REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG LOCAL DIVISION,
JOHANNESBURG

CASE NO: 2009/11101

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

24/07/2014
DATE

SIGNATURE

In the matter between:

**LETTY MOFOKENG** Plaintiff

and

**ROAD ACCIDENT FUND** Defendant

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**JUDGMENT**

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**OPPERMAN AJ**

**INTRODUCTION**

[1] The plaintiff instituted action against the defendant for damages for personal injuries arising out of a motor vehicle accident that occurred on 4 December 2005.

The merits have been settled, the agreement being that the plaintiff will be entitled to 100% of her proven and/or agreed damages. This hearing concerns only the quantum of the damages suffered.

[2] The parties are agreed as to the amount of past and future hospital and medical expenses suffered by the plaintiff and that the defendant shall provide the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 ("the Act') for the costs of the plaintiff's future accommodation in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to her arising out of the injuries sustained by her in the motor vehicle collision, after such costs have been incurred and upon proof thereof ("the undertaking").

[3] The remaining issues which fall for my determination are the amounts to which the plaintiff is entitled for past loss of earnings, future loss of earnings and/or earning capacity and general damages.

**THE EVIDENCE**

[4] The plaintiff relied on the evidence of a number of expert witnesses, they are:

4.1. Dr C M Lewer-Allen, a neurosurgeon and spinal surgeon;

4.2. Margaret Ann Gibson, a psychologist (educational) with a special interest in neuro-psychological and educational assessment of adults and children;

4.3. Dr A M Kellerman, an industrial psychologist;

4.4. Ndileka Ramaifo, an occupational therapist whose report was admitted with the following admission being recorded:

*"The defendant admits the contents of the report and that the findings and opinions expressed in her field of expertise therein can be accepted by the Court as true and correct with specific reference to paragraph 8.1".*

[5] In addition to the aforesaid expert witnesses, the plaintiff relied on her own evidence, that of her mother, Mrs. Margaret Mofokeng, and that of her employer, Ms. Elizabeth Monatisa.

[6] The defendant led no witnesses but the plaintiff's certified grade 12 year-end results were admitted by the plaintiff and received as evidence.

**COMMON CAUSE FACTS**

[7] On 4 December 2005, and on the main road in Orange Farm, the plaintiff was working in a public phone booth. Her duties included receiving monies from patrons and allocating phones to them for purposes of making phone calls. She worked part time and when doing so, managed this business on her own. She collected between R800 and R2000 per day for her employer.

[8] A vehicle had lost control and had driven through the phone booth, rendering her unconscious.

[9] There is some dispute as to the duration of this state. More about that later.

[10] The plaintiff suffered from pain in her back and neck and had been fitted with a cervical collar. X-rays were done, she was kept under observation and was discharged that very same afternoon.

[11] The plaintiff's case is that she suffered a neck, back and head injury as a result of the collision.

[12] The issues which fall for determination are the nature of the injuries sustained by the plaintiff and her future employability.

**THE PLAINTIFF'S EVIDENCE**

[13] The plaintiff herself testified. Although she did not testify first, it would be helpful to begin with her evidence.

[14] The plaintiff testified that she grew up in Soweto. She attended primary and high school in the Orange Farm area. She repeated Grade 1 but does not know why. She testified that she had repeated Grade 8 due to the fact that she had fallen pregnant and that her father was abusive to her mother. She also repeated Grade 12, and attributed this to her father having remained abusive towards her mother both physically and emotionally. Her mother had in fact laid a charge against him. She stated that she did not have learning difficulties and that she had partaken in other school activities.

[15] She had passed three subjects in Matric and failed three subjects, so she said. She also testified that she had rewritten the Grade 12 exams but that she had not collected the results for those exams. This she claims she did not do because she had been involved in the accident forming the subject matter of this trial.

[16] During 2005 she had commenced a computer course but did not complete it because she had found a job in the telephone booth container. She testified that she had enrolled for a computer course as she had wanted to work in a call centre. She testified that she would have earned more had she progressed to working at a call centre.

[17] She explains that on the day of the accident, being 4 December 2005, she heard people screaming and she then felt the container shaking. She fell to the floor and when she woke up she was in the Baragwanath Hospital. At the hospital she was x-rayed, was given an injection and a neck brace was fitted. She was discharged on the very same day.

[18] She explained that although the accident happened about nine years ago, she was still suffering from injuries that she had sustained. She said that she had become very forgetful, and that she experienced pain when she walked or stood for a long time. This pain she experienced in her back. She explained that she was not always in pain but just when she had been standing for some time. She stated that she took Grandpa or Disprin and that the frequency of this self-medication had decreased over time. Initially she needed to take medication every day, but recently, only once or twice a week. She also stated that she experienced headaches which occurred two or three times a week. She had no neck pains anymore.

[19] She testified that about a week after the accident she went back to the container to see what it looked like. It had been damaged. She explained that she attempted to get her job back, that she had returned after some months, but that she had not been employed again as "there was somebody employed there already".

[20] She stated that she was able to find another job after the accident at an entity called "Let Us Grow". She had worked there for less than a year and did not receive a salary but received stipends. She would receive between R500 and

R800 per month. The job required her to walk very long distances and she simply could not cope. She found alternative employment at a restaurant called Marko's Chicken where she was employed as a cashier and a waitress but also worked for less than a year. Her salary similarly fluctuated between R1500 and R1700 per month, all of which was dependent upon whether or not the restaurant had reached its target or not.

[21] She stopped working there as she was working from seven in the morning until seven at night. She could not cope with the hours. More importantly, she testified, that she sometimes confused the customer's orders or forgot them.

[22] She said that her personality had changed after the accident. She explained that she had become very short-tempered and impatient. She also explained that she had concentration difficulties post accident. By way of example, she mentioned that she used to read magazines and books prior to the accident, but had discontinued this practice. She explained that she had become listless and that she was lacking in energy. She explained that she used to play netball prior to the accident but that she no longer did so. She explained that she had become forgetful. To elaborate and explain her forgetfulness she testified that over the past nine years she has had many cell-phones as she forgets where she puts them. This never happened prior to the accident.

[23] During cross-examination, she explained that she had three siblings, one of whom was 32 years of age and who had recently started work. She explained that she had obtained a driver's licence during 2013 and that she had done a security course, grades C, D and E during 2013.

[24] The plaintiff was cross-examined extensively about what she might have said to Dr Fine, a psychiatrist, who had apparently recorded what she had said to him in a report compiled by him. The defendant's counsel argued that although the report of Dr Fine had not been admitted into evidence and he had not testified at all, his report had been utilised by all the other experts and could not simply be disregarded. The report was not tendered into evidence and I fail to see on what basis I am to consider the content. It comprises both hearsay and opinion evidence. I accordingly disregard any alleged inconsistencies that appear between what was allegedly said to Dr Fine by the plaintiff and the plaintiff's evidence in this court in so far as she denies having made such statements to Dr Fine.

[25] It was put to the plaintiff that nothing had changed from before the accident to after the accident. Adv Snoyman, who acted on behalf of the defendant, contended that the plaintiff had no motivation to find work before the accident and similarly had no motivation to find work after the accident. The plaintiff denied this. The undisputed evidence supports her position. She had attempted to better herself by enrolling for a computer course but unfortunately finances, coupled with an abusive father, compelled her to seek gainful employment which had interrupted the completion of the computer course. The plaintiff took up employment as the sole manager of a phone booth where she was responsible for the running of such booth and collected between R800 and R2000 per day for her employer. Her services were terminated, for no other reason than that the container which housed this facility had been destroyed by the accident. Post

accident she had secured employment at Let Us Grow and thereafter as Marko's restaurant. Her undisputed evidence is that she left Let Us Grow because physically, she simply could not manage. She left Marko's too because of the physical exertion of the long working hours. She also stated that she had received a written warning as she was very rude to customers.

[26] During her evidence, the plaintiff varied her position between being seated and standing. It was clear that she changed her position quite regularly and that she found standing uncomfortable

[27] During cross-examination the following was put to the plaintiff:

*"... Sorry M'Lady, I seem to have misplaced the statement from the witness. I cannot seem to find it, but we contacted the lady who owns the container. She said that you came back to the container and that you also wanted to go back to work. -- I went to the container the first time and that is when I found that the container was not repaired yet, but I could see that there was a car that drove into the container and I went back the second time. That is when I found out that there was already somebody working there.*
*But you see, the owner told us that because the container was destroyed ..."*

[28] Adv Den Hartog, representing the plaintiff, then enquired as to whether or not Adv Snoyman intended to call the witness. He responded:

*"Yes, M'lady, she has been subpoenaed. Because the employer, this lady, told us that, because this container was destroyed, she did not operate that phone system again, that public phone thing again -- That is not true.*
*Now you then also had a problem because you said this lady was not paying you enough money. -- No, I never said that."*

[29] What was suggested to the plaintiff and the court was:

29.1. that the defendant was in possession of a statement made by plaintiff's previous employer;

29.2. that her previous employer had been subpoenaed;

29.3. that she will say that the phone booth was never operated again after the accident;

29.4. that she will say that the plaintiff had returned and had requested to be employed again

[30] The plaintiff denied the propositions put to her and was corroborated in her denials by the employer who was ultimately called as a witness to testify on her behalf.

[31] Adv Snoyman, submitted in para 22 of his heads of argument, that :*"The side show as to how and when the employer was contacted has no bearing on the case."*

[32] As it turns out, the incorrect statements put to the plaintiff as well as the impressions created ie that a statement was obtained and the witness was coming to court to support that which was put to her, does not have a bearing on the outcome of this matter. This is so because the plaintiff stood her ground. It is unfortunate that propositions were put to the plaintiff which, certainly in part, have been proven to be incorrect. Counsel should be careful when putting statements of fact to witnesses. It was suggested to her that she was lying. In addition, the Court and the plaintiff were informed that a witness would be called to support this contention. The witness came, she testified contrary to what was put to the

plaintiff and advised the Court that she had not been subpoenaed. No subpoena issued by this Court or served by a Sheriff of this Court, was produced during argument. More about this later though.

**EXPERT EVIDENCE**

[33] The procedure laid down by the Rules as amplified by the practice manual, requires that summaries for expert witnesses are to be exchanged and that the experts are to meet with a view to determining whether there is common ground and to elicit the issues which separate them. They are to produce minutes of their meeting at the trial.

[34] The defendant did not call, nor have available, any expert witnesses. Prior to the matter being referred to this court for hearing, the deputy judge president of this division had decided an application for the postponement of the matter brought by the defendant. From what I could gather from counsel the purpose of the postponement was to enable the defendant to attempt to secure expert witnesses.

[35] I do not know why the defendant was not ready for trial but the obligation to crystallise issues does not fall away merely because the one party does not have an expert to counter the opposing side's expert. It is incumbent upon the parties to in all instances attempt to narrow the issues and to formulate what the points of difference are.

[36] In this matter, much of the defendant's case (which was not apparent from the pleadings, the minutes of the pre-trial or from the opening address) was ultimately that the plaintiff's experts had relied on incorrect facts and that their opinions were accordingly flawed.

[37] The facts which were shown to be incorrect were that the plaintiff:

37.1. had obtained a matric.

37.2. had completed a computer course.

[38] It would have been the simplest thing for the attorney of the defendant to have put these facts to the attorney of the plaintiff in writing, who would've placed such facts before the expert witnesses before the trial commenced enquiring from them whether reliance on the correct facts, would have changed their opinions, thereby achieving, by a written exchange, in a matter of minutes what it took hours, if not days, to achieve in court. This was not done. Much court time was wasted by virtue of this failure. Attorneys are fond of the phrase 'I will not litigate by correspondence' but this cliché should not be resorted to, to conceal a failure to give due consideration to the obligation to reduce the duration of the trial by eliminating unnecessary evidence. Appropriate costs orders may follow.

**EVIDENCE OF DR C M LEWER-ALLEN**

[39] Dr Lewer-Allen is both a neuro- and spinal surgeon. In preparation of this trial, he had prepared a report which was received as evidence.

[40] His expertise was not disputed.

[41] His report contains a history provided by the plaintiff.

[42] On examination Dr Lewer-Allen found that the cervical spine was tender over the C2 to C6 and in the paravertebral muscles to the trapezii. The cervical range of movement ('ROM') was about two-thirds of normal, being limited at the extremes by pain especially on the left side.

[43] In the lumbar spine he found that the plaintiff was notably tender over the L4 and L5 vertebra in the lumbar midline and in the paravertebral muscles. The tenderness extended slightly into the buttock on each side.

[44] On examination of the lumbar range of movement, the plaintiff revealed an ability to reach only to the mid shin. She had difficulty resuming the upright posture. The remaining movements were limited at about two-thirds normal by significant pain, particularly posterolateral quadrantic bending. Straight leg raising was very restricted, being resisted at first and then allowed up to about 10 degrees bilaterally.

[45] The normal sensation and power at the knee joints scored an average of 1 plus (normal scores are 2 plus), thus her score was on the low side.

[46] After the examination she took two analgesics.

[47] In the summary and discussion of injuries, Dr Lewer-Allen finds the following in respect of the injuries. It is important to observe that these symptoms prevail some 7 years after the accident – the examination occurring on 4 December 2012.

**The head injury**

[48] The plaintiff had no recall of whatever had happened, waking from being unconscious to finding herself in the casualty department at Baragwanath Hospital at 3 or 4 pm that afternoon. The accident occurred at 9 am, so her period of post-traumatic amnesia ('PTA') or inability to lay down continuous memory was in the region of 6-7 hours.

[49] The hospital records indicate that she was unconscious for about an hour. The Glasco Coma Scale ('GCS') was 15/15 in hospital.

[50] Dr Lewer-Allen explained that the GCS was a methodology of describing mental functioning where the primary concern would be blood collection over the brain. Bennett and Teasdale devised this scale of reference. There are three parameters. The patient is asked: (1) to name where he or she is; (2) to open their eyes (3) to move all four limbs. Each one of these categories is given a score. If the patient is good in all, the patient would score 15. A deceased person would score a 3. Dr Lewer-Allen expressed the view that the scale is not a forecaster of great accuracy, and said a score below 8 would indicate severe injury. Dr Lewer-Allen explained that a mild head injury is unlikely to lead to long-term problems but that the window of recovery after a head injury is approximately two years. He explained that a comparison could be drawn with somebody running a 2000 metre track race. At the first 100 metres one could assess who was in front and who was at the back and one could endeavour to predict who would be the eventual winner. However, certainty could only be gained after the 2000 metre race and at the end. The significance of using the example of the 2000 metre is that it would take approximately two years for a brain injury to settle. If a problem was identified two years later, and there was no other cause for the deficit, it could safely be inferred that the deficit arose from the accident and that the brain injury had been sustained. Her condition prior to and after the accident should be ascertained from people who knew her. The problems could be identified with reference to a neuro-psychologist.

[51] Dr Lewer-Allen explained that different meanings can be ascribed to the concept of loss of consciousness. It could indicate being in a coma, to being able to

respond to verbal stimuli, although not remembering answering. However, if the period of loss of consciousness or post-traumatic amnesia ('PTA') (the inability to lay down continuous memory) be regarded in the present case as probably nearer to 6-7 hours, then, the head injury would be regarded as being moderately severe. He explained that those who would base their prognostication of long-term sequelae on such limited criteria as duration of PTA and GCS change, would suggest that she sustained only a mild to moderate head injury and would believe that no long-term neurological sequelae would arise therefrom.

[52] He testified that it was his perception that, while the majority of such accident victims follow that precept, even a percentage (about one-third) of mild injury victims can manifest some degree of long-term neurological sequelae. He testified that the key to understanding whether or not she had actually sustained a significant brain injury would depend heavily on the demonstration at or beyond the two-year recovery window, of the presence or otherwise of neuro-cognitive and neuro-psychological shortcomings by the neuro-psychologists. Were they to confirm such malfunctioning and if that deficit was shown not to have been present prior to the accident, and not to have been caused by any non accident-related factors, then the brain damage will be attributable to the accident. He testified that this held true whether or not one could prove the nature of that injury e.g. if the mechanism of the injury to the brain tissue is in the form of a primary diffuse rotational axonal shear injury as against a contusional or hypoxic injury.

[53] He further testified that it held true no matter the duration of the loss of consciousness or degree of alteration of the GCS. Those criteria, he explained,

are observations made by non-experts in casualty at the outset of the two-year recovery period and serve only as prognostic tools. On the other hand, the psycho-metric findings two years later represent the actual neuro-cognitive status and are not guesses or suppositions. He suggested that one should defer and that he most certainly would, to the neuro-psychologists for such an assessment.

[54] He testified that in the present case he would consider that there was a possibility that the plaintiff had sustained a diffuse rotational shear injury. He explained that this type of brain injury is characterised by an effective disconnection between the frontal lobes and the rest of the brain to a lesser or greater degree. The microscopic changes in the axonal structures, generally at the grey/white or deep nuclear interface, he explained, are not visible on MRI scans unless they were severe enough to have an accompanying haemorrhagic component. He stated that the existence of this type of brain damage can only be diagnosed by the recognition of the consequential neuro-cognitive and neuro-psychological deficit.

[55] He also concludes that any deficits of brain function now demonstrated would be permanent.

[56] Defendant criticised Dr Lewer-Allen's approach as, so the argument went, it seeks to disregard the generally accepted assessment of neurological sequelae on the basis that the criteria is limited and wishes to replace these criteria with what the defendant has termed an "outcome based diagnosis theory".

[57] The defendant argues that this outcome based diagnosis disregards the nature of the injury completely, and seeks to rely on the demonstration of cognitive performance after a two-year period. It is argued that such an approach applies

no criteria and that it is assumed that if any cognitive fallout is found at the end of this window period, then it can be accepted that the fallout is as a result of the injuries sustained in the collision unless these can be attributed to non accident-related factors.

[58] The defendant argues that whilst such outcome-based diagnosis theory might be acceptable for treatment of the patient, it is unacceptable in a legal paradigm. The defendant argues that no criteria at all are applied. It argues that no criteria such as "CGS and PTA and even pre-existing deficits are applied". The defendant argues that it is incorrect to merely look at the end result and ascribe all fallout to the collision.

[59] I find nothing flawed with the reasoning process advocated by Dr Lewer-Allen. More importantly, the defendant has tendered no evidence as to what criteria such as "CGS and PTA" might be. No evidence at all has been tendered to counter the evidence adduced by Dr Lewer-Allen. I certainly cannot find any legally rational reason for rejecting Dr Lewer-Allen's evidence, given under oath and which stands undisputed. I am mindful of the fact that I am not obliged to accept opinions tendered by experts, even if undisputed by anything countervailing. His evidence was however cogent and the evidence of Ms Gibbs and the plaintiff supports his views.

[60] He was at pains to explain that his theory only holds if the neuropsychologists confirm malfunctioning, that it is shown that the deficit was not present prior to the accident and that it is shown that the deficit was not caused by any non-accident related factor. As discussed hereinafter, Ms Gibbs confirmed malfunctioning, the

evidence as a whole showed that the deficits were not present prior to the accident and Ms Gibbs had excluded depression and malingering.

[61] I accordingly find that the plaintiff probably sustained a diffuse rotational shear injury. This type of brain injury being characterised by an effective disconnection between the frontal lobes and the rest of the brain to a lesser or greater degree.

**Injury to the lower back**

[62] Dr Lewer-Allen opines that the accident would have set in motion a process of degradation that would be on-going, and it would have accelerated and aggravated the degree of any degeneration that might possibly have eventually occurred spontaneously. He explains that this will continue to be a problem long after the two-year of natural recovery has passed, and could be expected to continue to be symptomatic into the future.

**The neck injury**

[63] He opines that the plaintiff presented with symptoms and signs of having sustained a soft-tissue injury to the neck. He says it is likely that there would be associated cervicogenic headaches with this injury.

**MARGARET ANN GIBSON**

[64] Ms Gibson, a neuro-psychologist whose qualifications were not disputed, testified that she had assessed the plaintiff to determine the nature and extent of neuro-psychological sequelae emanating from head or other injuries during a motor vehicle accident which had occurred on 4 December 2005, seven years and three months prior to the assessment date.

[65] Ms Gibson caused the plaintiff to complete the Dysexecutive Questionnaire ("DEX), which is a 20-item questionnaire constructed in order to sample the range of problems commonly associated with Dysexecutive syndrome. This questionnaire rendered the following result:

> *"Her responses indicated that she has significant difficulty in thinking and planning forward, that she behaves without taking others into consideration, that she will often say one thing but do another, that she is restless, and finds it hard to stop herself from saying something once she has started. She is bad-tempered and unconcerned about others' views of her behaviour or utterances. She feels lethargic and unenthusiastic."*

[66] She testified that this finding is consistent with a frontal lobe injury. She testified that the accident could be the cause of the bad results obtained in the Dex questionnaire but it could also be caused by depression and accordingly requested her to complete the Becker Depression Inventory. She concluded that the plaintiff was mildly depressed.

[67] Ms Gibson administered a host of tests on the plaintiff, some twelve tests in total. Ms Gibson testified that although the plaintiff had an average functioning ability, the results are of such a nature to show that there was an underlying intelligence which could not manifest itself post-accident as a result of the head injury. She found that the plaintiff was, pre-accident, able to average intellectual functioning. But she said the tests showed that the plaintiff was no longer functioning at the same level she had pre-injury. The neuro-psychological test results revealed that the plaintiff was found to be of generally good functioning. However, deficiencies were identified in the following areas:

67.1. focussed span of attention;

67.2. complex attention or working memory;

67.3. difficulty with construction in conjunction with non-verbal reasoning;

67.4. below average and variable visual memory;

67.5. susceptibility to distraction;

67.6. retrieval of information from memory store and some retention difficulty;

67.7. she tended to not extend herself in the face of complexity or subtlety.

[68] Ms Gibson makes the following assessment findings:

> *"The most compelling observation and finding of the assessment, consistent with brain injury, was in the behavioural domain, with Ms Mofokeng presenting as irritable and with a low frustration tolerance, this being confirmed by self-report on two questionnaires, and by interview information. Behavioural difficulties such as lack of insight and social awareness, unconcern for social rules, knowledge-response dissociation, hyperkinesis, distractability and lack of drive were all reported and can all be associated with frontal lobe dissociation or injury. It is acknowledged that these difficulties can be associated with depression, however it is noted that Ms Mofokeng did not make strong report of this as on the Beck Depression Inventory. It seems reasonable to conclude that the behavioural difficulties are not depression-related and seemingly that brain injury has occurred."*

[69] Mr Gibson concludes that the plaintiff has two main difficulties, being behavioural-motivational and cognitive (attention-memory). She is likely to forget or ignore important information and working in an office environment she would be likely to be seen as more trouble than she is worth.

[70] The pain in her back and her knee to move around frequently as well as her headaches, aggravates such symptoms.

[71] She expresses the view that the plaintiff is probably unemployable.

**DR KELLERMAN**

[72] Dr Kellerman, an industrial psychologist, testified on behalf of the plaintiff and a report prepared by her, was received as evidence.

[73] She testified that the initial testing that she had conducted on the plaintiff was for a person with a grade 11 or 12 education. The assessment was to determine what the plaintiff's learning potential was.

[74] Upon receipt of the results, she realised that the results were too low for somebody with an educational level of grade 11. She then alerted the plaintiff's legal team to the fact that there could be some cognitive deficits.

[75] Dr Kellerman repeatedly stated that had the plaintiff suffered the deficits that were exposed by the experts, pre-accident, she would never have passed grade 11. She went so far as to say that she would not have passed grade 8. This opinion has not been contradicted by any evidence presented by the defendant

[76] In summary, Dr Kellerman's evidence suggests the following in respect of the scenario pre-accident:

76.1. The plaintiff would have been able to obtain work in the formal sector, that she would have been able to have been appointed in a position in the formal sector on a Paterson-derived Grade A1 at the age of about 25-28 years and that she would have progressed with 3-5 year intervals to a Grade B5;

76.2. As an alternative, she suggests that the plaintiff might have been able to obtain employment in the informal (amended to non-corporate during her oral evidence) sector in a semi-skilled position,

and that in both instances she would have been able to work until retirement age of 65 years.

[77] Post-accident Dr Kellerman opines that the plaintiff was unemployable.

[78] In respect of the first scenario postulated pre-accident by Dr Kellerman, the defendant criticised her approach, contending that the factual foundation for expressing the opinion was absent. This was raised with Dr Kellerman who stated repeatedly that her approach was conservative and that she had pitched the plaintiff's entry into the formal sector at a lower level than one would do with someone who had completed matric and had finalised a computer course. Somebody with a grade 12 level of education could enter on a Paterson level A3. Thus, the fact that the plaintiff had only achieved grade 11 and had not completed the computer course, did not affect her opinion.

[79] She conceded that it would have been more difficult to enter the administrative formal sector, but that the plaintiff would have had no difficulty finding employment in the formal sector with grade 11.

[80] Many hours were spent cross-examining Dr Kellerman on whether she would have entered the labour market on a semi-skilled or unskilled level. She was emphatic that she would have entered the work force on a semi-skilled level as a worst case scenario.

[81] Plaintiff's counsel argued that the cross examination of Dr Kellerman had been excessive, repetitive and unnecessary particularly as the defendant had no evidence with which to gainsay it. I agree.

**MARGARET MOFOKENG**

[82] The plaintiff's mother testified. She was clearly not an educated person and was not very involved with her daughter's education. So for example, she did not know why her daughter had repeated Grade 1.

[83] In the main, her evidence corroborated the evidence of the plaintiff. She explained that the plaintiff had, post-accident, become short-tempered, had shouted a lot, was impatient with her siblings and her mother, was forgetful, had had numerous cell-phones which she had lost, suffered from consistent pain in her back and headaches and she was no longer the happy child that she was prior to the accident. She also explained that prior to the accident, the plaintiff would pay attention to her personal appearance and that she "was very neat, loved herself but after the accident not."

[84] She attributed the plaintiff's Matric results to the circumstances which had prevailed in the family home. She explained that the plaintiff's father was abusive when inebriated.

[85] The defendant's counsel argued that Mrs Mofokeng's evidence is not reliable as, although she had told the Court that the plaintiff had done well at school, she had conceded during cross-examination that she did not know what a good mark was as opposed to a bad mark and that she further did not know what symbols the plaintiff had obtained on her report cards. As mentioned hereinbefore, in my view,

the plaintiff's mother honestly held the view that her daughter had done well at school. Her daughter had passed. For her, that was doing well. The defendant, in criticising the evidence of Mrs Mofokeng, assumes a standard which was not explored with the witness during cross-examination and it would be incorrect to draw an adverse inference from her evidence in the absence of this.

**ELIZABETH MONATISA**

[86] The plaintiff called one of her previous employers, who testified that she had been a pleasant person to work with and that she had had no complaints from any of the members of the public who had used the telephones during the course of her employment.

[87] Contrary to what was put by the defendant's counsel to the plaintiff, she testified that she had never been subpoenaed and that a person who introduced herself as the plaintiff's attorney had contacted her at approximately 13:00 on the day of the commencement of the trial.

[88] She testified further that the plaintiff had worked two to three days a week and that for this she had received R500 per month and if she had worked for a full week she would have earned approximately R1000.

[89] The plaintiff never got her job back because the container had been damaged in the collision and when they did start operating public phones again, they were cash-strapped and managed on their own.

**NDILEKA RAMAIFO**

[90] The report of an occupational therapist, Ndileka Ramaifo, was received as evidence and the admission recorded in respect thereof, has been referred to hereinbefore.

[91] The second paragraph of paragraph 8.1 (which was specifically admitted as being correct by the defendant) contains the following observations and opinions:

> *"While the symptoms may improve with treatment, literature indicates that cervical and lumbar spine symptoms are likely to persist with time. Even though she will be suited to perform work making sedentary to light physical demands, she will need to find a job that allows her to alternate between sitting, standing, walking and also avoid lifting and carrying medium to heavy items. Her job as a cashier/waiter is no longer suited for her if she has to spend extended periods of time standing. Based on her level of education and work experience, the writer is of the opinion Mrs Mofokeng may not have much choice to choose a suitable job making her chances to find a job that suit her condition limited."*

[92] Having regard to, *inter alia*, the evidence of Ms Ramaifo and Dr Kellerman that and to the sequelae of the head injury together with the physical injuries suffered by the plaintiff, I find, on a balance of probabilities, that the plaintiff has been rendered unemployable.

**LOSS OF EARNINGS**

[93] When the matter was argued on 2 April 2014, an updated actuarial calculation was received by the Court. It bears mentioning that during the course of the hearing, this Court received several actuarial calculations and it was agreed between the parties that the calculations recorded therein were accurate but that

the Court of course, needed to make findings in respect of the factual bases under pinning such calculations.

**Contingencies**

[94] Plaintiff's counsel has suggested a contingency of 5% to be applied to past loss of earnings pre-accident. Defendant's counsel has suggested 50% pre-accident. In my view, 5% is an appropriate contingency to apply. In respect of the contingencies to be applied to the future loss of earnings, the plaintiff's counsel has suggested 15% and the counsel for the defendant, 50% pre-accident and 35% post-accident. In my view a contingency of 15% pre-accident and 0% (nil percent) post-accident is appropriate.

[95] I am mindful of the fact that I should have regard to all the facts when exercising a discretion in relation to a contingency. Contingency deductions allow for the possibility that a plaintiff may have less than "normal" expectations of life and that she may experience periods of unemployment by reason of incapacity due to illness, accident, labour unrest or general economic conditions. (See *Van der Plaats v South African Mutual Fire & General Insurance Company* 1980 (3) SA 105 (A) at 114-115).

[96] Both favourable and adverse contingencies should be taken into account. (*Southern Insurance Association v Bailie* N.O. 1984 (1) SA 98 (A) at 117C-D.

[97] In the end, however, the assessments of contingencies is largely arbitrary and will depend on my impression of the case. (See *Bailie supra* at 116H-117A).

[98] The defendant argued that the plaintiff should have contingencies applied to her in the region of 50%-60% in a pre-accident scenario by virtue of, *inter alia*, the following factors:

98.1. She was three months short of turning 23 and still doing a part-time informal job;

98.2. The plaintiff comes from a deprived socio-economic background with no contact to assist in obtaining employment;

98.3. Her family culture reflects a tolerance for unemployment;

98.4. Her non-accident related psychological baggage is going to follow her;

98.5. Even with the spare time that she had, she had not acquired a more permanent or stable job;

98.6. She had incomplete schooling;

98.7. 70% of school leavers with incomplete schooling cannot find employment;

98.8. It is exceptionally unlikely that she would have been able to find work in the formal sector;

98.9. She is competing for work against a younger work-force, many of whom have better educational qualifications;

98.10. She has no skills which would give her job preference over her peers;

98.11. She has two children to support;

98.12. She has moved to Garankuwa outside the area of the accepted labour pool of the large cities; and

98.13. Her husband, by moving her to Garankuwa, probably does not want her to work as he has his own business.

[99] The scenarios sketched by the defendant are unrealistic for, *inter alia*, the following reasons:

99.1. No basis has been laid to assume a retirement age of 60 and not 65;

99.2. The contingencies applied are incorrect;

99.3. From the evidence it is clear that the plaintiff was not unskilled and would have progressed substantially further than semi-skilled median quartile.

99.4. Dr Kellerman had entered the plaintiff into the labour market at the age of 25-26, and was thus mindful of the fact that she would still have needed time to qualify and distinguish herself from the younger workforce.

99.5. Although it is correct that the plaintiff has incomplete schooling, she had re-written the matric exam and had enrolled herself for a computer course which had been interrupted by virtue of financial pressures.

[100] I am satisfied, having regard to all the evidence presented and in particular to the evidence of Dr Kellerman, which was subjected to considerable scrutiny during cross-examination, that the arguments advanced by the defendant in relation to contingencies cannot be sustained.

[101] The plaintiff's actuarial calculations have been done on two bases. Basis 1 is premised on an assumption that, had the accident not occurred, the plaintiff would have progressed to the lower quartile basic salary of the Paterson A1 level and would have progressed to the median basic salary of the Paterson B5 level. Her retirement age was pegged at 65. Basis 2 has been calculated with the plaintiff entering the market at the median wage for a semi-skilled worker in the non-corporate sector and attaining a career plateau at the upper quartile wage for a

semi-skilled worker in the non-corporate sector. Her retirement age was pegged at 65. Basis 1 yielded a total loss of 2 523 596, and basis 2 yielded a total loss of 1 970 234, applying the contingencies referred to hereinbefore.

[102] The defendant has sketched three scenarios in its calculations. Scenario 1 assumes the plaintiff to commence at the Paterson A1 lower quartile level progressing to Paterson B1 lower quartile with a retirement age of 60. Scenario 2 envisages a career in the informal sector assuming her retirement age at 60. Scenario 3 assumes earnings of R500 per month at the median quartile with a retirement age of 60. Scenario 1 then yielded a total loss of R758 992, scenario 2 R33 306 and scenario 3 R193 969, again applying the contingencies referred to herein before.

[103] In my view the total loss is represented by the average between the two bases created by Dr Kellerman which would yield a figure of R2 246 915.

**GENERAL DAMAGES**

[104] If the Russell criteria is applied to the head injury sustained by the plaintiff and the loss of consciousness is taken as 6-7 hours, the head injury is to be regarded as being moderately severe, according to Dr Lewer-Allen. He also opined that those who would base their prognostication of long-term sequelae on such limited criteria as the duration of PTA and GCS change, would suggest that the plaintiff sustained only a mild to moderate head injury. However, Ms Gibbs confirmed the presence of neurocognitive and neuropsychological shortcomings more than two years after the accident. It has also been shown that the deficit was not present prior to the accident and depression and malingering were excluded. Thus it can

safely be assumed that the plaintiff has sustained a head injury which, together with the pain in her lower back and spine, has rendered her unemployable.

[105] The plaintiffs counsel suggested that an amount of R780 000 in general damages is adequate in the circumstances whereas the defendant's counsel contended that general damages in the region of R180 000 be awarded.

[106] It is now recognised that awards pre- 2003 are not representative or accurate benchmarks as there is now a tendency for awards to be higher than they were in the past. See *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) at 170F-G; *Schoombee v Road Accident Fund* (unreported case no. 18426/2007), South Gauteng judgment delivered by Gautschi AJ on 24 February 2012 at para 14.

[107] In the *Schoombee* matter, the plaintiff had suffered a mild to moderate concussive brain injury combined with signs of more focal (right-sided) frontal dysfunction. His left knee was immobilised in a knee brace for a period of three months during which he had to use crutches and after the knee brace was removed, he used crutches for a further month. An award of R700 000 was made.

[108] This case is to be distinguished for two reasons, one being that the plaintiff in this case was younger at the time of the collision, being 23 years of age and she was not completely immobilised by braces and crutches as was Mr Schoombee.

[109] In Torres v Road Accident Fund (unreported case no. 29294/04), South Gauteng High Court, a 24-year old male, 20 years old at the time of injury had sustained significant neurocognitive and neurobehavioural deficits. He suffered from depression and adjustment disorder. His successful career in jewellery design

had been limited to sympathetic employment. The general damages that were awarded to him was R600 000, which relates to R931 000 in 2014.

[110] In *Herbst v Road Accident Fund* (Witwatersrand Local Division: Case No: 3035/2004) the plaintiff was a 34-year old male cyclist and specialist anaesthetist. The plaintiff suffered severe brain damage and he was functionally permanently unemployable with no residual earning capacity. An amount of R600 000 was awarded, which relates to R931 000 in 2014.

[111] The present case is more in line with the Schoombee matter and the amount suggested by the defendant's counsel would be inadequate to compensate the plaintiff for the loss she has suffered.

[112] In the circumstances, in this highly inexact science, I consider R700 000 an appropriate award under this head.

**THE ISSUE RELATING TO THE SUBPOENA OF PLAINTIFF'S EMPLOYER**

[113] The court has summarised the events, which led to Adv Snoyman advising this court that the plaintiff's employer had been subpoenaed. This is contained in paras 27 to 32 and paras 87 and 89.

[114] The matter was argued on 2 April 2014. Prior thereto, a note was sent to counsel requesting him to provide a copy of the subpoena at the resumed hearing. If none existed, to explain, under oath, why the court was so informed.

[115] At the hearing a document was presented which had not been signed nor issued by the registrar and no proof of service was presented. The court was advised that an 'agent' of the defendant's attorneys offices had served or had attempted to serve the 'subpoena'. The explanation was not at all clear. What was, however,

crystal clear was that no subpoena, issued out of this court, had been served by the sheriff on the witness.

[116] The court was misled and so was the witness. No satisfactory explanation has been tendered, despite an invitation to do so.

[117] The person who was misled, the plaintiff, was particularly vulnerable. It was common cause that the plaintiff had neurocognitive deficits. The only issue was whether or not they were pre-existing or whether they were accident related. In my view, the conduct of Adv Snoyman is, *prima facie*, unprofessional. Practitioners have to be scrupulous with the truth and to refer to this as a 'side show' as Adv Snoyman did in his heads, reveals a grievious failure to appreciate the gravity of his conduct.

[118] It is for this reason that I refer this matter to the Johannesburg Bar Council. Should they deem it appropriate, the relevant law society might also be informed of this conduct on the part of the defendant's attorney.

**ORDER**

[119] I accordingly make the following order:

1. The defendant shall pay the plaintiff's attorney of record the amount of R2 946 915 in settlement of the plaintiff's claim.
2. The amount referred in paragraph 1 hereof, shall be paid to the plaintiff's attorney of record. The trust account details are as follows: Standard Bank, Melville, Renier Van Rensburg Inc. Trust Account, account no: 401022129, branch code: 006105.

3. 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 ("the undertaking") for the costs of the plaintiff's future accommodation in a hospital or nursing home or treatment of, or rendering of a service or supplying of goods to him arising out of the injuries sustained by the plaintiff in the motor vehicle collision that occurred on 4 December 2005 after such costs have been incurred and upon proof thereof.

4. The defendant is to pay the plaintiff's taxed or agreed costs on the party and party High Court scale, including the following:

4.1. the costs of counsel;

4.2. the costs of:

4.2.1. obtaining expert medico-legal reports delivered in terms of rule 36(9)(a) and (b);

4.2.2. preparation fees of the plaintiff's experts and the experts' fees upon attending the hearing of this matter, being:

4.2.2.1. Dr G Reid (did not attend);

4.2.2.2. Dr Fine (did not attend);

4.2.2.3. Ndileka Ramaifo (did not attend);

4.2.2.4. Dr C M Lewer-Allan (two days);

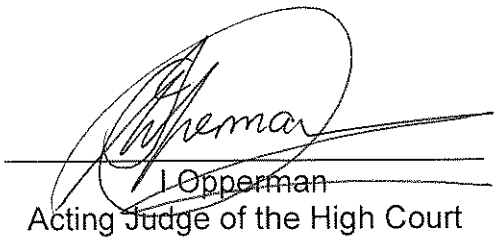
4.2.2.5. Dr A M Kellerman (two days);

4.2.2.6. M A Gibson (two days);

4.2.2.7. Algorithms;

4.3. The costs incurred for 13 March 2014 including the fees of Dr Kellerman for that day, are to be paid by the defendant as between attorney and client.

5. This judgment is to be referred to the Johannesburg Bar Council in respect of the conduct of Advocate Craig Snoyman.



I Opperman
Acting Judge of the High Court

Heard: 2 April 2014
Judgment delivered: July 2014
Appearances:
For Plaintiff: Adv A P Den Hartog
Attorneys: Renier van Rensburg Inc.
For Respondent: Adv C Snoyman
Attorneys: Pule Inc