REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 08/15751

DATE: 23/09/2010

In the matter between:

MTHETWA, JABULILE IMMACULATE Plaintiff

and

ROAD ACCIDENT FUND Defendant

J U D G M E N T

KATHREE-SETILOANE, AJ:

[1] The plaintiff, Ms Jabulile Immaculate Mthetwa claims damages from the Road Accident Fund ("*the defendant*") arising out of bodily injuries sustained in a motor vehicle accident which occurred, on 13 May 2005, on

the corner of Kitchener Street ("*Kitchener*") and Third Street ("*Third*"), Bezuidenhout Valley, Johannesburg between motor vehicle with registration number JYL 499 GP driven by Mr S.A. Gani ("*the insured driver*") and the plaintiff, a pedestrian.

[2] The matter comes before me for the determination of liability and the quantum of damages. The plaintiff's claim for damages is set out as follows:

General damages (i.e. pain and suffering, loss of amenities of life, disfigurement etc.) (actual and future)	R3 000 000,00
Past loss of earnings	R 36 000,00
Future loss of earnings and/or reduction in earning capacity	R2 000 000,00
Past hospital and medical expenses	R 15 000,00
Future medical expenses	R1 000 000,00
Total	R6 051 000,00

[3] I am informed that the following heads of damages have been agreed to and settled by the parties in the following manner:

3.1 Past loss of income R11 173.05

3.2 In respect of the claim for future medical and hospital expenses (inclusive of the costs associated with providing plaintiff with artificial limbs), the defendant has furnished the plaintiff with an

undertaking in terms of section 17(4)(a) of the Road Accident Fund Act No. 56 of 1996.

[4] In respect of the determination of the quantum of damages, the plaintiff's future loss of earnings or reduced earning capacity and general damages are the only issues that remain for determination.

COMMON CAUSE FACTS

[5] The parties have agreed to the following common cause facts and circumstances between them:

"***LIABILITY***

1. *On 13 May 2007 at Bezuidenhout Valley, Johannesburg, the plaintiff while being a pedestrian was involved in a collision ('the Collision') with an insured motor vehicle ('the vehicle') being driven at all relevant times by Shabir Gani ('the insured');*

2. *The degree of fault ('Liability') on either part of the parties is in dispute.*

QUANTUM

3. *That the Plaintiff sustained the following injuries as a result of the collision with the Vehicle driven by the Insured:*

    3.1 *An amputation above the knee of her left leg effected by the collision on the scene and described thus by Dr. Anthony Thomas:*

        'A traumatic amputation of the left leg';

    3.2 *Extensive injuries to her left arm necessitating the amputation of the arm shortly after the collision in hospital, described as thus by Dr Anthony Thomas:*

        'A severe compound fracture of the left humerus with compound fracture of the left olecranon.'

4. The following medico-legal reports are common cause and accepted in evidence:

4.1 Dr. J.J. van Niekerk;
4.2 Dr. A. Thomas;

4.3 Dr. A.P.J. Botha;

4.4 Ms. A. Jamotte;

4.5 M. van Niekerk;

4.6 Ms. R. Leshika;

4.7 Dr. J.A. Smuts;

4.8 Mr. K.G. Wilson.

5. The following joint minutes are common cause and accepted in evidence:

5.1 The Orthopaedic Surgeons', Drs. J.J. van Niekerk and A. Thomas;

5.2 The Occupational Therapists', Marietje van Niekerk and Rose Leshika;

5.3 The Industrial Psychologists', Dr. J. Greeff and Ms. A. Jamotte.

5.4 The Actuaries', I. Minnaar and G.A. Whittaker.

6. The aerial photograph and copies thereof are admitted in evidence as depicting the T-junction where the collision between the Plaintiff and the Insured took place."

LIABILITY

[6] In respect of the issue of liability, the degree of fault of both the insured driver and the plaintiff is in dispute. Paragraph 5 of plaintiff's particulars of claim reads as follows:

"*5. The collision was caused solely by the negligent driving by the Defendant's insured driver he having been negligent in one or more of the following respects:*

5.1 He failed to keep any, alternatively an adequate lookout and/or;

5.2 He failed to keep the vehicle, which he was driving under proper control and/or;

5.3 He drove at a speed, which was excessive in the circumstances and/or;

5.4 He failed to apply brakes of his vehicle timeously, adequately or at all and/or;

5.5 He failed to remain in his lane;

5.6 *He failed to avoid the collision when, by exercise of due and reasonable care, he could and should have done so.*

5.7 He drove his vehicle whilst under the influence of alcohol.

5.8 *He failed to stop at a red robot, alternatively stop street.*"

[7] The defendant's plea to paragraph 5 of the plaintiff's particulars of claim is as follows:

"***AD PARAGRAPH 5:***

Should the above Honourable Court find that a collision occurred as described by the plaintiff in paragraph 4 of her particulars of claim, then and in that event, the defendant pleads as follows:

5.1 The defendant denies each and every allegation contained in this paragraph. The defendant specifically denies that the driver of motor vehicle with the registration number JYL 499 GP, S A Gani ('the insured driver') was negligent as alleged or otherwise.

5.2 ***Alternatively to paragraph 5.1 supra**, and in the event of the above Honourable Court finding that the insured driver was indeed negligent as alleged or otherwise (which is denied), then and in that event, the defendant denies that such negligence*

was a cause of the collision and pleads that the sole cause of the collision was the negligence of the plaintiff who was negligent in one or more of the following respects:

5.2.1 She failed to keep a proper lookout;

5.2.2 *She failed to have due regard to motorists in particular, the insured driver;*

5.2.3 She failed to take adequate, or any cognisance of the traffic carried along the stretch of road in question, and more specifically, took no cognisance of the insured vehicle;

5.2.4 *She failed to ensure that she was appreciably visible to motorists, in particular, the insured driver;*

5.2.5 She failed to allow the insured driver a wide berth;

5.2.6 *She entered the road without first ascertaining whether it was safe to do so and as it so happened at an unsafe and inopportune moment;*

5.2.7 She failed to pay adequate, due or any regard to what was happening in her immediate vicinity, and more specifically, to the approach of the insured vehicle;

5.2.8 She failed to avoid the collision when by the exercise of due and reasonable care she could and should have done so.

5.3 ***Alternatively to paragraphs 6.1 and 6.2 supra****, and in the event of the above Honourable Court finding that the insured driver was negligent as alleged or at all (which is denied) and that such negligence contributed to the collision (which is also denied), then and in that event, the defendant pleads that the plaintiff was contributory negligent in one or more of the respects set out in paragraph 5.2 supra, and that any claim which the plaintiff may have should be reduced in accordance with the provisions of the Apportionment of Damages Act 34 of 1956 as amended.*"

[8] It is common cause that on 13 May 2007 at Bezuidenhout Valley, Johannesburg, the plaintiff, while a pedestrian, was involved in a collision with the insured motor vehicle driven by the insured driver.

[9] The plaintiff led the evidence of three witnesses including herself. The other two witnesses were Ms. Numpilo Sithole ("*Ms. Sithole*"), who was present with the plaintiff when she was run over by the insured motor vehicle, and an independent witness, Ms. Cindy Nake ("Ms Nake"). The insured driver, Mr. Shabir Gani, and his cousin, Mr. Mohamed Taahir Gani (*"Mr Taahir Gani*") who was a passenger in his motor vehicle when the accident occurred, testified on behalf of the defendant.

THE PLAINTIFF'S EVIDENCE

[10] The plaintiff testified that she and her friend, Ms. Sithole, had taken a taxi from work on the afternoon of 13 May 2007. They alighted from the taxi at the junction of Third and Kitchener and waited on the southern side of Kitchener for the red traffic light to turn in their favour before crossing the road.

[11] Kitchener has two lanes running from West to East and two lanes running from East to West. There is no island in the middle, but a barrier-line in the middle of the road. It is common cause that each of the four lanes is about 3 metres wide. The plaintiff explained that they crossed Kitchener when the light turned green for them. They crossed the road at the pedestrian crossing in a northerly direction. They were walking side by side and were holding hands, with plaintiff on Ms. Sithole's right. They walked at a normal pace to ensure their safe crossing of Kitchener before the traffic light turned red again.

[12] Plaintiff further testified that whilst they were crossing the road, two motor vehicles were stationary at the junction. There was a taxi and a sedan and she positioned the vehicles, one behind the other on the far northern lane, west of the junction.

[13] Plaintiff indicated the point of impact by the letter “A” on the sketch-plan, marked Exhibit “C”. This is about one-third across from the far northern lane of Kitchener and inside of the marked pedestrian crossing.

[14] She testified that she saw the insured vehicle moments before the collision, but was convinced that it would stop as the light was green and in her favour. However, the next thing she recalled was the impact; how she was flung into the air; how she tried to stand up where she fell, but was unable to do so, as her left leg was ‘*not there any more*’, meaning that it was traumatically severed from her body during the collision.

[15] Shortly after her admission to hospital, her left arm was amputated just below the shoulder, and she remained in hospital for two months before being released. The loss of her limbs has left plaintiff practically helpless and dependent on others, particularly when she takes a bath, uses the toilet or goes shopping. She has no balance and is unable to perform even the simplest of tasks. She also explained how the collision has impacted on her life generally. In this regard, she explained that a short while after her release from hospital, her husband had abandoned her.

[16] During cross-examination, plaintiff appeared unsure of the position of the vehicles. Apart from certain concessions, she remained confident about the point of impact. Although plaintiff was not an ideal witness she was adamant that the traffic light turned green and that she had ensured that it was safe before crossing the road. She indicated that she saw the vehicle when it was about 35 metres away. When it was put to the plaintiff, by Mr Motala, appearing on behalf of the defendant, that the insured driver will testify that the robot was green for him when he neared and crossed the junction; that the driver saw plaintiff approaching and hooted; that there had been no cars where plaintiff indicated there had been; that there was a vehicle beyond the intersection; that the driver swerved to the left and plaintiff thereupon walked into the vehicle; that there was no damage done to the front of the car; and that the insured driver was in the right lane, the plaintiff denied the insured driver's version.

MS. SITHOLE'S EVIDENCE

[17] Ms. Sithole confirmed the plaintiff's version, and that of the independent witness in all material aspects, and particularly on the point of impact; the lane in which the insured driver was travelling; and that he did not stop after the collision but only returned to the scene of the accident almost an hour later. She was also adamant that the plaintiff did not walk into the insured vehicle but that she was knocked down by the front of the vehicle. She said that she first the insured vehicle when it was approximately 50 metres away, and thereafter at 35 metres away. Ms. Sithole described the

reaction time that was available to both plaintiff and herself prior to the collision having taken place. The evidence of both the Plaintiff and Ms Sithole, which is undisputed, is that they saw the vehicle approach when it was about 35 metres (and approximately 1.8 seconds away from them) but had no reason to believe that it was going to run them over as the traffic light was in their favour. Ms Sithole explained how she miraculously managed to take a step backwards and was saved from being collided into, and although she called out to the plaintiff to alert her to the approaching car, it was much too late because plaintiff had already taken that inevitable step and the insured vehicle had collided into her.

MS. CINDY NAKE'S EVIDENCE

[18] Ms. Cindy Nake, a 14 year old schoolgirl, testified how she and her mother were walking from church on the south side of Kitchener when the collision occurred. As they approached the junction of Kitchener at the time of the collision, she observed two women waiting for the traffic light to change in their favour. When the traffic light changed in their favour, she saw them crossing the road, and when they were about half way across the road, she heard a car approach from behind her, travelling in a westerly direction. Ms Nake was certain that the insured car was travelling in the far northern lane of Kitchener; that it did not hoot to alert the plaintiff and Ms Sithole to its approach; that the insured driver did not stop subsequent to the collision, but proceeded to drive away until he was out of sight; that the insured driver did not swerve to avoid colliding into the plaintiff; and lastly that the traffic light

was red, and against the insured driver when the his vehicle collided into the plaintiff.

MR SHABIR GANI'S EVIDENCE

[19] Mr Gani, the insured driver, testified that he was driving from his house, which is about a kilometre away from where the accident occurred, to his mum's house in Observatory. His cousin Taahir Gani had accompanied him on this trip. As he approached the intersection of Third and Kitchener, he was travelling at a speed of between sixty to seventy kilometres per hour. He was travelling in an easterly direction, in the right hand lane of Kitchener. As he approached the intersection of Kitchener and Third, and from about fifty kilometres away, he observed the robot to be green and in his favour. He also observed a vehicle travelling in the right hand lane, which he believed to be the taxi which dropped off the plaintiff and Ms Sithole. As he approached the intersection of Kitchener and Third, he also observed the plaintiff and Ms Sithole crossing the road. He later said that he observed the plaintiff crossing from point "P" on the sketch plan in a diagonal direction, and Ms Sithole waited on the pavement.

[20] He was about 25 metres away from the plaintiff when he saw her crossing the road. He said he saw her crossing the road but did not think that she will cross over the whole road as the traffic light was in his favour. He said that as he began to cross the intersection, she was already in the middle of the road and he was of the view that her handbag or item of clothing got caught on the review mirror on the right-hand side door of his car. This made

her '*twirl around*' against the door, thus damaging the back door with her body weight. On being asked what he did when he first saw plaintiff approaching his car, he responded by saying that there was no need for him to do anything as she was on the side of the car. He said that after colliding into the plaintiff, he carried on driving and did not stop to see what happened. He said he attempted moving to the left lane in order to stop but there had been a taxi parked there which prevented him from stopping. He thereafter said that he did not do anything because it was too late.

[21] On being asked again by Mr Motala what he had done when he first saw the plaintiff crossing the road, he responded by saying that when he first saw the plaintiff he was driving in an easterly direction on Kitchener. He saw her take one or two steps from the pavement onto the road, but did not think that she was going to cross the road. He stated further that when he was unable to pull over to the side of the road after the accident, he turned left into Fourth Street and left again into Fifth Avenue, and left into Kitchener. It took him about two minutes to return to the scene of the accident. On arriving at the scene of the accident, he immediately approached the plaintiff who he described to be in a bad condition. He immediately phoned 112, the emergency response number. He also called his brother to inform him about the accident, and his brother arrived at the scene of the accident approximately ten minutes later. He said that he remained at the scene of the accident until the police and the ambulance arrived. His cousin Taahir was also with him.

[22] He said that he had given a written statement to the police officer present at the scene of the accident. On being asked what damage was caused to his car, he said that the review mirror on the front driver's door was damaged and that the rear right passenger door and window was also damaged when the plaintiff hit into the car. Finally, on being asked if there was anything that he could do to avoid the accident he said "*no*".

MR TAAHIR GANI'S EVIDENCE

[23] The final witness to testify on behalf of the defendant was Mr Taahir Gani, who sat in the front passenger seat of the insured vehicle at the time of the collision. Other than confirming that he was the front seat passenger in the vehicle at the time of the collision, and that Mr Shabir Gani was the driver of the vehicle, there was very little else that Taahir was able to remember.

ANALYSIS OF EVIDENCE

[24] Mr Van der Sandt, appearing on behalf of the plaintiff, submitted that I must reject the evidence of the insured driver as he was neither credible nor reliable and that his evidence was highly improbable. I am inclined to agree with Mr Van der Sandt for the following reasons. The insured driver was an extremely poor witness. He was bent on avoiding all blame and did not hesitate to twist the truth in order to cast doubt on the version of the plaintiff, and the witnesses called to testify in support of her version. There were also numerous internal contradictions between the insured driver's evidence-in-chief and his evidence under cross-examination. Firstly, he changed his evidence in relation to where the plaintiff was when he first saw her prior to

crossing the road. He said that the first time that he saw her she was already crossing the road and, when asked wheter she was on the pavement when he first saw her, he said "*I can't exactly remember*". Secondly, the insured driver's version was inconsistent with the version which Mr Motala put to the plaintiff and Ms Sithole under cross-examination. Mr Motala had put to the plaintiff, in cross-examination, that the insured driver will testify that:

(a) when he first saw the plaintiff approaching his car he hooted and swerved to the left, but plaintiff had nevertheless walked into his vehicle; and

(b) he stopped at the scene of the accident immediately thereafter.

This was, however, not the insured driver's version in examination-in-chief. It therefore came as no surprise that, under cross-examination, he denied that he hooted to alert the plaintiff of his approach, and that he swerved to the left in order to avoid colliding with the plaintiff.

[25] The insured driver's version, in evidence-in-chief, that the plaintiff crossed the road from point "P" on the sketch plan in a diagonal direction, and walked into his car thus causing her bag or item of clothing to become entangled with the review mirror on the front right-hand door, was a completely new version that was not put by Mr Motala to either the plaintiff or her witnesses. In addition, the insured driver admitted, under cross examination, that before the actual collision occurred there was no indication that the plaintiff was going to walk into his car and therefore there was no need for him to swerve to avoid her, hoot or do anything else. The insured

driver also ultimately admitted, under cross-examination, that his version was implausible.

[26] Furthermore, even though the accident report provided vital clues as to how the accident occurred, the insured driver failed to explain, under cross-examination, why he did not take photographs of the damage, which was caused to the insured vehicle. Again, although the officer's accident report described the damage to the insured vehicle as being to its right-hand side, the defendant did not call him to give evidence at the trial, and no explanation was provided as why this was not done.

[27] Mr Taahir Gani, the second witness called to testify on behalf of the defendant was also of not much assistance to the court, stating repeatedly that he did not remember much about the actual accident itself. He, nevertheless, maintained that the traffic light was green, and in the insured driver's favour. However, under cross-examination he conceded that he had assumed that the traffic light was green because the insured drive did not slow down or stop. Accordingly, it was clear from Mr Taahir Gani's testimony that he had not observed the traffic light to be green, and in the insured driver's favour.

[28] I accordingly reject the evidence of both the insured driver and his cousin Mr Taahir Gani in total. The evidence was replete with contradictions and inconsistencies, and when compared to the version of the plaintiff and her two witnesses, was overwhelmingly improbable and simply untrue.

[29] Mr Motala, on behalf of the defendant contends that the plaintiff's testimony was replete with inconsistencies and therefore should be rejected.

[30] Now although I am prepared to accept that the Plaintiff was not an ideal witness, and was unable to remember details about the position of certain cars on the road prior to the accident, it is important for this Court to view her recall of the events immediately prior of the accident in the context of the trauma which she experienced during the accident. Having regard to the fact that her leg was traumatically severed from her body during the accident, and that she was rendered unconscious, it would be unreasonable to expect her to remember the minute details of the events preceding the accident. Insofar as Mr Motala contends that her evidence should be rejected because there were inconsistencies between the evidence which she gave in-chief and that which appeared in the written statement which she had given to the police officer while she was in hospital, I am of the view that little weight should be given to the written statements of the plaintiff, Ms Sithole, and the insured driver as the evidence shows that they were drafted by police officers who clearly failed to give these persons an opportunity to confirm the correctness of their statements. I am unable, in the circumstances, to reject the plaintiff's evidence on this basis alone.

[31] Accordingly, I am of the view that other than a few minor inconsistencies in the plaintiff's evidence, her evidence was consistent in all material respects with that of Ms Sithole and Ms Nake and, in particular, that

the traffic light turned green and was in the plaintiff's and Ms Sithole's favour, that they ensured that the road was safe before crossing, and that they saw the insured vehicle when it was about 35 metres away from them. The plaintiff's evidence was also consistent with that of Ms Sithole and Ms Nake in relation to the point of impact of the collision.

[32] The defendant contends that that the Court must reject the version of Ms Nake because she was only 11 years old at the time, and her version differs from that of the plaintiff and Ms Sithole. I reiterate, that Ms Nake's version was consistent with that of the plaintiff and Ms Sithole in all material respects, and in particular that the traffic light was green and in their favour when they crossed the road, and that the insured driver did not stop after the collision. Ms Cindy was a model witness. She was sure of herself and very confident about her observations. Her evidence was completely unbiased, independent, candid and coherent. She did not know the plaintiff and had no interest in the matter.

[33] Although the defendant asked this Court to reject the evidence of Ms Nake on the basis that she was an 11 year old minor, its counsel failed to cross-examine her on crucial issues which he had put to the plaintiff and Ms Sithole relating to the insured driver's version. This failure accordingly prevents the defendant from disputing the truth of Ms Nake's testimony. The *dicta* of Claassen J in *Small v Smith* 1954 (3) SA 434 (SWA) is apposite in this regard: (at 438):

> "*It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as*

> *concerns that witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness' evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved.*"

[34] In the circumstances, I am of the view that the evidence of the insured driver, and Mr Taahir Gani, who testified on behalf of the defendant was completely false and should be, and is rejected by this Court. The only inference to be drawn from the need of these two witnesses to give false evidence, is that the driver did not keep a proper lookout (*Rabie v Kimberley* 1991 (4) SA 243 (NC) at 259D-F).

[35] The reasonable man in the position of the insured driver, approaching a robot-controlled intersection, would have foreseen the possibility of a collision, and would have, in the circumstances, kept a proper lookout for pedestrians crossing that intersection (*Rondalia Assurance Corporation of South Africa Ltd v Mtkombeni* 1979 (3) SA 967 (A) at 972B-D; *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E).

[36] It was accordingly the duty of the insured driver when approaching the intersection of Bezuidenhout and Third to have kept a proper lookout for pedestrians who were crossing the road, or likely to be crossing the road. Our courts have consistently held that a driver is required to exercise reasonable care and vigilance not only towards a pedestrian he sees, or ought reasonably to see, on or near the road; he is obliged to exercise the same reasonable care and vigilance towards an unseen pedestrian whose presence he should

reasonably foresee or anticipate because, for example, of the proximity of a school or of a passenger bus (*Adams v Sunshine Bakeries* 1939 CPD 72 at 76; *Santam v Nkosi* 1978 (2) SA 784 (A) at 791F-H), or for that matter a robot controlled pedestrian crossing.

[37] The evidence shows that insured driver travelled the route, which he travelled when the accident occurred regularly thus being aware that the intersection, at which the collision occurred, was robot controlled. It also shows that on a couple of previous occasions he had skipped the red robot at this intersection, and was caught by the traffic camera located at the intersection. Armed with the knowledge that the intersection was robot controlled, one would have expected him to have exercised reasonable care and vigilance when approaching it. I am, therefore, of the view that the driver was negligent in failing to keep a proper look-out for pedestrians when he approached the intersection of Third and Kitchener. Had he done so, he would have been able to avoid colliding with the plaintiff. I am accordingly of the view that the insured driver should reasonably, in all the circumstances, have foreseen the possibility of a collision with the plaintiff, and should have taken reasonable steps to guard against such an occurrence. His failure to have done so constitutes negligent conduct

[38] This then brings me to the question of whether any form of apportionment should be applied based on the plaintiff's conduct. It is argued by Mr Motala, for the defendant, that it is not the defendant's contention that the insured driver is blameless and that he did not contribute in any manner to

the cause of the collision, but that the plaintiff must bear responsibility for the collision as well, as she should have foreseen that a collision would occur between herself and the insured motor vehicle for the following reasons.

[39] She testified that as she began to cross Kitchener Road, she noticed the insured vehicle approaching at high speed, at which point it was approximately 35 metres away. Despite the speed of the insured vehicle, she continued walking because she assumed it would stop as the robot was green for her. It is, thus, submitted by the defendant, that even if the Court accepts that the robot was green and in plaintiff's favour, it is evident that the plaintiff was negligent as a pedestrian is required to maintain a proper look-out, and must first reconcile himself or herself that it is safe to proceed across the road before doing so. Hence, merely assuming that a vehicle would stop does not render safe passage.

[40] The primary contention for the defendant is that Ms Sithole, who was walking closest to the insured vehicle, managed to avoid the collision. Ms Sithole testified, in this regard, that she first looked at the insured vehicle when it was approximately 50 kilometres away, and under cross examination stated that she kept looking at it because she wanted to understand why it was travelling at a high speed when the robot was not in its favour. She then stopped looking at it. By the time she looked again it was very close and she realised that it was not going to stop at the robot, and was able to take a step back, and avoid the collision. It is therefore the defendant's contention that Ms Sithole was able to avoid the collision simply by being aware of the approach

of the insured vehicle, and by keeping it under observation intermittently. It contends further, that the fact that Ms Sithole was able to take a step back and avoid the collision demonstrates that had the plaintiff, similarly, kept the vehicle under observation, she would have realised that the insured vehicle would not stop, as assumed, and she would have been able to avoid the collision in its entirety.

[41] On a consideration of the plaintiff's testimony, and that of Ms Sithole and Ms Nako, it is clear that she had waited on the pavement until the robot turned in her favour and after looking left and right she, together with Ms Sithole, stepped onto Kitchener, and proceeded to cross the road. Up to this point no fault can be found in her conduct. She did testify, however, that she noticed the insured vehicle approaching at high speed when it was about 35 metres away but continued to cross as she assumed that it was going to stop as the robot was in her favour. I am of the view that the Plaintiff was not negligent in failing to observe the vehicle intermittently. The traffic light was in her favour. She crossed the road at a time and place where she was entitled to. She had the right of way, and it was therefore not unreasonable for her to have assumed that the insured driver would stop at the intersection. I am of the view that the fact that Ms Sithole was able to avoid the accident, because she observed the insured vehicle intermittently, should not be used to cast fault on the plaintiff. It is not disputed that when Ms Sithole and the plaintiff saw the insured vehicle approach, it was approximately 35 metres (or under two seconds away from the intersection). At a distance of about 35 metres

and at a speed of about 70 kilometres per hour (or the equivalent of 19.44 metres per second) their reaction time was no more than 1.8 seconds.

[42] Accordingly, at the time that Ms Sithole realised that the insured vehicle was not going to stop it was approximately 1.8 seconds (or less) away. She managed miraculously, in that moment, to step backwards and avoid the collision. Between the time that she realised that the insured vehicle was not going to stop, and taking a step backwards, the insured vehicle was approximately 1.8 seconds away. Although she called out to plaintiff to alert her to the approaching vehicle, it was too late as plaintiff had already taken the inevitable step forward - and the insured vehicle collided with her. On the probabilities, the insured driver would have missed colliding with Ms Sithole by just a breath of a hair. It was a matter of 'pure chance' that Ms Sithole was able to step back when she did. It was highly improbable, in the circumstances, that the plaintiff would have been able to escape the collision in less than 1.8 seconds. Hence, I am agreement with Mr Van der Sandt that the miracle which saved Ms Sithole should not be used in the insured driver's favour for purposes of apportioning damages.

[43] In the circumstances, I am of the view it was not unreasonable for the plaintiff to assume that the insured driver would exercise due care, and stop at the robot-controlled intersection. There was no duty on her to keep looking at the insured vehicle while crossing the road as the green light was in her favour She had the right of way and was therefore entitled to assume that the insured driver would stop at the intersection.

[44] Accordingly, having regard to the fact that the plaintiff crossed the road at a robot controlled intersection, when the green light was in her favour, and that there was a duty on the insured driver to stop at that intersection, I am of the view that the plaintiff was neither reckless nor negligent and no apportionment should be applied against her.

[44] In the result I find that the Plaintiff has discharged the onus of proving that the insured driver was negligent and soley responsible for the collision.

QUANTUM OF DAMAGES

[45] It is common cause that, as a result of the collision with the insured vehicle, the plaintiff sustained a traumatic amputation above the knee of her leg left during the collision, as well as extensive injuries to her left arm necessitating the amputation of the arm shortly after the collision, in hospital.

[46] Dr JA Smuts, the Neurologist is of the view that plaintiff sustained a mild concussion, but there is nothing to suggest brain injury. The severity of her headaches is moderate to severe and can be classified as post-traumatic headaches. Amputation related problems are a painful right arm and shoulder, and an over-use of right arm that leads to pain. She also has a form of phantom pain in her left stump. It is doubtful whether plaintiff would be able to obtain gainful employment due to the physical disability related to her double amputation.

[47] Dr JJ Van Niekerk and Dr A Thomas, the Orthopaedic Surgeons, are of the view that as a result of the double amputations problems in later life should be expected, and there will be episodes of increasing pain. She will always walk with some difficulty but with the appropriate prosthetic fittings, this can be decreased to a degree. With regards to her arms, she also needs to be fitted with a better fitting prosthesis. She is permanently unfit for any physical work, and is not suited to clerical work. She will, therefore, in all probability remain unemployed for her whole life.

[48] Dr APJ Botha, the Specialist Physician, is of the view that the Plaintiff clearly needs a rehabilitation regime after amputation that would entail a multi-disciplinary approach. This would include attention to the stumps of the left arm and left leg, prosthetic care, psychotherapy and psycho-pharmalogical treatment as well as aspects of mobility and transfer. From a medical point of view, the long term consequences of being a double amputee have not been documented clearly. The usual complications of major limb amputation include pain, neuroma, phantom phenomena, prosthetic fitting problems and psychological problems.In addition there are long term effects as a result of the altered biomechanics and unusual strain on the proximal joints with an increased incidence of osteoarthritis. Due to decreased mobility, obesity tends to develop in amputees. Although she is a young, relatively healthy person without cardiovascular risk factors or an abnormal metabolic profile, the long term haemodynamic effects of double amputation cannot be ignored in terms of the long term prognosis. Given her level of training and past work experience, she is probably not an ideal candidate for any type of

employment. It is expected that her life expectancy will be reduced by approximately 5 years.

[49] Mr G. Wilson, the Counselling Psychologist, is of the view that the plaintiff's life changed dramatically after the accident as she lost her leg and arm. As a result of her disability and loss of livelihood, her husband ended their relationship. She is unable to care for her children as a result of which they do not stay with her permanently. Her disability makes it difficult for her to work. She regularly experiences pain and discomfort. The overall picture is one of permanent and significant disability having led to a significantly diminished quality of life. Although she is not suffering from any clinical personality disorders, her disability creates significant stress and severely limits the quality of life. She requires psychotherapy.

[50] Ms. M. Van Niekerk and Ms. R.Leshika, the Occupational Therapists, are in agreement that the plaintiff requires twenty two sessions of occupational therapy to facilitate optimum independence in daily activities and to facilitate functional mobility skills with the new prosthetic devices, and that at least ten sessions should be reserved for home and work visits, should plaintiff secure employment in the future. They also recommend the intervention of an orthotist, biokinetist, physiotherapist, psychiatrist, and a clinical psychologist, and are in agreement that she would require assistance with household chores on a weekly basis. They note that the plaintiff was employed at a carwash, where she washed cars, for approximately two weeks before the accident. The accident interrupted her work, and she has since

been employed. Ms Leshika is of the opinion that with the recommended intervention, including occupational therapy, the plaintiff should be able to meet the demands of her pre-accident work in the car wash and tuck shop. Ms Van Niekerk is, however, of the view that the Plaintiff would not be able to meet the demands of her pre-accident work in the car wash and tuck shop. She instead recommends that the plaintiff be allowed financial aid for her choice of studies.

[51] Dr J Greeff and Ms. A. Jamotte, the Industrial Psychologists are in agreement that pre-accident the plaintiff would have remained gainfully employed on an unskilled level in the open labour market until her retirement at the age of sixty years. However, Ms Jamotte remains of the view that there would have been periods when the plaintiff was unemployed. Post-accident, they agree that within the parameters of the plaintiff's injuries and the contingencies related thereto, that she is unemployable in the open labour market on the same or on a similar unskilled level. They agree that the plaintiff is unemployable, and that in terms of future loss of likely earnings the median of the annual earnings level of R11 601.00 – R23 100.00 of R17 350.00 (18% of sample) is recalculated over a period of thirty years until retirement age of sixty years with an added annual income of 8%.

[52] The Actuaries, Mr IJ Minaar and Mr GA Whittaker agree to the following results in respect of past income:

Past value of income: R46 119.00 (normal life expectancy, and reduction of life expectancy of 5 years.

Present value of future income: R330 219.00 (normal life expectancy) and R316 400.00 (reduction in life expectancy of five years).

They also agree that the value of any State Disability Grant payments that the Plaintiff has received to date must be deducted from her loss of income.

According to Mr Whittaker, in a report dated 10 June 2010, the total disability grant, which has been paid to the Plaintiff to 10 June 2010, has amounted to R32 640.00. These are in respect of payments made from August 2007 to 31 May 2010. The next payment due is at the end of June 2010 in an amount of R1 080 per month. Increases are usually granted in April of each year. The last increase granted in April 2010 was 6.93%.

LIFE EXPECTANCY

[53] The Defendant postulates a 5 year reduction of plaintiff's life expectancy, on the basis of the expert evidence of Dr A.P.J. Botha, its Specialist Physician. Dr Botha notes in his report that the plaintiff, as a result of her present and future difficulties, particularly the operations and replacements of prosthesis envisaged, will suffer a reduction of life expectancy of 5 years. What this then translates into is whether the present value of plaintiff's future income would be R330 219.00 or R316 400.00 (before the application of contingencies).

[54] The plaintiff urges me, in this regard, to disregard Dr Botha's conclusion that the plaintiff will suffer a reduction of life expectancy of 5 years, as it is not only arbitrary but also self-destructive of his own report. In this regard, Dr Botha concludes in his medico-legal report that in view of the long

term adverse effects of multiple amputations notably the haemodynamic vascular consequences, the eventual impact of obesity and reduced mobility, it is estimated that the plaintiff's life expectancy will be reduced by approximately five years. I am in agreement that Dr Botha's report is self-destructive of his report because he states as follows:

> *"Although Ms Mthetwas is a young, relatively healthy person without cardiovascular risk factors or an abnormal metabolic profile, the long term haemodynamic effects of double amputation cannot be ignored in terms of long-term prognosis.*
>
> *12.* ***FUTURE MEDICAL TREATMENT:***
>
> *There are no recommendations from a medical point of view other than standard prophylactic measures to reduce her cardiovascular risk eg adherence to a low fat diet, timeous treatment of hypertension and regular follow up."*

It is therefore unclear why, if the plaintiff simply adheres to a low fat diet, and get*s* treated for hypertension, her life expectancy would be reduced by 5 years. I am, therefore, unpersuaded by the evidence of Dr Botha, and accordingly must reject it. I am, however, persuaded by the evidence of Dr JJ Van Niekerk, the plaintiff's Orthopaedic Surgeon, Dr A. Thomas, the defendant's Orthopaedic Surgeon, and Dr Smuts, the plaintiff's Neurologist, who are all in agreement that the plaintiff's life expectancy has not been negatively influenced by the accident. Accordingly, the present value of plaintiff's future income would be R330 219.00 (before the application of contingencies).

CALCULATION OF CONTINGENCIES

[55] Mr Minaar, the plaintiff's Actuary, applied a 5% contingency deduction to the Plaintiff's accrued loss of earnings, thus rendering a total of R108 570, and 10% to the Plaintiff's prospective loss of earning thus rendering a total of R753 127.

[56] It is a well established principle that the mathematical calculation of the value of income but for the injuries, as well as the value of the income having regard to the injuries together with the difference between the two calculations often to be adjusted, by appropriate contingency allowances, to arrive at a fair and just determination in the circumstances of the particular case. The determination and application of general contingencies is, therefore, an essential responsibility of the trial court (*Shield Insurance Co Ltd v Sodoms* 1980 (3) SA 134 (A).

[57] In relation to plaintiff's earnings, having regard to the injuries sustained in the collision, it is clear from a consideration of the expert reports that there is agreement that the plaintiff is unemployable in the open labour market at the semi-skilled level that she was employed in prior to the accident. The only expert with a contrary view is Ms Leshika, the defendant's Occupational Therapist. In view of the overwhelming evidence that the plaintiff is unemployable, I am unable to accept Ms Leshika's opinion that with the necessary intervention, including occupational therapy, the plaintiff should be

able to meet the demands of her pre-accident work in the car wash and tuck shop.

[58] In relation to plaintiff's uninjured earnings, it is common cause that, but for the accident, she would have worked until a retirement age of 60, earning an amount of R330 219.00. However, it is the defendant's contention that the Court must have regard to the fact that although the plaintiff was 28 years old at the time of the collision, she only had one period of employment, which lasted for three years prior to being employed at the carwash. Hence, it is submitted that, as per Ms Jamotte's (the defendant's Industrial Psychologist) evidence, there are likely to be future periods of unemployment as well.

The defendant also contends that I should apply a further contingency deduction as the plaintiff will, as a result of not working, be spared the costs of travelling to and from work. I am of the view that allowance must be made for any savings to the plaintiff as a result of not having to travel to and from work. Now, while Mr Minnaar, the plaintiff's Actuary, applies a 10% contingency deduction, which takes into account contingencies in life such as sickness and future unemployment (which takes care of the defendant's contention of future periods of unemployment), it does not make allowance for savings in relation to travel to and from work. I am, therefore, of the view that it would be fair and just to apply a further 5% contingency deduction to plaintiffs future loss of earnings to make allowance for the plaintiff's savings in relation to travel to and from work.

[59] The plaintiff, however, urges me not to apply any contingency deduction to her prospective loss of income for the following reason. Although the plaintiff testified that she earned R2400.00 a month, Ms Greef and Ms Jamotte, the Industrial Psycholgists took the median earnings of an unskilled or semi-skilled worker, such as the plaintiff, to be R17350.00, thus ignoring that her actual earnings amounted to R24000.00 per annum. The plaintiff testified, in this regard, that she earned in the region of approximately R600.00 per week between her waitressing job, and working at the car wash. I am, however, unpersuaded by the plaintiff's argument in this regard, as it is clear from the actuarial report of Mr Minaar, that he did take into account that, at the time of the accident, the plaintiff earned R31 200.00 per annum, which translates into R600.00 per week or R2 400.00 per month. In the circumstances, I consider that a 15% contingency deduction from the Plaintiff's prospective loss of income, and a 5% deduction from her accrued loss of income is justified, thus rendering an accrued loss of R108 570, and a prospective loss of R715 470.65 less R35 880 (being the total state disability grant, which has been paid to Plaintiff for the period 31 August 2007 to 31 August 2010). Accordingly, and having regard to the joint minute of the actuaries, I award the plaintiff an amount of R 679 590.65 for loss of future earnings.

GENERAL DAMAGES

[60] It is clear on consideration of all the evidence before this Court that the Plaintiff suffered pain, suffering, discomfort and loss of amenities in the months following the accident, and continues to do so some 3 and a half

years after the accident. She sustained a traumatic amputation of the upper part of her left tibia and fibula during the collision, which occurred on 13 May 2007. On the same day she underwent a guillotine amputation of her upper arm and lower leg. She had been fitted with ill-fitting artificial limbs (arm and leg) in August 2007.She currently walks with difficulty, and with crutches. Her prosthetic leg is of a very rudimentary nature, and is ill-fitting, heavy and uncomfortable. She experiences phantom pain in the amputation stump of her leg, and also experiences intermittent headaches. Her prosthetic left arm is simple, and covered with a glove as she has not been fitted with a skin covered hand. Her hand is heavy and unusable, and she experiences intermittent pain in the amputation stump of her left arm. In view of the double amputation, problems in the plaintiff's later life are anticipated, and there will be episodes of increasing pain and comfort. The pain worsens in inclement weather conditions

[61] The plaintiff is effectively permanently disabled, and entrapped in a handicapped body. Her work, social, and family life has been severely curtailed as a result of her double amputation, and she has lost her independence. Her husband, and other family members had abandoned her after the accident, and she now needs assistance with childcare, household chores, shopping etcetera. She used to be play basket ball socially, and jogged regularly before the accident, but has never been able to return to any form of sporting activity. There is accordingly no doubt that plaintiff's general enjoyment of life has been markedly diminished as a result of the injuries sustained in the collision, and will continue to do so.

[62] Mr Van der Sandt submits that, in view of the plaintiff's double amputation, the Court ought to show additional sympathy to the plaintiff by adjusting the award of general damages for pain, suffering and loss of amenities upwards. In other words, it is the plaintiff's contention that the cumulative effect of a double amputation should be calculated per limb as a double amputation is more debilitating than a single amputation, thus requiring more intensive care and maintenance. The plaintiff accordingly seeks an award of R750 000 for pain, suffering and loss of amenities arising out of the above knee amputation of the left leg, and R300 000.00 for the below shoulder amputation of the arm.

[63] The defendant, however, contends that the approach of the courts to general damages, where there are multiple injuries is to look at the cumulative effect of the multiple injuries, as opposed to looking at each injury individually. He then referred me to a number of cases dealing with an amputation of the either one leg or two legs, the most notable being *Ndlovu v Swaziland Royal Insurance Company* 1989 (4E2) QOD 1 (Swl) where the plaintiff, a 25 year old male chauffeur, sustained severe injuries to both legs necessitating amputation of both legs above the knee. He experienced considerable pain. It was anticipated that one of stumps would need further surgery, and even after the fitting of prosthesis, he would, at best, only walk a few paces with the assistance of crutches. The plaintiff would be confined to a wheelchair for the rest of his life. The court awarded an amount of R80 000.00 (in 1989) in respect of general damages, the current value being R395 000.00.

[64] In the later case of *August v Guardian National Insurance Company Ltd 1990 (4E2)QOD 13 (C),* the plaintiff, as a result of injuries sustained in a motor vehicle collision, underwent amputation of the leg above the knee. The knee stump was badly mutilated as a result of the injury, and a skin graft was effected over the stump. The stump was grossly distorted making the fitting of an artificial limb difficult, and causing pain, discomfort, and a limp accompanied by a lateral sway, which placed strain on his lower back, leading to degenerative changes in the lumbar spine. He was unable to continue driving or repairing his trucks, and his working life span was reduced. The court awarded an amount of R60 000.00 in respect of general damages, the current value being R259 000.00.

[65] In *Smith v Road Accident* 2003 (5D2) QOD 1 (AF), the injured person was a five year old boy, who sustained a parietal fracture of the right side of the skull, an avulsion injury and a traumatic amputation of the entire left arm.The minor sustained severe pain, shock, and distress as a result of the injury. He was admitted to hospital six months later for revision of the amputation stump, and removal of most of the residual humeral head. The absence of the stump rendered the chances of using a functional prosthesis in the future poor, but a non-functional prosthesis resembling a human hand could be considered purely to improve self appearance and boost self image. The minor child displayed behavioural problems, and psychological intervention was required. No future surgery was indicated, but the potential for employment in the open labour market was severely diminished. The

Court awarded R250 000.00 in respect of general damages, the current value being R375 000.00.

[66] The defendant accordingly contends that a fair and reasonable award for compensation in respect of general damages in the present case would be in the amount of R600 000.00. The plaintiff, however, referred me to the 2008 unreported decision, of *Etiene, Elois Wlisbrood Carguijeiro v The Road Accident Fund*, Case number 07/610, Witwatersrand Local Division,15 March 2008 (at paragraphs 4), where the Plaintiff, as a result of the motor vehicle collision sustained the following injuries and sequelae: a right below knee amputation; a severe pelvic injury; a broken left thumb, lacerations, bruises and abrasions. Zulman J awarded the Plaintiff R500 000.00 in respect of general damages.

[67] Although these cases have been of some assistance, it is settled law that *"each case must be adjudicated upon its own merits and no one case is structurally the same as another...Previous awards offer only guidance in the assessment of damages" (Brumage v SA Eagle Insurance Co Ltd* (C) QOD, Vol IV, E2-33 at *E2-50.* Therefore having regard to the severity of the plaintiff's pain, suffering, discomfort and loss of amenities as described above, I am of the view that an award of R800 000.00 in respect of general damages would be fair and just. It is important to emphasise, in this regard, that even if the plaintiff is fitted with new, better fitting prosthetics and is provided with specialized equipment, which may enable her to care for her children, and perform household chores independently, she will not fully recover from the

injuries sustained in the collision, and will therefore never gain pre-accident level of capacity and abilities.

[68] I am accordingly satisfied that the plaintiff has succeeded in proving her claim for damages in the following amounts:

1.	Past loss of earnings	R 11 173.05
2.	Future loss of earnings	R 679 590.65
3.	General damages for pain, suffering, discomfort, and loss of amenities	R 800 000.00
		R1 490 763.70

[69] In the result I grant judgement for the plaintiff against the defendant as follows:

1. Payment of:

1.1.	Past loss of income	R 11 173.03
1.2	Future loss of income	R 679 590.65
1.3	General Damages	R 800 000.00
		R 1 490 763.70

2. Interest on the said amount of R 1 490 763.70 at the rate of 15.5% per annum, calculated 14 days from date of payment.

3. Cost of suit including the qualifying and preparation costs of:

3.1. Dr J.A Smuts (Neorologist)

3.2. Ms M. Van Niekerk (Occupational Therapist)

3.3. Dr J. Greef (Industrial Psychologist)

3.4. Mr G. Wilson (Counselling Psychologist)

3.5. Dr J.J. Van Niekerk (Orthopaedic Surgeon)

3.6 Mr I.J. Minaar (Actuary)

4. It is recorded that the defendant has undertaken to provide the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 in respect of future medical costs.

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F.KATHREE-SETILOANE
ACTING JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

COUNSEL FOR THE PLAINTIFF:	ADV SWWJ VAN DER SANDT
INSTRUCTED BY:	BESSINGER ATTORNEYS
COUNSEL FOR THE DEFENDANT:	ADV N. MOTALA
INSTRUCTED BY:	EVERSHEDS
DATE OF JUDGMENT:	23 SEPTEMBER 2010