REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

20 April 2022

Case No: 442/18

In the matter between:

NICOLENE ELS Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

JUDGMENT

SK HASSIM AJ

A. THE FACTS

(a) Introduction

1. The plaintiff seeks compensation for bodily injuries sustained in a motor vehicle collision. The defendant has agreed to pay the full extent of the plaintiff's proven or

agreed damages, as well as past medical expenses. The remaining disputes are therefore the defendant's liability to compensate the plaintiff for (i) loss of earnings and (ii) general damages and (iii) the quantum of compensation for past medical expenses.

2. On 8 June 2017, a collision occurred between the insured vehicle and the vehicle in which the plaintiff, then aged 30, was a passenger.

(b) The injuries

3. The plaintiff sustained the following injuries in the collision:

3.1. Moderate concussive brain injury, with secondary brain damage.

3.2. Left femur fracture.

3.3. Right upper leg injury.

3.4. Moderate soft tissue injury to the lumbar spine.

3.5. Mild neck injury with no long-term sequelae.

3.6. Multiple rib fractures.

3.7. Left knee injury resulting in post-traumatic osteoarthritis.

3.8. Left upper leg injury.

3.9. Laceration to the right leg.

3.10. Head and facial injury.

3.11. Soft tissue injury to the cervical spine.

4. The compensation claimed by the plaintiff in the particulars of claim amended on 12 February 2021 is the following:

4.1. Past medical and hospital expenses: R298 762.57;

4.2. Past and future loss of earnings: R 5 547 942. 00;

4.3. General damages: R1 000 000.00.

5. The plaintiff also seeks an undertaking in terms of section 17 (4) (a) of the Road Accident Fund, Act No. 56 of 1996 ("**the Act**") for future medical expenses.

(c) Experts' reports

6. The plaintiff delivered reports from the following experts, who have confirmed their reports under oath:

6.1. Dr LF Oelofse, an orthopaedic surgeon.

6.2. Ms Luna Greyling, an occupational therapist.

6.3. Dr JJ du Plessis, a neurosurgeon.

6.4. Dr Hoffmann, a plastic surgeon.

6.5. Lindelwa Grootboom, a neuropsychologist.

6.6. Dr AC Strydom, an industrial psychologist.

6.7. Johan Sauer, an actuary[1].

7. The defendant delivered reports from the following experts:

7.1. Andre Lamprecht, an industrial psychologist.

7.2. Dr Gantz an orthopaedic surgeon.

7.3. Dr Okoli, a neurosurgeon.

7.4. Prof NJS Els, a neuropsychologist.

7.5. Ms Bridget Kekana, an occupational therapist.

8. Some of these experts delivered supplementary reports.

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[1] An amended report dated 5 September 2021 was uploaded onto CaseLines on 27 October 2021.

(d) Joint minutes

9. The following experts held meetings and the joint minutes prepared by them are before the court:

9.1. The occupational therapists, Ms. L. Greyling and Ms. B. Kekana. The minute records that the meeting was held on 11 March 2020.

9.2. The orthopaedic surgeons, Drs. LF Oelofse and OE Gantz. The minute is dated 31 October 2019.

9.3. The industrial psychologists, Dr Annalie Strydom and Mr Andre Lamprecht. The minute records that the meeting was held on 2 June 2020.

9.4. The neurosurgeons, Drs JJ du Plessis and BA Okoli. The minute is dated 23 June 2020.

(e) *Sequelae*

10. The left femur was internally fixated and the right upper leg was sutured. The plaintiff was hospitalised for approximately 11 days. She suffered acute pain for a week after the accident and moderate pain for a further six weeks. She has not been pain-free since the accident.

11. The plaintiff experiences left hip and knee pain if she maintains a sitting position for a period beyond approximately 120 minutes. This is alleviated by changing the posture. Her mobility has been slightly affected by the left femur fracture and the lumbar back pain. The left hip injury restricts active range of motion and has caused reduced muscle strength. The muscle strength in the left knee has been reduced. The plaintiff has reported lower back pain. According to the orthopaedic surgeon, Dr LF Oelofse, this is not related to the accident.

12. The plaintiff's ability to stand, walk and climb stairs, assume a forward-bending standing posture and perform elevated work has been restricted to 33% of a working day and kneeling has been restricted up to 5% of a working day.

13. The plaintiff experiences cognitive difficulties. Her risk of developing epilepsy due to the moderate concussive brain injury is approximately 2%. Her vision has reportedly been affected and her personality has undergone a change which could be due to the brain injury, emotional factors, chronic pain or a combination of these.

14. The neurosurgeons expressed the view that there exists a 5% chance of lumbar surgery. However, the joint minute prepared by the orthopaedic surgeons is silent on this. The only treatment which is foreshadowed in the orthopaedic surgeons' joint minute is an arthroscopy of the knee and a total knee replacement.

15. The injuries have caused the following disfiguring scarring which will not benefit from revisional surgery:

15.1. 7cm x 1cm depigmented scar (lower back);

15.2. 8cm x 2cm scar with visible suture marks (right) medial knee.

15.3. 22cm x 2cm stretched scar on the medial aspect of the (left) knee with visible suture marks.

15.4. 8cm x 2cm on the lateral aspect of the (left) knee.

15.5. 15cm scar on the patella.

(f) Pre-morbid employment

16. The plaintiff matriculated in 2005. She obtained a diploma in hair dressing in 2007 and entered the open labour market in 2008 as a hairdresser at "Perfect Hair" and remained there until she relocated to Rustenburg at the end of 2011. In December 2012, she obtained employment as a Management Safety Officer at Almar Investments, a mining plant.

17. The plaintiff worked from 7h00 to 16h00 five days a week. Her job entailed developing and executing health and safety plans according to legal guidelines, preparing and enforcing policies to establish a culture of health and safety, evaluating

practices, procedures and facilities to assess risks in the workplace and compliance with legal prescripts. Her job demanded mobility. She was required to walk between 50 m and 3 km per day. Climbing activities were rare and limited to a few flights of stairs. The work which the plaintiff performed prior to the accident falls in the category of sedentary work with the occasional execution of light work. Over weekends, and after hours, the plaintiff worked as a hairdresser for her own account. She saw five to six clients per week.

(g) Post-morbid employment

18. After a three-month period of recuperation, with full pay, the plaintiff returned to work and remains employed by the same employer and has retained the position of management safety officer. The plaintiff is not suited to perform full light, medium or heavy work. She is though able to perform sedentary work and lift and handle loads in this category of work.

19. Because of her functional limitations, on the recommendation of a clinical psychologist, the plaintiff's employer sought to accommodate her by assigning to her an assistant runner to assist with tasks such as filing and the delivery of documents to various departments at the mining plant. The plaintiff is therefore able to meet the current job demands which remain in the category of sedentary work.

20. It is not likely that the plaintiff will return to her pre-accident level of functioning performing the occasional light work demands of her pre-accident job demands. She

will need an accommodating employer because she will be reliant on an assistant to perform the occasional light work demands of her job.

21. A degeneration in the left knee developing into end stage osteoarthritis could lead to the left knee becoming more symptomatic. This will require the plaintiff to increase the frequency of rest periods to alleviate the discomfort which could affect her productivity.

22. While the plaintiff still has a long working life ahead of her, the work she does must not aggravate her symptoms. If she retains her current position, she should be able to continue working, albeit with pain and discomfort.

23. However, should it happen that the plaintiff must seek employment as a management safety officer with another employer, she may find that the employer is not willing to assign an assistant to her. In such a case, unless her need for frequent breaks is tolerated, her employment would be compromised.

24. According to the industrial psychologists, the neuropsychological *sequelae* together with the physical disabilities and tolerance for pain pose risks to sustained employment as well as her prospects of promotion in the workplace. This could result in her deciding to take early retirement.

25. The plaintiff is likely an unequal competitor in the open labour market compared to her uninjured peers and is a vulnerable employee.

26. The case presented at the hearing was that the plaintiff has not been able to return to hairdressing, and will not be able to do so, because she does not have the residual physical work capacity to perform the full requirements of light work which hairdressing requires. I am not satisfied that the plaintiff has discharged the burden of proving loss of income from the hairdressing business. I will return to this later.

(h) The presentation of the plaintiff's case

27. There was no appearance for the defendant at the hearing. A draft order providing for the payment of R6 594 809.00 as compensation for the plaintiff's loss was uploaded onto CaseLines on 12 February 2021 at 11h51.[2] No *viva voce* evidence was led at the trial. The plaintiff's case was presented on the expert reports which were delivered by her and the joint minutes of the experts. The oral submissions were brief. The heads (written submissions) were lengthy, however not entirely helpful. In the course of preparing the judgment several issues arose which had a material bearing on the plaintiff's claim which were not addressed in the submissions.

28. In the interests of justice and fairness, I afforded to the plaintiff an opportunity to address the issues which I will return to later.

29. During the national state of disaster, plaintiffs were allowed to adduce evidence by way of affidavit in third party actions *in lieu* of *viva voce* evidence. Unfortunately

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[2] Incidentally the one uploaded three hours earlier (at 8h02) provided for payment of R6 379 921.51.

and regrettably, this in my view resulted, especially where the defendant was not represented at the trial, in a perception that an order for compensation was for the asking provided that certain formalities were carried out. It seems to me that an affidavit by the plaintiff was seen as a mere formality. My experience has been that the plaintiff's affidavit in third party matters is scanty. The affidavit should contain all the evidence that would have been led by the plaintiff in chief had *viva voce* evidence been adduced, but the affidavit in a large number of cases is wanting. In the case of a dispute, for instance, whether a plaintiff earned income prior to the loss causing event, the plaintiff would have testified thereto *viva voce*. Similarly, if there was a dispute whether the plaintiff was able to resume such part time work post the loss causing event, the plaintiff would have testified to this *viva voce* as well. The rules of evidence do not change simply because the judgment is sought by default of appearance by the defendant at trial, nor because the evidence is to be presented in written form.

30. The plaintiff's own evidence in this case is very sparse. Her evidence is contained in an affidavit deposed to on 12 February 2021. It reads as follows:

> "*1. I am the plaintiff in this matter. I was a passenger at the time of the accident on 8 June 2017. I confirm that I have sustained the injuries set out in the hospital records and as documented in the following medical legal reports:*
>
> *1.1 Dr Oelofse (orthopedic surgeon)*
>
> *1.2 Dr Hoffmann (plastic surgeon)*
>
> *1.3 Lindi Grootboom (neuropsychologist)*

1.4 Dr du Plessis (neurosurgeon)

1.5 Rita van Biljon (occupational therapist)

1.6 AC Strydom (Industrial psychologist)

2 I confirm that I was hospitalized and underwent medical treatment as set out in the medical vouchers bundle as uploaded on the court system.

3 …

4 I confirm the sequelae of the injuries and the impact it had on my life as is fully discussed in the medical legal reports. I can state that I am no longer an equal competitor in the open labour market and will find it very difficult to be gainfully employed up to the age of 50 years. [3] *In this regard I refer the honourable court to the reports of AC Strydom (Industrial Psychologist) and Johan Sauer (Actuary)"*

31. The plaintiff's case is that in addition to the income she received pre morbid from her formal employment, she also derived an income from hairdressing activities part-time and that due to the injuries she is unable to continue these activities part-time. However her affidavit is silent on this.

32. The expert reports record what the plaintiff told the experts about her pre morbid earnings. Salary advises[4], a contract of employment and an employment certificate from the plaintiff's employer were uploaded onto CaseLines. However there is no evidence from the plaintiff that pre-morbid she earned an income from hairdressing part-time and what she earned. This, notwithstanding, the industrial psychologists having recorded in the joint minute that they differed on the premorbid income and

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[3] CaseLines 0003-32 to 0003-35 in respect of the months March to June 2017

[4] None of the experts are of the opinion that the plaintiff will find it difficult to be gainfully employed up to the age of 50.

that they therefore defer to the factual information. Furthermore, there is no evidence from the plaintiff that post morbid she has not been able to continue with hairdressing business. One would have expected the plaintiff to have stated under oath that (i) she did hairdressing and earned an income from it; (ii) what she earned; and (iii) she is unable to continue these activities due to her injuries.

33. Something has to be said about the presentation of the plaintiff's case which has caused a regrettable delay in the judgment.

(i) The presentation of the case for compensation for past medical expenses

34. The draft order did not reflect the claim for past medical expenses notwithstanding that it was referred to in paragraph 5.1 of the heads of argument.

35. The case for past medical expenses should have been put before the court in an orderly manner. I did not find this to be the case. After I located the schedule of past medical expenses uploaded onto CaseLines in the form of an excel spreadsheet at CaseLines 0017-3 and captioned "Medical Schedule for Nicolene Els"[5] ("**the Schedule**") I tried to establish whether the monetary value reflected in the line items on the Schedule correlated with the monetary value reflected on the documents purporting to be vouchers to support the claim. This turned out to be extremely tedious and frustrating.

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5 An excel spreadsheet under the tab 0017-3 on CaseLines.

36. Unless every line item on the Schedule was compared against the 80 pages of what appeared to be statements of account (0017-4 to 0017-83) from the service providers, there was no way of establishing whether the claim for past medical expenses was proven. Additionally, full statements of account from the various service providers, sometimes running into a number of pages, had to be carefully examined to find the payment by the medical aid to the medical service provider because the payment/s would be one line item on a statement of account consisting of many pages with many line items.

37. The documents intended to be attachments to the Schedule to prove the expense were prepared in a haphazard fashion. The Schedule itemizes the medical expenses but is not cross referenced to any pagination nor are the line items on the Schedule arranged chronologically. The last column on the Schedule described the supporting document as an invoice. However, no invoices were attached to the Schedule. Instead, statements of account from various service providers were attached. My search for invoices turned out to be futile. They may have been amongst the 626 pages of documents uploaded under the tab "*Discovery Notices*" which contained a motley of documents relating to the collision and the claim. It would have been useful if the Schedule referred to the paginated supporting document.

38. Additionally, the supporting documents were not uniformly marked. For instance, the document referred to in the first line item on the Schedule consists of four pages

which are conspicuously marked "R2" to "R5" in large bold typewritten text[6] at the foot of each page. The next set of supporting documents consist of three pages. The first page is marked "A1" in manuscript as well as "R9" at the foot of the page. The remaining pages are marked "R10" and "R11" at the foot of the page. Thereupon follow 17 pages. The first of these is marked "A" in manuscript as well as "R12" at the foot of the page. The rest of the pages are marked "R13" to "R29" at the foot thereof.

39. Furthermore, the documents in support of the claim were not sequentially arranged.[7]

40. The Schedule was not meticulously prepared. In a nutshell, the claim for past medical expenses was presented in an unsatisfactory way.

(ii) *The presentation of the case for compensation for loss of earnings*

41. In para 5.2.3 of the joint minute the industrial psychologists recorded that they deferred to the factual information. There was no reference to the factual information in either the written or oral submissions.

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6 All the R-series markings are in large bold typewritten text.

7 The documents were listed on the "*Medical Schedule for Nicolene Els"* and uploaded onto CaseLines in the following sequence: "R2-R5"; "A1"; "A"; "D"; "E"; "L"; "M"; "H"; "N"; "H"; "I"; "K"; "B";"C";" J";" F";" G";" G1";" G2";" G3";" G4";" G5";" G6";" G7";" G8";" G9";" G10";" G11".

42. I could not locate on CaseLines the documentation to support the plaintiff's pre-morbid hairdressing business.

43. Insofar as the plaintiff's pre-morbid income from her formal employment as a management safety officer was concerned:

43.1. I located under the tab "*Discovery Notices*" on CaseLines (i) a salary advice issue by the plaintiff's employer on 31 March 2017, 30 April 2017, 30 June 2017, and September 2017; (ii) an "*Employment Certificate"* issued by the plaintiff's employer which was accompanied by a "*12-month analysis report"* from July 2015 to June 2017. These documents were described as "*Plaintiff's Reply to Defendant's Notice ito rule 36(4)*" and were uploaded under four separate sub-tabs[8] without any indication what documents were uploaded.

43.2. An employment contract seemingly signed on 17 October 2017 had been uploaded also under the tab "*Discovery Notices"* and a sub-tag described as "*Plaintiff's notice in terms 9 of rule 35(9)".* While the date of signature appeared to be 17 October 2017[9], the numeral "7" could very well have been the numeral "2". This especially so because the plaintiff appeared to have commenced employment on 1 November 2012.

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8 Totaling 626 pages.

9 It turns out that the date was "2019".

44. I could also not locate on CaseLines proof of the plaintiff's post morbid income from July 2017 to date of trial, not even under the tab "*Discovery Notices*". Nor was there any reference thereto in the heads of argument.

(i) Request for clarification on issues to the plaintiff's legal representative

45. My past experience has been that the oral submissions on behalf of the plaintiff in third-party compensation cases do not always adequately address the issues. It is only when preparing a judgment that it comes to light that the submissions failed to address contentious issues. I was confronted with this when preparing this judgment. There were various aspects of the case that were not addressed in either the very brief oral argument or the very long heads of argument. During the course of preparing the judgment I identified issues on which I required submissions (or clarification).

46. As indicated earlier, in the interests of justice and fairness I afforded to the plaintiff's legal representatives an opportunity to address in writing, should they so elect, some of my concerns about the plaintiff's case and the undermentioned concerns were pointed out:

46.1. **Past medical expenses:**

46.1.1. whether the plaintiff was pursuing the claim for past medical expenses considering that there was no provision therefor in the draft order which had been uploaded to CaseLines.

46.1.2. Whether the monetary values on the Schedule correlated with the supporting documents.

46.2. **Pre-morbid earnings:**

46.2.1. Where on CaseLines support for the plaintiff's income from the part-time hairdressing business could be found.

46.2.2. In which year was the contract of employment signed and what did the plaintiff earn in October 2017.[10] The reason for this query was:

46.2.2.1. The contract of employment, in terms of which the plaintiff earned R14 656.82 per month was ostensibly signed on 17 October. The handwriting however left me doubting whether the year of signature was "2017" or "2012".

46.2.2.2. The "7" could have been a "2". This seemed plausible because the contract reflected the commencement date of

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[10] Neither the written contract of employment (CaseLines 0003-631-0003-636), the employment certificate (CaseLines 0003-36-0003-37) nor the 12-month salary analysis report (CaseLines 0003-37-0003-39) was referred to in argument.

employment as 1 November 2012. I needed clarity on the year when the contract was signed.

46.2.2.3. The plaintiff was earning R11 350.00 at the time of the collision. If the contract was signed in 2012 it meant that the plaintiff was earning more in 2012 than she was when the collision occurred. If the contract was signed in 2017 then it meant that four months after the collision the plaintiff's salary increased by R3 306.82. This seemed odd to me.

46.2.2.4. I required confirmation regarding (i) the date of signature of the contract of employment; and (ii) whether the plaintiff' earned R14 656.82 p.m. when she commenced employment or was that the salary she earned in October 2017. (While I had seen the 12-month salary analysis report which had been uploaded to CaseLines I required clarity largely because neither this nor the contract of employment or salary advices were referred to in oral argument or the heads of argument.).

46.3. **Post morbid earnings**:

46.3.1. In paragraph 5.2.3 of the industrial psychologists' joint minute they record that they defer to the factual information regarding the plaintiff's post morbid income. I could not locate proof of the plaintiff's post morbid income from July 2017 to date of trial. There was also no reference thereto in the heads of argument. Hence, the request to the plaintiff's legal representatives to direct where this information could be found.

46.4. **Compensation, if any, paid to plaintiff in terms of disability cover** According to the plaintiff's employment contract, read with the salary advice, the plaintiff and her employer were contributing to a provident fund which covered the plaintiff for disability. The plaintiff's legal representatives were requested to address whether (i) the plaintiff received compensation payment for disability; and (ii) if so, is this amount falls to be deducted from the compensation claimed from the defendant?[11]

[11] In the response by the Plaintiff's attorney it was stated that the plaintiff had not received compensation for disability.

46.5. **The actuarial calculation of compensation for loss of earnings**:

46.5.1. I had concerns regarding the actuarial calculations. Insofar as the actuarial report was concerned, I raised the following questions:

46.5.1.1. <u>Loss according to A Strydom scenario (only in relation to the income earned from formal employment and not hairdressing)</u>

(a) In paragraph 2 (loss according to A Strydom) (p. 009-197) the actuary records that according to the joint minutes the plaintiff earned a total package equal to median A3/B1 Patersen level which he states to be R174 896 p.a. in 8 June 2017 monetary terms. I did not understand that to be the agreement. Para 2.2 of the joint minute in fact records that the industrial psychologists were not in agreement as to the plaintiff's pre-morbid earnings which on the plaintiff's version was R11 350.91 p.m. and R136 211.00 p.a. Neither experts expressed themselves on whether the plaintiff earnings were in line with a total package equal to median A3/B1

Patersen level. I asked whether it could have been less.

(b) I did not understand the minute to record that the plaintiff earned a total package equal to median A3/B1 Patersen level at the time of the accident. What it records was that the plaintiff's pre-accident potential was that she would have continued to work as a management safety officer (A3/B1 median annual guaranteed package). It does not say that the plaintiff in fact earned at that level at the time of the accident.

(c) I enquired whether it was the plaintiff's case that the salary R11 350.91 p.m and R136 211 p.a accorded with a total package equal to median A3/B1 Patersen level?

(d) The actuary departed in the calculation of the loss of income suffered by the plaintiff from the premise that the plaintiff's pre-morbid earnings were a total package equal to median A3/B1 Patersen level which he calculated to be R174 896.00 p.a. This equated to

a salary of R14 574.66 p.m which is R3 224.66 more than what the plaintiff's industrial psychologist records in para 2.2.1 of the joint minute. I requested an explanation for what seemed to me a discrepancy.

(e) My understanding of the schedule at Caselines 009-199 (first row) was that the actuary calculated the plaintiff's loss of income on the basis that she earned R17 710 p.m (net) at 8 June 2017. This is inconsistent with the salary advice at p. 003-34 which reflected the plaintiff's net income as R9 512.78. It was not apparent to me whether the actuary had allowed for a yearly increase in the salary which appears to have been implemented with effect from December every year.

46.5.1.2. I raised the same questions mutatis mutandis in respect of "**Loss according to A Lamprecht" scenario**.

47. A response was not forthcoming for some time. It came to hand on 3 December 2021. Unfortunately it was incomplete and was lacking in some of the information requested. The issues raised by me gave rise to a fresh report by the actuary (dated 5 September 2021 and uploaded onto CaseLines on 27 October 2021) and a

considerable reduction in the quantum of the claim for loss of earnings (from R6 594 809.00 to R5 809 189.57). The reason given by the actuary for discrepancy appears in paragraph 57 below.

48. A draft order catering for past medical expenses in the sum of R298 762. 57[12] was uploaded. The response invited my attention to the medical expenses schedule uploaded onto CaseLines with the supporting vouchers even though it must have been evident from the queries I raised that I had considered these and that the questions arose from the Schedule and the supporting documents.

49. I was informed as follows:

Claim for past Medical Expenses

49.1. The plaintiff was pursuing the claim for past medical expenses for R298 762.57 as reflected in the Medical Expenses Schedule that had been uploaded to CaseLines with the supporting vouchers.[13] This was not a

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12 Being the sum of R292 595.51 paid by the medical aid and R6 167.06 paid by the plaintiff.

13 The response was the following: "*We are pursuing a claim for past medical expenses and amended the draft order accordingly to make provision for same. The total amount equates to R298,762.57 (R 6167.06 Plaintiff and R292,595.51 medical aid, respectively). This is reflected in the Medical Expenses Schedule uploaded to CaseLines with the supporting vouchers.".* This is not a complete answer to the query.

complete answer to my query. It would have been helpful if a properly referenced schedule of medical expenses had been prepared in response.

Pre-morbid income from hairdressing business

49.2. In response[14] to my request to be directed to the papers as uploaded to CaseLines where support for the plaintiff's income from part-time hairdressing activities could be found, my attention was invited to three affidavits that were to be uploaded to CaseLines. These affidavits were deposed to on 20 August 2021, being some six (6) months after the hearing and after my request for clarification. The affidavits were deposed to by three "regular customers"[15] of the plaintiff and were uploaded to CaseLines on 27 October 2021. These affidavits did not come to my attention before 3 December 2021.

49.3. The salient part of the three affidavits deposed to on 20 August 2021 is the statement in paragraph 3. Mrs Esterhuizen (one of the plaintiff's clients) states:

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[14] The response was the following: "*We attached hereto 3 (three) affidavits from regular customers of the plaintiff in respect of her hairdressing business in support of …. [the] question in 2 and will upload same to Case Lines."* The question which I had asked was: "*I am not able to find any documents on case lines to support the income the plaintiff made from her part time hairdressing activities. Could you please direct me to this?"*

[15] Described as such in the plaintiff's attorney's response to my queries.

"*I further confirm that I <u>have been</u> a client of Mrs Nicolene Els's salon on a regular basis for approximately 5 years."*

49.4. What this shows is that Mrs Esterhuizen was a client from 2016 but it also shows that she continues to be a client post morbid.

49.5. Save for the length of time the deponents to these three affidavits have been clients of the plaintiff, the same statement appears in the affidavits of Mrs Wolmarans and Ms M Els. Mrs Wolmarans has been a client on a regular basis for approximately six years (which means from 2015 and continues to be a client post morbid) and Ms M Els for ten years (which means from 2011 and continues to be a client post morbid).

Post morbid income from employment as management safety officer

49.6. As mentioned earlier there was no indication where on CaseLines I could find proof of the plaintiff's post morbid income from July 2017 to date of trial. This resulted in me having to go through a large volume of documents uploaded to CaseLines. The request to the legal representatives to point out where the factual information on the plaintiff's post morbid income could be found was met with the following response:

"*We also attach hereto payslips of the Plaintiff dating back from 2016 to 2021 in support of the Plaintiff's claim for loss of income.*

The factual information referred to can be confirmed by the attached payslips."

49.7. The payslips (salary advices) (neither indexed nor paginated) referred to in paragraph 58 below accompanied the plaintiff's attorney's response.

B. THE PLAINTIFF'S LOSS

(i) Loss of earnings from hairdressing business

50. There was no dispute between the experts that the plaintiff has suffered a loss of work and earning capacity and has suffered a loss of earnings from her hairdressing business. However insofar as her earnings were concerned they recorded that they deferred to factual information.

51. I am not satisfied that the plaintiff has proven the loss of earnings from the hairdressing business.

52. Her affidavit is silent on the income she earned from this business. Insofar as the three affidavits from the plaintiff's "regular customers" are concerned, there is no application before me to lead further evidence and for that reason alone I should disregard them. However, even if I were to adopt a benevolent approach, which I intend doing, and have regard to the affidavits they do not assist the plaintiff's case. To the contrary, they show that the plaintiff continues hairdressing activities. The affidavits do not proof how much she earned. What they prove is that the plaintiff continues her hairdressing trade (see paragraphs 49.3 to 49.5 above). It follows from the statements referred to in paragraphs 49.3 to 49.5 above that the three clients remain present day clients and the plaintiff is continuing the hairdressing business.

(ii) Loss of earnings from formal employment as a management safety officer

(aa) Future premorbid earnings

53. Insofar as her formal employment as a management safety officer is concerned, at the time of the accident the plaintiff was earning a basic salary of R11 350.99. This is supported by the employment certificate issued by the employer as well as the document attached thereto and captioned "*12-month analysis report for the period ending 30/ 06/ 2017*".

54. The industrial psychologists agree that the plaintiff would have continued working as a management safety officer (A3/B1, median, annual guaranteed package), until such time as she was promoted to the position of Chief Safety Officer (C2 median, annual guaranteed package), which would have been her career ceiling in her mid-40s, provided that such a position had become available. Normal inflationary increases would have been applicable after she had reached her career ceiling until the normal retirement age. They were also agreed that pre-morbid contingencies should be applied because it is not possible to accurately determine by when she would have received the promotion but accepted that individuals reach their career ceiling at 45 years of age. The approach in this regard is correct and I will take this account when deciding the appropriate deduction for contingencies on the plaintiff's pre-morbid future loss of earnings.

(bb) Pre-morbid retirement age

55. There is no consensus on the plaintiff's pre-morbid retirement age. The plaintiff's industrial psychologist is of the view that the plaintiff had the capacity to continue working until the age of 65, and beyond, health permitting. The defendant's industrial psychologist's opinion on the matter is that based on collateral information the plaintiff would probably have been able to continue working until the age of 63. The defendant did not participate in the proceedings and therefore the collateral information which formed the basis of the view that the plaintiff would probably not have worked beyond the age of 63 is not available. I am therefore not able to find that the plaintiff would have retired earlier than the normal retirement age of 65.

(cc) Post morbid earnings

56. Coming to the plaintiff's post morbid earnings. No evidence was led on the plaintiff's post morbid income. While this was discussed at the meeting of the industrial psychologists, they were unable to reach consensus. The defendant's industrial psychologist recorded that the plaintiff had reported her post morbid basic earnings manually calculated to be R180 000.00 per annum. The plaintiff's industrial psychologist recorded that according to the salary advice issued in October 2019 the plaintiff was earning a monthly salary of R 15,889.21. These experts agreed to defer to the factual information. The heads of argument delivered on behalf of the plaintiff only stated that the experts defer to the factual information. The salary advices post

morbid were not uploaded at the time of the hearing.[16] What was contained in the court record at the time was the contract of employment.

57. The actuary in his revised actuarial report (dated 5 September 2021) states that he had not been provided with the 2019-2020 salary advices when he prepared his earlier reports and that his understanding is that nor was Dr Strydom, the industrial psychologist. It is unsatisfactory that experts are not provided with accurate information from which to draw their conclusions and it is equally unsatisfactory for experts to express opinions without having the correct facts at their disposal.

58. As per the salary advice slips[17] the plaintiff's basic salary post morbid was the following:

    58.1. Until 30 November 2017: R11 350.99.

    58.2. From 1 December 2017 to 30 June 2018: R12 259.07.

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16 They were provided after the hearing consequent upon my enquiries where in the CaseLines record I could locate the plaintiff's post morbid income.

17 Provided after the hearing and pursuant to the queries I directed to the plaintiff's legal representative.

58.3. September 2019 to November 2019: R14 565.82. [18]

58.4. From 1 December 2019 to 31 March 2020: R15 862.80.

58.5. June 2020: R15 682.80.

58.6. July 2020: R7 841.40.

58.7. 1 August 2020 to 30 November 2020: R15 682.80.

58.8. 1 December 2020: R16 780.60.

59. It seems that the employer adopted a special dispensation for the months of April 2020 and May 2020, presumably due to the national lockdown. For the month of April 2020 the plaintiff earned R15 744.80 and for the month of May 2020 R8 002.77.

(dd) Post morbid retirement age

60. According to the parties' respective industrial psychologists, the age of retirement depends on the plaintiff's tolerance for pain and the neuropsychological sequelae.

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[18] This is consistent with the written employment contract entered into on 17 October 2019 which reflects her basic salary as R14 656.82. (The date of commencement of employment is reflected as 1 November 2012).

There is however no evidence by the plaintiff, for instance, on the intensity of the pain, its effect on her duties or her tolerance for pain.

61. The actuarial calculation in the report of 5 September 2021 (Retirement at age 65; Pre-morbid progress to Median C2 package – CaseLines 0009-210 and 0009-212) is on the basis (i) of the plaintiff's actual earnings at the date of the collision; (ii) that the plaintiff would have retired at 65 years of age; (iii) that she would have reached her career ceiling at the age of 45; and (iv) thereafter she would have been able to earn a total package equal to median C2 Paterson level of R499 000.00. Apart from the deductions for contingencies suggested by the actuary, which I am not in agreement with, I am satisfied that the plaintiff has suffered a loss of earnings from her employment as management safety officer as set out in the "*Retirement at age 65; Pre-morbid progress to Median C2 package*"[19] scenario.

(iii) Contingencies

62. The normal and widely accepted deduction for contingencies is 5% for past loss of earnings.

63. The actuary has applied a deduction of 5% for past loss of earnings had the accident not occurred and now that the accident has occured. I am satisfied that this is fair and reasonable in the circumstances.

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[19] CaseLines 0009-210.

64. However, insofar as future loss of earnings on the plaintiffs uninjured earnings (had the accident not occurred) is concerned, I cannot ignore that an opportunity for promotion may not have presented by age 45 or for that matter at all. A 10% deduction for contingencies on future uninjured income in my view is somewhat optimistic. The plaintiff's counsel suggested in oral argument that a contingency deduction between 10% and 17% would be appropriate in the circumstances. In my view a 17% deduction for contingencies is more realistic.

65. Turning to a deduction for contingencies on future earnings on injured earnings (now that the accident has occurred), the actuarial calculation is based on a 30% deduction. This in my view postulates a bleak out-look for the plaintiff. I am prepared accept that there is a prospect of early retirement, that the plaintiff's competitiveness in the open labour market has been reduced and that any future employment must not aggravate the symptoms she experiences. Save for early retirement, the other possibilities will only arise if the plaintiff is no longer employed by the same employer. The employer has thus far been accommodating and the plaintiff remains in employment notwithstanding the lapse of approximately four years (i.e., June 2017 to February 2021). This, in my view, is an indication that the plaintiff is a valued employee. In these circumstances it is unlikely that the employer will terminate the plaintiff's employment. What should however be catered for is the prospect that the plaintiff may choose to retire earlier because of pain. There is also the fact that the plaintiff appears to be continuing hairdressing activities. The three affidavits referred

to earlier point to this. Considering all of these, in my view a deduction of 20% for contingencies on future injured loss is fair and reasonable in the circumstances.

(iv) Past medical expenses

66. The manner in which the plaintiff's claim for past medical expenses was put before the court is very disappointing. Be that as it may, having perused the Schedule and the documents filed from 0017-4 to 0017-83, I am satisfied that the plaintiff has proven her claim for compensation for past medical expenses in the sum of R298 762.57.

(v) General damages

67. Turning to the plaintiff's claim for general damages. I have discussed the plaintiff's injuries and the sequelae thereof. There is no dispute that the plaintiff suffered from acute pain for a week following the accident and thereafter moderate pain for a further six weeks. Furthermore, there is no dispute that she has not been pain free since the accident. Her mobility has been affected and her injuries have resulted in disfiguring scarring on the legs and lower back. There is none on the upper body or face. The orthopaedic surgeons agree that the knee injury has resulted in post-traumatic osteoarthritis of the knee joint. The plaintiff has undergone emotional changes and her cognitive functioning has been affected. There is a 2% chance of her developing epilepsy.

68. The legal principles regarding the assessment of general damages are well-established and I do not intend to repeat them, save for stating that while awards for general damages made in previous cases provide guidance, each case must be considered on its own facts.[20]

69. It is trite that when considering general damages, the court has a wide discretion to award what it considers to be fair and adequate compensation to the injured party.[21]

70. The plaintiff's counsel referred in his heads of argument to awards in other cases and submitted that the plaintiff should be awarded R1 000 000.00 in respect of her claim for general damages. I have considered the cases and the injuries suffered and the sequelae thereof. While awards in other cases are a useful guide in arriving at a reasonable assessment of the quantum of general damages to be awarded, there would rarely, if ever, be a case that is on all fours with the case under consideration. For this reason, the courts have accepted that there is no hard and fast rule of general application requiring a trial court to consider previous awards. [22]

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20 Minister of Safety and Security v Seymour 2006(6) SA 320 (SCA).

21 Road Accident Fund v Marunga 2003 (5) SA 164 at 169E-F.

22 Road Accident Fund v Marunga 2003 (5) SA 164 (SCA).

71. I am cognisant of the tendency in recent times to grant higher awards than the trend in the past.[23] I must at the same time bear in mind the principle that the award I make must be fair to both sides.

72. Having considered all these issues, the case law, the injuries and the *sequelae* thereof an award of R850 000.00 would represent fair compensation for general damages.

(vi) Revised actuarial calculation and draft order

73. The plaintiff's actuary is requested to prepare a revised calculation on the *Retirement at age 65; Pre-morbid progress to Median C2 package*" scenario on the following basis:

73.1. The plaintiff has suffered no loss of earnings from the hairdressing business;

73.2. The following deductions for contingencies:

73.2.1. 5% for past loss of earnings on uninjured and injured earnings;

73.2.2. 17% on future uninjured earnings; and

73.2.3. 20% on future injured earnings.

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[23] *Cf.* Marunga.

73.3. Section 17(1) of Act 56 of 1996 as amended by Act 19 of 2005, and particularly s 17(4)(c), with effect from 1 August 2008, places a limitation on the amount of compensation payable by the Fund in respect of claims for loss of income. The updated calculation must also take into account this limitation.

74. Based on the revised calculations the plaintiff is directed to prepare a revised draft order providing for the following:

74.1. Payment of past and future loss of earnings as recalculated by the actuary on the basis set out in paragraph 73 above.

74.2. Payment of general damages in the sum of R850 000.00;

74.3. Payment of R298 762.57 for past medical expenses;

74.4. An undertaking in terms of section 17 (4) (a) of the Road Accident Fund, Act No. 56 of 1996 for future medical expenses;

74.5. Interest; and

74.6. Costs.

75. Upon receipt of the revised calculation and a revised draft order I may be approached to make the draft order an order of court.

S K HASSIM AJ

Acting Judge: Gauteng Division, Pretoria

20 April 2022

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 21 April 2022

Date of hearing: 12 February 2021

Appearances:

Plaintiff: Adv. Marx

Defendant: No appearance.