IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NO : **09/14443**

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE ~~YES/NO~~ NO
(2) OF INTEREST TO OTHER JUDGES YES/~~NO~~ NO
(3) REVISED

SIGNATURE

DATE 11/11/2010

In the matter between:

ELMARIE LANDZAARD Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

BAVA AJ:

[1] The Plaintiff instituted action against the Defendant consequent upon the Plaintiff sustaining bodily injuries arising from a motor vehicle collision which occurred on 22 October 2004.

[2] Prior to the matter coming before me it had begun before another Judge in this division. An application for the Judge's recusal was brought by the Defendant which was duly granted. The matter then started before me *de novo*.

[3] Initially both the merits and the quantum were aspects that required adjudication. The Plaintiff moved for an amendment of paragraph 5 of the Particulars of Claim which indicated that the Plaintiff and the motor vehicle driven by H Labuschagne were travelling in opposite directions when the collision occurred. Plaintiff sought the amendment indicating that the Plaintiff and Labuschagne were in fact travelling in the same direction.

[4] The Defendant's Counsel initially objected to the amendment but thereafter withdrew her objection and indicated that the Defendant reserved its rights to argue costs in that regard. The amendment was accordingly granted.

[5] The parties indicated that there were two agreements between the parties which would curtail certain evidence being led. The two aspects agreed upon by the parties were:

[5.1] that the Defendant tendered an undertaking in terms of Section 17(4) of the Road Accident Fund 56 of 1996;

[5.2] the second point agreed between the parties was that it was agreed that the report of Franja Botha, the occupational therapist, was admitted into Court as evidence and there was agreement that such witness need not be called.

[6] The Plaintiff handed in two bundles into Court, namely Bundle A, being the expert reports, and Bundle B, being the documents. The Defendant did not file any expert reports. Before the first witness was called by the Plaintiff, the Defendant's Counsel indicated that the Defendant conceded the merits subject to Defendant's rights to argue costs in that regard.

[7] Accordingly, the issue for determination was only that of quantum and more particularly the past and future loss of earnings of the Plaintiff as well as general damages.

[8] At the beginning of the trial, Plaintiff's claim in respect of the estimated past and future loss of earnings was R303 000,00 and the claim for general damages was R150 000,00.

WITNESSES

Lance Marais – industrial psychologist

[9] This witness indicated that he is an industrial psychologist and that he is registered with the Health Professions Council of South Africa. He qualified at Potchefstroom University, now the North West University, and he obtained an MA in the year 2000.

[10] From the report, the witness indicated that he assessed the Plaintiff on 11 November 2009. Mr Marais also indicated that he has testified in other matters in the past and his medico-legal report was contained at pages 31 to 49 of Bundle A.

[11] He indicated that he conducted a structural interview which was used to obtain information and to formulate an opinion. He indicated that the objective of his assessment was to evaluate the effects of the accident and its *sequelae* on the employability and earning capacity of the Plaintiff.

[12] He had summarised the pre- and post-accident potential of the Plaintiff which was contained in a table at page 46 of Bundle A. What was apparent from his evidence was that the Plaintiff had her own business and that her income or her earning potential is not limited. He calculated the loss

of earning capacity at 10% based on Dr Reid's report and more particularly page 14 of Bundle A. He stated that where people such as the Plaintiff run their own business, that they invoice per the hour.

[13] When a question was posed by the Court to Mr Marais regarding who, in his opinion, would be properly qualified to comment on the loss of productivity of the Plaintiff, Mr Marais indicated that a time and motion study specialist would be required to determine the loss of productivity of the Plaintiff.

[14] The pre- and post-career path of the Plaintiff was unaffected by the accident according to him. Where a person such as the Plaintiff does not work then, he said, the Plaintiff is unable to bill and accordingly there is a loss of the number of hours multiplied by the rate charged per hour of such a person. This he indicated is the method that would be used to establish the loss of the Plaintiff.

[15] When Mr Marais was asked to comment regarding the future loss of the Plaintiff, he answered that he was unable to indicate to the Court from what date the Plaintiff would begin suffering the loss.

[16] In dealing with the post-accident work history, he said that he was not furnished with any documentary evidence to show income of the Plaintiff and

accordingly when he compiled pages 9 and 10 of his report, he did not have any documentary evidence regarding the proof of income of the Plaintiff.

[17] When Mr Marais was asked to assist in dealing with the pre- and post-accident earning capacity, Plaintiff's counsel indicated that that may not be necessary as the Court only has to determine the future loss of income. Mr Marais testified that the Plaintiff may suffer a loss of income and he set down two bases for establishing future potential loss of income:

[17.1] The time taken off work where the person is self-employed for medical treatment, that is the number of hours multiplied by the hourly rate;

[17.2] The second basis related to the injuries and their effects on the mobility, pain, etc, on the Plaintiff as she performs her functions. In this regard Mr Marais indicated that one would have to look at the frequency of the Plaintiff as to when she would be sitting and when she would be standing, how this affects her work condition and indicated that this was outside his field of expertise. He testified that this would have an impact but qualified it by stating that he could not comment when and how this loss will occur in the case of the Plaintiff.

[18] In his report, Mr Marais indicated that the Plaintiff returned to her business ventures and to her pre-accident employment after the occurrence

of the reported accident but closed down one business for reasons unrelated to the reported accident. He said that the Plaintiff then resigned from her pre-accident employer for a better opportunity and has continued to operate her other businesses to date. He indicated that one of the Plaintiff's businesses, Exodus 2NZ operated similarly after the reported accident to what the business had operated prior to the reported accident, meaning that her business had not suffered any loss. He said that the Plaintiff, however, started to scale down Exodus 2NZ as the Plaintiff decided to focus on other goals. The pattern of people wanting to emigrate to New Zealand changed and Exodus 2NZ closed down for reasons unrelated to the accident which was confirmed by the Plaintiff during the interview. The Plaintiff, he told the Court, had two other businesses. The business Passports4U operated similar to what it did prior to the accident. Accordingly, in respect of this business the Plaintiff reported no loss as well. The other business run by the Plaintiff, Employ Direct CC, has not yet commenced with operations.

[19] The Plaintiff, he testified, is currently working as a Response Handling Specialist in conjunction with the Plaintiff's business ventures and he testified that the Plaintiff would be able to perform the same type of work that she did prior to the accident. The Plaintiff's work experience and employment history focused on positions such as emigration specialist and recruitment consultancy.

[20] Under cross-examination it was put to Mr Marais that the complaints that he records regarding the Plaintiff at pages 11 and 12 of his report were not mentioned to the other experts. He testified that that was the reason he qualified his report on page 12 by stating *"Assuming the above complaints are valid and/or related to the reported accident, which may not necessarily be the case, this could have an impact on Ms Landzaad's ability to work in the open labour market."* Under cross-examination it was put to Mr Marais, by the Defendant's Counsel, that the Plaintiff's complaints to him regarding poor concentration, becoming short-tempered, becoming irritable, becoming depressed and experiencing palpitations are not mentioned in other reports and Mr Marais indicated that he could not comment as to why these do not appear in other reports. These complaints do not appear in Dr Reid's report.

[21] Mr Marais recorded at page 11 of his report that the Plaintiff had commenced employment with OMA Human Capital on 2 September 2009 as a Response Handling Specialist on a contract basis and earned an hourly rate. He also indicated that Ms Moosa, from OMA Human Capital, verified that Ms Landzaad earned:

[21.1] R5 800,00 in September 2009;

[21.2] R6 600,00 in October 2009;

[21.3] R5 300,00 in November 2009; and

[21.4] R2 400,00 in December 2009.

[22] Under cross-examination, Mr Marais was also referred to page 55 of Bundle B, being a letter of reference for the Plaintiff dated 25 June 2008, approximately 4 years after the accident, where nothing is mentioned about Plaintiff's lack of performance or any aspect hindering her ability to work. In fact, the letter praises the Plaintiff and lauds her work ability and work ethic.

[23] Mr Marais also stated, at page 15 of his report, that the Plaintiff would be able to continue working with her current capacities as well as the work and the type of positions that she occupied at the time of the reported accident. Furthermore, the report states that the Plaintiff's earnings with regard to her self-employment would depend upon the sustainability and profitability of the business as well as the needs of the clients and economic climate. Under cross-examination Mr Marais verified this statement in his report as being correct.

[24] The Court found this witness helpful to the Court in that he did not attempt to enter into areas of expertise that were not his own. Mr Marais did not attempt to exaggerate or interpret any aspect save to deal with those aspects that appeared from his report. Where concessions were required, he

made such concessions under cross-examination.

[25] Further under cross-examination and in dealing with the reading of CV's, that is the part of work that is carried out by the Plaintiff, her mobility, and her loss of productivity were dealt with by Mr Marais. The Court asked him a question as to whether the loss of productivity mentioned by Dr Reid translates into a loss of income. Mr Marais indicated that he could not say that this will occur or how and to what percentage it would occur and he could not say whether the mobility of the Plaintiff will affect the income and to what extent and from when this would occur.

[26] Under cross-examination certain propositions were put to Mr Marais regarding Plaintiff's ability to employ people to carry out certain tasks such as travelling and doing administrative work. Mr Marais conceded that the fact that other people may be employed might not necessarily be a loss to the Plaintiff.

The evidence of Dr Reid, the orthopaedic surgeon

[27] Dr Reid testified that he is an orthopaedic surgeon and that he examined the Plaintiff on 10 June 2009, following the collision when Plaintiff went to the Benoni MediCross Clinic where she was examined but not admitted. X-rays of the cervical spine were done at the time of examination

at the MediCross Clinic and were signed by Dr H Mistry on 25th October 2004 which were noted to be normal.

[28] According to the MMF1 form signed by Dr le Roux, he said, the Plaintiff sustained the following injuries:

[28.1] A soft-tissue injury to the cervical spine;

[28.2] A soft-tissue injury to the lumbar spine.

[29] Dr Reid noted that at present the symptoms in the Plaintiff's cervical spine are more severe than those in the lumbar spine.

[30] Following the accident, the Plaintiff attended physiotherapy treatment on 26 October 2004 and she also attended treatment with a chiropractor in August 2007 and received five sessions of treatment. The Plaintiff indicated that the treatment with the chiropractor relieves the symptoms in the cervical spine. Dr Reid testified that the Plaintiff informed him that she did not continue having the treatment with the chiropractor due to medical aid constraints.

[31] Following the accident, he states that the Plaintiff told him that she stayed off work for a period of one day and that she returned to her pre-

accident occupation and continued to work there until January 2006. He detailed her work history and indicated that she currently runs her own recruitment agency and the nature of her work involves 70% sitting in the office and 30% driving to consult with clients. He said that at present the Plaintiff copes with the work albeit with some difficulty.

[32] Dr Reid explained the workings of the spine and in dealing with the osteophytes he indicated that he could not say whether the osteophytes were as a result of the accident or not.

[33] Dr Reid indicated that in terms of the x-ray there was spurring at the level of C6/7 of the cervical spine and some early scattered osteophytes in respect of the lumbar spine.

[34] In respect of the soft-tissue injury to the cervical spine, Dr Reid indicated that the Plaintiff complained of ongoing symptoms of pain, stiffness and paraspinal muscle spasm especially over the right-hand side in the mid and lower cervical spine area. He also indicated that the Plaintiff has indicated an occasional feeling of numbness in the fingers of both her hands.

[35] In respect of the soft-tissue injury to the lumbar spine, the Plaintiff complained of pain, stiffness and paraspinal muscle spasm in the lower lumbar spine area but that she has no radicular symptoms in either of her

lower limbs.

[36] Dr Reid testified that the Plaintiff experienced considerable pain and suffering as a result of the symptoms emanating especially from the cervical spine and to a lesser degree from the lumbar spine and he said in his evidence that one would now regard the Plaintiff as a back pain sufferer.

[37] In commenting on the effect on employment, Dr Reid stated that the Plaintiff's self assessment was 15% to 20% and that he thought that 15% to 20% was reasonable. He testified that the Plaintiff needs to keep moving and that there is a probability that if she subjects herself to treatment that her symptoms can improve.

[38] Dr Reid said that he saw the 10% loss of productivity as being the minimum and that he calculated that the Plaintiff would lose one hour of productivity per day. This calculation was revised downwards by Dr Reid under cross-examination.

[39] Dr Reid also testified that the Plaintiff will develop more osteophytes in her back and neck which would then become still and it may diminish her pain. He indicated, however, that her neck pain will still continue.

[40] Under cross-examination Dr Reid was referred to page 14 of the

document bundle, being Bundle B, and to a report of the diagnostic radiologist, Dr H T Mistry, where he dealt with the cervical spine and Dr Reid indicated that the loss of cervical lordosis meant that there was muscle spasm. He indicated that this related primarily to a neck spasm and that this could occur immediately and go on for months.

[41] Dr Reid was then referred under cross-examination to page 15 of Bundle B and agreed that she was complaining of:

[41.1] Aching intermittent muscular pain bilaterally in her neck and upper fibres of trapezius region and that she rated this pain at an intensity of 4 out of 10. Dr Reid indicated that 4 out of 10 was not debilitating.

[41.2] Page 15 of Bundle B also indicated that she complained to the physiotherapists, Solomon & Long, that she had complaints of a dull aching intermittent headache in the back of her head.

[42] Under cross-examination Dr Reid was asked to comment on the fact that the dull aching intermittent headache at the back of the head was new since the accident and that meant that the first complaint of aching intermittent muscular pain bilaterally in her neck and upper fibre of trapezius region was not necessarily *"new"*.

[43] Despite the fact that this was not a report presented by Dr Reid, it appeared to the Court that Dr Reid went to great lengths in attempting to interpret the physiotherapists' report by using grammatical constructions rather than sticking to his field of orthopaedics. Dr Reid tried to justify in the grammatical sense that because it indicated that the second portion of her injury was 'new' since the accident does not mean that the first portion was old or prior to the accident.

[44] Dr Reid's evidence in respect of questions posed to him under cross-examination relating to the fact that the Plaintiff did not subject herself to the necessary physiotherapy sessions was also less than impressive. Under cross-examination Dr Reid was referred to page 24 of the bundle where the physiotherapist, Kirsty Goodman, indicated that the Plaintiff only attended one treatment session, Dr Reid once again attempted to come to the assistance of the Plaintiff, for no apparent reason, by beginning to define what a session meant. This attempt by Dr Reid to create the impression that sessions meant two or three or more physiotherapy treatments was also contradicted in his report at page 4 of Bundle A where he indicates only one treatment when the Plaintiff attended physiotherapy treatment, namely on 26 October 2004. The impression that the Court gained from Dr Reid's evidence in this regard was that he went to great lengths to create the impression that the Plaintiff had indeed suffered a great deal and to diminish any negative connotation to the Plaintiff's failure to mitigate the pain.

[45] The report of the chiropractor at page 23 of Bundle B indicates that the Plaintiff reported no more numbness after three treatments and showed remarkable improvement in the cervical range of motion.

[46] At page 24 of Bundle B which should be read with page 15, it is indicated that insofar as the physiotherapy treatments were concerned, the Plaintiff only attended one treatment session and that she did not attend follow-up appointments.

[47] Dr Reid was then cross-examined on the aspect relating to the fact that in his report he said that the Plaintiff used Grand-Pa/Myprodol tablets, about 30 a month, to relieve her pain symptoms. Initially the impression given by Dr Reid was that she took these tablets on almost a daily basis but eventually this impression gave way to the fact that she takes medication quite often but she may take a few tablets at a time. When the question was posed to Dr Reid that on the 10th of June the Plaintiff indicated to him that she took about 30 tablets of Grandpa/Myprodol per month and three days later on the 13th of June 2009, the Plaintiff indicated to Franja Botha, the occupational therapist, that she tries not to drink any medications but occasionally drinks a migraine mixture from her local pharmacy or Grand-Pa headache powders to relieve the headaches, Dr Reid could not satisfactorily answer this inconsistency.

[48] Under cross-examination, Dr Reid also sought to challenge the report of the occupational therapist indicating that if he saw an occupational therapist's report without a doctor's report he would not accept it.

[49] Dr Reid accepted that pain was a subjective element and also conceded that there was no objective test that he had taken in determining the pain of the Plaintiff. He could not give a scientific basis for how he estimated a loss of productivity of about 10% that he indicated is likely to persist in the future in respect of the Plaintiff. He also indicated that there was no pain experiment but indicated that he had come to his conclusion by consulting with the Plaintiff, writing down what she said and examining the Plaintiff. This evidence of Dr Reid was also unsatisfactory.

[50] Dr Reid then explained the different grades of pain indicating that Grade 1 was minimal pain, a Grade 2 required medication, a Grade 3 required taking of medication which may not help and Grade 4 was pain at night.

[51] He dealt with the issue of pain threshold and indicated that night pain was a particularly bad pain and this was indicated in evidence that the Plaintiff experienced pain at night and put a pillow between her legs to help her with the pain.

[52] Dr Reid then went on to deal with the relationship between pain and disability and said that the lack of sleep was a problem and disturbed normal sleep patterns also affects the ability of a person. This evidence was also of a general nature and unrelated to his field of expertise. However, Dr Reid conceded that he was not a sleep expert. He, however, was adamant that the 10% disability that he spoke of was minimal. Here once again the Court notes the discrepancy in Dr Reid's report. He says at page 14 of Bundle A that the loss of productivity would be about 10% and that this is likely to persist in the future.

[53] Dr Reid then began testifying indicating that 70% of the Plaintiff's work was sedentary in nature and that the 30% was the problem. He indicated that if this 30% was reduced, the disability would be reduced.

[54] Dr Reid then indicated that if one took the driving away from the Plaintiff, this disability will then be reduced by a further one-third. He indicated that he arrived at 10% by what he thought would be the appropriate figure from years of experience. This assessment was not in keeping with his field of expertise as an orthopaedic surgeon.

[55] In response to whether devices could assist the Plaintiff, he indicated that devices would assist the Plaintiff but not cure her.

[56] Dr Reid was also then pointed out to page 21 of Bundle A, the report of Franja Botha, where it indicated that Plaintiff stated that the pain intensity is bad but that she managed without taking painkillers. A further aspect that the occupational therapist also indicated was that the pain according to the Owestry Back Pain Disability Questionnaire indicates that the Plaintiff's disability was minimal.

[57] Dr Reid was also referred to the occupational therapist's report at page 22 of the bundle where it indicated that the Plaintiff stated that only after 2 hours of driving did she experience lower back pain whereas Dr Reid suggested, contrary what the Plaintiff had indicated, that one hour sitting was too long. In response to this Dr Reid stated that the one hour was generally accepted by orthopaedic surgeons and that the one hour was his cut-off point. Here, once again, it appeared that Dr Reid was overstating the Plaintiff's disability.

[58] Dr Reid then testified that the 10% loss of ability was not constant and that it did not occur every day. He indicated that the pain is not continuous and that it is episodic.

The Plaintiff's evidence

[59] The Plaintiff testified that she was born on 20th September 1970 and

that she was involved in a motor vehicle accident on the 22nd of October 2004. She indicated that it was a rear-end collision and she was not aware of any other rear-end collision in which she was involved.

[60] She was driving in a motor vehicle behind that of her husband and that a lady with a cellphone ramped into her husband's car. As a result thereof, she was involved in a rear-end collision when the motor vehicles hit her car from the back and that she suffered a whiplash.

[61] She testified that she was not hospitalised but that she went to her doctors and was given a brace to wear. Plaintiff said that she is still suffering from pain and that the pain that she suffers from is severe at times. The pain is a spasm in her neck and that she uses Myprodol to treat the pain.

[62] The Plaintiff said that she had a high pain threshold and when she gets headaches, these headaches are so severe that she cannot concentrate.

[63] She testified that she had spasms in her neck and lower back and that the status of her headaches are a dull pain behind her eye which goes around to her entire head.

[64] The Plaintiff also indicated that the frequency of suffering these

spasms is about three times a week when she suffers headaches as well. She indicates that it affects her when she looks straight and that on good days she does not have headaches. At times the headaches began around the temples.

[65] The Plaintiff also testified that when she does take tablets, it takes the pain away for 2 to 3 days. In addition to that, she indicated that she also takes for pain medication Sinuforte which she says is a muscle relaxant and that she takes two capsules of these at a time. These, she said, are over-counter drugs which are available without prescription.

[66] She said that on better days she works a lot, giving the impression that she covers up on lost work. Insofar as her work is concerned, she says that she works for herself and that she is contracted to OMA Human Capital and that they pay her on an hourly rate.

[67] She said that she used to screen 4,500 CV's per weekend but that she now has to employ someone. However, evidence was not led as to when she used to screen 4,500 CV's and she began working for OMA Human Capital approximately 5 years after the accident. She said that she now goes through between 700 to 800 CV's per weekend. The essence of this evidence was lost in that the accident occurred approximately 6 years prior to her leading the evidence and the comparative counting of CV's was not given

a timeframe in the evidence. She also testified that it takes her approximately 35 minutes to read through a CV. She began working for OMA Human Capital since March 2009. She indicated that her pre-accident work is contained in the report of Mr Marais where he sets out her pre-accident work history from pages 36 to 38.

[68] In terms of Mr Marais' report, the period between August 2003 and October 2004, the Plaintiff worked for Objective Personnel in Benoni as a recruitment specialist. She earned a basic salary of R5 000,00 per month and R6 000,00 per month commission without benefits. In addition to this, she ran her own businesses called Exodus 2NZ as an emigration specialist and as a director of Passports4U. In respect of her own businesses, namely Exodus 2NZ and Passports4U, Mr Marais indicated that the earnings in respect of her former own business was unsure and without benefits. In respect of the latter own business, namely Passports4U, she did not draw any earnings.

[69] The Plaintiff indicated the reasons why her business Exodus 2NZ closed and indicates that she phased the company out as she could not justify charging people for merely filling in the forms as she was.

[70] The Plaintiff was then referred by Plaintiff's Counsel to page 46 of Bundle B which is a letter dated 28 February 2002 which indicates that the

Plaintiff was previously employed with Network Migration Services from 1 March 1997 until 31 October 2002 with a salary of R15 000,00 per month excluding commission. This letter indicates that for the period December 2001 to January 2002 and February 2002, the Plaintiff earned R15 800,00, R22 340,00 and R26 100,00 respectively. This letter has the letterhead from a company called Australian Business Associates. Plaintiff indicated that she paid Australian Business Associates an amount to use their office space but did not specify exactly how much this amounted to.

[71] The Plaintiff was then referred to pages 51 to 56 of Bundle B which indicates payments made to the Plaintiff between May 2005 and December 2005 supposedly received by the Plaintiff from Objective Personnel. Plaintiff did not provide payslips but indicated that these constitute amounts that she actually received. The pages from 51 to 56 contain amounts which range from R72 493,12 to as low as –R2 160,00. In addition to this there is a written formula which seems to indicate the commission structure of the Plaintiff and these amounts range from nil to R6 998,62.

[72] The Plaintiff was then referred to page 50 of Bundle B which indicated that she had an average turnover of R47 577,09 over a period of 11 months with the company Objective Personnel and this was dated the 9th of February 2006. The Plaintiff indicated that she earned between R6 000,00 to R21 000,00 per month but no documentary proof of such payments been

received by the Plaintiff were actually furnished to the Court.

[73] She indicated that her post-accident work history is set out at pages 39 to 40 of Bundle B contained in Mr Marais' report. Prior to contracting with OMA Human Capital, she was working for Adcorp Talent Resourcing Specialists. She indicated that she left Adcorp Talent Resourcing Specialists because she did not want to work for them.

[74] Her close corporation Employ Direct CC could not indicate any earnings to Mr Marais and in respect of her other business, Passports4U, she indicated to Mr Marais that she does not draw any earnings.

[75] She indicated that her biggest account was the Government Pension Fund which followed her when she left Adcorp Talent Resourcing Specialists.

[76] She indicates that she needed to take a bit of a break after she left Adcorp in 2008 and according to the Plaintiff she then took a break for a period of six months to one year.

[77] She indicates that the Government Pension Fund then contacted her and more particularly Ms Viljoen and Ms le Roux and they wanted her to provide them with services as they were not getting services to their satisfaction with other entities. Plaintiff discussed this with her husband and

decided to begin doing this work for the Government Pension Fund.

[78] Plaintiff indicated that she was well experienced in her field and set out the procedure of how she would quote for the work approval, what screening criteria was used, what the client requirements were and how she created the individuals.

[79] Plaintiff also indicated that she went from Benoni to Pretoria and from Pretoria back to Benoni. She indicated that there is a screening for each job vacancy and after the screening, she would go back to Pretoria and that the turn around time in respect of producing results for her clients was 10 working days.

[80] Plaintiff then indicated how she would conduct the interviews and be on the panel of persons making up the questionnaire. She indicated that after her work on the panel, she would come home and do the submission and then furnish a submission report to a client.

[81] During the evidence of the Plaintiff, the Plaintiff's Counsel moved for an amendment indicating that from the evidence of Mr Marais the Plaintiff had done a revised actuarial calculation which showed estimated past and future loss of earnings to be R601 098,00. Plaintiff's Counsel indicated that this was an increase of R15 000,00 per month to R30 000,00 per month

indicating the Plaintiff's earnings and the calculation was accordingly based on this figure.

[82] Defendant's Counsel objected, indicating that this amendment should have been brought at the outset of the hearing as the reports were available. Furthermore, Defendant's Counsel indicated that Plaintiff's Counsel had the opportunity of amending the Plaintiff's claim when the matter started before me and after the recusal application and despite this opportunity failed to do so. Defendant's Counsel indicated that the quantum had now increased threefold and she required instructions. Defendant indicated that they would have cross-examined differently and they would then have made use of the expert reports of:

[82.1] C du Toit, the industrial psychologist;

[82.2] Dr Ledwaba; and

[82.3] Dr A F Pienaar, the orthopaedic surgeon.

[83] Defendant indicated that Plaintiff was examined by Drs Ledwaba and C du Toit. After hearing argument, the amendment was granted and accordingly the Plaintiff's claim of estimated past and future loss of earnings was amended from R303 000,00 to R601 098,00.

[84] The Plaintiff continued testifying that the drive from Benoni to Pretoria to OMA Human Capital was approximately 130 kms and that her travelling costs to and back from the Government Pension Fund was approximately 120 kms. She indicated that her trip would last approximately 1 hour 10 minutes to 1 hour 20 minutes. She would go to Pretoria to fetch the documents.

[85] The Plaintiff's Counsel put to the Plaintiff that according to Dr Reid, the Plaintiff spent approximately 30% of her working time on driving. The Plaintiff indicated that she could not work out the percentage. However, Plaintiff indicated that she does not drive anymore to Pretoria and has employed the services of a driver and pays the driver R100,00 per trip. She indicated that if she did the trip herself, she would charge R2,80 per kilometre.

[86] Plaintiff indicates that she now uses the driver to collect the documents from Pretoria and that accordingly the collecting of the documents and going into the Government Employers Pension Fund building, which was problematic, is no longer a problem.

[87] Plaintiff, however, indicated that she still drives to Pretoria when she has to conduct candidate interviews and when she delivers the submission report.

[88] In terms of her current remuneration from OMA Human Capital, Plaintiff indicated that whatever work she does for OMA Human Capital she submits an invoice to the Human Resources Department of OMA Human Capital. She gives them a breakdown of the fees and she submits an account for the driving per kilometre and if the driver drives for her, she puts in a fee of R100,00 per trip and the company then pays her.

[89] The Plaintiff's Counsel then referred Plaintiff to page 61 of Bundle B and Plaintiff described page 61 to be her payslip from OMA Human Capital. This appears to be a salary slip where there are deductions for PAYE and UIF together with a portion indicating the annual leave due. The nett pay appears to be R23 315,74 and it is dated 30th of April 2010. The nett pay amount indicated on this is R23 315,74.

[90] Plaintiff then referred to page 62 of Bundle B which is the payslip for the 30th of June 2010 and which indicates a nett pay of R29 774,72.

[91] At this juncture the Court enquired from Plaintiff's Counsel how the discrepancy could be described and the Plaintiff indicated that she charged an hourly rate of the number of hours x R170,00 per hour and that is how she got her pay from OMA Human Capital. When the Court enquired from Plaintiff's Counsel as to whether these invoices, that Plaintiff submitted to OMA Human Capital, would be introduced, Plaintiff's Counsel indicated to the

Court that they would not be introduced as evidence.

[92] Plaintiff then also indicated that she experiences symptoms of pain approximately three times a week but she also indicated that she does not work a 9 to 5 job. Plaintiff indicated that when she gets headaches or when she gets spasms she takes a tablet and that when she gets up after the effects of the medication, she continues working.

[93] Plaintiff then indicated that she works for about 16 hours a day and indicated that *"my mother did not make lazy children"*. The Plaintiff also indicated that she works from Monday to Monday and that the symptoms do have an effect on her work. The Plaintiff indicated that she gets such serious cramp that she cannot carry on doing her work but also indicated that she does not have pain every day of her life. Insofar as work breaks are concerned, Plaintiff indicated that she smokes in her office and that she rarely takes any breaks apart from when it is absolutely necessary.

[94] In terms of the headaches, Plaintiff indicated that if the headache starts in the morning it starts around her eyes and she cannot do anything for about 3 days.

[95] Plaintiff also stated that if she did not have the debilitating headaches and spasms, she would be able to claim more money but she did not say how

much.

[96] Plaintiff in explaining the situation and the event surrounding the trial, told the Court that she went to Christa du Toit who assessed her as well as to Dr Ledwaba. She said that she spent 2 hours, maybe more, at the consultations. These experts were Defendant's experts and despite this no reports had been presented to Court.

[97] Plaintiff also indicated that she applied for insurance recently when she and her husband decided that after one of their friends had lost work, the loss of income was particularly devastating. Plaintiff was sent for an examination and from this examination they excluded the Plaintiff's back. The assessment document or the insurance document was not submitted into Court as evidence.

[98] Under cross-examination, the Plaintiff conceded that while she employs people to do her screening of the CV's, she charges the company for the screening of those CV's. However, Plaintiff indicated that whoever she employs to do the screening has to be paid R500,00 per day. Plaintiff, accordingly, indicated that she had to split her income with someone else.

[99] Plaintiff then also indicated that her monthly income is dependant on two aspects:

[99.1] whether a position is advertised or not;

[99.2] the number of candidates that apply for the position.

[100] She indicated that if there are no positions advertised then there would not be any work but that this has not happened in the last 10 years.

[101] Plaintiff then clarified that the Government Pension Fund is the client of OMA Human Capital and that she charges OMA and that she bills and the driver gets R100,00 per trip or if she is travelling herself, she gets R2,80 per kilometre travelled.

[102] Plaintiff conceded that while the driver was delivering and while she was freed up for a period of possibly 2 hours or longer that she would continue working and accordingly that the time that she would normally spend in travelling she would be able to do work and charge for that.

[103] Plaintiff also indicated that before the accident she used to sit in the kitchen and do the work at the table but since then she had acquired a desk in her office.

[104] When the Plaintiff was asked how she managed taking a break for six months to a year, Plaintiff indicated that she experienced a tragic incident

where a person was shot in front of her and that she was forced to take a break and that she consulted with a psychologist and went for 8 treatments in that regard. She indicated that she took a break just because she wanted to take a break.

[105] Defendant's Counsel asked the Plaintiff whether she exercised regularly and Plaintiff indicated that she did back exercises every day. When Defendant's Counsel enquired as to why the Plaintiff did not tell this to Dr Reid, Plaintiff indicated that she was not sure and that she said a lot of things to Dr Reid and the other doctors but she does not know why this is not recorded.

[106] In terms of the physiotherapist, Plaintiff indicated that she was referred to the physiotherapist by Dr le Roux and that she only attended one treatment session and the next time she wanted to go and see them, they did not have the space. Plaintiff stated that she seemed to recall that she went for more than one treatment.

[107] When Defendant's Counsel put it to Plaintiff why she regarded her pain only 4 out of 10 and why she did not measure it 8 out of 10 or 9 out of 10, the Plaintiff indicated that *"I can handle pain"*.

[108] Defendant's Counsel then elicited from the Plaintiff that her

headaches begin behind her eyes and move around the head. Sometimes the headaches start at the side of her temples and if she puts pressure on it, it would move. Plaintiff indicated that the majority of the pain was behind her eyes. In exposing this Defendant's Counsel indicated that that pain is not pain related to injury of the neck and she referred to Dr Reid's evidence in this regard. Plaintiff had no response to this but indicated that she did receive a collar, that she doesn't remember ever having a complaint of her neck prior to the accident.

[109] Defendant's Counsel also pointed out to Plaintiff that her complaint to the physiotherapist was only regarding pain to the neck. To this the Plaintiff responded that she complained of both her neck and her back. Defendant's Counsel referred Plaintiff to page 15 of Bundle B which contradicted what the Plaintiff said.

[110] Defendant's Counsel also put it to Plaintiff that she did not attend any physiotherapy sessions after the 26th of October 2004 as the report of the physiotherapist clearly indicates this. Plaintiff struggled to answer this question satisfactorily.

[111] Plaintiff simply stated that since the accident it has always been her neck or lower back that was sore and she also indicated that she had got Voltaren injections. Defendant's Counsel enquired why this information of the

Voltaren injections was never put to Dr Reid or any of the other experts of the Plaintiff or the Plaintiff's legal representatives. Plaintiff's unsatisfactory answer to this was that she only thought of that *"now"*.

[112] Plaintiff also indicated that she went to Dr Roberts as her medical doctor and she does not normally go to Dr le Roux and Defendant's Counsel indicated to Plaintiff that no claim for past hospital and medical expenses have been in fact claimed. Plaintiff had no satisfactory response to this.

[113] Defendant's Counsel then confronted the Plaintiff with the fact that she was employing a driver and that none of this information was mentioned to the experts. Initially, the Plaintiff was hesitant and eventually indicated that she had only employed the driver a month prior to the trial beginning. Plaintiff indicated that she could not employ a driver earlier as this is a relationship building exercise and accordingly she had to present herself personally with clients. This, somewhat, contradicts her earlier testimony that she had a long-standing relationship with the Government Pension Fund and that they required her services and called upon her to provide the services when they were not getting satisfactory services from other companies.

[114] Defendant's Counsel then raised numerous aspects relating to apparatus that the Plaintiff could have purchased such as getting a trolley, Defendant's Counsel referred to a shopping trolley, for the carrying of the

files; purchasing of massage cushion; home exercises; headsets for the telephone so that she would not have to strain her neck.

[115] Plaintiff indicated that her husband had recently purchased a trolley for her and as far as the telephones were concerned, she does speak on the speaker phone but that she did not purchase any of the other apparatus. Plaintiff conceded that the treatment with the chiropractor was remarkable but had no explanation as to why she did not continue with that treatment. Defendant's Counsel put it to Plaintiff that the reason given, namely financial considerations, were not the correct reasons for her discontinuing and Plaintiff had no satisfactory response to this question. Defendant's Counsel then put it to Plaintiff that Plaintiff's own conduct was contributing to the pain and that had she continued with the proper medical prescription of attending sessions with the chiropractor as well as the physiotherapist, her pain would have been drastically reduced. Plaintiff's unsatisfactory response to this was *"I don't think so"*. Defendant's Counsel also then indicated to Plaintiff that if her pain was relieved pursuant to the Plaintiff following the correct medical advice that she would not lose 2 to 3 days of her work time. Plaintiff indicated that she could not answer this.

[116] Defendant's Counsel then also referred to the fact that Plaintiff was not called as the first witness and that she sat in the Court listening to the evidence of Mr Marais as well as Dr Reid and that a negative inference

should be drawn from this in view of the fact that the proper sequence was not followed by the Plaintiff in leading the evidence. Defendant's Counsel indicated that Plaintiff could adapt her version after listening to the expert testimony.

[117] Insofar as the medication, Defendant's Counsel indicated to Plaintiff that the 30 Grand-Pa or Myprodol referred to by Dr Reid did not make sense. To this Plaintiff responded by stating that she bought two boxes of Grand-Pa and one box of Myprodol and this would be approximately 100 tablets per month as well as the migraine mixture from the pharmacy. Defendant's Counsel then pointed out the contradiction to Plaintiff by stating to Plaintiff that this is not what she told the experts and more particular Ms Franja Botha where she stated : *"Ms Landzaard tries not to drink any medications, but occasionally drinks a migraine mixture from her local pharmacy or Grandpa Headache powder to relieve the headaches."* Plaintiff could not explain this contradiction and indicated that if she did contradict she did not mean to mislead the Court but that she takes approximately 48 tablets in one session.

[118] Insofar as the payslips were concerned and the reference to Mr Marais indicating that the Plaintiff earned R5 800,00 in September 2009; R6 600,00 in October 2009; R5 300,00 in November 2009 and R2 400,00 in December 2009, the Plaintiff had no answer to this.

[119] Defendant's Counsel then indicated that the two payment amounts from OMA Human Capital were cherry picked to increase her earnings whereas this was not in fact the earnings. Defendant's Counsel requested Plaintiff whether additional documents or invoices will be produced to show all her earnings from OMA Human Capital and Plaintiff did not have an answer to this.

[120] In having regard to Defendant's Counsel's cross-examination, Ms Dockrat who appeared for the Defendant, exposed the inconsistencies in Plaintiff's evidence regarding her injuries and her earnings. This exposé was of such a nature that it left the Court in no doubt that the Plaintiff was not being truthful about her injuries as well as her income that she was deriving from her employment. In fact, despite the Plaintiff being afforded the opportunity of producing further payslips and invoices as well as any proof of income from the other entities that Plaintiff owned, none of this was forthcoming apart from Plaintiff's Counsel indicating that *"documents"* were offered to the Defendant and which were contained in the motor vehicle of Plaintiff's Counsel and that Defendant had not availed itself to have regard to the documentation.

[121] This offer of presenting documents, which are unspecified in nature, does not assist Plaintiff and Plaintiff's Counsel in his closing argument conceded that this failure to produce any of the documents or further invoices

or payslips may be a shortcoming on his part and the Plaintiff should not be punished for this. The issue is not one whether the Court should *"punish"* the Plaintiff or not but the Court has to weigh on a balance of probabilities whether the evidence tendered by the Plaintiff in respect of her earnings/earning capacity is sufficient to meet the standards required to prove such loss.

LOSS OF EARNINGS/EARNING CAPACITY

[122] Generally the onus of proving all the facts relevant to establishing the quantum in respect of loss of earnings/loss of earning capacity rests on the Plaintiff. In the case of **Goldie v City Council of Johannesburg** 1948 (2) SA 913 (W) at 916, the Court indicated that as in all civil disputes, this onus is discharged by proof established on a preponderance of probabilities.

[123] Insofar as the evidence of the Plaintiff is concerned, Plaintiff has failed to discharge the onus placed upon her to prove loss of earning capacity. The evidence of Mr Marais indicated:

[123.1] that he based the 10% of Plaintiff's loss of productivity on Dr Reid's report;

[123.2] that he did not receive the documentary evidence from the Plaintiff

to establish her post-accident work history as contained on pages 9 and 10 of his report;

[123.3] that the Plaintiff earned amounts ranging from R2 400,00 to R6 600,00 for the months of September 2009, October 2009, November 2009 and December 2009;

[123.4] that the loss of productivity was an aspect that needed to be determined by time and motion study specialists and not by an orthopaedic surgeon;

[123.5] that the Plaintiff's earnings in terms of her self-employment would depend upon the sustainability and profitability of the business as well as the needs of the clients and the economic climate;

[123.6] that the Plaintiff would be able to continue working within the current capacities as well as the work in the type of position that the Plaintiff occupied at the time of the accident;

[123.7] that the Plaintiff would be able to continue working until normal retirement age;

[123.8] that Mr Marais could not say whether the loss of productivity in

respect of the Plaintiff would translate into a loss of income;

[123.9] furthermore, Mr Marais could not say whether the loss of activity would translate into a percentage of income and how much;

[123.10] Mr Marais could also not tell the Court whether the mobility would affect the Plaintiff's income and to what extent and from when this will occur.

[124] The evidence of Dr Reid indicates that the Plaintiff had only missed one day of work when the accident occurred. No evidence was led by the Plaintiff to indicate what loss she has suffered to date.

[125] Dr Reid indicated the nature of the injuries but in making the assessment of 10% loss of productivity, he could not substantiate a medical basis or any objective scientific basis on which he based the 10%. In fact, Dr Reid indicated that the aspect that affected Plaintiff the most was the driving which constituted 30% of her productivity and if this was addressed then the loss of productivity would be reduced substantially. Dr Reid was not told that the Plaintiff had employed a driver to do her driving. This was not put before Dr Reid by Plaintiff's Counsel. The sequence in which Plaintiff's witnesses were called necessitated this evidence being placed before Dr Reid for his comment. It was only when the Plaintiff herself testified, as the last witness and having heard the evidence of the experts, that she indicated that she had

employed a driver. This information was not made known to either of the experts and neither did the Plaintiff's Counsel make them aware in respect of this during the trial. Accordingly, neither of the experts could comment on the employment of a driver.

[126] The Plaintiff's failure to continue the treatment with the physiotherapists and the chiropractor is indicative of the Plaintiff's attitude in the matter in that she simply failed to make use of the available medical treatment and comes to Court on the basis that she is entitled to payment from the Defendant without attempting to minimise the effects of the injury. There is no doubt that the Plaintiff has suffered injury as was confirmed by Dr Reid as well as the Plaintiff herself but the Plaintiff's failure to mitigate the loss was apparent.

[127] The Plaintiff appeared not to have informed Dr Reid and Plaintiff's other experts of the proper information relating to medication that she was taking and accordingly the evidence of Dr Reid in this regard seemed to have contradicted what the Plaintiff has said and furthermore it was incongruent with what the occupational therapist, Ms Franja Botha, stated at page 7 of her report.

[128] The Plaintiff failed to provide the documentation that would be required in order to assess Plaintiff's loss. Plaintiff produced two payment

slips from OMA Human Capital and failed to provide the payment slips in respect of the periods September to December 2009 as contained in Mr Marais' report. In fact, the Plaintiff's documentation in respect of her income was so scanty that it would be difficult for any Court to assess whether the Plaintiff had a loss of income. Plaintiff cherry picked two payment slips from OMA Human Capital for the months of April and June 2010 despite the fact that she was working for this company for at least 11 months. Plaintiff failed to furnish documentation relating to the companies that she is running as her own business. No balance sheets were produced, no income indication was given and no evidence was led on this aspect.

[129] The general rule, where the courts will do their best with the material placed before them, was stated by Diemont JA in **Esso Standard SA (Pty) Ltd v Katz** 1981 (1) SA 964 (A) as follows:

> *"Whether or not a plaintiff should be non-suited depends on whether he has adduced all the evidence reasonably available to him at the trial and is a problem which has engaged the attention of the courts from time to time. Thus in* ***Hersman v Shapiro and Co*** *1926 TPD 367 at 379 Stratford J is reported as stating:*
>
> *'Monetary damage having been suffered, it is necessary for the court to assess the amount and make the best use it can of the evidence*

before it. There are cases where the assessment by the court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the court is justified in giving, and does give, absolution from the instance.'"

[130] Van Winsen AJA in **Mkwanazi v Van der Merwe and Another** 1970 (1) SA 609 (A) referred to the decision of Tindall J in **Klopper v Maloko** 1930 TPD 860 at 865 where he stated:

"... When a plaintiff is in a position to lead evidence which will enable the court to assess the figure he should do so and not leave the court to guess."

[131] Plaintiff's Counsel in closing argument also conceded that the lack of documentation was a weakness in Plaintiff's case in respect of proving her income. Plaintiff's Counsel indicated that the documents were available in the car but failed to indicate what the documents were. Plaintiff's Counsel conceded in closing argument that this failure to produce the documents was a problematic aspect and appealed to the Court to be lenient to the Plaintiff in this regard as this was not the Plaintiff's fault personally and it may have been an oversight by the Plaintiff's legal representative. However, this is not

the basis on which an onus is discharged and neither can the Court deal with the lack of evidence by attempting to come to the rescue of a party for the sake of leniency.

[132] I am not satisfied that the Plaintiff has discharged her onus in proving a loss of earnings or earning capacity and accordingly I make no award under this heading. While the Plaintiff does continue suffering from the injuries sustained she failed to prove that this affected her income or her earning capacity in the future and I am of the view that the pain, discomfort and suffering of the Plaintiff fall to be determined as a general damage.

GENERAL DAMAGES

[133] In **Protea Assurance Company Limited v Lamb** 1971 (1) SA 530 (AD) at 534 H – 535 A, the following was held:

> *"It is settled law that the trial judge has a large discretion to award what he in the circumstances considers to be a fair and adequate compensation to the injured party for (the) sequelae of his injuries."*

[134] The judgment in **Protea Assurance Company Limited v Lamb** *supra* at 535 H – 536 B states:

"... The trial court or the court of appeal, as the case may be, may pay regard to comparable cases."

[135] In **Sandler v Wholesale Coal Suppliers Limited** 1941 AD 194 at 199, Watermeyer JA stated:

"The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case."

[136] In this regard see also the case of **Southern Insurance Association v Bailie NO** 1984 (1) SA 98 (AD) and the line of cases quoted by Saldulker J in the case of **Megalane v RAF** 2007 [JOL] 19483 (W).

[137] Plaintiff claims an amount of R150 000,00 in respect of general damages. Plaintiff argued on the basis of the judgment of Saldulker J in **Van Vuuren v RAF** Case No: 2005/925 (South Gauteng High Court) that the Court should award the sum of R120 000,00. Defendant argued on the basis of R60 000,00 being granted to the Plaintiff but was not totally averse to the amount of the award in the **Van Vuuren** case. Defendant's Counsel indicated that she was in possession of some case authority in this regard but she did not place sufficient emphasis on those cases.

[138] I have considered the soft-tissue injuries to the back and neck and I have considered the fact that Plaintiff suffers pain on an ongoing basis. I have taken into account the evidence led by the Plaintiff as well as the evidence of the Plaintiff regarding the injuries suffered and the pain and suffering of the Plaintiff.

[139] Although Plaintiff was not hospitalised and that she failed to attend medical treatments which alleviated and also cured her symptoms I have to attempt to compensate the Plaintiff for her pain and suffering taking the broadest general considerations. I have also attempted to arrive at an amount that is fair in the circumstances.

[140] Plaintiff suffered, in essence, a whiplash injury and suffers pain and suffering – some of it related to the accident and some of it not. The evidence of the Plaintiff as to why she stopped treatment gave the impression that she simply was too busy getting on with life to bother attending treatments that were to her benefit. In the Van Vuuren case there was a financial constraint to attending physiotherapy treatments and in this matter that was not the case. In a report Plaintiff suggested this but in evidence Plaintiff did not persist with this as a basis for her avoiding treatment.

[141] I have considered the Van Vuuren case *supra* and I regard the facts of the current case to be comparable insofar as the nature of the injuries and

the effects are concerned. In the Van Vuuren case *supra* the was forced to bear the pain whereas in this case the Plaintiff had alternatives which she simply refused to take advantage of. I am, therefore, of the view that it is fair, having regard to the circumstances to award the Plaintiff the sum of R100 000,00 in respect of general damages.

COSTS

[142] I have been asked to remain silent as to costs and to reserve granting a costs order and that the parties wish to argue the issue of costs after the determination on quantum has been made.

ORDER

[143] I accordingly order that :

[143.1] The ~~Plaintiff~~ having ~~been~~ conceded by the Defendant that the Plaintiff is entitled to 100% of the amount proved.

[143.2] That the Defendant be ordered to pay to the Plaintiff the sum of R100 000,00 in respect of General Damages.

[143.3] The Defendant shall pay interest on the aforesaid sum mentioned in paragraph 143.2 above at the legal rate calculated from fourteen (14) days after the date of judgment to date of payment.

[143.4] The Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for the Plaintiff's costs of future accommodation in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to her.

[143.5] The costs be reserved for determination on argument.

BAVA AJ_____