IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

Case No: 994/2008

In the matter between:

KATJA SHAPIRO Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

J U D G M E N T
DELIVERED ON 25 JANUARY 2012

Introduction

[1] Plaintiff claims damages from defendant resulting from a brain injury she sustained in a motor vehicle collision on 11 January 2007.

[2] Plaintiff, was born on 6 August 1972. She was 34 years old when she was injured.

[3] The matter was initially enrolled for hearing on 10 June 2010. On 14 June 2010 an order was made by agreement between the parties that defendant would compensate plaintiff fully for her still to be proven damages. The wasted costs occasioned by the postponement of the

quantum determination, was held over for later determination. The quantification of plaintiff's damages was ordered to proceed to trial on 1 December 2010.

[4] In terms of her amended particulars of claim, plaintiff seeks the following damages:

Past hospital and medical expenses	R 50 000,00
Future medical and related expenses	R 100 000,00
Past loss of earnings and future loss of earnings, alternatively future loss of earning capacity	R9 900 506,25
General damages	R 700 000,00
	R10 750 506,25

[5] When the matter commenced before me, I was informed by the parties that it will not be necessary to consider plaintiff's claim for past hospital and medical expenses or the claim for future medical and related expenses as defendant had undertaken to provide plaintiff with a statutory undertaking for future medical expenses and that past medical expenses would be settled before the conclusion of the trial.

[6] The parties requested me to only consider and make findings on the following issues, to enable an actuary to calculate the plaintiff's damages for past loss of earnings and future loss of earnings/earning capacity:

(a) the pre-accident career path and earnings of the plaintiff;

(b) the post-accident career path and earnings of the plaintiff;

(c) the contingencies to be applied on the pre- and post-accident career scenarios; and

(d) the discount rate to be applied in such calculations.

[7] I was also tasked with deciding on plaintiff's general damages.

[8] The parties reached the following agreements at their resumed Rule 37 meeting as set out in the minutes thereof (Exhibit A):

(a) The medico legal reports of the following experts were admitted as evidence as if the relevant expert witnesses confirmed the content of such reports under oath, save that the hearsay statements in these reports are not admitted and the parties reserve their rights to argue that the opinions expressed in these reports should not be accepted having regard to the totality of the evidence:

(i) the two medico legal reports of Mr M Wohlman, a counseling psychologist, dated 10 October 2008 and 4 May 2010;

(ii) the three medico legal reports of Dr George, a psychiatrist, dated 16 May 2008, 10 July 2009 and 6 May 2010;

(iii) the three medico legal reports of Dr S Truter, a neuro-psychologist, dated 23 September 2008, 6 July 2009 and 26 June 2010;

(iv) the report of Ms L Bennewith, a clinical psychologist, dated 5 February 2010;

(v) the medico legal report of Miss C Bell, an occupational therapist dated 19 September 2008;

(vi) the medico legal report of Carol Legg, a speech and language therapist dated 17 July 2009; and

(vii) the report by Professor Alan Bryer, a neurologist, dated 14 June 2010.

[9] The parties further agreed to admit on the same basis:

(a) the medico legal reports of Elspeth Burke, a neuro-psychologist, dated 30 November 2009 and 30 April 2010 and Cora de Villiers, a neuro-psychologist dated 10 March 2009, as well as their joint minute dated 21 November 2010; and

(b) the medico legal reports of the neurosurgeons, Dr Z Domingo dated 16 March 2009 and 20 May 2010 and Dr F H Badenhorst dated 10 December 2008 as well as their joint minute dated 22 November 2010.

[10] The parties further agreed that the following statements may be accepted as if the author of the statement gave such evidence under oath, but reserving the right to argue that the factual averments and/or the opinions contained therein should not be accepted in the light of the totality of the evidence led during the course of the trial:

(a) the contents of a letter by Karin Shippey ("Shippey") dated 24 November 2009 (Exhibit B, pp. 193-194);

(b) the statement of Andries Claassens ("Claassens") dated 1 June 2010 (Exhibit B, pp. 197-201);

(c) the statement of Dr Andrew Spinks ("Spinks") dated 16 September 2010 (Exhibit B, pp. 195-196);

(d) the statements of Martin Luger ("Luger") in reply to questions posed to him by Bernadette Furnell dated 28 February 2010 and 7 March 2010 (Exhibit B, pp. 209-219).

[11] On behalf of the plaintiff the evidence of Dr Domingo, the neurosurgeon who attended to plaintiff, the evidence of Ms Elspeth Burke, a neuro-psychologist; Dr Sharon Truter, a neuro-psychologist and Claassens, the human resource manager of Aurecon, the firm where plaintiff was employed from March 2009, was adduced. Towards the end of Claassens' evidence in chief, he testified that Aurecon was in the process of instituting proceedings to terminate plaintiff's services as a result of her incapacity.

[12] Defendant thereupon requested and was granted a postponement to consider its position in the light of this evidence. Costs resulting from this postponement stood over for later determination.

[13] At the resumption of the hearing during April 2011, I was informed by the parties that the plaintiff's employment had been terminated as a result of the *sequelae* of the injuries she sustained in the collision. She will receive a disability income in terms of her contract of employment which income is deductible from her damages as a collateral benefit. I was informed that this effectively quantified her residual income capacity and that it would no longer be necessary to make any finding on plaintiff's post-accident career path and earnings.

[14] It was common cause that plaintiff will receive the following as a disability income until age 62, which is the compulsory retirement age at Aurecon, whereafter she will receive a pension:

(a) R214 245,00 per annum as from 3 March 2011 increasing on an annual basis by 10% or the rise in the Consumer Price Index, whichever is the lesser.

(b) In addition she will receive pension contributions at 12,5% of her pensionable salary, which amounts to R35 707,50 per annum for the first year, also increasing at 10% per year or with the rise in the Consumer Price Index, whichever is lesser.

[15] The parties were accordingly in agreement that only the following two issues remain for decision:

(a) determining plaintiff's pre-accident career path and earnings, and the contingencies to be applied thereto, if any, to enable an actuary to calculate plaintiff's damages;

(b) plaintiff's general damages.

[16] The parties were further in agreement that it will not be necessary to decide upon the discount rate to be utilised by the actuary. No evidence in this regard was placed before me.

[17] The plaintiff then proceeded with her case and presented the evidence of Shippey, the plaintiff's line manager, whereafter Claassens' evidence was concluded.

[18] In reply the defendant led the evidence of Bernadette Furnell ("Furnell"), an industrial psychologist.

THE PLAINTIFF'S PRE-ACCIDENT CAREER PATH

[19] The plaintiff obtained a BA (Honours) degree in geography from the University of Durham and joined the Toronto Police Services where she was employed as a constable for six years. She was highly respected and her performance management reviews were all very positive.

[20] She then left Canada for Cape Town. In 2005 she obtained a Masters degree of Philosophy in Environmental Management, from the University of Cape Town.

[21] In March 2006 she was employed by Ninham Shand, a firm of consulting engineers, as an environmental practitioner.

[22] Some ten months later, on 11 January 2007, she was involved in the motor vehicle collision in question.

[23] On the basis of her performance prior to the collision, Ninham Shand promoted her to the position of senior environmental practitioner in September 2007.

[24] In March 2009 Ninham Shand merged its business with a number of other firms and its employees were thereafter employed by the firm Aurecon. The plaintiff was employed as an environmental practitioner in the environmental unit of Aurecon's Cape Town office. This was the same position in the Aurecon structure as the position plaintiff was employed in at Ninham Shand at the time of the merger.

[25] The issue in question is how plaintiff's career would have progressed after her promotion to senior environmental practitioner during 2007, but for the accident.

[26] In this regard plaintiff presented the evidence of Claassens and Shippey, whilst defendant adduced the evidence of Furnell. The statements by Spinks and Luger handed in by agreement between the parties (see paragraph 10 above) are also directly relevant to this issue.

[27] Claassens testified that he is the human resources manager of Aurecon's offices in Cape Town, Port Elizabeth and East London where some 450 people are employed.

[28] He was the human resources executive for Ninham Shand when plaintiff was initially employed. He testified that when plaintiff was employed, she was seen as a very high functioning assertive person with high leadership potential. Ninham Shand was keen to promote women and he followed, counseled and coached plaintiff personally. She was however a bit young and she needed support. He took a particular interest in her because he saw positive characteristics in her.

[29] Claassens testified that he saw plaintiff as one of the women with the highest potential in Aurecon and in his view she was senior management material for the future.

[30] Questioned on plaintiff's career prospects, he was of the view that, but for the accident, she would have become a principal environmental practitioner by mid-October 2008 and that she would have been promoted to the level of associate, two to three years thereafter.

[31] In his view, plaintiff would eventually have become a technical director/unit manager at Aurecon, a position comparable to that of a level three director at Ninham Shand.

[32] Under cross-examination Claassens conceded that it would be reasonable to accept that plaintiff would only have reached the

position of associate in the Aurecon structure in 2017, had she not been injured.

[33] Claassens further testified that as an associate, plaintiff could Ihave been invited to become a member of Aurecon's incentive scheme whereunder she would be allocated units in a trust, through which profits are distributed to the unit holders. He could not explain how the trust operates, what the requirements are to be invited to become a member of the trust and how units are allocated. All he could say was that it is quite a complex and sophisticated scheme.

[34] He further explained that should one be invited to become a member of the trust and units are allocated to you, you have to pay for such units on a loan account basis. The loan is repaid from the proceeds that would have been paid out to the member, based on the number of units allocated to him or her. It would take about two years to pay for the units, whereafter the proceeds of the units would be paid out to the member or be credited to his or her loan account, depending on Aurecon's cash flow requirements. Whether unit holders would receive payments and the amounts paid out per unit would depend on the profitability of Aurecon.

[35] Claassens testified that 80% to 90% of employees who are promoted to the level of associate, are invited to become members of the trust and

are allocated units. Initially they will be allocated ten units which might be increased over time. Depending on how many units one holds, you may receive an additional income of between 15% to 40% of your annual salary, tax free.

[36] Claassens testified that he is also a member of the trust. In 2009 he received R28 000,00 per unit, in 2010 he received R18 000,00 per unit and during 2011 he received R10 000,00 per unit, but that is not the final figure. He conceded that the economic climate and the performance of Aurecon would be decisive on whether payments are made to unit holders and if so, the extent of such payments.

[37] Claassens also raised the issue of international transfer and testified that an Aurecon employee who is so transferred may earn up to 40% more than his or her South African salary. Some employees are transferred for a two year period in what is referred to as a skills transfer, whereas others accept permanent transfers to foreign countries such as Australia. He testified that a number of employees were transferred for a two year period, but that the present economic circumstances had curtailed these transfers. Only a few employees were transferred permanently. He conceded that the increase in salary is largely to off-set the higher cost of living in these foreign countries. He expressed the view that plaintiff would have been a candidate for such a transfer, should she have requested it.

[38] Shippey testified that she holds the position of an associate with Aurecon. She initially obtained a BSc (Honours) in environmental science and geology and was employed by another firm. In 2001 she obtained an MSc degree and joined Ninham Shand as a principal environmental practitioner. Four years later, in 2005, she was promoted to the position which is the equivalent of associate under the Aurecon structure. That is also the position she holds in Aurecon. Her next promotion would be to the level of technical director.

[39] Shippey testified that she was the plaintiff's line manager responsible for managing her technical work. She worked with the plaintiff since the latter started at Ninham Shand. She is of the view that plaintiff would have been promoted to principal environmental practitioner by March 2009, had she not been injured.

[40] She was further of the view that plaintiff might have plateaud at this level, but she was being coached and if she responded she could have become an associate within five years from March 2009. Shippey regarded it as more likely than not that she could have reached the associate level.

[41] Shippey regarded it as unlikely that plaintiff would have been promoted to a higher level than associate.

[42] She testified that plaintiff needed coaching and mentoring to develop her business leadership skills. She also did not, in Shippey's view, use the correct approach with clients as a result of which she did not give clients a sense of confidence.

[43] Although plaintiff would not in her view have reached a position higher than that of associate, plaintiff may however over time have been remunerated at a level higher than that of an associate. That would depend on her performance and the strategic nature of her clientele. Shippey referred to examples of staff at Ninham Shand who was not given director level 3 status, but were remunerated at that level. She however conceded that these were engineers and that it is speculative whether plaintiff would, as an associate, eventually have been remunerated at that level.

[44] With regard to the Aurecon incentive scheme, she candidly conceded that she did not have the knowledge and could not explain it in any detail.

[45] Shippey further testified that although the compulsory retirement age at Aurecon is 62 years, employees with environmental skills become specialist consultants and carry on working in that capacity. Depending on their health, some of them carry on working as consultants until they are 75 years old.

[46] According to Shippey, plaintiff was a candidate to work in a foreign country, specifically in Africa or the Middle East.

[47] She was confronted with Luger's statement, which was admitted on the basis set out in Exhibit A. Luger left Ninham Shand in November 2008 to take up employment in Australia, but took up employment with Aurecon in Australia thereafter. Whilst at Ninham Shand, he was the unit manager in which plaintiff was employed.

[48] Luger replied to a number of questions posed to him in writing by Furnell in doing her collateral investigations. He was of the view that while plaintiff was passionate, dedicated and capable, her professional conduct during meetings, project management support and contribution and delivery of products was average rather than exceptional. He stated that she was on a steep learning curve with some bright younger staff sometimes outshining her. Luger was of the opinion that plaintiff's career, but for the accident, would have progressed along the lines of an average employee with advancement to associate in due course. He was however of the view that she would probably not have advanced to very senior management ranks, such as senior associate and director as she did not in his view have the natural aptitude or ability to manage teams at the higher levels. He was further of the view that she would have started to plateau at the level of principal environmental practitioner in

the Ninham Shand structure and that it would have taken her longer than the average of four years to reach the level of associate thereafter. He placed this period at five years in plaintiff's case.

[49] Shippey pointed out that Luger was a perfectionist and a hard task master. When he says that plaintiff is average, it should be borne in mind that Luger is comparing her with other professionals who as a rule have master's degrees. However Shippey agrees with Luger's assessment that plaintiff would probably not reach a higher level than that of associate in the Aurecon structure. She also conceded that plaintiff would probably only have reached that position ten years after she had started her career with Ninham Shand.

[50] Shippey further conceded that the people best placed to express opinions on plaintiff's ability in the work environment was Luger and Spinks. Spinks was plaintiff's direct line manager. He left the employ of Ninham Shand in early 2008.

[51] Furnell is an industrial psychologist who considered plaintiff's case with a view to advise also on her pre-accident career path. Based on her assessment and the collateral information she obtained, she was of the opinion that had the accident not occurred, plaintiff would have become a principal environmental practitioner by March 2009 and

that she would with time have become an associate in the Aurecon structure.

[52] She was of the opinion that plaintiff would not have progressed beyond the associate level. She based this opinion on plaintiff's personality, her make-up, abilities and attributes and collateral obtained from Luger who felt that plaintiff was not a natural leader and that she could not, in his view, manage teams at a level beyond the associate level. This also ties in with the psychometric personality tests done on plaintiff by her, which indicated that plaintiff was introverted and suited to careers with a minimum inter-personal contact. Plaintiff is not someone who would be wanting to manage people.

[53] Furnell was further of the view that it would be reasonable to consider plaintiff progressing to the level of associate by 2017 when compared to the progression of other employees.

[54] Furnell testified, at the hand of information supplied to her by Claassens, that the following figures represent the lower quartile, median and upper quartile salaries for environmental practitioners, adjusted to reflect April 2010 values:

	Lower quartile	Median	Upper quartile
0-3 years experience	R169 176	R199 180	R251 210
4-7 years experience	R231 732	R306 020	R384 978
Over 8 years Experience	R365 803	R465 975	R516 529
Promotion to Associate	R500 000	R540 000	R600 000
Technical Director	R560 000	R600 000	R650 000
Unit Manager	T628 000	R780 000	R820 000

[55] She prepared a schedule reflecting her view of plaintiff's pre-accident progression with Aurecon, which tied in with her opinions expressed in her evidence as to plaintiff's pre-accident promotion prospects. This was handed in as Exhibit F. The Aurecon salaries reflected therein are average salaries calculated on the basis of the median and upper quartile salaries provided to her by Claassens. Claassens when confronted with the figures in this schedule confirmed them as reasonable. The following is set out in Exhibit F with regard to the rank, date of commencement in that rank and expected salary per annum. The values expressed therein are April 2010 values:

JOB RANK / GRADE	DATE OF COMMENCEMENT	EXPECTED SALARY PER ANNUM (CTC)
Senior Environmental Practitioner (Ninham Shand – "NS")	September 2007	R205 000
Senior Environmental Practitioner (NS)	March 2008	R260 000
Principal Environmental Practitioner (NS)	Between October 2008 & March 2009	R286 000
Environmental Practitioner (Aurecon)	March 2009	R345 499

Environmental Practitioner (Aurecon)	2014	R491 252
Associate (Aurecon)	2017-2034	R570 000
Technical Director (Aurecon)	Considered unlikely – progression only till Associate – till age 62 (2037)	
Unit Manager (Aurecon)		

[56] Furnell was further of the view that it should be accepted that plaintiff would have carried on working beyond the compulsory retirement age of 62 as this is a tendency that happens more and more in the market place. She did not indicate to which age and on what basis plaintiff would have carried on working after retirement, save to point out that various individual factors, such as plaintiff's health and her financial need as well as whether there would be opportunities to do consultancy work, would influence the decision whether to work after retirement or not.

[57] Furnell, in cross-examination, was confronted with a letter Spinks had written on 16 September 2010 and which was admitted by agreement between the parties on the basis as set out in Exhibit A. Spinks describes plaintiff therein as focused with a clear commitment to her career, looking to develop her experience and to advance as quickly as possible. Prior to the accident, Spinks wrote, her career path seemed fairly set and she was seen as a rising star.

[58] Furnell was also confronted with a memorandum Spinks wrote to Luger on 25 July 2007 in support of plaintiff's promotion to the level of senior environmental practitioner. In this memorandum, Spinks describes plaintiff as someone who approaches her work with a high level of professionalism, who evokes a high degree of confidence with Ninham Shand's clients and who stands up above her peers in terms of quality of the work she produces. Therein Spinks expressed the view that she will become an effective and competent manager. Spinks, of course, did not testify.

[59] This memorandum, Furnell stated, should be seen in context as it was written as motivation for plaintiff's promotion to the level of principal environmental practitioner and not as an overall opinion on her future career and promotion prospects. The qualities referred to therein, in Furnell's opinion, would not have seen plaintiff going beyond the level of associate.

[60] Finally, the reports by Cora de Villiers and Elspeth Burke and their joint minute, should be referred to. According to both these neuro-psychologists, plaintiff was of superior- very superior intellect, before the accident.

The parties' submissions

[61] Mr Eia who appeared for the plaintiff, submitted that Claassens' evidence as to plaintiff's career path should be used as a basis to calculate her loss of earning capacity.

[62] Insofar as Shippey differed from Claassens, Mr Eia submitted, Claassens' evidence should be preferred. This was specifically the case with regard to Shippey's evidence that plaintiff would not have progressed further than the level of an associate, whilst Claassens was of the view that she would have risen to the level of a technical director/unit manager.

[63] Furnell's opinions, Mr Eia submitted, were unreliable as she was biased in favour of the defendant and did not impress as a good witness. Her opinions, he further submitted, were speculative and uncorroborated.

[64] Mr Eia submitted that the following would have been plaintiff's probable career progression, had the accident not occurred:

(a) She would have achieved the rank of principal environmental practitioner by either October 2008 or March 2009, earning either R306 000,00 or R340 000,00 per annum. An average between the two scenarios should therefore be utilised, being a promotion to

principal environmental practitioner by December 2008 earning R323 000,00.

(b) Thereafter, she would, on Claassens' evidence, have become an associate by 2010/2011, whilst on Shippey's evidence she would have become an associate three to five years after she achieved the rank of principal environmental practitioner, hence 2012 to 2014. As a compromise, he argued, the average between the two scenarios should be utilised, namely that she would have become an associate by October 2011 or March 2012, earning R576 000,00 per annum in 2010 values.

(c) She would then have progressed to the rank of director/unit manager by 2015 to 2018 earning between R650 000,00 to R750 000,00 in 2010 value terms.

[65] Mr Eia further submitted that plaintiff would have been "given" ten to fifteen units as her commencement "share level" in Aurecon's trust incentive scheme once she became an associate in 2012. This would have increased to 40 units by 2015 which would have represented anything from 10%/15% to 40% of her annual income. The average value between R28 000,00 (which Claassens received in 2009) and R18 000,00 (which Claassens received in 2010) being R23 000,00 per unit

should be applied to calculate plaintiff's earnings from the incentive scheme until her retirement at the age of 62.

[66] Mr Eia further submitted that plaintiff would have worked beyond the retirement age of 62 until age 75, subject to her health and financial needs, earning the cash equivalent of a pre-retirement salary less medical/pension contributions.

[67] With regard to possible overseas work, it was submitted on behalf of the plaintiff that she would have worked overseas from the middle years of her associate level (2013/2015) earning between 20% to 40% more than she would have earned in South Africa until retirement age and beyond that as an independent consultant until age 75.

[68] Mr Potgieter, who appeared with Mr Salie for the defendant, submitted that the evidence of Claassens and Shippey presented by the plaintiff did not "make the grade as reliable, independent expert opinions". He argued that their opinions are not really of any assistance as they are not experts in the field and they were biased towards plaintiff. This failure to lead reliable expert opinion evidence on plaintiff's pre-accident career possibilities, submitted Mr Potgieter, left gaping holes in her case.

[69] He further submitted that plaintiff's failure to testify, while no reasons were given for such failure, must count against her on those aspects where there is uncertainty, such as her long term goals in her professional life, her intentions, whether to stay in South Africa with her partner or aim for a position overseas and her intentions about retirement.

[70] He submitted that Furnell's evidence on plaintiff's pre-accident career path should be accepted as it is rational, reasonable and based on a thorough analysis of all the relevant facts and is furthermore uncontested by any independent and acceptable expert evidence.

[71] A realistic assessment, Mr Potgieter submitted, is that plaintiff would have reached the associate level in 2017 as testified to by Furnell and conceded by both Claassens and Shippey. Plaintiff would have earned in the lower quartile and such earnings would have increased evenly until retirement age at 62 in 2034.

[72] Prior to plaintiff reaching the level of associate, Mr Potgieter submitted, her career progression would have been as set out in the schedule prepared by Furnell and handed in as Exhibit F, save for the associate level where she would have started to earn at a lower quartile.

[73] As there is no evidence indicating that plaintiff had any intention to work beyond the retirement age, Mr Potgieter submitted, the actuarial calculation should be made on the basis that she would have retired at age 62.

[74] With regard to the incentive trust scheme, he submitted that there is no reliable evidence on the exact structures and value of the scheme or whether plaintiff would have been invited to take part in the scheme. The evidence of both Claassens and Shippey with regard to the scheme, he submitted, is speculative and vague.

[75] He further submitted that it remains speculative whether plaintiff would have worked overseas and that this contention is not based on any reliable evidence that she had such intentions.

The findings on plaintiff's pre-accident career path

[76] It is a concern that opinions were sought from and given by both Claassens and Shippey without a proper basis having been laid to qualify them as experts, although Claassens as the human resources manager of Aurecon certainly would have some expertise on the career prospects of employees of that firm. However, no objection was at any stage made to these witnesses expressing their opinions on

the plaintiff's career prospects, prior to the issue being raised in argument.

[77] Although Claassens created a good impression as a witness, he was clearly inclined to bias in favour of the plaintiff. This is well-illustrated when his communication to Furnell on 1 June 2010 in which no mention was made of plaintiff becoming a director, is compared to his evidence in which he strongly advanced the contention that plaintiff would have become a director. He was unable to explain why he made no reference to this strong probability, in his communication to Furnell.

[78] Furthermore, he testified that plaintiff would have become an associate within two to three years after her promotion to principal environmental practitioner which, in his view, she would have become by mid-October 2008. In cross-examination he however concluded, that the proposition that she would only have become an associate by 2017, is reasonable.

[79] Although Furnell is relatively inexperienced, she gave proper motivations for her views and, more importantly, her views were corroborated. Her opinion that plaintiff would have become a principal environmental practitioner by March 2009 was supported by Shippey. It was common cause that plaintiff would then have filled a

position at Aurecon as environmental practitioner which is the same position as she previously held at Ninham Shand.

[80] Furnell's evidence that plaintiff would have been remunerated as an environmental practitioner with more than eight years experience by 2014, was supported by Claassens as far as the applicable salary was concerned.

[81] Her opinion that plaintiff would have become an associate by 2017 was supported by Shippey, whilst Claassens conceded that that was a reasonable scenario.

[82] Her evidence that plaintiff would have remained at the level of associate was supported by both Shippey and Luger.

[83] I have no hesitation in accepting the evidence of Furnell as to the plaintiff's probable pre-accident career path and the remuneration she would have received, as set out in the schedule prepared by her referred to in paragraph [55] above.

The incentive scheme

[84] The evidence of Claassens, in my view, is not sufficient to make any finding on whether plaintiff would have been invited to become a member of the incentive trust. No evidence was adduced on behalf

of the plaintiff as to the requirements an employee has to fulfil to be invited, if any. No information was placed before me as to how the trust operates, how units are allocated, how payments in respect of units are decided upon, what the history of the scheme is and by whom it is operated.

[85] Clearly these are issues which could have been properly explained by the evidence of someone with the necessary knowledge such as the financial manager or someone with an equivalent position at Aurecon. I cannot embark upon speculation as to how the scheme operates. There is an inadequate factual basis in the evidence on which to make a proper assessment of the position. Plaintiff failed to produce available evidence upon which a proper assessment could have been made . (See **Bridgman NO v Road Accident Fund, Corbett & Buchanan B4-1, Vol. 5 at B4-23, Monumental Art Co v Kenston Pharmacy (Pty) Ltd 1976 (2) SA 111 (C) at 118E-F** and **Rudman v Road Accident Fund 2003 (2) SA 234 (SCA) at 224H.**)

Overseas transfer

[86] The contention that plaintiff would have been offered and would have accepted a permanent transfer overseas, as opposed to a skills transfer for two years, is speculative and is not based on any reliable

evidence as to plaintiff's intentions. I have already referred to plaintiff's failure to testify.

[87] Furnell furthermore raised the valid point that plaintiff is in a stable and loving relationship and would probably choose to remain in South Africa.

[88] On the evidence presented, I find that plaintiff did not prove, on a balance of probabilities, that she would have been transferred overseas on a permanent basis.

Retirement

[89] Although Furnell conceded that the trend is for people with skills such as plaintiff has, to work as consultants after they retire, no evidence was presented as to whether plaintiff intends to do so or until what age she would have been so employed.

[90] The evidence that in some instances consultants carry on working until age 75, is relatively meaningless in relation to plaintiff's intentions and prospects.

[91] It will furthermore be pure guesswork to attempt to establish, if plaintiff would have carried on working after she had reached retirement age, until what age she would have done so.

[92] In these circumstances I find that plaintiff failed to prove, on a balance of probabilities, that she would have kept on working after age 62 for any specific period.

Contingencies

[93] Mr Eia submitted that a contingency of nothing higher than 15% should be applied to plaintiff's uninjured career progression/earnings until age 75 (on the basis that she would carry on working after she reaches retirement age).

[94] Mr Potgieter submitted that a contingency reduction of 25% should be applied up to the level of environmental practitioner and 35% from the level of associate.

[95] "*The amount to be allowed for contingencies is difficult to determine for the Court is not gifted with prophetic insight.*" (per Leon ADJP in **Nhlumayo v General Accident Insurance Co of SA Ltd 1986 (3) SA 859 (T&Cld) at 864H**).

[96] Plaintiff had only been employed as an environmental practitioner for some ten months prior to the accident. Thereafter Ninham Shand merged with Aurecon. She was promoted to the level of senior environmental practitioner (in the Ninham Shand structure) during 2007 based on her pre-accident performance. The witnesses were in

agreement that she would have been promoted to the level of principal environmental practitioner in the Ninham Shand structure. It is also a fact that she was still employed by Aurecon until her services were terminated as a result of the sequelae of her brain injury during March 2011. Despite the difficult economic circumstances, all Ninham Shand's employees were retained by Aurecon after the merger. Plaintiff in particular was retained in the same position (level) at Aurecon as she was in at Ninham Shand prior to the merger. The witnesses were also in agreement that she would have reached the level of associate, although Shippey and Furnell were of the view that she would have done so over a slightly longer period. Allowance must be made for things like sickness, accident, a downturn in the economic circumstances affecting Aurecon and the like.

[97] In these circumstances I am of the view that a contingency deduction of 15% should be applied to plaintiff's uninjured earnings up to the level of environmental practitioner.

[98] As from 2017 when she would have been promoted to associate, until she reached the age of retirement at 62, a higher contingency deduction should in my view be applied to her pre-accident earnings to allow for the possibility of downturns in the economy, possible loss of employment, sickness, accident and the like. A deduction of 25% is in my view warranted.

[99] As I was informed that it would not be necessary to make any findings on plaintiff's post-accident career path and earnings, I refrain from making any findings on possible contingencies to be applied to such earnings.

General damages

[100] Plaintiff was 34 years old at the time she was injured. She suffered a contusion of the frontal lobe of the brain and a diffuse brain injury. She was hospitalised for five days. As a result plaintiff lost her sense of smell and taste permanently. She also experiences depression for which she is taking anti-depressants. Her depression persists which might mean a poor prognosis. She has already suffered one nervous breakdown which required institutionalization. Although she was of super- very super intellect prior to her accident, she now suffers from fluctuating attention and concentration and in certain cognitive domains such as incidental memory and word fluency, her performance is now only average.

[101] Prior to the accident she had started a promising new career for which she had qualified with an M-degree the previous year. As a result of her injuries and its effect on her ability to perform her duties, her services were terminated. She has full insight into her problems and the

reasons why her services were terminated. There can be no doubt that this must have caused her on-going anxiety and distress.

[102] In **Sauerman v RAF 2004 (5B4 QOD 190 (AF))** a 36 year policeman suffered a concussive head injury of moderate to severe intensity leading to a so-called "concussive syndrome" which became irreversible. His symptoms included a failure to cope with demands of everyday living and work, developing into poor attention and memory, irritability, headaches, dizziness, fatigue and anxiety. His behaviour and personality had changed dramatically. His inability to cope continued until he was finally declared permanently unfit for duty. He was no longer considered to be employable. The 2012 value of the general damages award to Sauerman is R320 000,00.

[103] In **De Jongh v Du Pisanie NO 2005 (5) SA 457 (SCA)** the plaintiff, a 35 year old married father of young children, was injured in a motor vehicle accident. As a result of the accident he suffered several orthopaedic injuries as well as an extensive fracture of the skull with an underlying brain injury. He had to undergo operations as a result of the fracture of the skull and injuries to his shoulder. He spent more than a month in hospital. As a result of his brain injuries he suffered a change in personality and his intellectual capacity was compromised. He lost the ability to smell and taste and became prone to episodes of severe aggression. It also caused him to suffer epileptic fits. As a result his

employment was terminated and he had no prospects of further employment. His family and social life suffered severely. He was awarded the sum of R250 000,00 for general damages which amounts to R429 000,00 in today's terms.

[104] Considering the adverse effects of her brain injury on plaintiff's personal and professional lives as well as her insight into the effect of her injuries on her intellectual abilities, I would award her an amount of R350 000,00 for general damages.

Conclusion

[105] As a result I make the following findings on plaintiff's pre-accident career path and earnings and the contingencies to be applied thereto, to enable an actuary to calculate plaintiff's damages in this regard:

(a) Plaintiff would have been promoted to the position of principal environmental practitioner from the beginning of March 2009 in the Ninham Shand structure and would therefore have become an environmental practitioner in the Aurecon structure with the merger in March 2009 at a salary of R345 499,00 per annum.

(b) At the beginning of March 2014 her salary would have increased to R491 252,00 per annum in 2010 values as an environmental practitioner at Aurecon with more than 8 years experience.

(c) In March 2017 she would have become an associate in the Aurecon structure at an annual salary of R570 000,00 in 2010 values, a position she would have filled until she retired at age 62 on 6 August 2034.

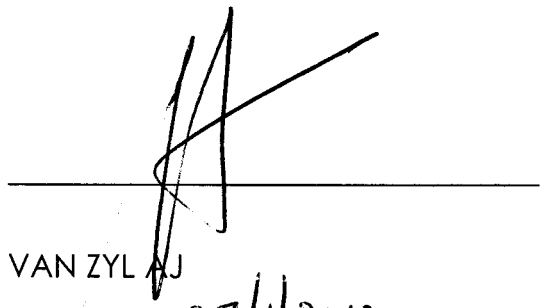
(d) A contingency deduction of 15% should be applied to plaintiff's pre-accident earnings up to the level of environmental practitioner at Aurecon with more than 8 years experience, in other words up to the end of February 2017.

(e) A contingency deduction of 25% should be applied to plaintiff's pre-accident earnings as an associate from 1 March 2017 to 6 August 2034.

[106] Plaintiff is awarded an amount of R350 000,00 as general damages.

[107] As plaintiff's damages for loss of earnings must still be calculated by an actuary on the basis set out above, the parties may approach me for a final order once this calculation is available.

[108] No order as to costs is made at this stage. Should it become necessary, I will consider and make a costs order, also in respect of the wasted costs occasioned by the two postponements, when the final order in this matter is to be made.



VAN ZYL AJ

25/1/2012