**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**(1) REPORTABLE: YES/~~NO~~**

**(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~**

**(3) REVISED**

**CASE NUMBER: 96985/2016**

**4/7/2019**

In the matter between:

**SOHABA OFENTSE** Plaintiff

and

**THE ROAD ACCIDENT FUND** Defendant

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**JUDGMENT**

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**ERASMUS AJ**

**INTRODUCTION**

[1] The Plaintiff, a 29-year old Customer Care Consultant, is suing the Defendant for damages that she suffered, under different heads of damages, arising from bodily injuries which she sustained in a motor vehicle collision on 5 October 2015. She was a passenger in a taxi. The

taxi overturned when the driver of the said taxi overturned when the driver was overtaking a truck coming from the front to opposite direction and the driver of the taxi drove to the extreme right of the road and the truck passed when the driver of the taxi went back to the road, but started swerving, which lead the taxi to overturn.

**MERITS**

[2] During July 2017 the Defendant, and correctly so, conceded the merits. It is therefore not necessary that I deal with the merits of the matters. I have already alluded to herein above as to how the accident occurred.

**ASPECTS THAT NEED TO BE DETERMINED BY THE COURT**

[3] What remained for this Court to consider are the following:

3.1 The amount of general damages;

3.2 The amount of loss of earnings / earning capacity;

3.3 The amount for the past medical expenses.

[4] At the outset it was indicated to me that the Defendant made a tender in respect of the past medical expenses. The Plaintiff still had to consider this tender. The parties undertook to inform me of the amount they agreed on in order for it to be included in this order. I indicated to the parties that I am not inclined to postpone the past medical expenses and that I am of the intention to deal with it in the week of 8 April 2019. The issue of unnecessary costs was raised with the parties.

[5] In addition hereto it was mentioned to me that the Defendant wishes the Plaintiff to call the Plaintiff herself to come and testify. The Court cannot force any party to call a witness or refuse to listen to any evidence presented by a party during the trial proceedings, unless there is a basis in law in which the Court can or should disregard the evidence.

[6] I am mindful of the fact that any Court can make a negative inference from

the fact that an available witness is not called to come and testify. At no stage was it indicated to me that the Plaintiff is present at Court and available to testify and at no stage was I requested to make a negative inference from the fact that she is present and not called to give evidence. I, however, did highlight the risk of a party not calling a witness and indicated that that is the risk is that the Plaintiff should accept if they fail to call a witness to come and testify.

[7] I cannot take this matter any further.

[8] Mnr Manala, who appeared with Mr Tshavhungwe, on behalf of the Plaintiff, indicated to me that there was an agreement reached on Friday 5 April 2019 at a pre-trial held between the parties that an agreement was reached between the parties that argument will be made on the expert reports and joint minutes filed. Mr Manala also provided me with an email that was send on Friday 5 April 2019 to the attorney for the Defendant indicating this alleged agreement. The attorney on behalf of the Defendant replied to this email simply indicating "Received" but did not deny the indication that such an agreement was reached.

[9] Mr Baloyi on behalf of the Defendant denied that any such agreement existed and he again raised the issue of the calling of the Plaintiff to come and testify. I have indicated to Mr Baloyi that I have already indicated to the parties that I cannot force any party to call a witness, but that the parties must accept the risk that goes with that.

[10] It was then agreed that in as far as the experts are concerned the parties will proceed on the reports filed. I need to emphasize that I never understood the reports to be accepted by either party. The agreement that was allegedly reached only indicated that the parties will argue on the reports. It was not stated by the parties that the contents of the reports are accepted by the other party.

[11] At this stage I need to interpose and state that despite the fact that the parties were made aware of the risk of not calling a witness, the parties elected to proceed without calling any witnesses.

[12] During argument it was clear that there were some inconsistencies in the report by Dr Akhona Mazwi (herein after referred to as "Mazwi"), the report

by the Neurosurgeon. This report was filed by the Plaintiff. I had not had the benefit of hearing oral evidence in order to clarify what on the report seems to be a mistake or oversight. However, without the oral evidence of Mazwi the Court cannot merely accept that it was a mistake or an oversight.

[13] Much reliance was placed on the fact that no counter expert was appointed by the Defendant, or that such expert report has been filed. I am of the view that the Court is not a rubber stamp of any expert witness and that the evidence set out in the report should still be weighed up and a find should be made on the facts set out in the report by the expert.

**LACK OF PRE-TRIAL MINUTES ON THE COURT FILE**

[14] The Court was faced with a plethora of bundles. Much of it was a duplication of bundles already filed in the court file. Despite this, not one single copy of any pre-trail held was filed on the Court file.

[15] This issue was raised with the counsel for the Plaintiff. The counsel for the Plaintiff undertook to provide me with copies of all the pre-trials held. Despite this undertaking this bundle of pre-trial minutes was never made available to me. I therefore was not in the position to have regard to any of the agreements set out in the minutes. I must note my displeasure with the fact that it was not provided to me despite an undertaking to provide same to me before I make the order.

**BUNDLES PROVIDED TO THE COURT AT THE DATE OF HEARING OF THE MATTER**

[16] I was provided with the Court File the weekend before the Monday on which this matter was set down for trial. I therefore worked through the bundles that was filed on the Court File and I have made my necessary markings in these bundles.

[17] At the beginning of his argument, Mr Manala handed me 5 bundles, and an email dated 5 April 2019. The bundles were a mere duplication of the bundles that was already filed on the Court File and the bundles that was

served on the Defendant.

[18] The only difference of these bundles was the sequence in what it was inserted in the bundles, and the pagination thereof. This also made the argument of Mr Baloyi difficult as he prepared his argument on the previously served bundles.

[19] During the argument of Mr Tshavhungwe, a further two bundles were handed to me. The one contained a number of documents, but reference was only made to the Hospital records, and a second bundle of pictures showing the scarring of the Plaintiff.

[20] The bundles were marked as follows:

A - Pleadings & Notices

B - Discovered Documents

C - Plaintiff's Expert Reports

D - Defendant's Expert Reports

E - Joint Minutes

F - Hospital Records

G - Pictures

[21] I already during the argument indicated to the parties that I am not of the intention to allow costs of the second set of bundles prepared for the trial of 8 April 2019.

[22] I indicated that this is simply a waste of costs of the Defendant.

[23] Mr Manala then indicated to me that the Plaintiff do not seek costs for the preparation of the second set of bundles.

[24] On perusal of the draft order that was handed to me, and in paragraph 2.4 thereof, provision was made for the costs of the making of the bundles for the trial of 8th April 2019. This was not deleted prior to handing the draft order to me. I took this aspect up with Mr Tshavhungwe on Friday 12 April

2019. The only explanation he could provide was that the draft order was prepared prior to the trial. I said to him that it still does not assist his argument as the indication by Mr Manala was that the costs of these bundles will not be sought by the Plaintiff. Be that as it may.

[25] In light of the indication by Mr Manala that the Plaintiff will not seek the costs of the second set of bundles, this prayer is amended by myself, specifically to exclude the fee for the preparation and copying of the bundles for 8 April 2019.

**BACKGROUND**

[26] On 5 October 2015, and at Molefe Makinta Highway, Hammanskraa, l a collision occurred. In paragraph 3 of her Particulars of Claim the Plaintiff indicated that the collision occurred between a motor vehicle with registration letters and numbers [….] driven by a certain Maponyane Peter Khomo (herein after referred to as "Khomo") and a motor vehicle driven by an unknown driver. The Plaintiff as a passenger in the vehicle driven by Khomo. This should be read in conjunction with paragraph 1 of this judgment.

**PLANTIFF'S INJURIES**

[27] In paragraph 5 of her Particulars of Claim, the Plaintiff alleged that she sustained the following injuries:

"5.*1* *Head injury*

*5.2* *Shoulder dislocation*

*5.3* *Deep laceration on left eye, and also on nose."*

[28] In the RAF4, completed by Dr Mogora, the orthopaedic surgeon of the Plaintiff,[1] he listed the following injuries:

28.1 Facial injuries - bilateral blowout fractures

28.2 C6 / C7 spinous processes fracture

[1] See Bundle C, page 30 - 37

28.3 Left humerus fracture.

[29] In the RAF4 form duly completed by Dr TS Bogatsu, the orthopaedic surgeon of the Defendant,[2] he listed the following injuries:

29.1 facial disfigurement/ scarring;

29.2 Healed humerus fracture;

29.3 Post- traumatic headaches.

[30] In the RAF4 completed by Dr Akhona Mazwi, the Plaintiff's neurosurgeon,[3] he listed the following injuries:

30.1 Head injury;

30.2 Facial fracture;

30.3 Severe headaches;

30.4 Lumbar back injury;

30.5 Visual disturbances;

30.6 Humerus fracture;

30.7 Hearing disturbances;

30.8 Cervical Spine Injury;

30.9 Multiple Facial Scars.

[31] At this point I need to interpose and emphasize the fat that regarding the poor hearing Mazwi made deference to an Ear Nose and Throat Specialist[4] and in respect of poor vision bilateral orbital fracture, deference was made to an ophthalmologist.[5]

[32] The Plaintiff failed to appoint experts in these two fields of practice.

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[2] See Bundle D, page 182 - 193
[3] See Bundle C, page 54 - 60
[4] See Bundle C, page 47
[5] See Bundle C, page 47

[33] No expert reports or evidence was placed before me of an ENT or ophthalmologist. There is therefore not evidence before me that these injuries are accident related or caused as a result of the accident. This might have been a pre-existing condition, or a pre-existing condition that was merely aggravated by the accident. In order to determine this, the Court need the assistance of an expert to come an give the necessary evidence in this regard.

[34] In light of the failure to appoint these experts, the Court cannot come to the conclusion that these injuries are indeed accident related.

[35] I will later herein deal in greater detail with the report by Mazwi and the conclusion he came to in his report

[36] In paragraphs 9 - 12 of the Heads of argument of the Plaintiff, she listed her injuries as follows:[6]

"9. *The Plaintiff is recorded to have sustained orthopaedic injuries to wit:* a *facial injury-bilateral blowout fracture, C6 / C7 SPIOUS process fracture and left humerus fracture. She has* a *11 cm scar below the left eye to above upper lip. She presents with* a *16*3cm anterior left shoulder scar, deformed left side of the face (characterised by disproportion), depressed check and ptosis of left eye (dropping of upper eyelid due to paralysis.)*

*10. On assessment of whole person impairment, Dr Mogoru concludes that the Plaintiff has suffered 33% whole person impairment, and further opines (with reference to the narrative test) that the Plaintiff has serious long-term impairment or loss of* a *body function: Permanent serious disfigurement and severe long-term mental or sever long-term behavioural disturbances or disorder.*

*11. The neurosurgeon on assessment, concludes that the Plaintiff has sustained a moderately sever head injury, with multiple facial fractures with bilateral maxillary fractures to wit: Fractures on the jaws, neck and both zygomatic bones; and multiple facial lacerations.*

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[6] See Plaintiffs Heads of Argument, paragraph 9 - 12

*12. On assessment of whole person impairment, the neurosurgeon concludes that the Plaintiff has suffered 50% whole person impairment. Insofar as the narrative test, the neurosurgeon concludes that the Plaintiff has permanent serious disfigurement and sever long-term mental or severe long-term behavioural disturbances or disorder."*

[37] On its turn, and in the Heads of Argument prepared by Mr Balyoi, the Defendant lists the sustained injuries as follows:

"7.*1 The Plaintiff sustained a fracture of the left humerus and head facial injuries (Dr TS Boagadi page 165 of second pre-trial index)*

*7.2 Dr N Mogoru noted C6 I Cl spinous Processes fracture (page 4 of second pre-trial index)*

*7.3 Deep laceration on the left eyebrow and left upper lip*

*7.4 Swollen and tender left shoulder*

*7.5 Back injury*

*7.6 CT scan showed bilateral blow out fracture of inferior orbital rim and anterior wall of maxillary sinuses."*

**<u>*SEQUELAE* / CURRENT COMPLAINTS</u>**

[38] The Plaintiff documented her present complaints in the various reports filed. Mr Manala & Tshavhungwe summarised the present complaints as follows:[7]

- *Has post injury severe headaches;*
- *Has severe difficulty with concentration;*
- *Has significant permanent residual memory disturbances;*
- *Has personality changes and short temper;*
- *Has lower bac and left arm pain;*
- *Has facial pain;*
- *Has poor hearing and bilateral poor vision;*

[7] See Paragraph 17 of the Plaintiff's Heads of Argument

- *Has upper lip scar;*
- *Has left facial aspiratory; and*
- *Has deep left eyebrow scar;*
- *Painful left arm;*
- *Aggravated by inclement weather conditions;*
- *Backache;*
- *Unable to stand for long;*
- *Stiff neck;*
- *Discomfort feeling around nose and cheek;*
- *Sensitivity to light;*
- *Irritability to noisy places;*
- *Loss of appetite;*
- *Constipation;*
- *Social;*
- *Teary left eye;*
- *Dripping nostril; and*
- *Forgetfulness.*
- *Sleep disturbances due to recurring nightmares."*

[39] The Defendant summarised the *sequelae* in paragraph 8 of its Heads or Argument as follows:

*"8.1 <u>Cognitive:</u>*

*8.1.1 Headaches.*

*8.1.2 Pains and scarring.*

*8.1.3 Socially withdrawn.*

*8.1.4 Difficulty in wearing short sleeves and backache.*

*8.2 <u>Orthopaedically I Physically</u>*

*8.2.1 One has found no evidence of any pre-existing musculoskeletal pathological condition and/or disability.*

*8.2.2 Assessments of orthopaedic injuries and its sequalae in this case is not bedevilled by contradictory facts and potentially problematic conclusions.*

*8.2.3 Facts reported in consultation by Ms Sohaba indicate that she sustained significant orthopaedic injuries in the accident.*

*8.2.4 Her report is supported by contents of available clinical records. Where one is to take into consideration subjective report by patient, objective clinical observations and employment history, one would find:*

*8.2.5 Healed humerus fracture with motion deficits."*

[40] I already dealt with the lack of report by and ENT and an ophthalmologist. There is therefore no evidence that any reference to these type of injuries relates to the injuries sustained in the accident. I therefore cannot come to the conclusion that the sequelae in relation to the eyes, nose and ears are as a direct result of the accident.

**PRESENSE OF A MODERATELY SEVERE HEAD INJURY AS A DIRECT RESULT OF THE ACCIDENT AND THE INJURIES SUSTAINED IN THE ACCIDENT**

[41] The existence of a moderately severe head injury is in dispute.

[42] Only the Plaintiff filed a neurologist report and the Plaintiff has placed much reliance on the fact that the Defendant did not file a report by a neurologist.

[43] I have already dealt with my view whether I should readily accept the report for the mere fact that there is no counterpart report filed. The answer remains no. I am simply no rubberstamp to the findings of a single expert witness.

[44] At the outset, I am not in possession of the curriculum vitae of Mazwi. On his letterhead, he describes himself as a Neurosurgeon. It is important to note that the Court does not disregard or deny the qualifications of Mazwi. I am simply having regard to his field of expertise. This therefore should

nowhere in the future being utilised in any fashion to state that I have found Mazwi is incompetent to give an expert opinion in his field of experience. It is also important to note that the Defendant at no stage raised any objection to his qualifications.

[45] This Court understands that the key to understanding whether or not a given patient had sustain a brain injury will depend heavily on the demonstration on psychomatric testing by the neuropsychologists, after **MMI ,** of the presence or otherwise of neurocognitive and neuropsychological shortcomings. It is in their province of expertise that such an evaluation of neurocognitive and neuropsychological deficits lies. It is important to remember that the neurosurgeon does not test for these dysfunctions and can only go on what he is told.

[46] There is unfortunately no neuro psychologist's evidence before the Court who tested and evaluated the neurocognitive and neuropsychological deficits. This was crucial in the case of the Plaintiff in order to convince the Court that she indeed suffers a moderately severe head injury.

[47] I have debated the report by Mazwi with Mr Tshavhungwe and I indicated to him that I have issues with the report and I have highlighted the issues I have with the report. I even went so far to state that it is a pity that Mazwi is not present to testify and clarify the issues I have with his report.

[48] It is also critical to note that at no stage was I requested to stand the matter down to secure the presence of Mazwi in order to take the stand in order to clarify the issues. In light of my attitude that I cannot force any party to call any witness this was also not something I suggested to the Plaintiff. I have warned the parties about the risk in the failure to call any witness.

[49] I will no turn and deal with the report by Mazwi itself.

[50] On page 47 of Bundle C Mazwi express the opinion that the plaintiff sustained a moderately severe head injury.

[51] On page 50 Mazwi deals with the classification and complications of a head injury and he states as follows:

*"Based on the American Academy of Neurology Grading Glascow Coma Scale and American congress of rehabilitation medicine definitions*

***A. Classification***

*i) Severe head injury*

GCS *3 / 15 to* GCS *8/15 or amnesia for one week or more*

*ii) Moderate head injury or* a *concussion*

GCS *13 /15 to* GCS *12 / 15 or amnesia for one day or more*

*iii) Mild head injury or* a *concussion*

GCS *13 /15 to* GCS *15/15 or amnesia for less than one day Mild concussion: amnesia for less than fifteen minutes Moderate concussion: amnesia for more than fifteen minutes Severe concussion for more than fifteen minutes."*

[52] Under the heading***"Cognitive disturbances"*** [8] Mazwi states that

*"The severity of* a *head injury determines damages of the injury, seriousness of the injury, fracture treatment, and risk of epilepsy, the seriousness of neuropsychological disturbances, employability and prognosis.*

*Severe head injury and moderate sever injury*

- *Significant cognitive disturbances can be expected*

*Mild head injury*

[8] See Bundle C, page 50

*Cannot expect significant cognitive disturbances in 85% of patients 15% of patients will have cognitive disturbances."*

[53] Mazwi then concludes that:[9]

*"The claimant has the following problems:*

- *'"*Has *severe difficulty with concentration*
- Has *significant permanent residual memory disturbances*
- Has *personality changes and short temper."*

[54] As already stated herein above, the Neurosurgeon does not make the necessary tests in order to determine these problems. They can simply record what was stated to them. I therefore cannot come to the conclusion that Mazwi made his findings on these problems, as these aspects were not tested by him. These aspects were merely related to him. This falls outside his province of expertise.

[55] It is a pity that the necessary and relevant expert evidence was not placed before the Honourable Court.

[56] In addition to the aforementioned I need to address the following issue. During the argument Mr Baloyi, on behalf of the Defendant, pointed out to me that the GCS of the Plaintiff was at all relevant times to the accident 15/15.

[57] I have debated this aspect with Mr Tshavhungwe. I took him back to page 50 of bundle C and the different classifications between a severe head injury, moderate head injury and a mild head injury or concussion.

[58] Mr Tshivhungwe pointed out and argued that one should have regard to either the GCS OR the amnesia. He argued that one should not only have regard to the GCS. On this argument I invited Mr Tshavhungwe to take me

to the relevant reports were the experts dealt with the period of amnesia.

[59] He was not able to do so.

[60] Based on this I have indicated to him that I will reserve my judgment for somewhere in the week between 8 April 2019 to 12 April 2019 in order to go through the reports again in order to establish if the experts deals with the period of amnesia.

[61] Mr Tshivhungwe then argued further and referred me to the Bilateral blow-out fracture. This injury is not assisting the Plaintiff's argument at all. This Court understands a blow-out fracture to be an indication of the existence of a sever brain injury.

[62] I took time to go through the reports again in order to determine if reference was made to the amnesia of the Plaintiff subsequent to the accident. In order to place her in the category which the Plaintiff the Court wants to believe she falls in, reference needs to be made of one week or more.

[63] In the report by Mazwi[10] he stated as follows:

> *"The claimants experience significant head trauma, had multiple facial fractures and CT brain showed genocides brain swelling, also had loss of awareness and wake up at the scene. The claimant had Joss of consciousness and amnesia in keeping with* a *moderately severe head injury."*
>
> [Court's emphasis]

[64] I find the remark by Mazwi in a certain contradictory. I the one breath Mazwi states that the Plaintiff woke up at the scene, but proceeds to state that the loss of consciousness and amnesia is in line with a moderately severe head injury. If one then has regard to the period of a severe head injury as set out on page 50 of bundle C one see that in order to have a severe head injury one need to have amnesia for one week or more.

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[9] See Bundle C, page 51
[10] See Bundle C, page 40

[65] On a simple analysis the conclusion of Mazwi cannot be correct. He expressly states that the Plaintiff woke up the scene. In the same breath states that her amnesia is in line with a severe head injury, in other words amnesia for one week or more. It is unthinkable that the plaintiff was at the scene for more than a week, as this is in actual fact what the argument by Mazwi boils down to.

[66] I also considered the other reports by the experts filed. Nowhere is there any indication that the Plaintiff had amnesia for more than one week. It is not even indicated that the amnesia was more than one day.

[67] The Plaintiff woke up at the scene of the accident. Unfortunately, no indication was made as to the duration the Plaintiff loss her awareness. Was it less then 15 minutes ore more.

[68] Based on this, this Court cannot but to reject the findings of Mazwi that the Plaintiff suffer a moderately severe head injury. The best this Court can do is to accept that the amnesia is more than 15 minutes and therefore the Plaintiff suffered a severe concussion.

**GENERAL DAMAGES**

[69] In order to substantiate the claim of more than R1 700 000.00, the Plaintiff referred me to the matter of Anthony v The Road Accident Fund, an unreported judgment by my brother Msimeki, under case number 27454/2013, which was handed down on 15 February 2017 (herein after referred to as "the Anthony-judgment").

[70] The Plaintiff wen to a great extent in order to show this Court and to convince this Court that the facts before me are similar to the facts in the Anthony- judgment, and that I therefore had to follow that judgment and aware an amount in line with the Anthony-judgment.

[71] I need to stress the fact that my brother Msimeki ha the privilege to her evidence by some of the experts. This court dud not had that privilege.

[72] I also need to stress the fact that I had no evidence of a neuro psychologist, ENT or ophthalmologist before me and evidence I could consider. This is to the Plaintiffs own doing.

[73] In the Anthony-judgment the Plaintiff the Plaintiff suffered a traumatic brain injury, and such injury was significant.

[74] I already indicated that I cannot come to the conclusion that the Plaintiff suffered a traumatic brain injury, it is at best a severe concussion. I have fully dealt with my reasons herein above.

[75] I therefore cannot follow the Anthony-judgment.

[76] I accept the position and circumstances of the Plaintiff is dire.

[77] In this regard I have had regard to the comments in the matter of ***De Jongh v Du Pisanie NO* (2004] 2 All SA 565 SCA,** where the Court reduced the award of the Court a *quo* from R400 000.00 to an amount of R250 000.00 for a head injury. At para [65] of that judgment the Court noted that the tendency to award high amounts and cautioned against same as it was not mathematically accurate. I am mindful that merely following the trend to grant high awards slavishly does not take cognisance of the view of Holmes in ***Pitt v Economic Insurance Co Ltd* 1957 (3) A 284 (0) at 287 E - F** that:

*"[T]he court must take care to see that its award is fair to both sides - it must give just compensation to the Plaintiff but it must not pour out largesse from the born of plenty at the defendant's expense."*

[78] Nor does it take cognisance of the view expressed in ***Hully v Cox 1923 AD 234* at *246*** where it was stated that:

*"We cannot allow our sympathy for the claimants in this very distressing case to influence our judgment."*

[79] The Defendant reminded me that the determination of General Damages has never been an easy task as there is neither mathematical nor scientific formula or formulation to compute the monetary value on pain & suffering, loss of amenities of life and disability. Regard was had to ***AA Mutual***

***Insurance Association Ltd V Magula* 1978 (1) SA 805 (A)** ar.id ***Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA)** at para 8.

[80] I was also reminded that I have a wide discretion to award what I considered to be a fair and adequate compensation to the injured. Such discretion may be exercised with the guidance of previous awards made in comparable cases. In this regard, I was referred to ***Van Dyk v Road Accident Fund* 2003 (SES) QOD 1 (AF).**

[81] I was further reminded that the use of comparable cases in not a hard and fast rule that should be strictly applied. Two cases can never be the same, hence the need for judicial adjudicative in cases for General Damages. In this regard I was referred to the judgments of ***RAF v Marunga* 2003 (5) SA 165 (SCA) 19 G - H.**

[82] On his turn, the Defendant in in the Heads of Argument filed by Mr Baloyi, reference was made to several matters. I am grateful for the assistance in this regard.

[83] I was referred to the unreported judgment of ***Mnqinda v RAF*** where it was held that as a result of the collision, the Plaintiff suffered *inter alia* facial fractures, back trauma, abrasion, left tibia and tibia fractures and multiple contusions. The injury resulted in him being unable to walk or stand for prolonged periods. The value of the award today is R720 000.00.

[84] In the case of ***Abrahams v RAF* 2014 (7J2) QOD 1 (ECP)** where the Plaintiff suffered a badly communicated fracture of the right proximal femur, fractures of the right distal fibula and patella, fracture of the right medial malleolus and mild concussive traumatic head injury. As a result, the Plaintiff was rendered unemployable. The value today is an amount of R750 000.00.

[85] The Defendant submitted that an amount of R700 000.00 for general damages would be reasonable.

[86] Taking all the factors into consideration I am of the view that the amount of R850 000.00 in respect of the General Damages are justified.

**PAST MEDICAL EXPENSES**

[87] As indicated above, the Defendant made a tender which was considered by the Plaintiff. The parties settled this head of damages on an amount of R 2 040.75. The Court will therefore ward such an amount.

**LOST OF EARNINGS/ EARNING CAPACITY**

[88] At the hearing of the trial, the Defendant handed fresh calculations to me. The basis of these calculations was incorrect and I will therefore not consider same.

[89] In considering the loss of earning capacity, the Court had considered the joint minutes filed by the parties.

[90] In her argument, the Plaintiff suggested that I accept the scenario 2 of Mr Thsepo Kalanko (the industrial psychologist of the Defendant). It was further suggested that I use the calculation of Mr Loots, the Actuary of the Plaintiff.

[91] The Defendant suggested that we work on scenario Mirriam Mathabela, the Industrial Psychologist of the Plaintiff.

[92] I am comfortable in accepting the scenario by Mr Kalanko as per the joint minute.

[93] The legal principles applicable to the assessment of both the heads of loss of earnings and loss of earning capacity has been set out in numerous occasions in the past in various case law. It is by now accepted that in assessment of these heads of damages, which cannot be assessed with any amount of mathematical accuracy, the Court has a wide discretion. See for example ***AA Mutual Insurance Association Ltd v Maqula*** **1978 (1) SA 805 (A).**

[94] The question before me is the question of contingencies.

[95] No arguments were presented to me as to what factors I should take into consideration in considering the pre-accident or post-accident contingencies. Both the Plaintiff and the Defendant forwarded very broad arguments.

[96] I do not see any reason why I should deviate from the normal pre-morbid contingency of 15%. I therefore reject the argument by the Defendant that

a contingency of 20% should be applied.

[97] In addition, the question is what contingency should be used on the post-accident scenario. The defendant suggested that post contingencies of 25% should be applied, and the Plaintiff in her argument suggested 45%, in the alternative 40%.

[98] I cannot agree with the Plaintiff that the facts before me warrants contingencies of either 45% of 40%. This is simply not justified.

[99] No arguments were presented to me as to the factors I should consider in coming to the conclusion of the post-accident contingencies .

[100] It is by now well established that contingencies, whether negative or positive, are an important control mechanism to adjust the loss suffered to the circumstances of the individual case in order to achieve equity and fairness to the parties. There is no hard and fast rule regarding contingency allowance. Koch in the Quantum Yearbook said:

*"General contingencies cover a wide range of considerations which may vary from case to case and may include: taxation, early death, saved travel costs, loss of employment, promotion prospects, divorce, etc. There are no fixed rules as regard to general contingencies."*

[101] There are also unforeseen contingencies based on factors such as error in the estimation of future earnings and life expectancy, loss of earnings due to unemployment and sickness, retirement at an earlier age and hazards of life. The list can never be exhaustive.

[102] Each case must be assessed on its own circumstances.

[103] Contingencies are the hazards that normally beset thee lives and circumstances of ordinary people. In ***Shields Insurance* Co *Ltd v Booysen* 1979 (3) SA 953 (AD) at 965 G** it was held per Trollip JA that:

*"The determination of allowance such as contingencies involves, but its very nature, a process of subjective impression or estimation rather than objective calculation."*

[104] In ***Southern Insurance Association v Bailey NO*** **1984 (1) SA 98 (A) at 113** Nicholas AJ held in relation to the process of imposing an opposite:

*"One (possible approach) is for the judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment by way of mathematical calculations on the basis of assumptions resting on the evidence. The validity of this approach depends off course upon the soundness of the assumptions and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to* a *greater or lesser extent."*

[105] That being said, and without guidance from the arguments as to what factors I should take into consideration and what not, I came to the following conclusion. I am mindful of all the factors before me. I had regard to *inter alia* the following: the stable working history of the Plaintiff, her additional qualifications she obtained, that the Plaintiff is functioning at a diminished level of functioning. I also had regard to all the medical evidence before me.

[106] When I consider all the factors, I am of the view that a 35% post contingency should be allowed.

[107] The calculation results are therefore as follows:

| | POST INCOME | | FUTURE INCOME |
|---|---|---|---|
| | | | |
| | R15 456 681,00 | | R15 456 681,00 |
| Less 15% | -R25 318 502,15 | Less 35% | -R5 409 838,35 |
| TOTAL | R13 138 778,85 | | R10 046 842,65 |
| | | | |

| | | | |
|---|---|---|---|
| | **Difference** | **R3 091 336,20** | |

**CONCLUSION**

[108] The Defendant, in my view, must therefore be ordered to pay to the Plaintiff an amount of R3 943 376.95, which amount is made up as follows:

1. Past medical expenses R2 040.75;
2. Future medical expenses in the form of an undertaking in terms of Section 17 (4)(a);
3. Future loss of earnings and earning capacity R3 091 336.20;
4. General damages R850 000.00.

**ORDER**

[109] Wherefore the amended draft order marked **" XYZ"** signed and dated (and attached hereto) is made an order of Court.

**E ERASMUS**
**ACTING JUDGE OF THE HIGH COURT**
**GAUTENG DIVISION, PRETORIA**