend. He pointed out that there has been no accounting carried out in respect of the plaintiff or of the books of Indigo Rain CC to demonstrate that these payments resulted in lower income being available to the plaintiff or that she has suffered a loss of income. Mr *Maharaj* submitted in conclusion that the plaintiff’s business does not show a decline. The plaintiff did not indicate that she has reduced the number of shows she attends. He pointed out that the plaintiff’s turnover had in fact increased and there was no drop in sales or in the income. He submitted that in the alternative, the plaintiff’s business expanded to such an extent that she would not have been able to cope singlehandedly and would have been compelled to employ people.

Legal principles

[106] As stated earlier in this judgment, loss of earnings is a special damage and has to be specially pleaded and proved in accordance with the provisions of rule 18(10) which requires a plaintiff to provide information on the earnings lost up to date and how the amount is made up. It is therefore trite that a claimant must adduce sufficient evidence to enable the court to assess the loss.

¹³ headnote

¹⁴ *Dippenaar v Shield Insurance Company* 1979 (2) SA 904 (A) at 917B-C.

[107] The following excerpts from texts set out the principles pertinent to a determination of a claim for loss of earnings:

Loss of past income or earnings (from date of delict to date of trial)

'Past loss of earnings is a matter of proof. A self-employed plaintiff may recover for such diminution in the income from his business or profession as can be fairly be attributed to his inability , as a result of his injuries, to attend properly to his affairs.'¹⁵

'Where as a result of his or her injuries a person has been precluded from earning income or has earned less income than normal, he or she is entitled to damages representing the income the injured person would have earned but for his or her incapacity. It is incumbent upon the plaintiff to prove what his or her income would have been had the person not been injured and what his or her actual earnings were for the duration of the injuries (if applicable).

A claim for loss of earnings exists irrespective of whether a plaintiff is in someone else's employ or is self-employed. In the latter case, it may be more difficult to assess the plaintiff's loss than in the former... Damages may also be assessed as being the reasonable cost of employing a substitute for the plaintiff.'¹⁶

Loss of earning capacity (prospective income, future earnings after date of action)

'...in *Rudman v Road Accident Fund* the Supreme Court of Appeal clearly stated that a physical disability which impacts upon capacity to earn does not necessarily reduce the estate or patrimony of the injured person. There must be proof that the reduction in earning capacity indeed gives rise to pecuniary loss.'¹⁷

'In order to recover loss of earnings, the claimant must be able to prove that he would have earned such income but for his or her bodily injury. Where income is indirectly earned through the medium of a company or trust, evidence of loss to this company and ultimately to the claimant is required to establish loss of income.'¹⁸

'In the event of the earning capacity of a claimant being affected to the extent that the claimant is no longer capable of effectively doing the work he was able to do prior to his or her injury, the salary of a substitute or manager to do such work is admissible. Such costs will represent the

¹⁵ PQR Boberg *The Law of Delict* Vol 1 (1984) at 531.

¹⁶ Visser and Potgieter *Law of Damages* 3 ed (2012) at 462-463.

¹⁷ *Ibid* at 464-465.

¹⁸ HB Klopper *The Law of Third-Party Compensation* 3 ed (2012) at 172.

claimant's loss of earning capacity and is an alternative to a claim for loss of earning capacity. Whether the salary of a substitute or manager is recoverable depends on the facts and circumstances of each case.

In order for a claim for a substitute ...as an alternative to a claim for loss of earning capacity to be enforceable, the following requirements must be met:

- there must be no possibility of the claimant being in a position to ...conduct another business; alternatively the circumstances and facts must be such that it would be unreasonable to insist that the claimant obtain alternative employment or conduct an alternative business;
- the cost of employing a substitute ... must not exceed the losses expected without the employment of a substitute ... and must be reasonably be required to best preserve the claimant's capital assets and to ensure maximum profitability; and
- the cost of a substitute ... will only be recoverable if the claimant can show that prior to his or her injury, his or her business...was a viable business...

Calculation

The amount of loss is based on an actuarial calculation and is the future value, at the time of the trial, of the cost of employing a manager or substitute at the reasonable rate determined by evidence.¹⁹

Discussion

[108] I am in agreement with Mr *Naidoo* that the joint minutes of the experts are instructive. In the joint minutes prepared by Dr Osman and Dr Yachad, the experts agreed that:

'Her knee disability is congruent with the outcome of the post-surgical treatment. Her ability to stand at work would be affected by the left knee pain which will improve following successful Total Knee Replacement.

Over the last 3 years, there has been at least a 25% to 50% decrease in her ability to stand and sell her products.

A successful Total Knee Replacement will improve her ability to stand at work.'

Similarly, the occupational therapists and the industrial psychologists agree that the plaintiff's ability to work has been compromised as a result of the injury to her knee. Ms

¹⁹ Ibid at 186-187.

Reddy and Ms Stirton have set out in detail the adverse physical sequelae suffered by the plaintiff which will militate against her 'returning to work as a promoter.'

[109] However while the joint minutes set out the congruency of opinions of the experts, such opinions must be carefully considered and not accepted unquestioningly by the court, especially as the opinions are based on the information supplied by the plaintiff. As stated by Wessels JA in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH*²⁰ with regard to the nature of an expert's opinion:

' . . . an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert'.²¹

A court has to ascertain whether the opinions expressed by the experts are based upon facts proved by way of admissible evidence. "An opinion based on facts not in evidence has no value for the Court."²²

Similarly in *Bee v Road Accident Fund*²³ the court held that :

'[22] It is trite that an expert witness is required to assist the court and not to usurp the function of the court. Expert witnesses are required to lay a factual basis for their conclusions and explain their reasoning to the court. The court must satisfy itself as to the correctness of the expert's reasoning...

[23] The facts on which the expert witness expresses an opinion must be capable of being reconciled with all other evidence in the case. For an opinion to be underpinned by proper reasoning, it must be based on correct facts. Incorrect facts militate against proper reasoning and the correct analysis of the facts is paramount for proper reasoning, failing which the court

²⁰ *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH* 1976 (3) SA 352 (A).

²¹ *Ibid* at 371F-G.

²² *PriceWaterhouse Coopers Incorporated & others v National Potato Co-operative Ltd & another* [2015] 2 All SA 403 (SCA) para 99.

²³ *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA).

will not be able to properly assess the cogency of that opinion. An expert opinion which lacks proper reasoning is not helpful to the court...’.

[110] In this case, the basic facts given to the experts were correct: the plaintiff fell on and injured her left knee which required surgery and medication, and which has and will impact on her ability to drive long distances and to work as a demonstrator. However, as the analysis of the evidence has shown, the information given by the plaintiff to the experts in relation to her work, employees and loss of earnings was neither consistent or reliable or based on fact. Mr *Maharaj* has also drawn attention to the lack of credibility and deficiencies in the plaintiff’s evidence. One example of an unfounded and unsustainable conclusion by the experts in their joint minute, is that Ms Reddy and Ms Stirton noted an increase in expenses and a decrease in profits as more staff was hired. Yet it is clear that they could not have based this conclusion on a proper interrogation of the annual financial statements or bank statements furnished by the plaintiff. Ms Hill pointed out that she would not make such a statement which was not borne out by admissible evidence. Another example is their conclusion that the plaintiff ‘could not return to work’ which arose from the plaintiff’s untrue advices that she was no longer working as a promoter or attending shows since 2016.

[111] Ms Reddy testified that in her second report she estimated an earlier retirement age of eight to ten years because the plaintiff told her that she had left work. She confirmed that she was not aware that the plaintiff in fact had been working in 2016 when she was assessed and continued to work thereafter until 2020, or that she operates a tuck-shop. Ms Reddy did not disagree with Ms Hill’s assessment and observation of the plaintiff and agreed that if the plaintiff had to work on a phone or computer, she could continue to work and earn a living. She also agreed that while the plaintiff may not be able to work as a promoter, she could work half a day, and if she had a knee replacement, she would be functional and able to cope better and to work. Ms Reddy also confirmed that if the plaintiff had two assistants and a driver, she would be able to continue working in a supervisory capacity. Ms Stirton also based some aspects of her opinion on fallacious information. Her view was that the plaintiff’s ‘current

vocation' as a business manager was appropriate and reasonable as she was able to work flexible hours and rest as required.

[112] There is a similar difficulty with accepting the evidence of Ms Bobat. While Ms Hill and Ms Bobat agreed that the plaintiff was physically compromised and would not be able to continue working as a promoter, Ms Bobat did not even consider any financial statements when formulating her opinion on the plaintiff's loss of income. Further her calculation²⁴ was on the basis that the plaintiff employed a driver who was paid R1 000 per month and two staff who earn between R5 000 and R9 000 a month while the plaintiff earns R12 000 a month in commission. The evidence before this court is that the plaintiff paid the driver varying amounts per trip, she employed the driver only as a promoter until 2016 and she allegedly earned R13 000 per month, although she declared a lower figure to SARS. Therefore Ms Bobat's calculation of the loss constituted by payment to the driver and the average commission paid to the promoters, was based on incorrect and unproven information and figures given to her by the plaintiff. Ms Bobat also did not factor into her calculation the fact that the plaintiff had an assistant even pre-morbid, which she conceded was relevant. Therefore while it may be that the plaintiff's loss pertains to the additional staff that she employs, Ms Bobat's calculations find no favour with me, as does the plaintiff's reliance thereon. Consequently the actuarial calculations based on Ms Bobat's report are also unacceptable.

[113] This appears to be an appropriate stage to consider the cases of *Rudman* and *Bee* that counsel have relied on. In *Rudman* the Supreme Court of Appeal pointed out that:

'[12] ...The argument on Rudman's behalf in the Court below, particularly with regard to the claim for past loss of earnings, was that he is the person who felt the pinch because there was less money coming in to the company. He is the person who in fact suffered the loss incurred by the company. He is the person who should be compensated. The counter-argument, which was accepted by the learned trial Judge, is that this ignores entirely that the company is a separate

²⁴ Paragraph 32 supra.

legal entity with its own personality and its own estate, which is distinct and separate from Rudman's estate.'

The engagement between Mr *Naidoo* and Ms Hill during cross-examination followed the same argument. However on appeal, counsel for Mr Rudman did not persist with this argument and submitted instead 'that in the circumstances of this case it is appropriate to use the loss to the company as a method of placing a monetary value on Rudman's personal loss'.²⁵ Mr Naidoo in relying on *Bee* in his argument has adopted a similar stance. He referred to the distinction drawn by the court between facts in *Rudman* and those in *Bee*, specifically that in *Bee* 'the very facts agreed by the experts established that the appellant had suffered a loss and that such loss was directly related to the impaired performance of BPW'.²⁶ The conclusion in *Bee* was based on facts. In *Rudman* the court stated that 'an award cannot be based upon speculation. It must have an evidential foundation'.²⁷ What facts are there in this matter that this court may rely on? Although Mr *Naidoo* effectively acceded to the opinion expressed by Ms Hill, which is consistent with the judgment in *Bee*, he has not taken his argument to the necessary conclusion. Where is the proof that the plaintiff had suffered a loss which is directly related to the impaired performance of Indigo Rain CC? Indeed, where is the proof of the impaired performance of Indigo Rain CC?

[114] Therefore, while it is accepted that the plaintiff required a driver because she was unable to drive long distances as a result of the injury to her knee,²⁸ the plaintiff has not provided reliable facts and figures which establish the quantum of the loss suffered by Indigo Rain CC or her through the employment of the driver. Mr *Maharaj* has in his heads of argument detailed the shortcomings in the plaintiff's evidence, with which I am in agreement. Similarly her claim for loss suffered by the employment of an additional assistant must be qualified by the fact that the plaintiff always had an assistant even when employed as a promoter. When she commenced her own business while already suffering the adverse sequela of her fall, she continued to work as she did previously,

²⁵ *Rudman* para 12.

²⁶ *Bee* para 82.

²⁷ *Rudman* para 16.

²⁸ Under participation in activities of daily living, both occupational therapists noted difficulty with driving due to pain in the knees and that the plaintiff had hired a driver when long distance driving was required.

with one assistant who helped her set up the stand and also did demonstrations. The plaintiff's own evidence is that she employed Meril in 2016 as an additional promoter not only because she was having difficulties associated with her inability to crouch or to stand for long periods of time, but also because her business was growing and there were occasions when there were two shows running concurrently. However there is no proper record of what Meril was paid, and the evidence of the plaintiff and Meril is inconsistent as to what she earned, even taking into consideration that the payment was commission based. The 15 reconciliations for the 2016 shows reflect various amounts ranging from R2 250 to R10 700, but there is no indication as to exactly what commission was paid to Meril and which shows she actually attended. Further there is no correlation between their evidence and the salaries paid to staff reflected on "E368".

[115] In *Sandler v Wholesale Coal Suppliers Ltd*²⁹ the appellant was the proprietor and personally involved in the operation of a garage business. He was absent from his business for four months after sustaining bodily injuries, during which time his manager ran the garage. On the question of whether the appellant had proved his loss, the court held:

'When the owner of a business of this nature, who works in it in the way in which the appellant worked, is confined to hospital for four months and enable to do the work which he previously did, the business as a profit-earning concern must necessarily suffer. It seems reasonable to assume that the appellant's skill and energy and his activities in the affairs of the business were a source of some profit to the business. These were taken away and nothing put in their Place. It is also not unreasonable to assume that the personal presence of the owner of the business is a factor in keeping up the efficiency of his employees and of the services rendered to the public, and so attracting customers.'³⁰

[116] In this case the plaintiff was not absent from her business even after Meril was employed. She continued working in the business and promoting her products at shows until 2020 when the Covid pandemic put an end to the shows There was therefore no decline in her business due to her absence or a reduction in the goodwill of Indigo Rain

²⁹ *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194.

³⁰ *Ibid* at 198.

CC. In *Rudman*, the court noted that while there was evidence which proved that, because of Rudman's injuries, the company lost income and incurred additional expenses of employing others to perform the work that Rudman used to do, there was no proof that these facts resulted in loss to Rudman eg there was no evidence that he received reduced fees or drawings from the company because of the company's reduced income. The court based this conclusion on the fact that the financial statements of Rudman and his company and the family trust's financial statements for four years as well as the evidence of Rudman and his accountant did not show any loss to Rudman.

[117] In this case, while there is some proof that Indigo Rain CC paid for a substitute driver for the plaintiff and an additional demonstrator from 2016, there is no proof that this resulted in a loss to the plaintiff, because on her own version, she consistently drew R12 000 per month and then an increased amount of R13 000 monthly. Nor do the annual financial statements shed any light on this issue. I am mindful that a court should come to the assistance of a litigant who does not have proper records but has proved a loss in earnings, but the plaintiff is not an informal trader. She conducts her business through a registered close corporation, employs an accountant and submits tax returns to SARS. However on the evidence, although Meril was employed in 2016, she was not the substitute for the plaintiff because the plaintiff continued to attend shows and to demonstrate on items other than shoes, and both attended different shows which occurred at the same time. The plaintiff also admitted that she required additional staff because of the growth in her business. Further there is no proof as to what Meril actually earned in commission although as submitted by Mr *Naidoo*, 'the plaintiff only sought loss based on the employment of an assistant as a promoter with the concomitant loss of R7 000-00 per month'. In the premises, I am unable to determine the past loss of income insofar as it relates to the employment of an additional assistant and decline to make an award for this component of her past loss of earnings claim.

[118] In respect of the claim for the expenses of the driver, I have similar very strong reservations given the paucity of reliable evidence. However I am mindful of the following comments of the Supreme Court of Appeal in *Road Accident Fund v Kerridge*:³¹

'Calculation of past and future loss of income earning capacity

[25] Indeed, a physical disability which impacts on the capacity to an income does not, on its own, reduce the patrimony of an injured person. There must be proof that the reduction in the income earning capacity will result in actual loss of income. However, where loss of income has been established but proof of the quantum thereof cannot be produced in the usual manner, the courts have shunned the non-suiting of a claimant and have preferred to make the best of the evidence tendered to give effect to the finding of proved reduction in loss of income-earning capacity. As long as almost a century ago in *Herman v Shapiro* the court said the following:

“Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages.”

[26] Since then this dictum has been quoted with approval in a number of cases. In *Esso Standards SA (Pty) Ltd v Katz* the court held that “where the best available evidence to the plaintiff has been produced, though it is not entirely of a conclusive character and does not permit a mathematical calculation of the damages suffered still, if it is the best evidence available the court must use it and arrive at a conclusion based on it.”

[27] In this case it was established that Mr Kerridge had suffered past loss of income and loss of future income earning capacity. It was incumbent upon the trial court to assess the quantum thereof on the best available evidence...’ (Footnotes omitted.)

[119] Therefore having accepted that the plaintiff required the assistance of a driver over long distances, I have to determine the loss on the evidence available, inconsistent and unreliable as it may be. It was not disputed that the plaintiff commenced business in February 2011, and held demonstrations at 13-14 exhibitions per year which extended over three to four days. In 2020 she had three shows until March. The exhibitions took place at Durban, Pietermaritzburg, East London, Cape Town, Gauteng and

³¹ *Road Accident Fund v Kerridge* 2019 (2) SA 233 (SCA).

Bloemfontein. The driver was paid R100 per day or R500 per show to drive to Durban, R1 000 per longer trip and R1 500 to Cape Town, and he received no increase from 2011 to 2020, a period of nine years. I have allowed for 14 shows per year. I have not allocated a fee for the driver for one show in Pietermaritzburg per year as the plaintiff lives in the town and she testified that she can drive short distances. The remaining 13 shows are allocated as follows:

2 shows in Durban at R500 each	R1 000
2 shows in Cape Town at R1 500 each	R3 000
9 shows in Gauteng/Free State/E Cape at R1 000 each	<u>R9 000</u>
	<u>R13 000</u>
R13 000 per annum x 9 years (2011 -2019)	R117 000
I have allowed 3 shows for 2020 at R500 +R1 000+ R1 500	R3 000
Total	<u>R120 000</u>

The 'normal' contingency applied to past loss of income is 5%.³² I am of the view that a higher contingency of 15% is appropriate given the fluctuating figures given by the plaintiff and Mr Govender and in the reconciliations. The amount awarded for past loss of income is consequently R102 000.

Future loss of earnings

[120] The use of a driver for long distance business trips by the plaintiff does not have to be factored into the claim for future loss of earnings as the plaintiff will no longer be travelling to shows and will assume a sedentary capacity as manager. This claim is based therefore based only on the cost of employment of an additional demonstrator. The difficulties already identified in the plaintiff's evidence are also relevant to the determination of her future loss of income. However the plaintiff has provided details of the income she has declared to the receiver. While the plaintiff seeks to perpetuate the under declaration of her income to SARS in this court by admitting that her income on the returns she submitted to SARS is less than the income of R13 000 per month on

³² Ibid para 30.

which she has based her claim for loss of earnings, it is untenable that a court perpetuates her unlawful conduct. Therefore I am of the view that the only basis for the calculation of the cost of the future employment of a substitute demonstrator are the figures reflected as member's salary on the SARS returns. The total salary declared from 2013 to 2019 is R459 000, which translates to an average salary of R5 464 per month.

[121] The plaintiff may not be able to perform the function of a demonstrator but she remains the driving force behind business conducted by Indigo Rain CC, and she can continue to arrange exhibitions and supervise her staff as she has done in the past. On the fallacious belief that the plaintiff was not working when interviewed, both occupational therapists noted that the plaintiff will not be able to 'return to work' as a promoter. However, Ms Stirton opined that claimant's current vocation as a business manager was appropriate and reasonable as she was able to work flexible hours and rest as required. Ms Reddy agreed that if the plaintiff had to work on a phone or computer, she could continue to work, albeit in a supervisory capacity and earn a living. On the facts, the risk of the plaintiff being forced to seek a living in the open labour market, or the possibility of her choosing to do so, is remote. Such financial statements of Indigo Rain CC that have been provided show continued growth from 2011 to 2019. As already held, there is also no evidence that the plaintiff received less from Indigo Rain CC by way of drawings because of the close corporation's 'reduced' income.

[122] In the premises, the plaintiff's future loss of earnings must be actuarially calculated on her declared income, her age and prospective retirement age and her ability to run her business operations and supervise her employees. Although Ms Reddy suggested an earlier retirement of eight to ten years it was based on the incorrect information that the plaintiff was no longer working at all. I have also taken into consideration that there were no shows from March 2020 and even when the plaintiff testified in March 2021 there were no demonstrations of her products taking place, and there was no indication that the shows had resumed when the trial resumed in October 2021. It would therefore be patently unfair to order that the defendant reimburse the

plaintiff for this period. The downturn in the economy is also pertinent. I find a higher contingency as suggested by Mr *Naidoo* appropriate. I issue the following directions for actuarial calculations:

Future loss of earnings

- (a) To be calculated from 1 November 2021 to date of retirement of plaintiff at age 60 years.
- (b) It is assumed that life expectancy has not been compromised.
- (c) The plaintiff's average income as demonstrator/manager is R5 464 per month as at end of 2019. The average income will also apply as at 1 November 2021.
- (d) It is assumed that the plaintiff will not work as a demonstrator but will continue to manage the shows and sale of leather care products. Therefore there is a residual earning capacity.
- (e) Future income from 1 November 2021 accruing to the plaintiff will increase in accordance to inflation and to be capitalised.
- (f) 25% contingency to be applied.
- (g) All other considerations normally taken into account in actuarial calculations of this nature to be taken into account.

General damages

[123] While it is trite that the court 'has a wide discretion to award what it considers to be fair and adequate compensation to the injured party',³³ it is not uncommon to seek guidance from case authorities on the subject. Mr *Naidoo* contended that an award for general damages in the sum of R400 000 is appropriate and provided the following cases as guidelines in respect of the quantum. (I have selected only those cases which are consistent with my findings in respect of the injuries suffered by the plaintiff in the fall and the sequelae.)

³³ *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) para 23.

(a) In *Road Accident Fund v Marunqa*,³⁴ the plaintiff sustained the following injuries:

- (i) A fracture of the left femur.
- (ii) Soft tissue injury in the chest area.

The trial court awarded R375 000 which was substituted on appeal to an amount of R175 000 in 2003 which in current terms equates to R510 000.

(b) In *Lee v Road Accident Fund*³⁵ the plaintiff sustained multiple fractures including the following namely:

- (i) A back injury;
- (ii) A comminuted fracture of the right knee.
- (iii) An elbow fracture.

The trial court awarded the sum of R250 000 which in current terms equates to R431 000.

(c) In *Coetzer v RAF*³⁶ the Plaintiff sustained the following injuries:

- (i) A back injury.
- (ii) A compound fracture to the left femur with complications.

The plaintiff recovered almost fully from the leg injury but suffered continued and residual effects of the back injury. His employment as an auto electrician was in the circumstances severely curtailed. He required now to take up sedentary employment. The trial court awarded the plaintiff the sum of R100 000 which equates in current terms to R229 000.

(d) In *Bosch v Parity Insurance Co Ltd*³⁷ the plaintiff sustained the following injuries:

- (i) 17 Broken ribs.
- (ii) A broken knee joint.

³⁴ Ibid.

³⁵ *Lee v Road Accident Fund* [2015] JOL 34211 (GNP).

³⁶ *Coetzer v RAF* [2006] JOL 17642 (T).

³⁷ *Bosch v Parity Insurance Co Ltd* [1964] 1 All SA 251 (W).

An amount of R2 000 was awarded by the trial court which equates in current terms to R193 000.

- (e) In *Titus v Road Accident Fund*³⁸ the plaintiff sustained the following injuries:
- (i) Indeterminable internal knee damage behind the knee joint which commenced from after the accident and at times it became so severe as to cause the plaintiff to give up remunerative jobs.

The award was initially R80 000 which equates in current terms to R202 000.

- (f) In *PM v Road Accident Fund*³⁹ the plaintiff sustained:
- (i) an injury to her C1 and C2 vertebrae and an injury to her knee, with the knee recovering completely.

She was awarded a sum of R300 000, which in current value is R354 765.45.

[124] Mr *Maharaj* has in response referred to *Lee v Road Accident Fund*,⁴⁰ a judgment of Makgoka J in which the learned judge referred to two of the cases relied on by Mr *Naidoo*:

'[26] In *Titus v Road Accident Fund* 2003 (5) C & H E 7-9, the plaintiff (age not stipulated,) suffered an indeterminable internal damage behind the knee-joint leading to persistent pain which commenced from after the accident and at times became so severe as to cause the plaintiff to give up remunerative jobs, avoid the physical aspects of training courses and take excessive sick leave. He was awarded R80 000.00 for general damages in 2003, which amounts to R120 000.00 today.'

In the case of *Marunga* the plaintiff suffered a fracture of the left femur, a soft tissue injury to the chest, bruises to the forehead and the left knee. He was hospitalized for 5 months of which two were spent with his leg in traction and in plaster cast. For some 4 years after the accident he was still receiving medical treatment. His left leg had a shortening of 3.5 centimetres and he was required to undergo 2 further surgical procedures which would cause him further pain and suffering. He was awarded R375 000,00 which on appeal was reduced to R175 000,00.

³⁸ *Titus v Road Accident Fund* C & H Vol 5 E7-9.

³⁹ *PM v Road Accident Fund* (5881/2017) [2019] ZAFSHC 168 (19 September 2019).

⁴⁰ *Lee v Road Accident Fund* (24915/2008) [2010] ZAGPPHC 276 (18 June 2010).

Mr *Maharaj* has pointed out that the plaintiff's injuries are not as severe as in the aforementioned cases. Further the plaintiff has been advised to undergo a total knee replacement which would substantially reduce the pain that she allegedly endures, but has elected not to undergo such surgery. The plaintiff's lower back condition was pre-existing and Dr Osman testified that the fall would have exacerbated the plaintiff's pain which would have settled within six to seven months. He therefore submitted that an amount of R140 000 would more than adequately compensate for the plaintiff's pain and suffering.

[125] In determining this claim I have taken note of the report of the occupational therapists and their joint minute in particular, in respect of the plaintiff's state of mind and her self-esteem as well as her post-morbid physical limitations such as her inability to dance and run. I have also taken into consideration the treatment the plaintiff has undergone and her election (to which she is entitled) not to undergo surgery. Further the approval of domestic assistance, assistive devices, the referral to a biokineticist and dietician and the measures suggested by Dr Osman will assist the plaintiff in respect of future pain in her knee and back. I am satisfied that the sum of R250 000 is the appropriate compensation.

[126] The quantum already determined by the court is subject to the reduction of 10% being the agreed apportionment by the parties.

(i)	Past medical expenses	R21 382.25
(ii)	Assistive devices and domestic assistance	R327 840
(iii)	Past loss of earnings	R102 000
(v)	General damages	<u>R250 000</u>
	Sub -Total	R701 222.25
	Less 10%	<u>R70 122.23</u>
	Total	<u>R631 100.02</u>

As these figures are final there is no need to delay payment thereof until the further issues are resolved.

Costs

[127] Mr *Maharaj* requested that the court not make an order in respect of costs until the judgment on quantum has been delivered, whereafter the parties may advance argument on costs. There was no objection to this request. I therefore at this stage do not make an order.

Order

[128] The following order do issue:

1. The defendant is directed to pay to the plaintiff the sum of R631 100.02 (six hundred and thirty-one thousand one hundred rand and two cents) as part payment of the plaintiff's claim, which sum shall be paid within fourteen (14) days of the date of this judgment by electronic funds transfer into the trust account of the plaintiff's attorneys Kooben Chetty & Associates:

Account name: Kooben Chetty & Associates Trust account

Bank: Nedbank

Branch: KZN Inland

Account no.: 1165 035 960

Branch code: 116 535

2. The following directions are issued in respect of future medical expenses:
 - 2.1 Future medical expenses are to be computed by an actuary in respect of the following interventions/ treatments:
 - (a) medication - R200 per month
 - (b) orthopedic surgeon - 1 consultation per annum
 - (c) wedge for the heel

- (d) knee brace
 - (e) evaluation by a biokineticist
 - (f) evaluation and diet plan by a dietitian
- 2.2 It is to be assumed that the plaintiff's life expectancy remains unaffected.
- 2.3 Contingency of 20% is to be applied.
3. The following directions are issued in respect of future loss of earnings:
- 3.1 Future loss of earnings are to be actuarially calculated from 1 November 2021 to date of retirement of plaintiff at age 60 years.
 - 3.2 It is assumed that life expectancy has not been compromised.
 - 3.3 The plaintiff's average income as demonstrator/manager is R5 464 per month as at end of 2019. The average income will also apply as at 1 November 2021.
 - 3.4 It is assumed that the plaintiff will not work as a demonstrator but will continue to manage the shows and sale of leather care products. Therefore there is a residual earning capacity.
 - 3.5 Future income from 1 November 2021 accruing to the plaintiff will increase in accordance to inflation and to be capitalised.
 - 3.6 25% contingency to be applied.
 - 3.7 All other considerations normally taken into account in actuarial calculations of this nature to be taken into account.
4. Costs are reserved.

Moodley J

Judgment on costs delivered 28 July 2023 (ex tempore)

MoodleyJ:

[1] I delivered judgment on 31 January 2022 in which I ordered part payment of the plaintiff's claim and issued directions in respect of future medical expenses and future loss of earnings. No order was issued in respect of costs pursuant to submissions by the defendant's counsel, Mr Maharaj. There was no objection on behalf of the plaintiff.

[2] There was no communication from the legal representatives of the parties thereafter until about 1 month ago I requested my registrar to enquire from the attorneys of record as to whether the outstanding issues had been resolved between the parties and the file may be closed. On receipt of correspondence to the effect that the issue of costs remained in dispute, I declined an invitation by the plaintiff's attorneys to hold a pre-trial conference, and directed that the issue of costs be set down for argument. This is therefore the only issue for determination at this hearing.

[3] The parties are represented today as they were in the trial:

The plaintiff: Mr V M Naidoo SC assisted by Mr M Chetty and
the defendant by Mr M Maharaj.

The instructing attorneys remain unchanged. Both parties have delivered Heads of argument as directed.

[4] The following should be noted:

1 Pursuant to the order issued on 31 January 2022, the Defendant has paid to the Plaintiff the sum of R911 309-02 in settlement of the Plaintiff's claim for past and future medical expenses, assistive devices and domestic assistance, past and future loss of earnings and general damages.

2 On 8 March 2021, when the matter proceeded to trial before me on quantum the plaintiff's claim was for damages, computed on all heads of damages, in the amount of R5 009 850.37. The defendant has pointed out that the plaintiff's initial claim was approximately R400 000. Her claim was increased to approximately R3 million when the Defendant conceded liability at a ratio of 90:10, before her claim was pinned at just over R5 million at the commencement of the trial.

3 On 16 November 2020 the defendant made an offer of settlement in terms of Rule 34(1) and (5), without prejudice and without admission of liability on quantum, in the amount of R500 000 and costs as set out in paragraph 2 of the notice of tender.

[5] On the issue of costs, there are several major points of dispute:

- 1 Whether the plaintiff is entitled to 100% of her party and party costs;
- 2 Whether the costs of the Plaintiff's experts, the Industrial psychologist Shaida Bobat, the actuary Munro Forensic Actuaries, the Occupational Therapist Gwen Reddy and the orthopaedic surgeon Dr Yachad, should be allowed, whether in full or partially;
- 3 Whether the costs of a bundle of financial statements filed by the plaintiff were reasonably incurred and should be allowed;
- 4 Whether the reserved costs relating to the adjournment on 16 November 2020 ought to be paid by the plaintiff; and
- 5 Whether the costs of two counsel, viz senior and junior should be allowed.

Principles relevant to the ordering of costs

[6] Briefly summarised:

- 1 All costs, except those specifically enacted, are in the discretion of the judge, which discretion must be judicially exercised on a consideration of the facts of the case, and is essentially a matter of fairness to all the parties.
- 2 The general principle that costs follow the event is also subject to the discretion of the judge. The judge may disallow costs or a portion thereof should the facts of the case or the conduct of a litigant warrant such deprivation of costs.

3 Where there is a gross disproportion between the amount claimed for damages and the amount awarded, the plaintiff will not necessarily be deprived of costs- the circumstances of the matter must be considered and warrant such deprivation.

[7] It is common cause that the payment in settlement of the Plaintiff's claim exceeded the tender of R500 000, which is the basis for the submission by Mr Naidoo that the plaintiff is entitled to an order for party and party costs, which is also consistent with the general rule that a successful party is entitled to costs.

[8] The defendant has advanced several contentions to the contrary and identified factors which the Court, in the exercise of its discretion, ought to take into account, which will justify a deviation from the aforesaid general rule:

Plaintiff's conduct of litigation and her performance as a witness

1 Inflated / Exorbitant Claim

(a) The amount claimed is grossly disproportionate to the amount realistically claimable by the Plaintiff for what is termed a "slip and fall" claim.

(b) the Plaintiff's initial claim of approximately R400 000 increased to just over R5 million, after the Defendant conceded liability although the factors giving rise to the Plaintiff's claim remained unaltered.

(c) This increase was not only unjustified but lead to the inference that:-

(i) the plaintiff was not acting bona fides; and

(ii) she did so because her claim effectively lay against the insurers of the Defendant.

The Defendant submits that it has, in contrast, acted properly by conceding liability at an early stage and tendering an offer based on precedent. Therefore the costs recoverable by the plaintiff should be limited.

2 The conduct of the Plaintiff in the trial

Extrapolated from my judgment, the defendant submits that

- (a) the Plaintiff was not a satisfactory witness;
- (b) she failed to disclose material aspects of her income and her employment activities to the experts;
- (c) she included the sum of R120 000 for knee replacement when she was adamant that she would not go for such surgery.
- (d) She exaggerated the injury to her back in an attempt to enhance her claim.
- (e) She tailored her evidence in respect of the size of her business in order to seek greater compensation.

The Defendant points out further that in its evaluation of the Plaintiff in the judgment, the court held that she was unable to explain the inconsistencies in her testimony and at times failed to answer important and very relevant questions.

3. The plaintiff undertook at a Rule 37 Conference held on 23 September 2020 inter alia to provide the Defendant by 30 September 2020 with:-

- (i) a schedule and copies of past hospital and medical expenses substantiated by invoices;
- (ii) the full names, contact details (phone numbers) and proof of amounts paid in respect of all employees of the Plaintiff's business.

There was no compliance with the undertaking nor was an explanation for the non-compliance forthcoming.

Mr Maharaj has submitted that had such documents been furnished, they would have lent some credence to that portion of the Plaintiff's claim.

In the light of all of the foregoing contentions, the defendant submits that the Plaintiff ought to be directed to forfeit 50% of her party and party costs.

[9] In response Mr Naidoo has contended that to deprive the plaintiff of her costs would be unfair and unwarranted. His argument is on record and I have taken his submissions into account.

Evaluation

[10] It is trite that a successful party will not be deprived of its costs just because its claim was excessive or extravagant. However an increase in the claim without a proper basis therefor, and a claim which the plaintiff knows is excessive and therefore partially fraudulent may result in a deprivation of costs.

[11] In this case the plaintiff had the benefit of advice from two counsel and an attorney. There is in my view merit in the defendant's contention that the plaintiff ought to have known, and indeed ought to have been advised, that there were portions of her claim that she could not substantiate or prove – past medical expenses and the employees of Indigo Rain and the salaries paid to them without the necessary supporting documentation .

[12] However I have interrogated the attempt made by the plaintiff in respect of the past medical expenses in the judgment and am of the view that there was no fraud intended or intent to mislead the court. However the discrepancies in respect of the employees and their salaries and failure to disclose the continued attendance at demonstrations by the plaintiff to the Occupational therapists, as well as the other adverse findings in my judgment cannot be ignored as they are indeed relevant as the reports based on misleading information or omission of facts become in themselves unreliable and misleading to a court that is dependent upon such expert reports to assist it in arriving at a fair and just order.

1 Expert Reports

[13] While it therefore follows that the expert reports did not in some respects serve the purpose for which they were intended, it was nevertheless necessary for the Plaintiff to obtain the services of experts in order to discharge the onus on her to prove that she was injured when she fell and suffered damages consequent thereto, and thereafter the quantum thereof. Without the input of the experts the sequelae of the fall could not have been determined and the quantum of damages could not have been computed. Although it is apparent given the judgment of this court and the amount paid in settlement of the claim, that the quantum was in fact excessive, it is however in my view

not a sufficient ground for depriving the plaintiff of the costs of the experts. She has already to an extent borne the brunt of her disingenuity in the settlement amount of her claim and the order I will issue will also reflect the exercise of my discretion.

2 Bundle E

[14] The next issue is whether the costs of a bundle of Financial statements consisting of 370 pages filed by the plaintiff during the course of the trial were reasonably incurred and should be allowed. I do not require much persuasion to specifically disallow these costs – I have commented on the unnecessary volume of the financial statements with which the court was burdened to no avail or useful purpose. In fact the only page of any relevance was page 368 which was the schedule of staff salaries for Indigo Rain CC contained in a single folio. Mr Naidoo's concession on this issue is properly made.

3 The reserved costs of the adjournment on 16 November 2020

[15] The defendant submits that the plaintiff was the cause of the adjournment and therefore the costs ought to be paid by the plaintiff. Mr Naidoo has responded pointing out that the plaintiff was ready to proceed and her experts were available.

However having had recourse to the order made, the request to the plaintiff for the financial statements which were not provided and the amendment to the particulars of claim, I am satisfied that the plaintiff was in fact responsible for the adjournment and should therefore bear the costs thereof.

4 Costs of two counsel, viz senior and junior

[16] Counsel for the Plaintiff have provided a number of authorities to sustain the argument that the employment of 2 counsel was warranted. The defendant has argued to the contrary. However given the nature and amount of the claim, I am persuaded that the services of two counsel were justified and not mere overcaution.

Order

[17] It is ordered that:

1. The Defendant is directed to pay 95% of the Plaintiff's party and party costs on the High Court scale as taxed or agreed; disbursements are to be excluded when the 95% of the costs are calculated.

2. The Defendant is directed to pay the following party and party costs on the High Court scale of the plaintiff, as taxed or agreed, subject to paragraph (1) of this order:

2.1 In accordance with the provisions of Rule 69 of the Uniform Rules of court, the costs of two counsel (Senior & Junior) where so employed, which costs are to include, (but not restricted to) the following:

2.1.1 advice on evidence;

2.1.2 heads of argument in respect of quantum and costs;

2.1.3 preparation for and attendance at Court on 11 May 2020.

2.1.4 preparation for and attendance at Court on 8, 9 and 10 March 2021

2.1.5 preparation for and attendance at Court on 4 and 5 October 2021

2.1.6 preparation for and attendance at Court on 27 July 2023;

2.1.7 new term refresher fees wherever applicable;

2.1.8 Preparation for consultations, traveling time and expenses, for consultations with Experts, Plaintiff and/or witnesses.

2.1.9 Preparation for and consultations for trial between themselves and/or Attorneys, with or without Plaintiff or witnesses being present.

2.2 The costs incurred in order to prove liability and reserved costs orders granted in the matter, save for the adjournment on 16 November 2020, which shall be paid by the plaintiff to the defendant;

2.3 The reasonable and necessary costs of experts listed below for perusal of documents, research and preparation conducted for their respective medico-legal

consultations with Plaintiff and for drawing of their medico-legal reports and/or supplementary reports, addendums, joint minutes, including consultations with plaintiff's legal representatives.

2.3.1 Plaintiff's Experts are:

- i. Shaida Bobat, Industrial Psychologist;
- ii. Gwen Reddy, Occupational Therapist;
- iii Dr. R Yachad, Orthopaedic Surgeon;
- iv Munro Forensic Actuaries, Actuary.

2.4 The attendance or reservation fees, qualifying fees, perusal of documents, travelling time and expenses for attendance at court of experts as follows:

2.4.1 Gwen Reddy on 8 and 9 March 2021;

2.4.2 Dr. R Yachad on 8 March 2021;

2.4.3 Shaida Bobat on 9 March 2021.

2.5 The Plaintiff's reasonable travelling and subsistence expenses to attend the assessments and consultations with the experts of Plaintiff and Defendant.

2.6. The reasonable and necessary costs of the Plaintiff's legal representatives for preparation for and consultations with the Plaintiff's expert witnesses, consultations between themselves and other witnesses, whether or not the Plaintiff was present.

2.7. The costs consequent upon Plaintiff's Attorney and/or Counsel attending Rule 37(4) and Rule 37(8) pre-trial / case flow management conferences held to date.

2.8 The reasonable and necessary costs of preparation for and travelling time and costs incurred in respect of the attendance at an inspection-in-loco held by the Plaintiff's legal representatives.

3. The Plaintiff shall, in the event that costs are not agreed, serve a Notice of Taxation on the Defendant's attorney of record.
4. The Plaintiff shall allow the Defendant fourteen (14) days to effect payment of the taxed or agreed costs.
5. The Defendant shall be liable to pay any additional costs reasonably and necessarily incurred pursuant to this order being granted for the enforcement of or recovery of the taxed or agreed costs from the defendant.

MOODLEY J

Trial

Dates of Hearing: 8-10 March 2021

4-5 October 2021

Date of judgment: 31 January 2022

Costs

Date of hearing : 28 July 2023

Date of judgment: 28 July 2023

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