IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: **CA143/2017**

Date heard: 12 February 2018

Date delivered: 20 March 2018

In the matter between:

ANGELIQUE PRINCE Appellant

and

ROAD ACCIDENT FUND Respondent

JUDGMENT

LOWE, J

INTRODUCTION

[1] In this matter Appellant sustained serious bodily injuries in a motor vehicle collision on 4 June 2010 when she was run down by a minibus taxi while crossing the street. On 19 June 2015 the court made an order declaring the Respondent liable for 80% of the Plaintiff's (Appellant's) damages. I will refer hereafter to Appellant as Plaintiff.

[2] On that occasion the order of court made by agreement between the parties, purportedly settled Plaintiff's claim for general damages, as also past and future medical expenses. In point of fact the learned trial Judge omitted to mention that this also included an interim payment for past loss of earnings. Having raised this with the parties in argument in the appeal I am satisfied that it was the parties intention that the interim payment for past loss of earnings was intended to operate up until the date of the order (being 19 June 2015) and that such loss of earnings as there may be subsequent to that date would be dealt with subsequently at the trial, as there might be some loss that should be regarded as past loss of earnings, at least until date of the trial and award.

[3] In dealing with this, and having heard the evidence, the trial judge found as follows:

> *"The plaintiff's claim in respect of future loss of earnings and earning capacity is dismissed with costs".*

[4] It is this order against which the appeal is aimed, that appeal with the leave of the trial Judge to the Full Bench. At the commencement of the appeal, it was necessary for Plaintiff to move an application condoning the late prosecution of the appeal. This was required, Plaintiff claiming through his attorney, Mr Walter that the delay was occasioned by problems concerning the transcription of the evidence and preparation of the appeal record. It seems clear that the delay was through no fault of Plaintiff personally, but due to his attorney's absence primarily at one time on holiday in the United States of America, together with the delay in transcribing the recording, it being alleged that Respondent suffered no prejudice thereby, the delay

being less than three months. This was contested by Respondent, it being argued that there was an unexplained delay in the launching of the application for condonation, that there was a lack of attention to matters, and that there had been no allegation of prospects of success on appeal, which it was argued was an important consideration. As I understand our law, whilst it is advisable to set forth briefly and simply essential information as may enable the Court to assess an Applicant's prospect of success, the failure to do so is not necessarily fatal, the Court to consider the entire matter and all relevant issues. It was thus that judgment on the condonation issue was reserved in order that this be considered in the light of the issues raised in the appeal generally. Having regard to the conclusion reached in this matter on the merits of the appeal, an appropriate order will be made, demonstrating the result which I reach on the condonation application, in the context of the necessary requirements as also considering justice and equity. The issue of costs in the condonation application are also similarly dealt with, Respondent being entitled to oppose the application as it did.

CLASSIFICATION OF DAMAGES

[5] In considering this appeal, it is important to emphasize the classification of damages in our law. There is a general division of damages into general damages and special damages. This applies to bodily injury cases which recognizes the distinction between general and special damages. All patrimonial loss actually incurred, such as for example medical and hospital expenses and past loss of earnings is treated as special damage. Quite apart from this all non-patrimonial loss, such as pain-and-suffering, loss of amenities, and loss of expectation of life is classified as general damage. However patrimonial loss, which up to the trial has

not yet crystallized in actual loss but remains prospective, remains general damage, such as future medical expenses and future loss of earnings. It is thus important to understand that past loss of earnings is treated as special damages, whilst future loss of earnings is treated as general damages.[1]

[6] As pointed out in this authority, the basic principle in respect of an award of damages in this kind of action is that the compensation must be such as to place the Plaintiff, as far as possible, in the position he or she would have occupied had the wrongful act causing injury not occurred. In respect of bodily injury cases the claim is *sui generis* and the measure of damages is necessarily less exact.[2] Further, by virtue of the principle of the once and for all rule it is necessary in one action to seek both past and prospective loss. In respect of prospective damages, which is the subject matter of the appeal, whilst this is a speculative element the loss must be established upon the usual test of a balance of probabilities. Justice may demand that a contingency allowance be made for the mere possibility of certain forms of loss.

[7] In Corbett *(supra)*[3] the following appears:

> "In this regard the distinction is drawn (in principle and not without difficulties) between causation and quantification: it has never been the approach of the courts to resolve the inescapable uncertainties by the application of the burden of proof. Mere difficulty in assessing this amount will not absolve the court from arriving at an estimate. The onus of showing that there is sufficient likelihood of such loss rests upon the plaintiff. This does not, however, mean that where the evidence suggests a range of possibilities, the courts will

[1] See The Quantum of Damages, Volume 1: Corbett Fourth Edition, Gauntlett at p 2-4.
[2] See *Sandler v Wholesale Coal Supplies Limited* 1941 AD 194 at 199.
[3] At p 8.

> select the one least favourable to the plaintiff because he bears the onus, and has not proved that a more favourable possibility ought to be preferred." [4]

[8] It is thus important to emphasize that in this matter the claim for future loss of earnings or loss of employability falls into the heading *"General Damages"*, with all the consequences thereof accordingly. This is prospective loss in the context set out above.

[9] Again as pointed out by Corbett[5]:

> "Before damages payable to the injured person can be assessed it is necessary that the court should determine factually what injuries were suffered by the plaintiff as a result of the defendant's wrongful act..."

In this regard the question that must first be answered in the assessment of damages is and what must be determined is:

> "…disability which is likely to impair the injured person's earning capacity or to cause a loss of the amenities of life. Such disability may be temporary or permanent. Where it is temporary and has in fact disappeared at the time of trial, it is not normally of great importance as an independent factor.… On the other hand, where it is permanent or where, though temporary, it extends beyond the time of the trial, then it may cause prospective losses, such as a diminution in the injured persons earning capacity or an impairment of the amenities of life, for which compensation should be made by the award of damages. Moreover, a permanent disability may be present at the time of the trial or it may be one which will only manifest itself at some future date."

[4] See *Bailey v Southern Insurance Co Ltd* 1984 (1) SA 98 (A).
[5] p 30.

[10] I accept, that the Plaintiff must always (on a balance of probabilities) establish the nature and extent of the disability and that if it is alleged to be permanent that there is no reasonable prospect of recovering. If a future disability, the Plaintiff must show that it is reasonably probable that the disability will supervene in the future.[6] In my view, however, the correct approach, as set out in Corbett, is to make a contingency allowance for certain forms of loss where the basis therefore has been laid in the evidence.

[11] The disability may be physical or mental or both. Good examples of mental incapacity are anxiety neurosis, personality changes, and disturbance of an injured person's emotional balance.

[12] As set out in Corbett *(supra)*[7]:

> "It is inconvenient in that in all cases where loss of earnings – past and future – features, this division cuts across the classification into general and special damages. While such loss of earnings, both past and future, constitutes patrimonial loss, loss of past earnings is regarded as special damage and loss of future earnings (or loss of earning capacity) is regarded as general damage."

[13] Further, Corbett *(supra)*[8] set out various approaches to the assessment of damages, it is said:

> "Generally, however, the modern tendency is to compute the special damages item by item and then to assess the general damages, if any, under the various main heads of damage, which are usually taken as being pain and suffering, disfigurement, loss of amenities,

[6] (Corbett at 30)
[7] At p 35.
[8] At p 36.

shortened expectation of life, and loss of future earnings (or loss of earning capacity, as it is often described); and then to award as damages the aggregate of these various sums."

[14] It is stressed that the court is not obliged to assess general damages in this way and may merely award a globular sum if it so wishes.

[15] I therefore stress that the assessment of damages under different heads may be dissimilar, and require separate consideration. This would also accord with the purpose served by Rule 18 (10).[9]

[16] I accept, that in a claim for past loss of earnings it is necessary for the Plaintiff to establish on the evidence that the injuries sustained did prevent the earning of a living in the normal way and what the earnings would have been but for the injury. This however usually relates to Plaintiff's loss up to the date of trial and are special damages, as I have set out above.

[17] In respect of loss of earning capacity and the future inability to earn a living temporarily or permanently, this being reduced capacity over the period of impairment, is a species of general damage as referred to above. Also as referred to a court should not rely purely on strict mathematical calculation and even annuity calculations have on occasions been disapproved.[10] As however in respect of future earnings there are usually at least some known factors that afford some guidance to the court attempting to arrive at a sum payable such as to give Plaintiff a periodic payment or lump-sum appropriate to the case.

[9] *Bailey (supra)* at 113 C to D. Visser PJ 407-409: LLB Dissertation UNISA 1980.
[10] Gauntlett *(supra)* 46 - 47.

[18] In *Bailey (supra)* the court emphasized that any inquiry into damages for loss of earning capacity is of its nature speculative involving a prediction as to the future. The Court said that all that could be done was to make an estimate, which was often a very rough estimate, of the present value of the loss. The Court discussed two possible approaches, the one to make a round estimate of an amount which seemed to the Judge fair and reasonable, a matter of guesswork, the second to make an assessment by mathematical calculation on the basis of assumptions resting on the evidence which might vary from probable to speculative. The Court said that either involved guesswork to a greater or lesser extent but that the Court could not for that reason adopt a *non possumus* approach or make no award.

[19] What is clear is that the learned trial Judge has a large discretion to award what, under the circumstances, he considers right and may be guided, but is not tied down, by actuarial calculations.

[20] *Gauntlett* suggests that if there is a permanent impairment of earning capacity then one should calculate the present value of the future income but for the injuries, the present value of the Plaintiff's estimate of future income, if any, having regard to the disability, subtract the one from the other and adjust the figure in the light of all relevant factors and contingencies.[11]

[11] At p 48.

[21] It must, however, be emphasized, that once it is established that there is a loss of earning potential, it is not open to simply avoid the issue on the basis of insufficient evidence in a matter such as this, as I point out hereafter.

[22] In the result, in this appeal it is necessary to analyse the approach of the learned Judge *a quo* in dismissing the claim for future loss of earnings, and thereafter consider the evidence against the outline of the approach set out more fully above.

[23] Regard may be had to *Griffiths v Mutual and Federal Insurance Co Limited* 1994 (1) SA 535 (A), in which matter the Appellant had suffered a severe whiplash neck injury in a collision. Plaintiff was a successful attorney and would have gone on to practice as an advocate. The court accepted that it was simply not possible to place evidence of her potential earning before the court and that there was no evidence upon which a mathematical calculation be made. The court held that once it was satisfied that pecuniary damage had been suffered, it must make an award of an arbitrary amount of what seemed to me to be fair and reasonable even though the result might be no more than informed guess. The court held that Appellant had adduced sufficient evidence upon which a global award could be made. The Appellant was intelligent, ambitious, hard-working and had set up a successful business as an attorney, she was well-qualified to be successful as an advocate. She had been left with a permanent reduced working capacity and her productivity

had been diminished, the Court awarded R200,000.00 for loss of earning capacity. The Court referred to and relied upon *Bailey.*[12]

THE JUDGMENT *A QUO*

[24] The learned trial Judge in a meticulous manner correctly set out, in summary, the factual and expert evidence that was placed before him.

[25] On a reading of the record that summary is perfectly accurate, nor, as I understood the argument, was it suggested otherwise.

[26] It would serve no purpose to reinstate that summary other than in the shortest relevant terms for the purposes of this appeal.

[27] It should be said, however, that the learned trial Judge was under the impression that what was before him related only to what might correctly be referred to as future loss of earnings, and it was not made clear to him that the order of 19 June 2015, which incorrectly referred to only future loss of earnings, in fact envisaged that the contribution that was made was merely a contribution to past loss of earnings being reserved, and that in fact it was Plaintiff's claim for the remainder of past loss of earnings from 19 June 2015, to date of trial, and Plaintiff's entire claim for future loss of earnings that required to be adjudicated.

[12] At 113G-114B.

[28] When this was brought to the attention of counsel during argument, it seemed to me that notwithstanding Respondent's resistance, this was inevitably the case. Both Plaintiff and Respondent were given the opportunity of filing further heads of argument relevant to the appropriate calculation of past and future loss of earnings on a strict timetable. Respondent in its supplementary heads went outside the brief, to say the least, but I have in any event considered all the arguments raised in reaching my conclusion in this appeal.

[29] Plaintiff in effect sustained a compound fracture of her left tibia, rib fractures and abrasions. She underwent an open reduction and internal fixation of the fracture of the tibia but was discharged suffering from a persistent multidrug-resistant wound infection and non-union of the fracture. She thereafter underwent multiple surgical procedures over a period of four years and multiple courses of antibiotics, and was kept in an isolation ward for a time.

[30] As a consequence of the injuries sustained and the complications therefrom, she suffered physical and psychological impairment.

[31] At the time of the collision she was temporarily employed at St George's hospital as an admissions clerk. It was Plaintiff's case that she would have become a permanent employee, would have been promoted to an admissions supervisor and continued to retire at 63. It was alleged that in view of the psychiatric and psychological impairment she was unable to continue with her current employment as an admissions clerk. She was, as I have said at the time of the trial, employed in

a similar capacity at Mercantile Hospital, it being alleged that she would be forced to resign and unlikely to find alternative employment in the future. She claimed payment of the sum of R3,695,000.00 being her estimated future loss of earnings.

[32] Importantly the learned trial Judge accepted that it was not in dispute that she indeed suffered from psychological or psychiatric impairments in consequence of the collision and the injuries sustained. The question was to what extent this affected her earning capacity. Defendant took the rather simplistic stance that since she was then employed in a permanent capacity at Mercantile Hospital she had suffered no loss of earning capacity. In the alternative it was suggested that such future loss of earnings, as she may have, could be met by a lump-sum to cover periods during which she may not be employed.

[33] Plaintiff is 37 years old, married with two children and commenced working in the hospital environment in 2008. Her employment at Mercantile Hospital came about in 2012, but she could not take it up, in fact becoming employed in 2014. She works day and night shifts which includes work in the casualty or emergency room from time to time. In summary this caused her considerable difficulty, from a psychological point of view, having regard to what she had to deal with in casualty resulting in panic attacks at work and being off for periods. When her supervisor removed her from casualty department this caused difficulty with other employees who were dissatisfied with perceived favouritism. She then as a result of embarrassment continued to work in casualty to her detriment.

[34] She applied for another position in the same hospital, which did not require casualty work, but she was unsuccessful. She had been *"booked off work"* on occasions due to the panic attacks and anxiety but has felt that she was forced to continue. She said she found it increasingly difficult to cope, became forgetful and had received a formal warning as a result of her failure to carry out work properly.

[35] She has become addicted to a scheduled tranquilizer which she obtains without a prescription but nevertheless suffers panic attacks and anxiety. This is, in my view, a highly significant issue especially as the medical evidence establishes that she must stop the abuse of the substance, a matter of not inconsiderable difficulty.

[36] It seems to me from the judgment that the learned trial Judge accepted Plaintiff's evidence in this regard.

[37] Dr Crafford, a psychiatrist, was called for Plaintiff and in summary described her as having severe post-traumatic stress disorder, a primary disorder very difficult to treat. She also had Agoraphobia. She had, he said, a general anxiety disorder and carefully described the severe impact this had on her daily and work life. He also diagnosed a major depressive disorder with fear of death but also suicidal urges and ideation. He said this disorder severely impacted her ability to function in the severe impairment range. He said she required hospital psychiatric treatment. Importantly he said the prognosis was *"guarded"* put otherwise that the treatment required may not achieve the desired result. He said that her present working circumstances were unsustainable and that she was unemployable presently in the

open labour market. The judge *a quo* commented that this view did not take cognizance of the fact that she was presently employed and that Dr Crawford had incorrectly based his view on the fact that Plaintiff's employer had reacted sympathetically.

[38] Dr Reddy, Plaintiff's current treating psychiatrist, gave evidence that she had consulted Plaintiff on 12 May 2016, and several times thereafter, confirming the diagnosis set out above. She found Plaintiff unfit to work on 7 October 2016 and booked her off although Plaintiff did not want this as she had little available sick leave.

[39] Dr Reddy importantly expressed the view that Plaintiff had a chronic condition and having regard to the length of time over which she had suffered this indicated a *"poor prognosis".*

[40] She suggested however, said the learned trial Judge, that the only way to determine whether Plaintiff would work in the future was to allow her time to be under medication and treatment but stated importantly that it was a matter of speculation whether this would have the desired effect, that she could not say the medication would not work but noted the Plaintiff had not responded positively to the medication. She said that if a two-year period of treatment did not change Plaintiff's level of functioning she would be unable to be rendered functional to a level that would allow her to work.

[41] Even when faced with the suggestion that Plaintiff's employer considered her to be functioning effectively, Dr Reddy expressed the view that this was not sustainable given her psychiatric and psychological condition. She said the condition would deteriorate as well as her level of functioning without treatment including inpatient treatment.

[42] I should comment that the psychiatrists were essentially in agreement and painted a picture of Plaintiff's ability to regain her full work of functioning as something that might occur well into the future but were extremely guarded as to this prospect suggesting a poor prognosis.

[43] Mr Eaton, a clinical psychologist concurred with the doctors, considered her currently unfit to work with severe impairment impacting her personal social and occupational functioning.

[44] The learned trial Judge commented that the extent of the psychiatric and psychological impairments were not disputed. There was also, he commented correctly, no evidence to challenge the poor prognosis as offered by Plaintiff's experts. This is the starting point for the inquiry, in my view, as there is nothing other than that poor prognosis for the Court to reach any other conclusion. The learned trial Judge particularly accepted that it was stated by the experts that her prognosis was *"guarded to poor by which was meant that the experts considered it more likely that the plaintiff would not respond positively to treatment than that she would".* And that *"the expert psychiatrists and psychologist considered that the present working*

circumstances of the plaintiff aggravate her condition and accordingly that work in the environment is not sustainable into the future".

[45] I will return to this in due course, but it must be emphasized that in a civil trial it is the probabilities that must be determined in the light of all the evidence. One must step back and ensure that one sees the wood from the trees.

[46] The evidence of industrial psychologist, Dr Whitehead, as referred to by the learned trial Judge, recorded that it was not possible for Plaintiff to remain working at Mercantile Hospital or in any hospital environment, he considering what the chances were of her obtaining alternative employment outside hospital work and what her earning capacity would be if so.

[47] He suggested that Plaintiff would best be able to be employed in the lower quartile of the basic salary for Paterson B1 employee, a person employed in an administrative capacity. This was not seriously contested by Defendant and there was no contradictory evidence.

[48] As to the prospects of being employed, Dr Whitehead said this was extremely small having regard to physical, emotional and psychological compromise, diminished self-esteem and confidence as well as anxiety depressive symptoms and disorders. She would, he pointed out, be competing with people most probably with no history of impairment and would be obliged to disclose her difficulties. She was hence unlikely to obtain employment he thought.

[49] The actuarial reports submitted were premised on Dr Whitehead, using a 30% chance of finding employment at the level suggested, giving a loss of R3,123,300.00, before contingencies.

[50] The only evidence presented by Defendant was that of Plaintiff's supervisor, Ms Mohammed, who stated the Plaintiff was diligent and hard-working, performed competently but that she had recently become ill. This was due to the casualty work issue and she arranged for her not to work in that department. Due to the staff conflict Plaintiff returned to the casualty department but she said that she was not aware of Plaintiff's experience panic attacks again. She said Plaintiff had indeed been booked off work on a few occasions, more recently for an extended period shortly before trial. She confirmed that the position Plaintiff had attempted to obtain in the hospital had been unsuccessful. I must say, that it is perfectly clear that the evidence of Ms Mohammed was, if anything, supportive of Plaintiff, and of no comfort to Defendant, and indeed could not and did not overtake the opinion of psychiatrists, and a psychologist. It must be remembered that her evidence is one dimensional she seeing only the face presented by Plaintiff at work – she exerting extreme effort to retain her employment.

[51] The trial Judge then went on to consider Plaintiff's loss of earning capacity as follows:

> "27. Her present working environment aggravates her psychiatric condition. This much is established both by the evidence of the plaintiff and by the evidence of Drs Crafford and Reddy and by that of Mr Eaton. It is on this basis that the medical experts consider that the

plaintiff's continued employment as an admissions clerk is 'not sustainable' suggesting that she will not be able to continue to perform the work as may be required by the employer.

…

30. The plaintiff's evidence was that she wanted to continue working because she wanted to provide for her family and her children. She wanted to be able to 'cope' like a normal person and she did not want to be subject to panic attacks. She stated that she could no longer see how it was possible to work in the hospital environment although she wanted to return to work. She accepted that she required treatment and stated that she had recently come to the realisation that she may need to be treated as an in-patient in a psychiatric hospital rather than on the out-patient basis that she had insisted upon with Dr Reddy. She also accepted that she needed treatment intervention in order to address her dependence upon a schedule tranquiliser that she uses daily without a prescription.

31. This evidence, it was argued, is at odds with the assumption made by the expert witnesses that the plaintiff will be forced to resign and therefore give up her current employment because of her psychiatric condition.

32. There is, in my view, substantial merit in the argument. There can be no doubt that the plaintiff is in need of urgent psychiatric and psychological treatment in order to address her severe and chronic condition. This was accepted by the defendant. Such treatment, it appears, is likely to be most effective if it occurs on an in-patient basis for a time, thereby removing the plaintiff from her present working environment. Although Dr Reddy could not state whether treatment will be successful, inasmuch as it will improve the level of functioning of the plaintiff, she could not state that it would not have such effect.

33. This, in my view, presents a difficulty for the plaintiff in establishing that she has suffered a loss in earning capacity, i.e. the capacity to add to her patrimony by the application of her talents and skills. The evidence of Dr Reddy goes no further than to establish that the plaintiff has suffered an injury which requires intervention and treatment and which, in the absence of intervention and treatment, may result in the plaintiff being rendered incapacitated. Her evidence also establishes that the treatment may not be effective, by reason of the nature and severity of her current chronic condition. Dr Reddy stated that it is only after sustained treatment, including treatment on an in-patient basis, that it will be possible to determine that no improvement in the plaintiff's functioning can be achieved and therefore whether she is incapable of continuing in her current employment.

34. The same is true of Dr Crafford's testimony and that of Mr Eaton. They both express the opinion that the plaintiff's continued employment is unsustainable, suggesting that a time may arise when she is unable to continue working in that environment. When that may arise and whether that eventuality may be avoided by medical intervention and treatment is unclear on the evidence presented.

35. The plaintiff's case is that she will, by reason of her condition, not be able to continue in her current employment. This is akin to a claim founded upon the assertion that a physical or psychological injury has reduced the working life of a claimant thereby compelling early retirement, except that the projected retirement date remains unspecified and is to be determined if and when it is determined that the injury has rendered her incapable of continuing in employment. Where a claim for future loss of earnings is based upon a required early retirement it is necessary that evidence be tendered to enable a court to determine, on the probabilities that date of early retirement. So too in this instance the evidence should establish when the plaintiff will no longer be capable of continuing in her current employment, since it is from this date that the two hypothetical scenarios referred to by Chetty J in *Prinsloo* can be constructed in order to determine the shortfall.

36. This the plaintiff has not done. Her evidence is to the effect that she will continue to remain employed in her present position and she will seek medical treatment in order to enable her to cope. The medical evidence is that the plaintiff requires treatment as an in-patient before it can be determined that she is no longer able to perform her current work, although the prognosis is not good.

37. There is no suggestion in the evidence that the plaintiff's condition and /or that her work performance is such that termination of her current employment is imminent. To the contrary, it appears that her employer has in place a policy to deal with the incapacity of employees which arises from a medical condition and that there is a process which would be followed. It is however not known what circumstances would trigger this process nor what benefits, if any, the plaintiff would be entitled to as a permanent employee should it be found that she is incapable of performing her current job.

38. Defendant's counsel accepted that the plaintiff will be required to undergo medical treatment in the future in order to address her severe and chronic psychiatric condition. It was also accepted that such treatment may well have as a consequence that the plaintiff is booked off work for a period or periods in excess of the period of remunerated sick-leave provided by her employer. On this basis the defendant accepted that, on the probabilities, plaintiff had established that she will in future suffer a loss of income for those periods when

she is undergoing treatment. In order to address this defendant's counsel suggested that the plaintiff ought to be compensated on an estimated basis for such future loss.

39. Whilst the concession is one which is fairly made in the interests of the plaintiff, this was not the basis upon which the plaintiff prosecuted her claim. Plaintiff's claim was formulated as a claim for a total loss of earning capacity based upon the fact that she will be forced to terminate her current employment and that she will in the future be unlikely to obtain alternative employment. She did not, in the alternative, formulate her claim for loss of earnings based on an estimate of loss for periods in future when she would not earn income while receiving medical treatment. There is also no evidence upon which a reasonable estimate of such loss can be determined.

40. While there can be no doubt that the plaintiff has suffered significant psychiatric and psychological impairments in consequence of the collision which gave rise to the plaintiff's claims, I am unable to find that the plaintiff has established that the injury has had or will have an appreciable effect on her earning capacity. In early 2014, subsequent to the collision and in her injured state, the plaintiff secured permanent employment as an admissions clerk. She has since that date performed her work to the satisfaction of her employer and has, on only a few occasions, been unable to work. While it appears that she has been able to do so at great cost to herself and even at risk to her well-being she has nevertheless continued to apply her skills and talents to the process of contributing to her patrimony. The evidence of the experts is to the effect that she requires urgent and appropriate intervention and treatment for her condition in the absence of which it is unlikely that she will be able to continue. The experts however do not state that such intervention and treatment will not enable her to function in the future despite their guarded prognosis. The plaintiff has the means, by reason of an earlier undertaking in terms of s 17(4) (a) of the Road Accident Fund Act 56 of 1996, to secure such treatment. This she has now sought.

41. At the time of the trial she was booked off work because of her condition. This was not, as I understood the evidence, a permanent cessation of work with her present employer. Whether that may arise in the future is not known. The plaintiff presented no evidence to suggest that, due to her condition and her present inability to function in her work, it was probable that her employment would be terminated. None of the experts expressed the view that it is necessary, in the interests of the plaintiff's well-being, that she should terminate her present employment.

42. That being so, leaving aside the possible periodic lack of earnings whilst undergoing medical treatment, the first of the two hypothetical scenarios referred to by Chetty J upon which a

> calculation of loss occurs does not arise since the plaintiff will, so far as can presently be determined, remain in employment earning commensurate with her pre-morbid capacity. It therefore cannot be said that the plaintiff has established a basis, in fact, for the calculation of future loss of earnings founded on a diminished earning capacity."

[52] In short, the learned trial Judge, notwithstanding his acceptance of the evidence of the psychiatrists and psychologist, incorrectly, in my view, accepted Respondent's argument that although Plaintiff required urgent psychiatric and psychological treatment the factual evidence of Ms Mohammed was at odds with the assumptions made by the experts that she would be forced to resign and give up her current employment. In essence he found that the medical evidence established only that Plaintiff *"may"* be rendered incapacitated but that effectively it had not been established that this would be the case (apparently, in my view, overlooking the issue of the inevitable probabilities), categorizing this is a type of early retirement case and that it was necessary for Plaintiff to establish at what time or date she would be unable to continue her current employment, which he said she had failed to do.

[53] The learned trial Judge recorded that Respondent accepted that on the probabilities Plaintiff had established that she would in future suffer loss of income whilst she was undergoing treatment and that she ought to be compensated herefor. He went on to say that Plaintiff's claim was formulated on a total loss of earning capacity basis and that she had not, in the alternative, pleaded a claim for loss of earnings based on an estimate of periods when she was to be under medical treatment and that there was no evidence upon which such a reasonable estimate could be determined. The learned trial Judge, whilst accepting that she had

significant psychiatric and psychological impairment, found himself unable to conclude that Plaintiff had established that this had or would have an appreciable effect on earning capacity. In so doing he found that she had performed satisfactorily, even at great cost to herself and at risk to her well-being, but found that this did not mean that this would not enable her to function in the future despite the guarded prognosis presented by the medical specialists. In this, as also in his approach to the assessment of loss of earning capacity considered this, the learned trial Judge erred.

THE ANALYSIS

[54] It is useful to be reminded, again at the first principle level, that the party in a civil trial whose version of the facts appears to be the more probable is entitled to judgment, the proof being on a balance – preponderance – of probabilities.

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

[56] Further, once *prima facie* proof or evidence has been provided, that is proof calling for an answer. This becomes conclusive proof on the point in issue usually if no evidence is produced to rebut it.[13] The fact of the matter is, however, that the Court must at the end of the case review all the evidence and evaluate this according to the applicable primary criterion.

[13] See *Ex parte Minister of Justice:* In re *R v Jacobson and Levy* 1931 AD 466 at 478.

[57] In this matter, it must be remembered, that Respondent called no evidence, save that of Mohammed, and that much of what was put to the Plaintiff's experts concerning what Respondent's experts would say must be disregarded as the Respondent's expert was not called (unless of course this elicited agreement from Plaintiff's expert).

[58] As to circumstantial evidence. This is, as referred to be the above facts from which an inference can be drawn, not an assumption.

[59] It must be accepted, of course, that where, for example, a Defendant fails to produce evidence, this does not mean necessarily that the opponent's version in the case, falls to be accepted. The acceptance of Plaintiff's case depends on the probative strength of Plaintiff's case, being whether or not it is sufficient to cast, an evidential burden on the Defendant to present evidence.[14]

[60] It flows from what I have said above, that in considering Plaintiff's claim for loss of earning capacity, it is necessary to consider all the evidence, together with a consideration of the fact that Defendant produced no expert evidence to rebut that of Plaintiff, and particularly:

(a) that at the time of the collision, the Plaintiff was temporally employed as an admissions clerk at St. George's hospital;

[14] See *Ferreira v Santam Insurance Co Ltd* 1995 (3) SA 287.

(b) that at the time of the trial, the Plaintiff was employed in a permanent position as admissions clerk at Mercantile Hospital, this commencing in 2014;

(c) that her work required both day and night shifts, she having run into genuine difficulty when being required to work in casualty, as explained above;

(d) that she was unsuccessful in applying for a different position in the hospital which was similar but did not require her to work in casualty;

(e) that her economic circumstances were such as to oblige her to work and she knows only hospital work;

(f) that Plaintiff explained that she was finding it increasingly difficult to cope, and does so with great anxiety, having become dependent on a highly addictive tranquilizer;

(g) that she was diagnosed with several psychological disorders, PTSD; a panic disorder; general anxiety disorder and insomnia;

(h) that the medical specialists, whose expertise was clearly established, and in respect of which there was no rebutting evidence, considered her current working circumstances as unsustainable, and at least at the time of trial unemployable in the open labour market, that her situation at work was not sustainable, and that her condition would deteriorate unless receiving sustained treatment including inpatient treatment in a hospital psychiatric facility,

(i) that her prognosis was guarded to poor and that the experts considered it more likely that Plaintiff would not respond positively to treatment than that she would;

(j) that the industrial psychologist considered it not feasible for Plaintiff to remain working at Mercantile Hospital or in any hospital environment and that her prospects of finding alternative employment were extremely small, or as it was put, her prospects of obtaining employment were very slim;

(k) that her present working environment aggravated her psychiatric condition;

(l) that Plaintiff wanted to continue working and wanted to cope like a normal person;

(m) that there could be no doubt that Plaintiff had suffered significant psychiatric and psychological impairment as a result of the collision;

(n) that she had performed a work at great cost to herself and at risk to her well-being and that there was a guarded prognosis.

[61] Upon an application of the probabilities to the above and the common cause or accepted facts, it simply must be accepted that Plaintiff was successful in establishing, in respect of both past loss of earnings and loss of earning capacity, that she had suffered a significant impairment, and was on the probabilities in a position where she would be compelled to leave her present employment, and would then be disadvantaged in the open labour market. This also having regard to the sequela arising from the accident, both psychiatric and psychological on the one hand and her orthopaedic impairment on the other.

[62] I am respectfully of the view that the learned trial Judge erred in his assessment, not of the evidence, but of the probabilities and results which flow

therefrom. In short, the learned trial Judge having accepted that the present working environment aggravated her psychiatric condition failed to place sufficient emphasis on the fact that the medical experts considered her to have a guarded prognosis, and over emphasized the prospect that she may, after treatment, recover sufficiently to the extent that she would be able to return to pre-morbid earning potential. This led the learned trial Judge to conclude that her case had not been sufficiently pleaded, and that her real claim, being one for loss of earnings, based on an estimate of loss for periods in the future, had not been established on the evidence. The learned trial Judge also found that Plaintiff had failed to establish that the injury has had, or will have, an appreciable effect on earning capacity. I am unable to agree on the probabilities, as already set out above, and conclude that the Plaintiff, on the probabilities, more than established that not only had she met her case as pleaded, but that the medical evidence which was effectively uncontested, other than in cross-examination establishes not only that she is not able to work in her current employment presently, but that on the probabilities her prospect of doing so was remote, her prognosis guarded, and that the claim in principle had been established, in the sense required for General Damages.

[63] I do not intend to deal separately with the many, and on occasions, lengthy arguments for Respondent supporting the learned trial Judge's decision, as I consider these to be dealt with more than adequately by the approach which I have adopted above. Indeed, it was suggested by Respondent, it would seem as an afterthought, that if the Judge erred in his approach, relevant to the conclusion reached (which was not admitted), that there were a number of other grounds upon which the learned trial Judge could have reached the same conclusion. These

grounds were not set out in the heads of argument, and it is sufficient to say that on careful consideration thereof, I could find no merit in any of the submissions in this regard.

[64] I then must turn to the evidence of the industrial psychologist which, the learned trial Judge correctly accepted was not seriously challenged and that no contradicting evidence was tendered. That being so, and on the appropriate test, the evidence must be accepted and applied. The industrial psychologist concluded that:

[64.1] it is not feasible for the Plaintiff to remain working at Mercantile Hospital or in any hospital environment; that she would best be able to earn a salary in the lower quartile for a Paterson B1 grade employee based on Plaintiff's qualifications, her level of experience and the need for a sedentary form of work given the orthopaedic sequela of the injuries suffered;

[64.2] that her prospects of finding alternative employment were extremely small based on physical, emotional and psychological compromise, her diminished self-esteem and confidence as well as anxiety, depressive symptoms and disorders; he took into account that she had a history of psychiatric problems post accident, which even if successfully treated, would inevitably significantly prejudice her in seeking employment in competition with others was no such history of impairment.

[65] The Munro actuarial report utilized the calculations as informed by the industrial psychologist in order to determine future uninjured earnings and injured earnings, suggesting a 30% chance of finding employment at the Paterson B1 lower quartile level. In my view, the evidence of Plaintiff's supervisor Ms Mohammed in no way mitigated against this conclusion.

[66] It would seem to me, that the suggestion of a 30% (or less) chance of finding employees post-accident earnings, put otherwise, that it be assessed positively that there was a 30% chance the Plaintiff would obtain work in the open labour market at the suggested level, was a reasonable and appropriate suggestion on the evidence and one which I am able to confidently adopt.

[67] At the appeal it was agreed as I understand it that a general contingency deduction should be applied to future income which Appellant would have and but for the collision must be set at 15%. Had this not been agreed, I would have determined the contingency deduction at this level in any event. I am also of the view that a 10% contingency deduction should be made to past loss of earnings, such as they remain relevant, calculated from the date of accident to 1 September 2016. This is simply the date of the actuarial calculation, which leaves a further post loss of earnings sum from 19 June 2015 to date of the trial of R 66,800.

[68] I do not understand this to be seriously contested by Respondent.

[69] Appellant accepted and it seems to me, correctly, nor did Respondent put up any convincing argument to the contrary, that Appellant's past loss of earnings is to be dealt with as follows, in addition to that already paid:

Appellant's past loss of income as at 01/09/2016	R318 900.00
Less: Appellant's past loss of income as at 01/06/2015	R252 100.00
Further past loss of earnings (i.e. loss of earnings from 19 June 2015 to the date of trial)	R 66 800.00
Less: 10% contingency deduction	R 6 680.00
Nett further past loss of earnings	R 60 120.00

[70] Appellant's loss of earning capacity/future loss of earnings from date of trial should be calculated as follows, with a 15% contingency deduction to uninjured income and allowing the possibility of work for future injured income at 30% on the following basis:

Appellant's future uninjured income	R3 676 700.00
Less: 15% contingency deduction	R 551 505.00
Nett uninjured deduction	R3 125 195.00
Less: Future injured income (Being 30% of R1 844 667.00, which is based On Paterson B1)	R 553 400.00
Nett loss of future earnings	R2 571 785.00
Add: nett further past loss of earnings	R 60 120.00
Total loss of earnings before apportionment	R2 631 915.00

Less: 20% merits apportionment	R 526 383.00
	_____
Loss of earnings to be awarded to Appellant	R2 105 532.00

[71] As referred to above, accordingly, the appeal must succeed to the extent referred to above, as reflected in the order below.

[72] Insofar as the application for condonation is concerned, as already adverted to above, condonation is granted as prayed, it being my view that justice and equity requires this to be done, further the omission of a reference to the prospects of success on the merits, not being a peremptory requirement, the failure to comply therewith not being fatal, and in this matter where the prospects of success were inevitable, condonation is justified within my discretion.

[73] In the circumstances the following order issues:

1. The appeal succeeds with costs, condonation being granted for the late prosecution of the appeal;

2. The order of the Judge *a quo* is set aside and replaced with the following:

    2.1 Plaintiff's claim for past and future loss of earnings succeeds;

2.2 The further sum of R60,120.00 is awarded to Plaintiff in respect of her claim for past loss of earnings

2.3 Plaintiff is awarded the sum of R2,045,412.00 in respect of her claim for loss of earning capacity;

2.4 Defendant shall pay interest on the aforesaid amount at the rate of 10.25% per annum, from 14 days after the date of this order to the date of payment;

2.5 Defendant shall pay the Plaintiff's taxed party and party costs, such costs to include the reasonable and necessary qualifying costs to include the reasonable and necessary qualifying and attendance fees and expenses of the following expert witnesses:

(a) Dr Crafford;

(b) Dr Reddy;

(c) Mr Eaton;

(d) Dr Whitehead; and

(e) Actuary Charl du Plessis.

2.6 The Defendant shall pay interest on the taxed costs at the legal rate of 10.25% per annum from 14 days after date of allocator to date of payment.

_____
M.J. LOWE
JUDGE OF THE HIGH COURT

VAN ZYL, DJP:

I agree.

_____
D VAN ZYL
JUDGE OF THE HIGH COURT

JAJI, J:

I agree.

_____
N.P. JAJI
JUDGE OF THE HIGH COURT

Obo the Appellant:	Adv D Niekerk
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Obo Respondent:	Adv P E Jooste and Adv T J D Rossi
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