IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1)REPORTABLE: YES/NO
(2)OF INTEREST TO OTHERS JUDGES: YES/NO(3)REVISED
8/12/2014
DATE SIGNATURE

8/12/2014

CASE NUMBER: 6644/2011

In the matter between:

RG VAN HEERDEN Plaintiff

And

THE ROAD ACCIDENT FUND Defendant

JUDGMENT

STRAUSS, AJ:

INTRODUCTION

1. This is an action for damages in terms of the Road Accident Fund Act (56 of 1996) ("*the Act*") pursuant to a motor vehicle collision on 19 January 2009. The plaintiff, then 32 years old, sustained a minor soft tissue injury of the neck and a soft tissue injury of the lower back. The defendant has conceded merits on a previous occasion, 80/20% in favour of the plaintiff.

The plaintiff does not claim for any past medical and or hospital related costs.

2. The parties have also agreed that the defendant will furnish the plaintiff with an undertaking in terms of section 17(4) (a) of the Act. Accordingly the only issue for determination is quantum of damages under two headings, i.e. loss of earning capacity and general damages.

3. The plaintiff after oral amendment of her quantum, claims for general damages in an amount of R250,000.00, and for loss of earning capacity an amount of R874,900.00, in terms of a calculation prepared by Gerald Jacobson Consulting Actuaries attached to the papers marked as "D2".

4. Evidence on behalf of the plaintiff would be led with no evidence for the defendant. By agreement between the parties the expert reports of both parties and the joint minutes of the orthopaedic surgeons, the occupational therapists and the industrial psychologists were handed in, and the parties argued on the respective joint minutes, as well as making some reference to the admitted reports handed in.

5. The defendant also indicated that it had rejected the RAF4 Form of Dr Khumbarai, qualifying the plaintiff to claim general damages due to her injuries resulting in a serious long term impairment, and that the defendant would provide the formal rejection letter to court in due course as they were still not in possession thereof. The defendant indicated that they had rejected the RAF4 already on 11 February 2014, some 9 months prior to trial, and that the matter cannot proceed on general damages.

6. The plaintiff counsel, denied receipt of the rejection letter and indicated that the Fund had admitted a second RAF4 of Dr Heymans dates 28 April 2014 qualifying the plaintiff for a serious injuries in a pre-trial held on 18 November 2014. The Fund, had further made an offer on general damages prior to the trial commencing, but this offer was rejected by the plaintiff.

7. I will deal with the rejection of the two RAF4 form first, as I have to first find if the plaintiff does qualify for general damages before I can find in favour of her claim for general damages, as such.

8. A rejection letter of 11 February 2014, was only handed up to me once counsel for the defendant could obtain such, and it was after the plaintiff's evidence, but prior to the parties arguing the matter.

9. The rejection letter was dated 11 February 2014, it was sent by the defendant's attorneys to the plaintiff's attorneys per email and fax indicating that the Fund rejects the RAF4 Form, compiled by Dr Kumbarai dated 21 January 2014. The letter indicated that in terms of the Road Accident Fund Regulations 2008, promulgated on 21 July 2009, Regulation 3(1)(a) and (b) thereof, the plaintiffs assessment qualifying her for general damages was rejected by the Fund, and that the plaintiff had to attend a further assessment with the Funds expert an orthopaedic surgeon Dr Heymans.

10. The Fund therefore acted in terms of regulation 3(3)(d)(ii) in re scheduling a further assessment with their own expert with the plaintiff to determine the plaintiff's qualification for general damages.

11. It was pointed out to counsel that there were in the circumstances two RAF4 Forms, one completed by Dr Kumbarai and one completed by Dr Heymans. The RAF4 Form completed by Dr Heymans dated 28 April 2014, also qualified the plaintiff in terms of the narrative test for a serious long-term impairment. This RAF4 had not been rejected as on date of trial, and the attorney for the Fund had accepted this RAF4 in the pre trial held. As soon as this was pointed out to defendant's counsel, the defendant's counsel then on instructions, orally, rejected the second RAF4 form , and argued that the general damages must be dealt with in terms of Regulation 3 (1) (a) (b) once again.

12. The court thus has to consider if the plaintiffs assessment of general damages had been rejected and could on the date of trial be rejected, once again, and if so, the general damages of the plaintiff must be referred to the tribunal.

13. Plaintiff's counsel argued that the defendant agreed in the pre-trial conference held between the parties on 18 November 2014, that the defendant's expert agreed that the plaintiff qualifies in terms of clause 5 of the RAF4 Form, with reference to the assessment of Dr. Heymans on 28 April 2014. The plaintiff is thus entitled to general damages. It was agreed in the pre trail minute as follows:

"B. ISSUES IN DISPUTE:

"The parties have agreed that the matter proceed on both issues of quantum, ***defendants expert agrees*** (own underlining) that *the plaintiff*

qualifies in terms of clause 5 of the RAF4 form and that the plaintiff is entitles to general damages."

14. It was further argued on behalf of the plaintiff that on the morning of the trial the Fund made a formal offer of settlement to the plaintiff, specifically mentioning an amount for general damages, thus confirming the acceptance of the assessment of general damages. The plaintiff rejected the settlement offer, but did not reject the acceptance by the fund of the RAF4 qualifying the plaintiff for general damages, in the pre-trial minute.

15. It was argued by the plaintiff's counsel that the Fund is bound by their admission in the pre trial minute, and was I also provided with the *ex tempore* judgment by Khumalo J, of this division, in the matter of ***Adv Ronelle Ferguson obo De Ridder, LA Case No A592/2013***: in which the following was found:

"[9] In an action pleadings are there to define issues between the parties. However the parties may by agreement re define the issues from the pleadings. ***Knox Darcy & Another v Land & Agricultural Development Bank Of SA 9625/12(2013) ZASCA 93 (5 June 2013)***

[10] One of the purposes of the pre trail minutes is to then facilitate such re-defining of the issues between the parties going on trial in order to curtail the duration of the trial, narrow those issues, curb costs, facilitate settlements see ***Kriel V Bowels 2012 (2) SA 45 (ECP)*** *as a result any admission, denial or agreement, between the parties recorded in the pre trial minutes as it would be with the pleadings, are binding between the parties,*

[11]By appending one's signature to a pleading an attorney or advocate confirms that he has been scrupulous in preparing the pleading see ***Motswai Road accident Fund 2013 SA8 (GSJ) at (30)*** *as it would be with pleadings in a pre trial minute the legal representatives signature signifies such scrupulousness and the weight of his mandate.*

[12] Hence an attorney has ostensible apparent authority to bind the client at a pre-trial conference convened in terms of Rule 37 of the Uniform Rules, even if the effect of the agreement is to settle an opposing party's claim see ***MEC for Economic Affairs, Environment & Tourism Eastern Cape v Kruzenga 2010 (4) SA 122 (SCA))***,

[13] The attempt of parties therefore to reach an agreement in a pre-trial must be bona fide. Such that failure to promote effective disposal of litigation may lead to an adverse costs order against the party or his legal representative.

[14] Therefore , where a litigant is a party to a pre-trial minute reflecting agreement on certain issues, our courts will generally hold the parties to that agreement or to those issues ***Price NO v Allied JBS Building Society 1980 (3) SA874 (A) at 882 D-E.*** *As a result a party is not entitled to resile from an agreement deliberately reached at a pre trail conference or during the trial unless (perhaps) special circumstances are present*

[15] The principal that a party is not entitled to resile from such an agreement reached in a pre- trail conference applies to an agreement concerning a fact, an agreement relating to law is not binding upon the

parties or the court: see ***Aegis Insurance Co Ltd V Consani No 1996 (4) SA 1 (A)"***

16. I find, based on the above that the defendants are prevented and precluded based on the pre-trial admission, to now reject the RAF4 of Dr Heymans, and they cannot be blowing hot and cold on their admissions in the pre- trial, this was factually an acceptance of the RAF 4, qualifying the plaintiff for general damages.

17. The defendant counsel still argue that even in light of the acceptance in the pre-trial, the Fund may still in terms of the Regulations of the Road Accident Fund, reject the assessment of Dr Heymans. I will therefore have to consider this argument. .

18. The court after its own investigation found that the Road Accident Fund Regulations 2008, promulgated on 21 July 2009, were amended by Government Notice No 36452 promulgated on 15 May 2013.

19. None of the counsel where aware of this amendment, and I directed several questions to them in this regard. I therefore, requested counsel to address me in heads of argument on this point and both counsel provided the court with heads of argument on this issue, and their heads were of great assistance to the court before finalising judgment herein.

THE ROAD ACCIDENT FUND REGULATIONS 2009

20. The Road accident fund regulations published in the Government Gazette dated 29 July 2008, (first regulations) states:

"3(1)(a)(i) The Minister may publish in the Gazette ,after consultation with the Minister of Health, a list of injuries which are for purposes of Section 17, not to be regarded as serious injuries and no injury shall be assessed as serious if that injury meets the description of an injury that appears on the list.

3 (1)(b)(ii) If the injury resulted in 30 per cent or more impairment of the Whole person as provided in the AMA guides, the injuries shall be assessed as serious.

3(1)(b)(iii) An injury which does not result in 30 per cent or more impairment of the Whole body person may be assessed as serious if that injury:

(aa) resulted in a serious long term impairment or loss of a body function;

(bb) constitutes permanent serious disfigurement;

(cc) resulted in severe long term mental or severe long term behavioural disturbance or disorder; or

(dd) resulted in loss of a foetus;

3(3)(a)(d) If the Fund or an agent is not satisfied that the injury has been correctly assessed, the Fund or agent must:

(i) reject the serious injury assessment report and furnish the third party with reasons for the rejection; or

(ii) direct that the third party submit herself or himself, at the cost of the Fund or an agent , to a further assessment to ascertain

whether the injury is serious, in terms of the method set out by these Regulations, by a medical practitioner designated by the Fund or an agent.

3(3)(a)(e) The fund or an agent must either accept the further assessment or dispute the further assessment in the manner provided in these Regulations.

(4) If a third party wishes to dispute the rejection of the serious injury assessment report , or in the event of either the third party or the Fund or the agent disputing the assessment performed by a medical practitioner in terms of these Regulations , the disputant shall:

(a) within 90 days of being informed of the rejection or the assessment, notify the Registrar that the rejection or the assessment is disputed by lodging a dispute resolution form with the Registrar;

(b) in such notification set out the ground upon which the rejection or assessment is disputed and include in such submission , medical reports and opinion as the disputants wishes to rely upon; and

(c) If the disputants is the Fund or agent, to provide all available contact details pertaining to the third party.

(5)(a) If the Registrar is not notified that the rejection or the assessment is disputed in the manner and within the time provided for in subregulation (4) , the rejection or the

assessment shall become final and binding unless application for condonation is lodged with the Registrar as well as sent to the other party to the dispute."

ROAD ACCIDENT FUND AMENDMENT REGULATIONS 2013 (15 MAY 2013)

21. The amended Regulations dated 15 May 2013, now contains a list of injuries, for purposes of Section 17, that are not regarded as serious injury and it is set out in the **ROAD ACCIDENT FUND AMENDMENT REGULATIONS 2013** as follows:

"3. Regulation 3 of the regulations are hereby amended-

(a) the substitution in sub regulation (1)(b) for paragraph (i) of the following paragraph:-

(i) any one or any combination of the following injuries are for purposes of Section 17 of the Act, not to be regarded as serious injury an no injury shall be assessed as serious if the injury meets the following description-

(aa) any whiplash type or soft tissue injury to the neck or back

(bb)**.....**

(pp) **.....**

Provided that ,if any complication arises from any one, or any combination of the injuries listed in items (aa) to (pp), the third party

shall be entitled to be assessed in terms of sub regulations 3 (1) (b)(ii) and 3 (1) (b) (iii)"

(e) by the insertion in sub regulation (3) after paragraph (d) of the following paragraph:

"(dA) The fund or an agent must, within 90 days from the date on which the serious injury assessment report was sent by registered post or deliver by hand to the Fund or to the agent who in terms of section 8 must handle the claim, accept or reject the serious injury assessment report or direct that the third party submit himself or herself to a further assessment," and....."

22. Thus, the amended Regulations firstly now list non serious injuries, and now insert a time frame in which the Fund has to reject or accept the serious assessment RAF4 form, and they do not amend regulations (4) or (5) (a) as set out in the previous Regulations.

23. In ***The Road Accident Fund v Duma Kubeka & Others (202/12)*** and three related cases ***(Health professionals council of South Africa as Amicus Curiae 2012 ZASCA 169 SCA 9 (27 November 2012)*** it was found that a court's jurisdiction is ousted in determining whether an injury is serious.

24. By the same token, I might add, the court's jurisdiction is also ousted in determining if an injury was not serious or resulted in a serious long term impairment or loss of body function. This judgment was delivered before the amendment of the Regulations as set out *supra*. In all the cases that

was before the SCA, the RAF4 forms had been rejected by the Fund, and the plaintiffs in these cases contented that the rejection was not valid and had to be disregarded due to the fact that that the Fund had failed to reject the RAF4 form within a reasonable time, and its right to do so had expired, the second reasoning was that since the Fund had given insufficient or invalid reasons for its rejection, it did not constitute a proper rejection in terms of Regulation 3(3)(d)(i).

25. The essence of the above judgment pertinent to the issue before me is to be found in paragraphs [18] and [19]

"[18] *Consideration of the High court's judgments in the four cases on appeal and those upon which they rely all seems to set out from the premise that it is ultimately for the court to decide whether the plaintiff's injury was "serious" so as to satisfy the threshold requirement for an award of general damages. Proceeding from that premise these decisions assume that if the Fund should fail to properly or timeously reject an assertion to that effect by the third party, the rejection can be ignored. If the medical evidence before the court shows that, on a balance, the plaintiff was indeed seriously injured the court can proceed to decide the issues of general damages.*

[19] That approach, I believe, is fundamentally flawed. In accordance with the model that the legislature chose to adopt, the decision whether or not the injury of a third party is serious enough to meet the threshold requirement for an award of general damages once conferred on the Fund and not on the court. That much appears from the stipulation in Regulation

3 (3)(c) that the Fund shall not only be obliged to pay general damages if the Fund and not the court is satisfied that the injury has correctly been assessed in accordance with the RAF4 Form as serious. Unless the Fund is so satisfied the plaintiff simply has no claim for general damages. This means that unless the plaintiff can establish the jurisdictional fact that the fund is so satisfied, the court had no jurisdiction to entertain the claim for general damages, the third party must satisfy the Fund, not the court, that his or her injury was serious.[my emphasis]

26. The court found that, that the Fund is an organ of state and any decision the Fund makes is an administrative action as contemplated by the Promotion of Administrative Justice Act 3 of 2000 (PAJA) the court accordingly found:

"[19] (b) If the Fund should fail to make a decision within reasonable time , the plaintiffs remedy is under PAJA.

(c) If the Fund should take a decision against the plaintiff, that decision cannot be ignored simply because it was not taken within a reasonable time or because no legal or medical basis is provided for the decision, or because the court does not agree with the reasons given.

(d) A decision by the Fund is subject to an internal administrative appeal to an appeal tribunal.

(e) Neither the decision of the Fund nor the decision of the appeal tribunal is subject to an appeal to court. The court's control over these decision is by means of the review proceedings under PAJA.

27. Thus, the court found in the circumstances that at trial stage the Fund was still in a position to reject the RAF4 Form, although it did not propose or endorse the Fund to play games with plaintiff's in litigation.

28. The position of a reasonable time has now, as indicated previously, been amended by the Regulations dated 15 May 2013 and thus, in terms of the amendment, the Fund has 90 days from date on which the serious assessment report was sent or delivered to them, to reject or accept the serious injury assessment report. Further as Regulations 4 & 5 (a) of the 2009 Regulations had not been amended by the Regulations promulgated in May 2013, I find, they are still applicable.

29. The defendant's counsel conceded that having regards to the amended Regulations, the Fund did not comply with this 90 day period, as Dr. Heymans provided his RAF4 on 28 April 2014, and the trail commenced on 21November 2014.

30. Plaintiff counsel with regards to the *Duma* matter, argued in her heads, that the Fund had in fact taken a decision as set out in the Promotion of Administrative Justice Act 52 of 2000 (PAJA) and argued that in terms of Section 6(2)(g) of PAJA : *" a court tribunal has the power to judicially review a administrative action if: the action concerned consist of a failure to take a decision".*

and further:

Section 6(3) of PAJA stated : "*if any person relies on the ground of review referred to in subsection 2 (g) he or she must in respect of a failure take a decision where-*

(iii) *The administrator who has failed to take that decision institute proceedings in a court or tribunal for judicial review of the failure to take a decision within that period"*

31. Plaintiff's counsel disagreed that the plaintiff had to invoke the process of PAJA to compel the Fund to act, alternatively review its non action. She argued that the attorney who acted on behalf of the Fund is its agent who must handle the claim, and the attorney on behalf of the Fund has the power to bind the Fund, and as such the attorney took a decision in the pre- trial conference held on 18 November 2014, not to reject the assessment of Dr Heymans and accepted same.

32. The plaintiff counsel argued that the common law requires that the administrative action must be clear and certain, and that review procedure in the ground of vagueness does not exist in our law, the question is whether the actions are reasonably capable of meaningful construction for it to be valid.

33. In the circumstances it was argued that the actions and or decision of the Fund qualify as an acceptance of the assessment done by Dr.Heymans and that it is capable of meaningful construction, and that the plaintiff *in causa* need not make use of the remedies of PAJA as the Fund's

attorney had already made a decision and seen to it, that justice had been done.

34. Counsel for the plaintiff did not address in her heads the Regulations as such, and did not argue that this court can find in terms of the amended Regulations that the assessment of Dr Heymans had become final and binding on the fund, after the expiry of the 90 day period.

35. Counsel for the defendant in its heads argue that even though the amendment now stipulate a time of 90 days, in which the serious assessment must be rejected or accepted by the fund, it did not change the scheme of affairs as set out in the *Duma* judgment.

36. Defendant counsel argues that as was the case previously with reasonable time, the Funds inaction within the 90 days times frame, vested the plaintiff with remedies under PAJA. Counsel argued that his argument is supported by a discussion by Campbell Attorneys in a article on the internet, "*that even though the 90 day deadline had been set in the amendment, the amendment provided no consequences in the event the Fund fails to comply with this deadline*". The article states that in most instances plaintiffs are obliged to bring an application to the High Court to obtain orders compelling the Fund, to either reject or accept the RAF4 form, qualifying a plaintiff for a serious injury. The link provided: Http://www.campbellattorneys.co.za/site/files/6826/RAF

37. Counsel for the defendant also mentioned another article by Leslie Kobrin an attorney at Bove attorneys. In the said article, the attorneys argued that in circumstances, after the amendment of the Regulations,

and if the Fund fails to reject or asses the RAF 4, it is estopped from rejecting the assessment and is deemed to have accepted the assessment. The defendant did however not argue that the plaintiff could now plead estoppel.

38. I find, that when the Fund rejected the first RAF4, by doctor Kumbarai it made a decision in terms of 3(3)(a)(d)(i) of the 2009 Regulations. The Fund was not satisfied that the injury had been correctly assessed and therefore they rejected the serious injury assessment report and furnished the plaintiff with reasons for the rejection. The Fund then in terms of Regulation 3(3)(a)(d)(ii) directed that the plaintiff submits herself to a further assessment to ascertain whether the injury is serious. The fund did so in terms of the method set out by these Regulations by a medical practitioner designated by the Fund or its agent.

39. The plaintiff in light of the Funds rejection submitted herself to Dr. Heymans and he once again in the second RAF4 dated 28 April 2014, qualified her in terms of the narrative test to qualify for general damages that resulted in a serious long-term impairment or loss of body function. The fund did not reject this RAF4 form, and only did so on date of trial. I already found that the Fund is bound by the acceptance of the RAF4 in the pre trial, I further find that that the 90 days had expired for them to reject the RAF4, in terms of the amended Regulations, as on date of trial.

40. The amendment to the Regulations existed on rejection of both the RAF 4 forms, the rejecting of the RAF4 of Dr Khumbarai however was done

within 90 days. I find that the Fund knew about the amendment of the Regulations. It will be untenable if one believes the Fund to be ignorant of these amendments.

41. The second RAF4 form, of Dr Heymans was not rejected within the 90 days as per the amended Regulations, that much was conceded. The defendant however argue that they cannot be estopped from now rejecting the RAF4 at trial. Further it is argued by the defendants counsel with reference to *Duma, supra,* that if the Fund fails to take a decision within reasonable time, it cannot be ignored, and if the Fund rejects the assessment the plaintiff has a remedy, and the plaintiff can refer the assessment to the HPCSA in terms of the Regulations.

42. These arguments, I find are fundamentally flawed, having regards to the 2009 Regulation 3(3)(a)(e), setting out that the Fund or an agent must either accept the further assessment or dispute the further assessment in the manner provided in the regulations. The Fund is given a second bite at the cherry in that it can in terms of Regulation (4)(a) , if it so disputes the assessment performed by a medical practitioner, notify the registrar within 90 days, that the rejection or the assessment is disputed by lodging a dispute resolution form with the Registrar. This will be a Form 5.

43. Regulation (5)(a) also sets out that if the Registrar is not notified that the assessment is disputed by the Fund and in the manner set out and within 90 days, the assessment shall become final and binding unless

application for condonation is lodged with the Registrar as well as sent to the other party to the dispute.

44. The fund did not reject the second assessment performed by Dr.Heymans, until trial, the Fund also did not dispute this assessment as they were bound to do in terms of the Regulations in the manner and within the time frame as set out *supra*. There is also no application for condonation from the Fund, lodged with the Registrar

45. I find, that the legislators certainly did not have it in mind that the Fund would be allowed to send a plaintiff for several and multiple assessment with their appointed experts, and that the Fund would be able to reject each one in turn, without resorting to Regulation 4, and filing a dispute with the registrar as mentioned *supra*.

46. The defendant, I find, rejected the assessment only on date of trial, because they chose not to follow the procedure as set out in Regulation 4, and they accepted the assessment and confirmed such an acceptance in the pre- trial minute, they were further under the incorrect impression that they can still reject the second RAF4, at this late stage at trial, and that they would probably only suffer a punitive cost order, in the least.

47. I find, therefore, that the defendant cannot now reject the second RAF4 assessment as they did not dispute it in terms of Regulations 4 & 5, and the acceptance of the assessment has therefore become final and binding on the defendant. In the premise the plaintiff does qualify for an award in general damages. I find, that as set out in *Duma, supra*, the plaintiff *in causa*, has established the jurisdictional fact that the Fund was

satisfied. The plaintiff therefore satisfied the Fund, not the court that her injury was serious.

48. The court is further aware that many applications are brought in the unopposed motion court on a daily basis compelling the Fund to make a decision on the RAF4 assessment forms, as if they reject or accept the assessment. Many of these applications were brought before the amendment, and now after the amendment of the Regulations granting the Fund, 90 days in which to make a decision. This is in accordance with the general law in regards to PAJA, in compelling a decision from the Fund, as an organ of state.

49. Its seems as if plaintiffs are covering all their bases, so to speak, in bringing these applications to compel a decision, due to the fact that they cannot ignore the rejection or non decision, and take a chance if the Fund on the date of trial rejects the assessment of the RAF4, for the first time.

50. The question therefore remains if the Regulations when the deadline of 90 days was inserted in which the Fund has to make a decision, provide any consequences to the failure of the Fund in not making such decision within 90 days.

51. PAJA creates an important new ground of review or at least a ground of review that has existed in common law, but was perhaps not well known. As already noted the failure to take action or make a decision is itself grounds of review, furthermore it has always been possible to obtain a mandamus forcing a slow or reluctant administrator to take action or make a decision. In terms of section 6 (3) PAJA where a particular

period has been prescribed for the taking of a decision, a person may institute review proceedings for failure to take the decision within the period.

52. Must the plaintiff therefore bring a review application for the failure of the f fund to reject the RAF4 form within 90 days, I find that they cannot, being mindful of the *Duma* case as set out, the rejection of the RAF4, is subject to an appeal tribunal, and only after such decision has been taken by the tribunal, can the plaintiff review such a decision. If the fund only rejects the RAF4 on date of trail and did not resort to Regulation 4, this decision thus first has to be taken to the tribunal and only after it's finding it is subject to review.

53. Even though the 2009 Regulation (5)(a), sets out the procedure to be followed after resort to Regulation 4, the amended Regulations provided no consequences when the Fund fails to comply with the deadline of 90 days after the rejection of a Form 4 assessment.

54. This question is thus left unanswered and not one I can make on the facts of this case, and in the mean time plaintiffs will most probably still have to bring applications to compel a decision, after the expiry of 90 days, and probably not before such time, and can therefore not assume and or argue that the finding had become binding due to failure of the Fund to make a decision after the expiry of 90 days.

I will now deal with the plaintiff's evidence in regards to her two heads of damages being general damages and future loss of income.

INJURIES, TREATMENTS AND OTHER CONSEQUENCES AND EVIDENCE OF PLAINTIFF

55. The plaintiff testified that she had suffered soft tissue injuries of the neck and lower back. She is employed as an administrative officer at the City of Tshwane in the National Archives Department and was so employed when the accident occurred. She did not sustain any loss of income for the two weeks she was off work, after the accident. She had difficulty meeting her job demands for two to three months following the accident, but she was assisted by another employee who resigned at the end of 2009. In 2014, she had been provided assistance from an intern that is currently assisting her in especially carrying files should the need arise that she should carry a substantial amount of files per day. She said that the carrying of files was the most strenuous for her to do.

56. She suffers from pain nearly on a daily basis, the pain is sometimes worse, and that due to the pain she experiences bouts of depression as well as irritation and feels unwell. She takes pain medication on a regular basis. She has gone for physiotherapy and she receives Voltaren injections when the pain and spasm in her neck and back become too much for her. The further *sequelae* of the plaintiff's injuries are that sometimes her left leg goes lame, she has pins and needles and she cannot turn her neck to reverse her car.

57. She further testified that although she was advised that she would most probably have to go for a neck or back fusion she has not undertaken this task since 2009. Her reason being that she is divorced, and due to lack of

a proper support structure, it will be difficult, although not impossible, to arrange for care for her minor child, if she is booked off for a long period. She confirmed that she currently chooses to manage the pain.

58. It was evident that she plays a large role in her place of employment and if she is not at work, nobody else can do her work due to the specific knowledge and specific way in which the plaintiff does her work. She is therefore in as much as an employee can be "indispensable". There is no chance that she would, first of all, loose her employment due to any of the *sequelae* influencing her work. The City of Tshwane will not easily dismiss anybody, as she stated "you will have to be a very bad worker for them to dismiss you". This tongue in cheek statement rings true, but besides that the plaintiff confirms that she copes in her working environment and that she can do her work. She has been provided with a trolley to push the files and there is an elevator in the building, which she uses to transport the files, and she therefore does not need to carry the files.

59. As to her future promotions at the City of Tshwane I had regard to the comments of her immediate current supervisor Mr Anderson to the industrial psychologists. He said that the plaintiff would definitely qualify for a senior administrative officer position which was vacancy dependant. There were various departments in which this position could become vacant, but that the time frame for such promotion was difficult to predict. Mr Anderson indicated that with a senior administration officer position, it would be considered a lateral move with a slight increase, and

that such a position would be less strenuous for the plaintiff, because it consisted of mostly sedentary administrative work. Such a position would not require physically moving of files and could thus accommodate her complaints. This was not rejected by the plaintiff although she doubted that Mr Anderson knew the specific details of her work.

60. She did not indicate that she was planning to enter the open job market. The plaintiff has never applied for any position opening up in any of the other departments in the City of Tshwane. She was afraid to apply for a senior position in Tswane, due to the fact that she thought that as a result of her constant pain she might not be able to do some of the work.

61. She did not apply for such positions due to some of the positions not being in her field of expertise. She was also not emotionally ready to compete with other fellow employees ,as the post would most probably first be advertised internally. Currently there have been no posts available and the plaintiff had not made any application for any other posts or lateral moves post accident. However, after the accident the plaintiff did reach her top notch in her specific work category and she is now at the ceiling of her specific post and earns the highest salary on the scale determined for her position.

62. I find, that the plaintiff's lack of applying for any position in a more senior administrative post was due to her own fear, and the unavailability of such post, and not due to the fact that she was not able physically to perform such task. I find, that a senior position will be more and better suited for her. She would also be the first candidate in her department to

qualify for a senior position as she has been employed by the City of Tshwane for 18 years, and in this position for 10 years.

63. In the event, that she manages her pain and brings it under control, and a neck or back operation is successful, plaintiff confirmed that she would be able to compete with a person on her job level if posts become available, and if she applies for such post.

64. After evidence for the plaintiff both parties addressed me on the joint minutes. In the joint minute of the orthopaedic surgeons, Dr Heymans and Dr PD Kumbarai, the experts agreed: That plaintiff's injuries were treated conservatively. Future treatment would be conservative and non-steroid anti-inflammatory and physiotherapy was recommended. Provision was made for a lumbar stabilisation operation. Dr Heymans was of the opinion that the plaintiff would also be subjected to a cervical fusion. Both experts qualified the plaintiff in the RAF4 Form as a person that qualified for a long-term impairment or loss of body function, due to the current pain she experiences in the neck and back.

65. In the joint minutes of the industrial psychologists, Christa du Toit and Linda Krause, dated 17 November 2014, they agreed: Pre-accident projected earnings and post-morbid earnings were the same. The challenges in terms of requirements for treatment, pain and some physical constraints were noted. It was suggested by the plaintiff's industrial psychologist, Christa Du Toit, that a slighter higher than normal post-contingency should be applied to the calculation although the plaintiff's job security was not at risk. It was stated that in the unlikely

event that she would have to change jobs she would remain a slightly vulnerable job seeker and would experience increased difficulties to secure work.

66. The defendant's industrial psychologist, Linda Krause, stated that there were no inadequacies and in addition both occupation therapists agreed that the plaintiff retains the capacity for slight sedentary and moderate physical work and that her pre- and post-accident occupation would fall into the sedentary light work category. She was likely to remain employed in her current capacity and receive annual inflation and sectorial related increases.

67. That plaintiff will remain an unequal competitor in the open labour market as she is unable to sit or stand for prolonged periods. The plaintiff's expert Christa du Toit, noted that the injuries sustained have affected her ability to work as a registration officer, and that her potential future fields of work have been significantly reduced due to her physical limitations. She can be seen as a highly vulnerable and compromised individual. It was however once again reiterated by the defendant's expert that the plaintiff's job is not in jeopardy.

68. The occupational therapists, D van Wyk and S Moagi, in their joint minute noted and agreed on the following: The claimant's physical capacity presently meets the physical requirements of sedentary or light to moderate work, that the physical strengths of the plaintiff pre- and post-accident occupation falls within sedentary to light type of work. As a result the plaintiff retains the physical capacity required for pre- and post-

accident occupation duties. However, her competitiveness and productivity will be affected for as long as mechanical pain and symptoms persist when performing physical work that put constraint on affected body parts. The therapists agreed that the plaintiff continues to struggle with work related difficulties as a result of treatable symptoms due to the injuries sustained. They agreed that the reported limitations are justified and will continue to have a negative impact on the plaintiff's work performance.

69. In the actuarial calculation compiled on behalf of the plaintiff after having regard to the occupational and industrial psychologist's report, the actuary applied the pre- and post-income to be the same, due to the fact that the plaintiff is still employed in the same capacity, post accident. A 15% contingency was applied to the pre-accident income, and a higher 35% contingency on the post-accident income due to the capacity loss as indicated in the experts' joint minutes. This calculated into an amount of R874,900.00, which is the amount plaintiff claims for loss of future income.

LOSS OF FUTURE INCOME/CAPACITY LOSS

70. Now, turning to the law in general on a claim for loss of future income. It is so that the mere fact of physical disability does not necessarily reduce the estate or patrimony of the person injured. Put differently, it does not follow from proof of a physical injury, which impaired the ability to earn an income, that there was in fact a diminution in earning

capacity. See **Union & National Insurance v Coetzee 1971 SA 295 (A) at 300 (A).**

71. I had regard to a reported judgment by ***Makgoka J, Masilo D Motalalepule (2 March 2012) (GNP)*** that in recent times the clearest application of the principle set out above is to be found in two cases, namely ***Rudman v The Road Accident Fund 2003 (2) SA 234 (SCA)*** *and* ***Prinsloo v Road Accident Fund 2009 (5) SA 406 (SE).*** In *Rudman* the trial court dismissed the claim on the ground that although the appellant had proved disabilities, which potentially at any rate could rise to a reduction of his earning capacity he had failed to prove that this had resulted in patrimonial loss since the loss of earnings and earning capacity he had suffered was a loss to the company and not to his private estate.

72. In *Prinsloo* a white female inspector in the South African Police had suffered soft tissue injury of the lumbar spine. The accident rendered her unsuitable to continue in her physical demanding situation at the SAPS. A sedentary type of work was recommended. The expert opinion was that notwithstanding her placement in a sedentary position, whatever the prospects she might have enjoyed for promotion were substantially reduced, if not entirely negated. The court rejected that supposition. The court reasoned that if relevant factors such as race, equity and structural requirements were taken into account the plaintiff's prospects for promotion as a white woman were negligible, even pre-accident as the evidence by the SAPS had established. The court therefore concluded

that the claimant had failed to discharge the onus of proving that she suffered a loss or reduction of earning capacity as the pre- and post-accident promotion prospects were the same.

73. In the present case the plaintiff's back pain, stiff neck and emotional *sequelae* to her pain, are hardly likely to affect her position as an administrative officer, save for the inconveniences mentioned by the occupational therapist. She is not required in her job to constantly bend her back to pick up objects, her work is of a sedentary nature. There is also no suggestion that the plaintiff will have to give up her position for a lesser paying one resulting in a pecuniary loss.

74. There is also no suggestion that her promotion prospects have been compromised in any manner as the plaintiff testified herself that she has not applied for any such position as she was fearful to do so, but I conclude that she will most probably if she applies, qualify for a senior administrative position, and therefore will be, as Mr Anderson indicated, be in a less strenuous working environment.

75. The loss of work capacity postulated by the orthopaedic surgeons does not, however, equal to a straight loss of income, but represents an inconvenience at work and at times pain, possibly sick leave. It is clear therefore that her allegations in the particulars of claim for a future loss of income, are not supported by the evidence.

76. I therefore, find, that the plaintiff has failed to prove that her injury had a cognisable effect on her earning capacity and the type of work she does. It would have been different if she had been, for example, a domestic

worker. Her damages are therefore nil and accordingly no award will be made under this heading. Given the view I take there is no need for me to consider the amounts postulated in the actuarial report. They are based on a fallacious premise.

GENERAL DAMAGES

77. The plaintiff's counsel argued that general damages should be awarded in the region of R250,000.00 and quoted the following comparable case law in regards thereto: ***Marais v Road accident fund, 2005, QOD C3 – 12.*** An award in today's terms an amount of R212,000.00. And ***Jacobs v RAF, 2003 (5), QOD, C3 – 131.*** An amount awarded in today's terms was R147,000.00.

78. The general damages as per the defendant were argued to be between R150,000.00 to R200,000.00. The following comparable case law was quoted :***Daniels v Road accident Fund 2003 (5), QOD, 1.*** The updated amount awarded in today's terms was R178,000.00.***Van Vuuren v Road Accident Fund 2010 (6C3) QOD (GNP)*** an award of damages in today's' terms was R156,000.00, and ***Mavimbela v Road Accident Fund 2011 (6C3) QOD (GNP)***, the updated amount was R218,000.00.

79. Therefore on the plaintiff's and defendant's counsel argument the highest award argued on the plaintiff's version would equate to R212,000.00 and on the lowest region of the defendant's argument would equate to an amount of R156,000.00. I am only going to consider these postulations by counsel for the award in general damages.

80. I am quite aware of and take into account the recent tendency by our courts to make higher awards than what has been the trend in the past. I also take into consideration that it was tempered later in ***De Jong v Du Pisanie N.O. 2005 (5) SA 457 (SCA)*** at paragraph 60 where after noting that the tendency towards increased awards in respect of general damages in recent times was readily perceptible, the court re-affirmed conservatism as one of the multiple factors to be taken into account in awarding general damages. The court concluded that the principle remained that the award should be fair to both sides, it must give just compensation to the plaintiff, but not pour out largesse from the horn of plenty at the defendant's expense, as pointed out in ***Pitt v Economic Insurance Co Ltd 1975 (3) SA 264 (N) at 267.***

81. I also had regards to the matter of ***Riana Deysel v RAF, (SGHC)*** a reported judgment by Bizos, AJ, on 24 June 2011. The court in this judgment went along the same reasoning as *Rudman*, and also discussed the difference between a loss of income and/or earning capacity. The court referred to ***RAF v Delport, 2005 (1) All SA 468 (SCA)*** and ***De Kock v RAF 2009, 9851/07*** and confirmed in:

> [28]"*The judgment of the Supreme Court of Appeal above confirm my reasoning behind the relationship between a claim for loss of earnings and a loss of earning capacity. The one cannot exist without the other. Therefore any patrimonial claim of this kind requires:*

(a) a loss of earning capacity as a result of a damage causing event and

(b) an actual patrimonial loss of income as a result of the abovementioned loss of earning capacity in which case neither the one nor the other may be claimed for the same amount.

[29] Without a loss of income the loss of earning capacity becomes a misnomer and remains a non-patrimonial loss at best that cannot be quantified in money because it has not truly led to monetary loss. (this is true for future scenarios as well). Likewise, without a loss of earning capacity as a result of the damage causing event, it is difficult to say that any patrimonial loss of income was caused by such damage causing event, which make the issue of liability difficult to resolve. In this way, loss of earning capacity, in my view, acts as somewhat of a causal link between the damage causing event and the patrimonial loss suffered through loss of earnings. Through this logic I am of the opinion that loss of earnings and loss of income are part and parcel of the same concept and are vital for each other's existence.

[30] In conclusion, without proof of loss of income, a plaintiff cannot claim for a loss of earning capacity as the only proof that a person's earning capacity has been lowered would be to show that they would or did in fact earn less money."

[42]" *As I have stated, I find that the submissions regarding the actual future patrimonial loss of the plaintiff that would manifest as*

loss of income are incorrect. However, what suddenly becomes clear is that the plaintiff has suffered a non-patrimonial future loss by being forced to endure harder working conditions in order to avoid an actual patrimonial loss.

[43]The perplexing situation now is that should the plaintiff give into her impairment and her impending lowered performance she may suffer the patrimonial loss that would become with her possibility being demoted or worse. In this hypothetical situation (which the plaintiff has not put forward) she would have suffered a loss of income, simultaneously proving that she has also suffered a loss of earning capacity. On the other hand, if she fights her impairment and maintains her current job and income as she intends (thus sustaining her patrimony) she would have done so at the price of having to work harder than would have been required but for the accident. Ultimately the plaintiff was faced with the choice of sacrificing her patrimony, or sacrificing something that does not form part of her patrimony (time and effort). As explained before the plaintiff has shown her intention to do the latter through her calculations (however legally flawed they may be). However, this difficult choice was forced upon her by the damage causing event for which the defendant has accepted liability and the consequences of this fall to the latter.

[44]Therefore the pain and suffering sustained through the plaintiff's injuries exist not only in the impairment itself and its

effect on her day to day functioning, but also in the specific requirement amount of extra effort that the plaintiff intends on putting into her career to maintain her position.

[45] Let it be clear that I do not intend awarding the plaintiff damages for loss of income or earning capacity by including this amount in an award for general damages so as to avoid the many legal questions surrounding the viability of such a claim. I have already answered these questions and pointed out that I believe that no such patrimonial claim exists in causa. However, I fully accept that the damages that the plaintiff incorrectly interpreted to manifest as a loss of income or earning capacity does exist, but manifests instead as non-patrimonial damages in the form of pain and suffering and shall form part of the quantum of general damages to be awarded."

82. Referring to the case of *Deysel supra,* I find in the circumstances of the plaintiff's case *in causa* the claim for general damages of R250,000.00, when not considering the career related pain and suffering that was identified by way of evidence, would otherwise have been excessive. However, if one is to accept that the extra amount of effort required to maintain the plaintiff's current career level manifests not as a loss of income but instead as pain and suffering in addition to that already alleged by the plaintiff, then I find that the plaintiff's claim for general damages is not excessive.

I therefore make the following order:

1. **The plaintiff's claim for loss of earning capacity and loss of income is dismissed.**

2. **The defendant is ordered to pay the plaintiff the amount of R250,000.00 being in respect of general damages.**

3. **The defendant is ordered to pay interest on the amount as set out in paragraph 2 at the prescribed legal rate from a date 14 days after date of this judgment to date of payment.**

4. **The defendant is ordered to pay the plaintiff's costs of suit including the qualifying expenses of:**

   a. **Dr JJL Heymans;**

   b. **Labuscagne & Partners**

   c. **Dr Kumbarai**

   d. **Georgie Le Roux;**

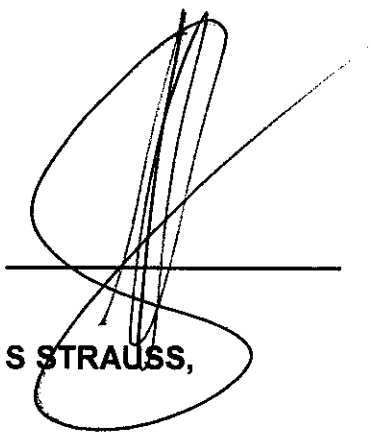
   e. **Christa Du Toit;**

   f. **D van Wyk**

   g. **Gerald Jacobson Consulting.**

5. **It is recorded that defendant undertakes in terms of Section 17(4) of the Road Accident Fund, 56 of 1996 to furnish the plaintiff with 80% of the costs of any future accommodation of the plaintiff in a**

hospital or nursing home as well as the treatment of and/or rendering of a service to her or supplying of goods due to the injury sustained by her in the collision and the sequelae thereof after such costs have been incurred and upon proof thereof.



S STRAUSS,

ACTING JUDGE OF THE HIGH COURT, PRETORIA

HEARD ON: 21 NOVEMBER 2014

DELIVERED ON: 9 DECEMBER 2014

COUNSEL FOR PLAINTIFF: ADV M OLIVIER

ATTORNEYS FOR PLAINTIFF: GUSTAV SMIT ATTORNEYS

COUNSEL FOR DEFENDANT: ADV NUSENGA

ATTORNEYS FOR DEFENDANT: MAPONYA INC