REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 21180/18

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

SIGNATURE 1/08/2022 DATE

In the matter between:

MOGALE SHALATE GLADYS Plaintiff

And

THE ROAD ACCIDENT FUND Defendant

JUDGMENT

FLATELA A.J

[1] The matter served before me on 29 October 2021 for the determination of quantum in respect of general damages and loss of earnings. The plaintiff seeks judgement by default against the Road Accident Fund (the Defendant) following an order by Davis J on 18 October 2021.

[2] Liability was settled at 100% in favour of the plaintiff. The defendant was ordered to pay 100% of the plaintiff's proven damages by Molopa ADJP on 30 October 2019. The future medical and hospital expenses was also settled in that Molopa ADJ ordered the defendant to deliver to the plaintiff within a reasonable time an undertaking a certificate in terms of s 17(4) (a) of the Road Accident Fund Act 56 of 1996 (the Act).

[3] The only issues which remained for determination was general damages and loss of earnings.

Plaintiff's Pleadings

[4] The plaintiff instituted an action for damages arising from a vehicle collision which occurred on 30 December 2016 on Emily Street, Pretoria North, when an insured motor vehicle with registration BX82 GP driven by Nyeleti Charlotte Rivombo, (The insured driver) collided with her whilst a pedestrian whilst walking towards her vehicle which was parked in the street. She was 61 years of age and retired at the time of accident.

[5] Plaintiff was taken by ambulance to the Netcare Akasia Hospital in Pretoria where she was admitted to the Intensive Care Unit for three days. It appears from medical records filed that Plaintiff's Glycol Coma Scale (GCS) reading was 15/15. X-rays and a CT scan of her brain were processed. She was treated conservatively. Her

right foot was reduced under local anesthetic. Plastic of Paris was also applied to her right foot and she was discharged on the fourth day of her admission on 2 January 2017.

[6] As a result of the collision, the Plaintiff sustained injuries:

6.1 Head Injury;

6.2 tissue injury to face;

6.3 Multiple abrasions to upper limbs;

6.4 Soft tissue injury to the right knee and bruising off right leg;

6.5 Soft injury to the right hip;

6.6 Soft injury tissue injury to the neck;

6.7 Abrasions to the right arm, right hand and left hand.

[7] In her particulars of claim the alleges that the injuries sustained by her are **SERIOUS INJURIES** as is contemplated in sec (17) of the Act together with regulation 3 of the Regulations under the Act;[1]

[8] The plaintiff alleges further that a Serious injury (RA4) as contemplated in Regulation 3 of the Act will be completed by a Medical Practitioner registered in terms of the Health Professions Act (Act 56 of 1974) and submitted to the Defendant in due course[2]. The allegations remained the same as at the date of trial.

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[1] Para 7.1 of the particulars of claim
[2] Para 7.2 of the particulars of claim

[9] In the heads of argument, it was submitted that the plaintiff qualifies for general damages. I was referred to RAF 4 reports of Drs TJ Enslin and Dr JPM Pienaar.[3] The reports by an Independent Medical Practitioner and Plastic and Reconstructive surgery confirmed that the plaintiff's injury falls under a narrative test. An amount of R86 384 .00 for past and future loss of earning was claimed and sum amount of R 600 000.00 is claimed for general damages.

[10] At the date of trial there was no indication as to whether the RAF has accepted or rejected RAF4 forms and the assessment of the plaintiff's injuries.

[11] Upon consideration of the plaintiff's pleadings, it was not clear to me whether the plaintiff had fully complied with the procedure set out in regulation 3 of the Act regarding the serious injury claims or the claims that are deemed as serious.

[12] I issued a directive to the plaintiff's attorneys to confirm whether the fund has accepted the plaintiff's claim as it is now trite that unless and until the plaintiff has complied with procedure set out in Regulation 3 of the Act, the court has no jurisdiction to entertain the claim for damages.

[13] In response to my directive the plaintiff's attorneys stated that a tender letter from the RAF dated 11 November 2021 confirmed that general damages **were not** rejected. A settlement proposal letter from the plaintiff's attorneys on the eve of the trial and the response received after the trial was annexed to sustain the claim that the general

[3] Para 22 of the Plaintiff's heads of Argument, 015-14

damages were not rejected. The defendant's official made a tender to pay R334 139.05 made up of R84 139.05 for loss of earnings and R250 000.00 for general damages. I deal with heads of damages herein below.

General Damages

[14] The plaintiff relied on the reports by several experts but a report of Dr HB Enslin is instructive.

Report by Dr HB Enslin, Orthopaedic Surgeon, dated 16 March 2020.

[15] To Dr HB Enslin, Ms Mogale complained of:

- Pain present inside the left knee;
- Her knee swells;
- She uses a crutch;
- Inclement weather, squatting, kneeling and climbing stairs exacerbate the symptoms in her left knee;
- Pain is present over the metatarsal heads of the left foot;
- Her sleep is disturbed by the symptoms in her left foot;
- Pain is present over the lower cervical spine four to five times a week;
- Occipital headaches are present every morning;
- Neck stiffness is present;
- Muscle spasm is present in the left and right trapezius muscle;
- Back pain is present;
- She struggles to turn her neck;

- Pain is present over the lateral aspect of the right hip;
- She limps;
- Her sleep is disturbed by pain and discomfort in the right hip;
- Pain is present over the 2nd metatarsal bone of the right foot;
- Pain is present over the left and right wrists;
- Her sleep is disturbed by pain and discomfort in her left and right wrists;
- Pain is present over the lower lumbar spine and mid thoracic spine;
- Stiffness is constantly present;
- Her sleep is disturbed by pain and discomfort in her back.

[16] It is noted in the report of Dr HB Enslin that Ms Mogale has not been left with serious long-term musculoskeletal impairment. She does not qualify for non-pecuniary damages (p.20). He deems her WPI at 10%. He also made the following recommendations:

a) Allowance be made for conservative treatment (p.21);
b) Allowance be made for the 4% to 5% possibility of a surgical stabilization of the cervical spine with time off work of 3 months (p.21)
c) Allowance be made for the 4% to 5% possibility of a surgical stabilization of the lumbar spine with time off work of 4 months (p.21).
d) Allowance be made for the 20% to 25% possibility of an arthroscopic debridement of the left knee with time of work of 3 weeks (p.22).
e) She should be evaluated by a Plastic and Reconstructive Surgeon (p.22)

Report by Dr TJ Enslin, Independent Medical Examiner, dated 18 March 2020

[17] Dr TJ Enslin reports that Plaintiff has suffered the following injuries:

- She has suffered permanent serious disfigurement;
- A head injury with loss of consciousness;
- A soft tissue injury to her cervical spine;
- A soft tissue injury to her lumbar spine;
- A soft tissue injury to the thoracic spine;
- A soft tissue injury to her right hip;
- A soft tissue injury to the right wrist;
- A soft tissue injury to her left knee;
- A fracture of the metatarsal bone of the right food; and
- A soft tissue injury to the left foot.

[18] It is also noted in the report of Dr TJ Enslin that Ms Mogale has not reached the 30% Whole Person Impairment (WPI) but qualifies under the Narrative Test, which he submits, warrants an award for general damages (p.8). According to Dr TJ Enslin, Ms Mogale WPI is 18%. He further recommended that she would benefit from future conservative and possibly surgical treatment.

Report by Dr JPM Pienaar, Plastic and Reconstructive Surgeon, dated 22 October 2020

[19] It is reported by Dr JPM Pienaar that Ms. Mogale's scarring, and disfigurement make her self-conscious. It has affected her confidence and self-esteem and she has become withdrawn (p.2). The scarring affects her appearance and dignity, it causes social anxiety and embarrassment (p.3). From a plastic surgery viewpoint, the following scars were noted:

a) a scar over her left wrist
f) a scar In her right lateral eyebrow that causes distortion of her eyebrow and is very visible and unsightly
g) minor abrasion scars on her legs and arms (p.3)

[20] He concluded that from a plastic surgery viewpoint, she will not benefit from scar revision surgery due to the nature and extent of her scarring (p.3). Further reported is that Ms. Mogale has reached Maximum Medical Improvement but she scores a 9% Whole Person Impairment rating but qualifies under the Narrative Test in terms of serious permanent disfigurement and under paragraph 5.2 qualifies under general damages (p.2)

Legal Principles Applicable

[21] In ***M S v Road Accident Fund***[4] Fisher J neatly summarised the legislative framework and legal principles regarding general damages as follows:

> 21.1 For accidents that occurred after 1 August 2008, general damages are only paid if a serious injury has been sustained, which is in line with the RAF Amendment Act[5] (the

[4] [2019] 3 All SA 626 (GJ) (25 March 2021)
[5] 19 of 2005.

Amendment Act). The Amendment Act amended the RAF Act to limit the RAF's liability for compensation in respect of claims for general damages to instances where a "serious injury" has been sustained.[6]

21.2 A medical practitioner has to determine whether or not the claimant has suffered a serious injury by undertaking an assessment prescribed in the RAF Regulations. The practitioner performing the injury assessment has to prepare an RAF 4 report which deals with the assessment of the injury in terms of the *American Medical Association's Guides to the Evaluation of Permanent Impairment* (*AMA Guides*). If the injury is found to have resulted in 30% or more the whole person impairment (WPI) according to the methodology provided for in the *AMA Guides,* the injury should be assessed as serious.[7]

21.3 If the evaluation is that the 30% of WPI cannot be reached, non-patrimonial loss may still be claimed if the injuries fall within the "narrative test", namely (a) resulting in a serious long-term impairment or loss of a body function; (b) constituting permanent serious disfigurement; (c) resulting in severe long-term mental or severe long-term behavioral disturbance or disorder; or (d) resulting in the loss of a foetus. A plaintiff may use either of the two tests to establish serious injury and in such a manner qualify for compensation for non-patrimonial loss.'

21.4 A medical practitioner must complete and submit a serious-injury assessment report on the RAF. If the RAF is not satisfied that the injury has been correctly assessed it must reject the serious-injury assessment report within 60 days and furnish reasons for the rejection; or direct that the third party submit himself or herself, at the cost of the Fund, to a further assessment. Thereafter, the RAF must either accept the further assessment or

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[6] *Road Accident Fund Regulations*, 2008. *GG* 31249, Notice number 770 of 21 July 2008, The Regulations became effective on 1 August 2008.

[7] Section 17 (1) rw s 17(1A) of the RAF Act

dispute the further assessment within 90 days. An Appeal Tribunal, consisting of three independent medical practitioners, has been created to hear these disputes.[8]

[22] In RAF v Faria[9] the Supreme Court of Appeal stated the following regarding the amendment Act:

> "The amendment Act, read together with the Regulations, has introduced two 'paradigm shifts' that are relevant to the determination of this appeal: (i) general damages may only be awarded for injuries that have been assessed as 'serious' in terms thereof and (ii) the assessment of injuries as 'serious' has been made an administrative rather than a judicial decision. In the past, a joint minute prepared by experts chosen from the contending sides would ordinarily have been conclusive in deciding an issue between a third party and the RAF, including the nature of the third party's injuries. This is no longer the case. The assessment of damages as 'serious' is determined administratively in terms of the prescribed manner and not by the courts. Past legal practices, like old habits, sometimes die hard. Understandably, medical practitioners, lawyers and judges experienced in the field may have found it difficult to adjust. As the colloquial expression goes, 'we are all on a learning curve'.

[8] RAF Regulation 3

[9] *RAF v Faria* (567/13) [2014] ZASCA 65 (19 May 2014)

[23] In this matter the plaintiff's experts differ fundamentally on whether the plaintiff qualifies for narrative test. I doubt that the Fund has accepted the assessment in terms of Regulation 3 of the Act.

[24] Is a tender to settle by the fund after the trial date a proof that the fund has accepted that the plaintiff's injuries has been correctly assessed?

[25] Dealing with this question in special sitting of a Full Bench Easten Cape Division Maqhutyana and Another v RAF [10] Hartley J writing for the court said that:

> [123] In my view it would not be an unreasonable inference to draw in all the circumstances that in such a scenario the relevant jurisdictional fact for the court to adjudicate a claim for general damages in a default judgment application has been established, otherwise a court should leave the resolve of this aspect of the plaintiff's claim where it belongs, namely in the administratively realm, reserving the right of the plaintiff to pursue it in court again at the appropriate time.

[26] As at the date of trial there was no tender of settlement. There was no allegation that the fund had accepted the assessment of the plaintiff's injuries as serious. The said letters were not part of the pleadings.

[27] I am of the view that I no jurisdiction to determine general damages. The determination of the quantum in respect of general damages *is postpone sine die.*

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[10] CA 17/2020 [2021ZAECMHC 30(17 August 2021)

Loss of Earning Capacity

[28] The plaintiff claims an amount of R45 408 for the past loss of income. According to the calculations obtained from Mr. Greg Whittaker from Algorithm Consultants &Actuaries the plaintiff's loss on the uninjured income is R72 566 .00 and on injured is R24 769 minus 5% contingency deduction.

[29] With regard to loss of future loss of earnings, the plaintiff contends that her future loss of income on uninjured income will be R65 951 and post-accident he will earn R20 110 subject minus 15% contingency pre-morbid and 25% for the post-morbid. The estimated future loss of income is R40 976.00

[30] The actuary relied on the report of Industrial Psychologist Ms. R van Zyl dated 22 October 2022. The assumption is that had the accident not occurred, Ms Mogale would have opened a Spaza Shop from 1 March 2017. The Actuary valued the pre accident earnings from 1 March 2017 and it was noted that there does not appear to be loss prior to this date).

[31] It is stated that earnings at 1 March 2017 are taken at R15, 100 per annum (in 2017 monetary terms increasing in line with the headline inflation to give earnings at R18 037 per annum at 1 December 2021 until retirement at the age of 70.

[32] The post-accident earnings at 1 March 2017 are taken as R5 500 per annum (equal to reported average profit of R1000 per month less the costs of R250 per fortnight in respect of an assistant, remaining at that level until the calculation date minus 25%contigencies due to covid-19 pandemic.

[33] I now deal with the main report being that of an Industrial Psychologist.

Industrial Psychologist

[34] The Plaintiff's Industrial Psychologist, Ms Renee van Zyl, render a 36 pages industrial projection report (excluding referencing and bibliography) as to Ms Mogale's supposed diminished earning capacity occasioned by the accident. In reproducing the summary of the report, I propose to only extract those salient points that will be pertinent for discussion and determinative of Ms Mogale's claim against the Defendant for loss of earnings and/or earning capacity.

[35] Of critical importance, the Report notes that at the time of the accident, Ms Mogale was a pensioner, having retired from her position of a Supervising Cleaner at Medunsa Dental Hospital in 2015 at the age of 60 because she was tired (p16).

[36] According to a letter from the Government Employee Pension Fund, signed by the Principal Officer and dated 3 September 2018, Ms Mogale's gross pension amounted to R4 167.00 per month translating to earnings of R50 004.00 per annum. This pension remains payable to Ms Mogale until her demise.

[37] In analysing Ms. Mogale's employability profile, Ms Van Wyk opined that it is evident that Ms Mogale presented with the **Employment Potential Capacity** to have functioned in an unskilled / low-level semi-skilled capacity. Ms. Mogale's career history is indicative of someone who functioned in unskilled and low-level semi-skilled occupations

with associated earnings. Furthermore, Ms. Mogale functioned in the **withdrawal career phase and was already a pensioner at the time of the accident in question. (my emphasis)**

[38] In the Pre-Morbid Scenario, Ms Van Zyl opined that Ms Mogale would probably have remained functioning as a Pensioner. She would probably have started augmenting her pension income by functioning as a self-employed Spaza Shop Owner for as long as physically possible.

[39] The conclusions of the writer were that Ms Mogale was a Pensioner at the time of the accident in question and therefore suffered **no loss of earnings during this time** (My emphasis). However, purely for quantification purposes, Ms Mogale's **Pre-Morbid Earnings Growth** earning potential as a Spaza Shop Owner, prior to the accident in question, should be based on that of a Spaza Shop Owner (scale point 1) of R15 100.00 p.a. (fifteen thousand and one-hundred rands) as from 2017, followed by annual CPI percentage increases until retirement at seventy (70) years of age. Ms Mogale is rated at this scale because she reported to the Ms Van Zyl that the current profit generated from her spaza shop varies between R500.00 to R1 500.00 per month due to the nature of the industry. Ms Mogale pays her sister between R200.00 to R300.00 per fortnight. This translates to average earnings of R500.00 per month after her sister has been remunerated.

[40] I extract below only those relevant recommendations of Ms Van Zyl's report that pertain to Ms. Mogale present claim. The recommendations read that:

[41] Based on available information the following recommendations are made:

[42] Ms. Mogale's loss of earnings as a result of relevant career impediment (compromised performance and diminished access to work opportunities) will be addressed through the quantification of the pre- and post-morbid earnings growth scenarios. Ms. Mogale's loss of earnings as a result of her non-sustainability should be addressed through the application of a higher post-morbid contingency deduction. It is recommended that the normal pre-morbid contingency deductions be applied. Taking the expert opinions into consideration, a higher post-morbid contingency than the pre-morbid contingency should be applied with regard to the Ms Mogale's post-morbid occupational functioning. In this regard, the writer refers to Ms Mogale's **Pre-morbid scenario** for the factors to be considered in determining the contingency deduction.

Ms A Wyrley-Birch (Bester Putter), Occupational Therapist, report dated 14 October 2021

[43] Ms Wyrley-Birch reported that Ms Mogale does present with cognitive fallouts, however, the exact relation and / or apportionment of the accident ought to be established. Considering the reported change in mood and fear of a recurrent accident, it seems that Ms Mogale's mood and emotional functioning has changed since the accident. Her emotional sequelae seem to have a negative impact on her social skill, cognitive functioning, and general level of motivation (p.19).

[44] With regards to the accident's impact on her employability and work capacity, Ms Wyrley-Birch reports that:

a) The work of a Domestic Worker and Cleaning Supervisor is considered as mostly medium in nature but may also have involved aspects of heavy work (p.40).

b) Due to the right knee replacement, Ms Mogale would have been advised to limit her weight handling to that of a sedentary and light nature, and to avoid frequent handling of medium weights. It is noted that she was however still able to handle these weights prior to the accident (p.42).

c) Ms Mogale's work as a Spaza Shop Owner prior to the accident required sedentary, light, and medium exertion. Reportedly to Ms Wyrley-Birch, Ms Mogale indicated that she established her shop in 2016. Now her work as a Spaza Shop Owner post-morbidly requires sedentary and light exertion as she refrains from performing medium work on the doctor's advice (p.28).

d) Her sister assisted her once a week prior to the accident but now assists her daily. From the information available and observations made, she probably relies on her sister for physical and cognitive assistance in running the business (pp.28, 41).

e) Since the accident she however refrains from handling weights of a medium nature due to the multiplicity of her injuries. She has adjusted her physical demands since the accident and now relies on her sister for performing work she is unable to do, or which exacerbates her symptoms with increased costs and therefore decreased profitability.

f) Considering her presentation on the day of the assessment and her reporting, she probably also relied on her husband for emotional support and physical tasks, such as driving her to get her stock and probably to rely on her sister for mental skills, to run the business.

g) It is noted that her husband passed away in 2020 and it should be taken into account that this might impact on her ability to continue with the business (pp.29, 42).

h) She is capable of sedentary and aspects light work as a result of her limited mobility due to her decreased balance.

i) Due to her cognitive and psychological sequelae, probably at least partly related to the accident, her ability to run her own spaza shop is probably also negatively affected and also increases her reliance on her sister in this regard. Ms Wyrley-Birch is of the opinion that she would need to be reimbursed for these costs (p.42).

j) Ms Mogale has therefore been rendered a more vulnerable individual on a physical as well as mental level, in the informal labour market, where she relies on the extra income that she is able to secure by selling vegetables fromher home. She will probably also need to discontinue this business prematurely as a result of the accident or need to appoint someone like her sister to run the business on her behalf due to the physical as well as the psychological and mental sequelae as a result of the accident. This would have a further negative effect on the profitability of the business (p.42).

k) Had the accident in question not taken place, Ms Mogale would probably have continued with her business even if her husband passed away. Her physical and mental vulnerability since the accident may cause that she discontinues this business in totality (p.43)

The Legal Principles

[45] The legal principle in respect of a claim for diminished earning capacity is trite in that the Plaintiff must be placed in the position he would have been in had the injuries not occurred. To succeed in the claim for loss of income or earning capacity, the Plaintiff has to establish on a balance of probability that as a result of the accident, he has lost future earning capacity[11].

[11] Rudman v RAF 2003 (SA)234 (SCA)

[46] On the claim for loss of earnings Gough[12] states: 'If one were to regard the loss as one of future earnings one may ask the question "what income will the plaintiff actually lose as a result of the defendant's wrongful act?'.

[47] The plaintiff was 60 at the time of the accident and was retired because she was tired of working, by her own admission she retired because she was tired then it cannot be said that her earning capacity has been diminished.

[48] Whether the plaintiff will not be able to gain meaningful employment is neither here nor there. She was already in the withdrawal phase premorbid scenario.

[49] The plaintiff retired in 2015 at the age of sixty years and the accident only happened a year thereafter when she had not been working for a full year and reliant on government pension. Pension of which she would get till age of her demise. She opened her shop almost near to two years after her retirement and three months after the accident.

[50] Ms A Wyrley-Birch reported that Ms. Mogale started functioning as an Spaza Shop Owner in 2016 and that her sister assisted her one (1) day per week. But during a follow-up telephonic discussion with Ms. Mogale on 20 October 2021, Ms Mogale confirmed that she only started functioning as a Spaza Shop Owner in 2017, after the accident in question.

[51] After the accident in question on 30 December 2016, Ms Mogale recuperated for four (4) days. Ms Mogale was a Pensioner at the time of the accident in question and therefore suffered no loss of earnings during this time. In 2017, Ms Mogale and her

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[12] Gough "The Lost years" The claim for loss of earnings '(1983) De Rebus 486

husband started their own spaza shop from home. Ms Mogale's husband used to take Ms Mogale to buy the goods in Brits on Fridays. She would then sell the goods from home. In 2020, Ms Mogale's husband passed away and her son started fulfilling the role of taking her to Brits with their bakkie to buy goods. Her sister has been assisting her in the spaza shop and her home ever since. Ms Mogale's working hours are from 9:00 to 17:00 Monday to Saturday

[52] I am of the firm view that the recommendations by the Industrial Psychologists are inconsistent and are not supported by facts, Thus the plaintiff has failed to prove on a balance of probabilities that she has lost earning capacity.

Costs

[53] It is an accepted legal principle that costs are at the discretion of the court. The basic rules were stated as follows by the Constitutional Court in *Ferreira v Levin NO and Others*[13]

> 'The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct

[13] *Ferreira v Levin NO and others* 1996 (2) SA 621 (CC) at 624B—C (par [3]).

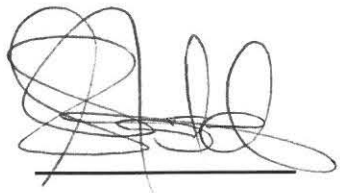
of their legal representatives, whether a party achieves technical success only, the nature of litigants and the nature of proceedings.'

[54] Although the Plaintiff has not won substantially, it has not lost the quantum on damages which is largest amount claimed, I will not upset the cost order proposed in the draft order paragraph 4,5 and 6. The conduct of the RAF officials in these proceedings leaves much to desire from not responding to the plaintiff's attorney's correspondence to ignoring the court orders, thereby allowing the matters to proceed unopposed. The plaintiff is entitled to sue the RAF for general damages. The claim is not frivolous .

ORDER

[55] In the results, I order as follows:

1. The quantum in respect of General damages is postponed *sine die*.
2. The past hospital and medical expenses is postponed *sine die*.
3. The claim in respect of past loss of earnings and future loss of earnings is dismissed.
4. The defendant to bear the costs of interlocutory application of 18 October 2021 and trial on 29 October 2021.



L. FLATELA

ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on 1 August 2022

Date of Hearing:	29 October 2021, In Chambers
Date of Judgment:	1 August 2022
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