IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 2192/2009

In the matter between:

ASHLEIGH PATRICIA PAMELA BATTLE **Plaintiff**

and

ROAD ACCIDENT FUND **Defendant**

JUDGMENT DELIVERED ON 20 AUGUST 2014

BOQWANA, J

Introduction

[1] The plaintiff is a 31 year old business woman. She is married to Gren Aspeling ('Aspeling') with whom she runs very successful fashion clothing stores selling both men's and women's apparel. On 17 December 2007, she was involved in a motor vehicle accident, when her vehicle which was stationery was hit from behind by another vehicle. She was wearing a seatbelt at the time. She was admitted to hospital and discharged on the same day and went home with a neck collar. She sustained a soft tissue injury to the neck (whiplash) from the accident.

X – Ray and CT scan were reported normal. She wore a neck brace for about six to eight weeks and did not go to work during that period.

[2] The merits of the case have been conceded by the defendant. The defendant has also admitted: that the plaintiff suffered a soft tissue injury to the cervical spine; her past hospital and medical expenses of **R5704.37**; that she is entitled to an undertaking in respect of her future hospital and medical expenses arising from the injuries sustained in the accident and to general damages, although the quantum thereof is in dispute.

Issues to be determined

[3] The issues for determination by the Court are whether the plaintiff suffered any loss of earnings as a result of the accident and quantum in relation to general damages. The plaintiff contends that she has suffered a total loss of income in the amount of **R 4 617 814.00** as a result of the accident. She however concedes that there was no direct loss of income arising from the accident in December 2007 and January 2008 (which would be the period she would have stayed at home and not gone to work). The amount of **R 4 617 814.00** is made up as follows:

3.1	Past (until 28 February 2013)	:	R 1 185 114.00
	Comprising of:		
	3.1.1 Past (assistant)	:	R 92 880.00
	3.1.2 Past (stores)	:	R 1092 234.00
3.2	Past (assistant)	:	R5700.00
3.3	Past (stores)	:	R115 100.00
3.4	Future (assistant)	:	R509 000.00
3.5	Future (stores)	:	R2 802 900.00

[4] The plaintiff's claim for loss of earnings is two-fold being; a claim for losses owing to the need for on-going additional assistance, and a claim for losses owing to the delayed national expansion of her business and slower growth in stores. The

plaintiff testified in her own case and also called Aspeling, her husband, and Mark Edwards ('Edwards'), a financial accountant from Summit Forensic Accountants ('Summit'), as her witnesses. Roy Waligora ('Waligora'), a chartered accountant from KPMG, testified on behalf of the defendant. This was done by agreement between the parties in order to curtail the proceedings.

[5] The parties further agreed that expert reports would be handed in on the basis that they are what they purport to be, without the need for oral evidence from those experts. Expert reports handed in on behalf of the plaintiff were by Dr Jaffe, an orthopaedic surgeon; Susan Human ('Human'), an occupational therapist; Graeme Lewis ('Lewis'), a clinical psychologist; Norma Colley, an industrial psychologist; Edwards of Summit, a forensic consultant and Alex Munro of Munro Consulting Actuaries ('Munro Consulting'). On behalf of the defendants, the following expert reports were submitted: that of Dr Marks, an orthopaedic surgeon; Professor T Zabow ('Prof Zabow'), a psychiatrist; Lynne Pringle ('Pringle'), an occupational therapist; Larry Loebenstein ('Loebenstein'), a clinical psychologist; Professor F Abrahams ('Prof Abrahams'), an industrial psychologist; Waligora of KPMG, a chartered accountant and Piet Zeeman ('Zeeman'), a chartered accountant.

[6] In addition to the above reports, joint minutes of Doctors Jaffe and Marks; Lewis and Prof Zabow; Human and Pringle; Colley and Abrahams; and Edwards, Waligora and Zeeman were handed in.

[7] For purposes of convenience, I will sometimes refer to the plaintiff and Aspeling as 'the couple', when reference is made to both of them together.

Plaintiff's case

Plaintiff's evidence

[8] The plaintiff has had interest in fashion and clothing from when she was a little girl. At school she achieved good academic results and even won, amongst others, an award for constructing a sustainable business model for products that

could be sold to her peers. She passed matric well and enrolled for a B Com Information Systems degree with the University of Cape Town ('UCT'). Whilst at University she organised events for a night club, for extra cash, which proved to be successful. Having realised her entrepreneurial abilities, she got involved in several promotional exercises which involved hiring promoters and DJs for several events. At that point, she met Aspeling with whom she worked together in organising events. The couple found that they worked very well together.

[9] The plaintiff had always wanted to have a fashion empire and shared the dream that she had with Aspeling. The two realised that they shared a common interest in fashion. Aspeling had been to Thailand during a school trip where he discovered that clothes could be bought at cheap prices there and sold to South African buyers at profitable mark-up.

[10] Together with the plaintiff, they investigated the idea of importing clothing from Thailand to South Africa and opening clothing stores. Their first clothing store called Twisted Love was opened in 2006 at the Old Biscuit Mill in Woodstock. The store made great sales mainly on Saturdays. The business was successful even though it was quiet during the week. The couple continued to explore other spaces. Premises became available in Kloof Street and a second store, known as Poppa Trunks, was opened. Due to the success of the Twisted Love store the couple had capital and that meant roll-out of stores from that point on would be fast.

[11] In 2007 they started actively looking towards opening a third store. They were considering Cavendish Square and also had Canal Walk and various other possible options in mind. They however realised that overheads and rental per square metre would be higher in malls together with other rates such as marketing, security and percentage of the turnover that needed to be paid. They needed to build more capital to get there. They therefore dismissed the option of opening inside a mall and investigated street locations instead. They were also considering opening stores in malls in Johannesburg, Sandton and Durban, Gateway. At the

time of the accident they had not secured space nationally. They were investigating opening their first national store in Johannesburg because of the sheer volume of people with a lot more available disposable income. Their first national store would have been opened at the end of 2008 or early 2009. The national expansion did not take place because of the accident. Their first national store would be opened on 01 March 2014.

[12] As a result of the accident the plaintiff developed fear of being in a motor vehicle as a driver and a passenger and only trusted her husband and parents to drive her. She also developed intense fear of flying in aeroplanes, which is an irony because when she was younger she had an interest in becoming a pilot. She described the trauma involved when she had to fly overseas which involved preparing herself several days before the trip by taking tranquilisers, in order to sedate herself. If she did not do that she would suffer from severe panic attacks whilst on board before the flight took off.

[13] The fear of travelling has affected her social life heavily and she also misses out on a lot of things because she cannot travel overseas by herself and has had to miss invitations from friends due to this restraint. Aspeling had to be by her side whenever she travelled overseas for their business. Her professional life was also affected because she could no longer just jump into her vehicle and go to the stores or other places she needed to go to as she was completely dependent on Aspeling. This has had an impact on both of their productivity, has brought a strain on their relationship and has also affected her view of herself as a strong, independent woman.

[14] As an attempt to eliminate the need to travel they changed their business model of opening stores in different geographical locations ('i.e. a vertical growth pattern') to opening stores within the same proximity ('i.e. a horizontal growth pattern'). Three stores were opened in Kloof Street[1] within 100 metres of each other as a result and another three stores were subsequently opened in Claremont.

[1] (in Cape Town)

With every store that opened on the same street, turnover in the existing stores went down. Essentially all those businesses were profitable but it is claimed that they were so much less profitable than they would have been if they were in different geographical locations. Different stores were branded differently to give customers a different 'feel' of each store. The stores were essentially competition to themselves. A few years down the line, the plaintiff and Aspeling have realised that the horizontal business concept is flawed. They have consolidated all of the stores except for one. They have now returned to the business model they initially intended to follow in 2008, namely, a vertical growth pattern. In 2009 they won a Small Business of the Year Award.

[15] The plaintiff travelled overseas because she had to procure stock to make a living. She could not send Aspeling to go on his own because she procured all of the women products and at least half of the men's wear, which made up 80% of the products.

[16] The business is grossly overstaffed because of the fact that the plaintiff is so dependent on others. She requires assistance not only in being driven everywhere she needs to go, but also, due to her neck and back pain, with the lifting, packing or pulling of stock that is required onto or from the shelves. She uses Spasmed and Myprodol regularly for the pain. The pain has been consistent since the accident. She had to see a chiropractor a number of times and only does light exercises at the gym. Insofar as the psychological *sequalae* are concerned, she went to see a psychologist who after the third to fourth week of treatment suggested that she take anti-depressants. She found the experience of seeing a psychologist and having to take medication very traumatic. She researched a lot of different techniques on how to deal with her situation. She effectively applies self-help treatment. She also does yoga. She did try to undergo a three months course of anti-depressants last year but did not feel there was enough benefit in them especially compared to the side effects that she experienced such as changes in appetite, drowsiness, and the

headaches she experienced if she did not take the tablets every day at the same time.

[17] She advised Edwards, the financial accountant, that they would have achieved 5 stores nationally by now. The projections done by Edwards of three national stores were conservative. She maintained that she is 100% accurate they could have reached such a projection had she not been injured as she was able to achieve whatever she put her mind to.

Aspeling's evidence

[18] Aspeling corroborated most of the plaintiff's testimony. I would therefore not repeat all his evidence, save to highlight relevant aspects that are important for the determination of the issues before me. Aspeling testified that the plan was to 'open one store per year around the country comprising of Johannesburg and Durban and within five years, have six to seven stores maybe a couple in Cape Town and a couple in Johannesburg and maybe Durban.' As the person who knew the product the plaintiff had to be involved in unpacking of merchandise and in the creative process which involved unpacking, tagging, and placing clothes on hangers (in a certain way). Their business is overstaffed to cater for functions which the plaintiff requires assistance with. Extra staff members were employed as a result of the accident.

Edwards' evidence

[19] The claim was quantified by Edwards on the plaintiff's behalf. Edwards testified that he had a Bachelor of Science with accounting, economics and corporate finance degrees and an honours degree in corporate finance. He worked, *inter alia*, at Pick 'n Pay for about 2 years heading up their corporate strategy division. Edwards has experience as a forensic accountant and has been involved in over 100 personal injury matters. He believed that the experience he received from his time at Pick 'n Pay enabled him to assist the plaintiff with the quantification of the claim. He quantified the claim based on what the couple told him and the financial statements of their businesses. He tested this information using his

experience against a number of factors, being the couple's skill and capacity, availability of capital and space.

[20] The couple run their business through two registered close corporations, i.e. Grassy Knoll Trading 84 CC ('Grassy Knoll') owned 100% by Aspeling, and Playnice Retail Productions CC ('Playnice') owned 100% by the plaintiff. Edwards treated the two corporations as one unit, attributing 50% to the plaintiff as her share, for the purposes of quantifying a claim. When the business started in 2007, it was run under one corporation, Playnice, which was owned 50% by plaintiff and 50% by Aspeling but they later changed that arrangement for tax efficiency purposes. The couple considered themselves to be in a 50/50 partnership. They always re-balanced their earnings from the two CCs so that the 50/50 partnership remained. The distribution of the profits remained 50/50 to each despite the changed ownership structure. Each of them is paid a member's salary, which they receive in their personal capacities, and pay income tax on it, in their personal capacities. The balance of profits that remain in the corporations is distributed to them as dividends. The extent of the member's salaries declared to each of them and the extent of the amount of profit declared to each of them were, according to Edwards, consistently equal over the period under evaluation. The overheads are also split equally between the two CCs. Forensic accountants on both sides are more or less in agreement regarding calculations on what the plaintiff has earned over the period of time since the accident.

[21] Perhaps it is opportune to briefly outline the number of stores opened by the couple and their timeline.

Timeline and opening of the stores

[22] The first store called Twisted Love was opened in the Old Biscuit Mill in Woodstock in May 2006, as already mentioned, followed by a second store called Poppa Trunks which was opened in Kloof Street in June 2007. In 2008 another store was opened at 45 Kloof Street, known as The Lot, 100 metres away from Poppa Trunks. The Twisted Love store at the Biscuit Mill was closed

simultaneously with the opening of The Lot at Kloof Street. The reason was that the concept of Twisted Love was not working for the couple and they sought to trade under a different banner, The Lot. Another store was opened at Vineyard Street in Claremont under The Lot brand name. In 2009 the couple finished the year with three stores, being, Poppa Trunks and The Lot at Kloof Street and The Lot at Vineyard Street in Claremont.

[23] In the 2010 financial year another Poppa Trunks store was opened in Vineyard Street next to The Lot. In the same financial year another store called The Wardrobe was opened in Kloof Street. This meant that within 200 metres of each other in Kloof Street three stores had been opened. In the 2011 financial year another store, The Wardrobe, was opened in Vineyard Street, increasing the number of stores there to three. In 2011 the plaintiff and Aspeling had 6 stores opened, three next to each other in Kloof Street and another three next to each other in Vineyard Street.

[24] This business strategy was fairly anomalous because stores trading adjacent to each other were targeting the same customers. Edwards was informed by the couple that these stores were opened in this manner to make it easier for the plaintiff to travel between the stores. The couple needed to take as many opportunities as possible within very short geographical distances.

[25] In 2012, The Lot store in Kloof Street was doubled in size by renting extra space and removing the inter-leading wall between it and a store known as The Lot, 43 Kloof Street. According to Edwards this was effectively one store with bigger premises. In the same year another consolidation occurred in Vineyard Road of The Lot and Poppa Trunks stores, the inter-leading wall was removed making it one larger store trading under the banner, The Lot.

[26] At the end of the 2012 financial year another store, The Lot, was opened in Canal Walk. The couple had decided that The Lot was the brand name they would use for the future. At the end of the 2012 financial year there were six stores open. A new store called The Lot in Stellenbosch was opened in November or December

2012. In 2013, Poppa Trunks in Kloof Street was closed. At the end of 2013, The Wardrobe store in Claremont was closed, leaving five stores remaining, all trading under the banner of The Lot, in different geographical areas of the Western Cape. One further store was opened in V &A Waterfront in the 2014 financial year. The first national store was to be opened in Johannesburg in 01 March 2014.

How the plaintiff's loss has been quantified

[27] The need by the plaintiff for extra assistance is argued on two fronts: the first one being physical overexertion of the neck and back pain from lifting heavy objects; the second being the inefficiency that results from her inability to drive which renders her dependant on Aspeling. The argument is that when the plaintiff requires assistance with physical work in the business, she effectively removes a staff member from their otherwise productive work to assist her which causes a loss to the business. The business also loses productivity, it is submitted, by virtue of Aspeling having to leave his productive work to drive the plaintiff wherever she needed to be. It is admitted on behalf of the plaintiff that no one person has been employed to assist her with such additional burdens but a point is made that it would be impractical to do so as that person would have to do the driving (which would not work because the plaintiff only trusts her husband and parents to drive her) and that person would need to be with her in all the stores and assist with the picking up of stock.

[28] This claim is quantified using the average cost of a store assistant hired for the business. Edward testified that he tried to adopt the conservative approach by effectively taking the lowest cost member of staff in the organisation. According to him the net result of this additional assistance needed, to the business, is reduction in profits of **R66 000.00** per annum, as at 2010, which is **R5500** per month.

[29] In the curtailed national expansion plan, Edwards is convinced that were it not for the injuries sustained in the accident, the plaintiff would have been able to open more stores. Deferring to medical evidence which states that the plaintiff's

'psychological condition is responsive to treatment and that with appropriate intervention it is probable that she will be able to regain much of her psychic health'[2], Edwards assumes a catch up scenario as the plaintiff's ability to effectively manage the business to its full capacity is restored. In Edwards' opinion the number of stores in Cape Town would have remained the same, i.e. five stores (as at 2013 financial year) irrespective of the accident. Over and above those stores, the plaintiff told Edwards they would have opened five more stores nationally. Edwards reduced that number to three more stores nationally as at 2013. He quantified the loss of profits by taking the average profit per store in their existing stores per month. His conclusion was that as at 28 February 2013, the average net profit per store was **R40 573.00** per month. The stores are predominantly street stores. The national stores were going to be opened in malls which would be more profitable. Therefore taking the average of the smaller street based stores is, according to Edwards, conservative.

[30] Edwards testified that he used his experience as well as analysis of the available information and considered the possible constraints that may have resulted in the couple not being able to open the stores. Constraints considered were the availability of skills and capacity of the plaintiff, the availability of space to open new stores, and availability of capital to fund the opening of those new stores. Edwards denied when challenged by the defendant's experts, Zeeman and Waligora, that he took what he was told by the couple at face value, without questioning it. The business was in Edwards' view profitable enough to self-fund all their expansion needs.

[31] He assumed that in the uninjured scenario, the couple would have opened three national stores by the 2013 financial year, the stores opening in the 2010, 2011 and 2013 financial years, over and above the stores opened in Cape Town. The first store was initially predicted to open in 2009 nationally (in line with the couple's evidence), but after Waligora challenged the practicality of this

[2] See Graeme Lewis' Psychological Assessment Report dated 21 June 2009 at page 11

assumption, Edwards pushed it to 2010. Further national stores would have been opened in 2015 and 2017 in the uninjured scenario. Edwards' view is that there would have been five stores in Cape Town in 2013 irrespective of the accident (giving a total of 8 stores, both Cape Town and National, as at 2013). Two further stores would have been opened in Cape Town in the 2015 and 2017 financial years to make it seven stores in Cape Town or the Western Cape. That is the number they would settle at in Cape Town. The total number of stores opened by 2017 both nationally and in Cape Town would have been 12 in the uninjured scenario.

[32] In the injured scenario, the couple would open their first national store in 2014 (i.e. the 2015 financial year). This has already happened on 1 March 2014 in line with his predictions. The next number of stores nationally will open in the 2017, 2019, 2021 and 2023 financial years. Edwards' assumption is that after 2023 the couple will stop opening stores. His view is that had the plaintiff not been injured she would have opened three more stores than she has had. This is how the catch up approach is explained. He also allowed for a 12 month timeline for plaintiff's treatment and recuperation. The past loss of earnings as at 28 February 2013 is calculated to be **R1 185 114** after tax.[3]

Defendant's evidence

Waligora's evidence

[33] Waligora testified that he is a chartered accountant with a B Comm. degree from UCT and a post graduate diploma in accounting from UCT. He is employed by KPMG and has specialised in forensic accounting for over 16 years. He has led or conducted fraud investigations. He prepared the two KPMG reports and addendum dated 22 February 2013 and 13 February 2014 respectively. He was appointed to conduct an independent review of the plaintiff's claim. He consulted with the couple and reviewed documentation he had been provided with which included the actuarial calculations done by Munro Consulting, costing the claim at

[3] Munro Consulting calculated past and future loss of earnings as per paragraph setting out the claim above

R17 853 500.00, but subsequent to KPMG's involvement the claim was reduced. First, KPMG questioned that the plaintiff had suffered any direct loss of R165 000.00 having inspected the relevant VAT records. This part of the claim was later abandoned by the plaintiff. The second aspect of their involvement in the reduction of the claim relates to the curtailed national expansion where it was apparent that the claim was calculated on the basis that the plaintiff would suffer permanent loss of five stores. Edwards agreed with Waligora's observations and prepared a supplementary report quantifying the claim as a delayed roll out of the stores. This led to the significant reduction of the claim to about R4 million. Whilst he believed that this approach was more reasonable than the first one, he questioned whether any loss existed at all.

[34] With regard to the claim for extra assistance, the plaintiff would be entitled to actual costs incurred, but because no actual appointment was made in this regard, the plaintiff had not been able to show any loss as there was no actual expenditure for assistance. Furthermore, the staff compliment of the business had grown significantly but such overstaffing could not be attributed to the accident alone, it could also be due to the growth of the business. The numbers showed an inconsistent picture on overstaffing. The business was also overstaffed at certain periods relative to others.

[35] In regard to the claim of curtailed expansion, the plaintiff had failed to produce any evidence to support her claim that she planned to expand nationally prior to the accident. This included diagrams and anecdotal material which she claimed to have had.

[36] Despite her professed difficulties in travelling, travel records and passports (which were furnished upon their request) showed that the plaintiff had travelled overseas with some of those trips going *via* Johannesburg. Despite her driving limitations, the business has grown beyond the southern suburbs (of Cape Town) to Canal Walk and Stellenbosch. The business has shown positive growth year on year based on the Western Cape expansion. According to Waligora, Summit's

(Edwards) report did not show what external source they used to compare the financial performance of this entity with the market place. In the absence of that, Waligora looked at retail indicators. He conceded that it was difficult to find an exact comparison for the plaintiff's business, but it was not without merit to compare it with the retail sector (listed in the JSE and Statistics SA). The business exceeded the benchmarks he compared it with. In his opinion the couple made tremendous success of their business in Cape Town. Whilst they may have been confined by the accident, their business grew in the Western Cape from 2008 to 2012 as a result of the acute focus and retail acumen of both the plaintiff and Aspeling. According to Waligora, Edwards failed to recognise this.

[37] KPMG and Zeeman (who was requested by the defendant to investigate and report on the plaintiff's claim prior to KPGM coming on board) were further of the view that Edwards' assessment of the number of stores to be opened was speculative and not based on fact. According to them the positive business performance in Cape Town may have set off any claim for loss of income. They were of the opinion that there was no consensus medico-legal opinion that the plaintiff suffered loss of income and that medical opinions were inconclusive on the extent to which the plaintiff's ability to travel was impeded and according to them Summit did not wish to express an opinion in that regard.[4] Even on the modified plan by Edwards, Waligora was not of the view that there was a claim. He has not been able to establish any claim, mainly due to the positive performance of the business after the accident and the inconclusive nature of the medical opinion about her inability to travel (because while the plaintiff is impaired she factually still does travel). According to Waligora, it was not clear that the plaintiff's limitations with regard to travelling impacted negatively on the business growth.

[38] Furthermore, the business had achieved a high degree of success despite those limitations and there was no evidence to suggest that the plaintiff could have

[4] See joint minute between Summit, KPMG and Zeeman at page 267 of the paginated Court papers and expert reports

done better. Growth of the business was 34% compared to Young Designers Emporium's ('YDE') compound annual growth rate of 5 percent. The plaintiff disputed that YDE was comparable to her businesses as it was more matured than hers.[5]

[39] Waligora conceded in cross-examination that he had not come across a business like the plaintiff's before. This was his first RAF case and it was his first time testifying in the High Court. The work done in his report was carried out by staff members under his guidance. He however applied his mind to the information provided and work done by his juniors. He could not dispute that malls were potentially a better prospect than street stores. He further agreed that once expanded in Cape Town, it made sense for the couple to expand in other cities. He further agreed that Gauteng was a bigger market than Cape Town, although he was not an expert on this issue. Whilst agreeing that malls would bring more sales than street stores, he however was not sure if that meant more profit in light of the higher rental and other rates applicable in malls. He confirmed that the approach of average profitability of the existing stores, as a way of calculating the loss, was a reasonable approach but still maintained that no loss had been shown. He could not give a view on the prediction made by Edwards that the plaintiff would be able to catch up by 2023. He maintained that she could get there much sooner than 2023. Despite criticisms sought to be levelled against Waligora, he played a significant role in the reduction of the claim.

Medical reports

[40] Dealing briefly with the medical reports, it is common cause amongst all medical experts that the plaintiff was impaired by the accident both physically and psychologically. In regard to the physical aspect of the injuries, the difference between the experts lies in the extent to which such injuries would have reduced

[5] YDE is (according to the plaintiff) a fashion retail success story founded by Paul Simon, which gave retail space to young South African Designers. Simon had within nine years managed to open ten stores turning around R120 million a year, but subsequently sold to Truworths. She was inspired by what Simon could achieve, but wanted to open her empire without borrowing money.

her capacity. Doctors Jaffe and Marks agree that the plaintiff still has intermittent neck pain and that she has developed an intense fear of driving and severe anxiety diagnosed with post-traumatic stress disorder and that there is no evidence of instability and no neurological involvement. They however differ on the causes of the pain and on the need for extra assistance. According to Dr Marks bouts of neck and/or low back pain were not attributable to a single traumatic event in the absence of demonstration of structural damage. He is of the view that neck and back pain are common in the general population following activities of daily living, and aggravated by psychological distress. According to him treatment should be focused on the plaintiff's emotional status as determined by the psychologist and psychiatrist. He concludes that because there is no functional impairment observed, there is no justification to impose restrictions on the plaintiff's physical activities in her day to day life, including handling of merchandise and household chores. His view is that pain is perpetuated by psychological stress, not the other way round, and that the bio psychosocial model of pain is well established in scientific literature.

[41] Dr Jaffe however is of the opinion that the neck and back pain will continue to require analgesic mediation on an on-going basis. He concludes that the physical side of the plaintiff's work aggravated the pain and he noted that she goes for Chiropractic treatment regularly. According to him it was unlikely that the neck pain would improve. His view is that the plaintiff would be able to continue with her business as long as she received extra assistance. At the end of the day, there is disagreement between the plaintiff's and defendant's experts on the plaintiff's ability to perform her physical side of work, without a need for assistance.

[42] With regard to the psychological aspect of the injuries, all the psychologists and the psychiatrist are in agreement that the plaintiff suffered from a Post-Traumatic Stress Disorder ('PTSD') as a result of the accident. This resulted in heightened anxiety when she travels in motor vehicles and panic attacks which

occur when she travels in aeroplanes and in lifts. She therefore avoids being in those situations.

[43] The experts found that with the necessary intervention she will overcome her fear of travelling. In his first report dated 21 June 2009, Lewis recommended that the plaintiff should consult with a psychologist for psychotherapy and have one session a week for six months initially and then on a needs basis for two years. Lewis, however, having found no change in the plaintiff's condition in 2014, expanded on this in his report of 6 February 2014 by stating that the Eye Movement Desensitisation Reprocessing (EMDR) method would be the most optimal form of psychotherapy for the plaintiff to receive as this modality of treatment had been proven to be efficacious in the treatment of PTSD. He further stated that the psychological treatment had been made more complicated by the fact that the plaintiff had struggled for a very long time with her psychological difficulties, and these were entrenched with the passage of time. Lewis prepared a further report dated 17 February 2014, explaining and listing reasons why the plaintiff had not gone for treatment, which were treatment fear, fear of emotion, anticipated utility, self-disclosure, social stigma and self-esteem issues. According to him, these have been shown in the literature to be avoidance factors that inhibit help-seeking behaviour when it comes to psychological assistance. Zabow on the other hand, in his report of 20 November 2011, found that although there would have been a long time period since the accident, the plaintiff would benefit to some extent from treatment and he recommended a form of psychotherapy (cognitive behavioural course).

Evaluation

Loss of earnings

[44] I would first deal with an issue raised by the defendant that the manner in which the claim is calculated may not be a legally acceptable way of determining the plaintiff's loss of earning incapacity. It was submitted by Mr Bhoopchand on behalf of the defendant that the plaintiff's loss of earnings is not based on her own

losses but that of the potential loss of the two close corporations, i.e. Grassy Knoll, owned 100% by Aspeling, and Playnice, which is wholly owned by the plaintiff. I have already dealt with the structure of the businesses above. Edwards treated the two CCs as one whole, attributing 50% of the consolidated business to the plaintiff.

[45] Mr Bhoopchand submitted that this situation presented a legal conundrum in the context of the **Rudman v Road Accident Fund**[6]decision. His view was that, whilst this arrangement of the two CCs is based on sound accounting principles, it did not necessarily follow that it was a legally acceptable way of determining the plaintiff's loss of earning capacity. He argued that in **Rudman,** the Court found that one must be careful not to attribute any losses suffered by a company or a CC to that of the plaintiff who has suffered an injury in an accident. According to him the plaintiff had not been able to show that this present matter is distinguishable on the facts from the **Rudman** decision, unlike those cases that Mr Coughlan, plaintiff's counsel, mentioned in his heads of argument, which were clearly distinguishable.[7]

[46] Mr Bhoopchand submitted that in those cases the entire earnings of the plaintiffs involved could be compared to, attributable to and were equal to the earnings of the CCs. Furthermore, in those cases, the plaintiff was either the only member of the CC or he or she was the majority member. The difficulty that the Court is presented with in this matter, he argued, is that the two CCs in this case were separately owned on paper but for convenience the earnings were split equally between the plaintiff and Aspeling. The problem he raised was that in terms of her evidence, the plaintiff was doing the bulk of the work, which is 80% of the purchasing of merchandise. She did the marketing, decoration and dressing of the store windows. Her work constituted significantly more than 50% of the shared profit. In view of the fact that the business is structured as a CC, her expectations lie in her 50% member's interest (in the two CCs combined),

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[6] 2003 [2) SA 234 [SCA)

[7] Cases cited by Mr Coughlan are, inter alia, *Miller v Road Accident Fund*, unreported judgment, (A 134/2013) [2013[ZAWCHC delivered on 12 September 2013; *Van der Walt v Road Accident Fund* 2002 [5J2) QOD 149 (AF); *Miles v Road Accident Fund* [7410/2009) (2013] ZAKZPHC 41 (14 June 2013)

regardless of the amount of work she did or did not do. If there was a loss therefore in a business which is structured in the form of a judicial entity, then that loss would be attributable to the business and not to the individuals that are either members or shareholders of that business. Mr Bhoopchand essentially attacked the structure of the claim on the two bases: firstly, that the claim is based on the loss suffered by two close corporations, one of which the plaintiff does not own, and secondly, regardless of what she did or did not do, her expectation from the combined turnover of those two CCs was 50%.

[47] I disagree with Mr Bhoopchand's view on this issue. As a starting point, it is important to examine the **Rudman** decision as well as the decisions that were delivered by different courts, especially those whose facts were held to be different to those in the **Rudman** case. **Rudman** was a game farmer and a professional hunter who ran a very successful operation in the Eastern Cape. He was involved in a motor accident that left him permanently disabled, not being able to hunt nor conduct his farming business with the same vigour as the hands-on manager as before. **Rudman**'s business was run through a company of which the family held 3900 shares and the remaining 100 belonged to **Rudman. Rudman** remained the driving force behind the company. The Court held that the loss to the company could not automatically and necessarily be equated to **Rudman**'s personal loss. Whilst there was evidence to show that the company had incurred and would in future incur the additional expense of employing others to do what **Rudman** used to do, there was no proof that that produced loss to **Rudman.** The Court held that there was no evidence, for example, that his shares in the company were worth less, or he had received less dividends, or fees or drawings because of the company's reduced income, or that he would do so in the future. The company's, the trust's and Rudman's financial statements did not show any loss to Rudman at all, neither did Rudman's nor his accountant's evidence.[8]The Court found further that on the evidence before it, Rudman could still perform his real function of

[8]See *Rudman* supra at paragraph [13].

being the driving force behind the company, and the most important capacity in which he acted, and that which mattered the most, i.e. being a Chief Executive Officer of the Rudman empire, was not impaired. The Court found further that whether or not he still did things he formerly did, those things could still be done by his sons and his employees under his direction and supervision.[9]

[48] My view is that the facts of this case are indeed distinguishable from Rudman's on many fronts and are more in line with judgments that Mr Coughlan referred to. In **Miller v Road Accident Fund**[10], the Court in considering circumstances of the appellant, Miller, who was claiming for past and future loss of earnings held that:'... unlike the position in Rudman, Miller's close corporation was nothing more than a conduit for his sole source of income which was the fees that he generated as an architect'[11]. In the matter of **Miles v Road Accident Fund**[12], it was held that:

> 'The fortunes of the CC, quite clearly, are inextricably bound up with the well-being as well as the time and effort expended by the Plaintiff on the business. Importantly, the performance of the CC depends vitally on the efficiency with which the Plaintiff conducts and manages the business. The fact that persons are employed in the business, in my view, does not militate against the approach which I propose to follow.'

[49] In the latter case, the Court concluded that the case was distinguishable from that of **Rudman** and the matter of **Raath v Nel**[13]because of the Plaintiff's ownership of 99 per cent of the member's interest in the CC, his control of the affairs of the CC, and its dependence on the Plaintiff's personal exertion and performance.[14] Another case worth mentioning is that of **Road Accident Fund v**

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[9]See *Rudman* supra at paragraph [14].
[10] Unreported judgment (A 134/2013) (2013] ZAWCHC (12 September 2013)
[11]*Miller v Road Accident Fund* supra at paragraph 7
[12][7410/2009) [2013[ZAKZPCH 41 (14 June 2013) at paragraph 25
[13]2012 [5) SA 273 [SCA); [2012) 4 All SA 26 (SCA)
[14]In *Raath* the Court at paragraph (17) emphasised the point made in Rudman that '... it is not axiomatic in these circumstances that the company's loss is the individual's personal loss, even if he is the sole shareholder and/or the driving force behind the company. Proof of the individual's personal loss is still required.'

Oberholzer[15] where on appeal the Eastern Cape full court distinguished Oberholzer's (the claimant's) situation from the Rudman position as follows:

'In the present matter the plaintiff's real function was never that of chief executive officer of a large undertaking. In fact, while he may have been in charge of his business he could hardly have been described as the chief executive officer. He now holds the position of managing director which, as I have indicated, is really a misnomer when one has regard to what he does. What the plaintiff did that mattered most was to make patterns, manufacture moulds, maintain the factory and the machinery, and do deliveries. He cannot be said to have built up an empire. He was in the process of building up his business. While the business will benefit, probably not to the same extent, from the duties now performed by the additional people that have been employed, this will occur at an expense which would not have been incurred had the plaintiff not been injured. In all the circumstances there has, in my judgment, clearly been a diminution of the plaintiff's earning capacity, which has resulted in him suffering a loss. In fact, the position of the plaintiff is more akin to that of the disabled banana farmer in the case of **Union and National Insurance Company Limited vs Coetzee1970 (1) SA 295 (AD)**who, as Jones, AJA pointed out in Rudman's case supra at 244 D:"had been on the threshold of his career as a farmer and about to begin the development of his empire".(Own emphasis)

[50] The description of this banana farmer seems to fit the plaintiff's situation in my view. She had been at the doorstep of her career and about to begin the development of her fashion empire when the accident occurred. She had already opened two stores together with her husband, at the time, and was about to open the third one. In my view, the plaintiff has been able to show that she purchases 80% of the apparel and she is, of the persons connected to the business, the most crucial to the existence of the business, given her creative talent and ability. Whilst Aspeling shares 50% of the business with her, his role is more administrative and that of a financial manager. The turnover, profit and performance of both CCs largely depended on the plaintiff's well-being and capacity. The fortunes of the CCs are inextricably linked to her efforts spent therein and there was complete

[15][2006] 3 All SA 593 (E). See also *Road Accident Fund v Ronaasen NO* (86-2006) [2007] ZAECHC 153 (22 June 2007) at paragraph 8

convergence between her interests and those of the CCs, as the court put it in the **Miles** judgment.[16]The present case is also distinguishable from **Rudman** because unlike the claimant Rudman, who played an overseeing role of the CEO in his business, the plaintiff describes herself as a hands-on person, which is demanded by the nature of the business. Furthermore, unlike in **Rudman,** loss of profits of the CCs has not automatically been attributed to the plaintiff. The plaintiff's loss of earnings is based on the net profit of 50% and her member's salary from the consolidated business. There is an acknowledgment that she only owns 50% of the consolidated business. Even though she does 80% of the work, what is important is what she would have earned at the end of the day and that equates to 50%. In the circumstances, I have no difficulty with the fact that the claim is premised on the earnings of the CCs, which are attributed to the plaintiff in the manner they have. I now proceed to deal with the claims.

Need for extra assistance

[51] As I have mentioned above, there are conflicting medical views on whether the plaintiff would require extra assistance in executing her physical duties. In assessing the evidence, it seems to me there is some level of agreement that the physical pain and psychological difficulties have an effect on each other. Dr Marks' view, however, is that the pain is perpetuated by the psychological stress, not the other way round, as some may seem to suggest. In her evidence, the plaintiff testified that the injury to her neck was relatively minor compared to the psychological issue. Whilst there was no evidence of neck instability or neurological involvement, I am not convinced that Dr Marks' conclusion has been conclusively established as a fact, on this aspect.

[52] In view of the fact that there is evidence that the plaintiff was diagnosed with an injury to the neck as a result of the accident, I am prepared to accept that the recurring pain is connected to physical injuries sustained to the neck during the accident. Even if it could also be attributed to psychological difficulties, it seems to

[16] Miles v Road Accident Fund supra at paragraphs 22 to 26

be common cause that the emotional difficulties in any event resulted from the accident. Given the medical consensus that there was recurring pain (whether physically or psychologically related) and the evidence of the couple, which was consistent, there is no reason not to accept that on the balance of probabilities, she had difficulty in conducting duties that required physical effort.

[53] The second part of the plaintiff's claim based on the need for extra assistance is that she depends on Aspeling to drive her and that affects the productivity of both of them. The plaintiff's fear of driving is not in dispute. It is borne out by medical reports and her evidence that indeed she has depended on Aspeling to drive her.

[54] That is however not the end of the enquiry, the key question arising from the plaintiff's claims based on the needs for additional assistance is whether she has shown any actual loss of earnings owing to such need.

[55] The defendant is challenging this claim on the basis that there has not been any person actually appointed to assist the plaintiff, which is admitted by the plaintiff and her witnesses, nor has there been any actual expenditure incurred. I am persuaded by Waligora's opinion that the plaintiff should only be compensated for the actual loss incurred.

[56] The plaintiff has not been able to show that the business has suffered any loss by her requiring assistance from staff members in her business. The assertion that whenever she needed assistance at the store, the plaintiff removed a staff member from their otherwise productive work seems to be in conflict with the evidence to the effect that the business was actually overstaffed to cater for that need for assistance. I understood the plaintiff to be saying that additional staff members were appointed in all the stores due to the accident. If that is the case, the actual expenditure incurred as a result of the accident should have been the basis of the claim. That is however not how the claim is characterised. Furthermore, I am persuaded by Waligora's view that the fact that the business was overstaffed at certain periods relative to others could not be attributed to the accident alone, it

could also be due to the growth of the business. For example, Waligora notes that the business was overstaffed by 5.57 in 2012. There was no clear explanation as to why the figures escalated so much, i.e. from 19 in 2011 to 39 staff members (including casual workers) in 2012.Numbers seemed to have been consistent between 2009 and 2011 per store, but then jumped in 2012. It is this inconsistency that creates doubt in my mind about whether overstaffing could only be attributed to the accident.

[57] Nevertheless and without emphasizing the point, the argument that more staff members were employed than the business required seems to neutralize the point that employees were removed from their otherwise productive work to help the plaintiff as and when she attended to work at those stores. Those extra staff members would presumably help her and would without a doubt have been engaged in other functions such as attending to customers and contributing to the growth of the business. Aspeling did not seem to dispute this proposition when put to him in cross-examination by Mr Bhoopchand. His answer was that for the bulk of the business, they have had extra staff so he had nothing to compare it with.

[58] I am aware of the evidence of the plaintiff and Aspeling that it would have been impractical to appoint an assistant to go with the plaintiff everywhere she went. I am however not convinced that the plaintiff has been able to show a loss to the business. The submission is made on her behalf that the cost of an additional staff member resulted in an annual expense, which results in a reduction in net profits of **R66 000.00** per annum as at 2010 and **R73 870.00** in 2013. Edwards has tried to quantify the claim by looking at the average salary of an assistant. In my view this kind of claim requires actual loss to be shown, which has not occurred. My view is that the claim based on the need for extra assistance must fail.

Curtailed national expansion

Did a national expansion plan exist?

[59] The plaintiff has led compelling evidence regarding her dream of a fashion empire. The evidence shows that she had the talent, the skill and the drive as an

entrepreneur. From a young age she was drawn to fashion and has had a creative mind, and knowledge of how to sell her product to customers. Her abilities were apparent even before she opened her first clothing store, when she turned around fortunes of a night club due to her creative ideas and organising of events, which had made good money for herself whilst being a student. Taking into account her career track record, the fact that already by December 2007 she had two stores, her impressive success in opening multiple stores even after the accident, I have no difficulty in accepting that, on the balance of probabilities, she wanted to expand her business nationally. It also does make sense that Johannesburg would be most attractive because of the sheer volume of the market and available disposable income.

[60] However, it is another question altogether whether the national stores would have been opened at the time the plaintiff alleges and that would depend on a number of factors, including those mentioned by Edwards and Waligora. Although the absence of documentary evidence does not necessarily discount the evidence given by the couple that they would have opened their first store at the end of 2008 or early 2009 had it not been for the accident, written growth plans would have helped in confirming evidence of the actual opening of the stores at such times. I do not believe that the claim is as straight forward as put by Edwards. There are a number of factors which in my view Edwards did not take into account in the quantification of the claim.

[61] In the first instance, I do not think any doubt exists that the plaintiff was impaired psychologically; particularly that she feared travelling in aeroplanes and vehicles as a result of the accident, if one has regard to the expert reports. There is however evidence before this Court that the plaintiff, whilst she had difficulties, did actually fly about 5 times a year to Asia and once a year to Europe. It is submitted on behalf of the defendant that those flights went *via* Johannesburg. I am in agreement with Waligora that this factual evidence was not factored in by the medical experts, particularly in addressing the question of whether the fact that the

plaintiff did fly, would in any way have influenced the assessment of her claim on curtailed expansion. I do accept the plaintiff's evidence that she had no option but to fly to Asia to buy the stock as it was crucial for her livelihood and because most of their stock is imported from Asia. I also accept that she could not send Aspeling alone there because 'she was the creative eye' of the business and the business was successful because of her.

[62] It is accepted that it was a struggle for her every time she had to fly as she had to take tranquilisers or suffer panic attacks. It also must be counted in the plaintiff's favour that whilst Johannesburg and Durban are much closer to Cape Town than is Asia, flights to those destinations would have had to have been more frequent especially at the beginning stages of the new stores. The fact though is that the plaintiff did fly. Without sounding unsympathetic regarding the plaintiff's situation, the factual information, it seems to me, should have been considered by the medical experts and Edwards should have considered it in the quantification of the claim, more so, because most of the travelling to Asia would have been after the accident, taking into account the fact that the stores were doing well and well stocked with apparel predominantly from Asia.

[63] The second issue is that the basis of the claim regarding delayed expansion of national stores is premised on the claim that as at 2013, the plaintiff would have had opened 5 stores in Cape Town and would have had 3 more national stores by then in the uninjured state. The quantification of the claim does not seem to consider the fact that over a period of seven years, i.e. from 2006 to 2013, in fact, 11 stores were opened (at different stages of the business), albeit, some of which were consolidated or closed thereafter.

[64] The couple started with the Twisted Love brand in 2006. They would indeed have been experimenting with brands until they settled with The Lot as the preferred brand. They opened a store each year and all these stores would have generated profits for the CCs. The stores, according to my understanding of the evidence, were either closed because they did not fit the brand or consolidated with

those built in close proximity in line with the horizontal strategy. The point is they did exist and did make profit and contributed to the business growth even though they were in competition with each other. The quantification of the claim, based on the three national stores, cannot be viewed separately from that context in my view.

[65] If one looks at the plaintiff's evidence closely, it is clear that although she did not expand the business vertically, i.e. nationally, she did expand horizontally. In cross-examination the plaintiff said the following: *'Like the plan that we have needs travel, is such a huge part of it that is when we started thinking about the idea of possibly rather than, we could still get to the same amount of stores, I mean, from, from, from the start of this until now I have opened eleven stores, eleven spaces, but they just were compounded on top of each other.'*[17]

[66] In another passage still under cross-examination she went on to say: *'....so when I said to you before, before the accident my dream was always to open that amount of stores, it is just they did not work together, so we did open that amount of stores, it is just they did not work together, so we have had to close them down because geographically they were not in the different locations that we had initially identified was the way to do it.'*(Own emphasis)

[67] From that I do not understand her evidence to be that she would have opened only five stores in Cape Town as articulated by Edwards and over and above those five stores, a further five (or three as reduced by Edwards) in Johannesburg and/or Durban. She is saying, in what I have quoted above, that she would have opened the same number of stores that she actually did, which is 11, but in different geographical areas.

[68] Even Aspeling's evidence is not as crisp on the number of stores they sought to open as Edwards presents the case to be. Aspeling testified that their plan was to open a store a year and within five years to have six or seven stores, maybe a couple of stores in Cape Town and a couple in Johannesburg, with Johannesburg

[17] Page 41 of the transcribed record

being the main focus, that they would have 'at least three, four, five stores up there because of the financial benefits'. Elsewhere he says the following: *'So sitting now in 2014 we would have liked to have had maybe six or seven stores nationally, but comprising probably maybe four Johannesburg, two, three Durban and a couple in Cape Town.'*[18] (Own emphasis)

[69] Although Edwards would have to have received his instructions from the couple about the number of stores that would have been opened both nationally and in Cape Town, the couple should have explained their aims more clearly when giving their evidence. That is however not the main point of my analysis of this evidence. My main issue is that the factual position regarding the actual stores opened over the seven year period does not seem to have been considered by Edwards. I therefore agree with Mr Bhoopchand that the consolidation and closure of stores did not justify the manner in which the claim was formulated which gave an incorrect impression that the plaintiff now lags behind the number of stores she should she would have, had she not been injured. The consolidation of stores did not reduce floor space occupied by the stores. Rather, the number of stores was technically reduced. Further, had the matter been heard in 2013, the plaintiff would have had 7 stores, as The Wardrobe in Claremont was closed at the end of 2013, as it is argued on behalf of the defendant.

[70] If one considers the fact that 11 stores were factually opened, although some being consolidated and others closed, that could arguably have been in excess of the number predicted for both the injured and uninjured state. The fact that expansion in Cape Town showed positive growth year on year cannot be ignored. Edwards dismissed this issue as being irrelevant on the basis that one ought to be put in a position they would have been were it not for the accident. He completely ignores the fact that the couple did not only open 5 stores in Cape Town and does not deal with what impact the stores that were opened and consolidated had on the business. Those stores did trade and made profits.

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[18] Pages 400 and 401 of the transcribed record

[71] The defendant contends that the impact or success of those stores may have offset the claim for curtailed expansion. Whilst that may be so, that has not been established and remains speculative because no proper assessment was done to that effect. Apparently annual business results per store were not made available when requested by Zeeman.[19]

[72] I have already expressed a view that there is enough evidence to show that the plaintiff would in all probability have expanded nationally. My issue however is that Edwards failed to take relevant factors into account and simply dismissed them as being irrelevant. In a situation like this the Court is not without options, it can still award an amount that it deems appropriate.

[73] Another important issue is that the experts gave no indication as to the period estimated in which the plaintiff would regain her full capacity, given treatment. Lewis simply said '*psychological condition is responsive to treatment and that with appropriate intervention it is probable that she will be able to regain much of her psychic health*'[20]. Edwards admittedly 'guessed' the catch up period with no medical backing. Whilst I am critical of Edwards' approach, I do find that the plaintiff's earning capacity would have been reduced by the fear of flying that she had developed. The extent to which such earning capacity would have been reduced remains a mystery, in the light of the fact that the medical experts did not address the fact that she factually flew to Asia. Her business strategy of opening stores next to each other in the manner she did is also evidence of her intentions to expand her business. Her success after the accident does not mean she was not entitled to a claim of loss earnings. In the decision of **Venter v Road Accident Fund**[21], Beasley AJ, disagreeing with the findings of Bizos AJ in **Devsel v Road Accident Fund**[22], held that '...the Plaintiff may well not suffer a loss or diminution of her

[19] See P D Zeeman report dated 14 November 2012 at page 9 at paragraph 5.2.2.1
[20] Other experts including Norma Colley agreed with that conclusion
[21](50016/10) [2012] ZAGPPHC 297 (19 November 2012) at paragraph 13

[22]Case number 2483/09 handed down in the South Gauteng High Court on 24 June 2011 (unreported). In this case Bizos AJ held at paragraph 38 that "... her [the plaintiff] employment contract as it was at the time of the *delict* was replaced with a significantly higher profile contract

present income in the future. However, this does not mean that she would not (but for her injuries) have enjoyed an even better income....., depending on the facts, the court is entitled to investigate the relevance of such potential future loss.'

[74] The plaintiff's claim in respect of her diminished earning capacity must now be considered in the light of the medical evidence and factual position that I have alluded to. There is convincing evidence to the effect that the plaintiff was well qualified to have opened successful stores nationally. Her track record showed this. Her business continued to grow and was successful even during the recessionary period of 2008/2009. However, not much evidence was given to the court regarding differences between the trading landscapes in Johannesburg, Durban and Cape Town and differences between trading on streets and in malls, apart from secondary evidence obtained from a certain Mr K Schreuder, a director at Foschini who apparently had independent conversations with Prof Abrahams and Edwards, and who provided them with his views about the plaintiff's business and national expansion. These views changed between the conversations he had with Prof Abrahams and Edwards. Apparently, after Schreuder visited the plaintiff's stores, he was of the opinion that mall based stores would be the most appropriate form for future expansion. He also agreed with Edwards that Gauteng would be more profitable, followed by Cape Town and Durban, but he did raise the issue of the challenges that arise with management of multiple stores, especially when they exist indifferent geographical areas. There was no agreement from the parties that this 'collateral evidence' should be accepted for what it purports to be, although Schreuder features in both Prof Abrahams and Edwards' report. I am not

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after the accident. If anything, her earning capacity has increased recently... 'He held that no future loss of earnings had been proved therefore, there no future loss of earning capacity was proven, because '... a claim for loss of income is effectively a quantified claim for loss of earning capacity and a claim for loss of future earning capacity cannot be made without the proof and quantification that is found in its resultant loss of future income.' (paragraph [27].

convinced that I should attach too much weight to Schreuder's views. I do however note that Waligora made some concessions during cross-examination, almost agreeing with most of Schreuder's views as reported by Edwards.

[75] My impression is that whilst the couple was successful in Cape Town, they could face different market conditions in Johannesburg and Durban. The risks of high rental amounts and rates payable in upmarket Johannesburg malls could affect the profitability of the business. The issue of economic environment and market demand is equally important. It cannot be assumed that just because the plaintiff was successful in Cape Town, she will equally be the same in Johannesburg and in Durban. While the existence of Facebook followers and evidence of interest of members of the public in the products offered by the plaintiff may be indicators of demand, such indicators will not necessarily be translated into sales should those stores be opened in such areas. The economic environment is important. By 2013 only one mall store was opened in Canal Walk. The Canal Walk store was said to be more profitable than others but its financial statements were not presented.

[76] The management of those stores is another important issue. The plaintiff testified that she is hands-on and involved in how the apparel is displayed on hangers, in the store and in windows and in the unpacking and packing of merchandise. She gave an impression that her involvement is daily. This means that not all stores will get the same attention, especially those stores that are not in her immediate geographical area. The advantage in having them concentrated in one area, as was the case in the past, is that the plaintiff is given an opportunity to pay attention to and have acute focus on each of them. This advantage might be lost with the geographical spread of the stores, especially nationally.

[77] In **Southern Insurance Association Limited v Bailey N.O.**[23]Nicholas JA said the following:

> 'Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls,

[23]1984 (1) SA 98(A) at 113 G – 114B.

soothsayers, augurs or oracles. All that the court can do is make an estimate, which is often a very rough estimate, of the present value of the loss.

It has open to it two approaches.

One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.

The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award. See Hersman v Shapiro & Co 1926 TPD 367 at 379 per STRATFORD J:

'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, it is certain that pecuniary damage has been suffered, the Court is bound to award damages.'

[78] The Court said in **Griffiths v Mutual and Federal Insurance Company Limited**[24]:'In a case where there is no evidence upon which a mathematical or actuarially based assessment can be made, the Court will nevertheless, once it is clear that pecuniary damage has been suffered, make an award of an arbitrary, globular amount of what seems to it to be fair and reasonable, even though the result may be no more than an informed guess. (See *Southern Insurance Association Ltd v Bailey*NO 1984 (1) SA 98 (A) at 113G – 114E and the cases there cited.)'

[79] In view of all the uncertainties as to the future and the imponderable nature of the factors that could have influenced the business, it is impossible to perform any actuarial calculation with sufficient accuracy to justify an award on that basis. In light of that, and taking into account all the considerations I have mentioned above, including concerns I have raised regarding failure to take into account

[24][1993] ZASCA 121; 1994 (1) SA 535 (AD) at 546f – h

important considerations in the assessment of the claim, it seems to me awarding a globular amount would be most favourable and reasonable to both the parties. The amount of **R2 000 000.00** would be most adequate in compensating the plaintiff for her loss of earnings claim.

General damages

[80] The plaintiff seeks R250 000 as general damages, whilst the defendant is of the view that an award of R150 000 would be more than adequate to compensate for any pain and suffering and for loss of amenities of life. I have allowed the amendment of the claim on general damages from R200 000 to R250 000. The plaintiff had omitted filing the amended page and did so at the hearing of argument.

[81] There is clear evidence that the injuries affected the plaintiff in a significant way. I would not want to burden an already lengthy judgment by repeating all the evidence. The plaintiff clearly continues to suffer pain in her neck that has resulted in her having to obtain assistance in order to lift heavy weight objects. Pain often wakes her at night and she experiences severe headaches which would last for a few days. She often has to rest at home or attend chiropractic treatment when pain is aggravated. She continues to go to gym, but has to do light exercises. The plaintiff was clearly a fit and healthy individual prior to the accident. Her social and business lives were affected by her psychological state, with her being confined to or dependent on others to transport her or not being able to travel whenever she needed to visit friends overseas or parents, which she frequently did before the accident. Her view of herself as a strong and independent woman was affected.

Mitigation of damages

[82] There is an allegation by the defendant that the plaintiff failed to mitigate her loss. It is worth mentioning my dissatisfaction regarding the fact that the plaintiff was advised as early as 2009 to obtain treatment by Lewis and yet only went for 3 or 4 sessions of psychotherapy and thereafter stopped because she thought she would be coerced to take anti-depressants. In 2014 her condition was recorded by Lewis as largely unchanged but could potentially be entrenched due to the passage of time.

[83] Lewis' conclusion in his report dated 06 February 2014 that the plaintiff's condition remained largely unchanged does not seem to accord with Aspelings' evidence that the plaintiff is getting better and the evidence that at this juncture, stores have been opened at different geographical locations of the Western Cape and one recently in Johannesburg, which might indicate some improvement in her condition. There is also evidence to the effect that the plaintiff does drive to destinations at close distances, although driving where there are fast moving cars such as on the N1 highway is still a struggle. It is not clear if this improvement is attributed to 'treatment' recommended or methods applied by the plaintiff based on her research. It was however apparent in Court that the accident still affected the plaintiff. She was very emotional and cried a number of times whenever she had to give details about the accident and its impact on her. My assessment is that the plaintiff still needed professional help to help her solve her psychological distress.

[84] There is a possibility that the plaintiff's condition could have improved had she gone for treatment as soon as she was advised to do so by the experts, first by Lewis, her own expert. It is rather curious that the only reason mentioned in 2009 to Lewis for the plaintiff having stopped attending psychotherapy treatment was because '*[After 3 or 4 sessions] she recommended that I go on antidepressants, the reason being that I had an anxiety disorder and tranquilisers are addictive. So she said that the way one treats it is by going onto antidepressants. And even though she still said that she would treat me if I didn't [take the antidepressants] , I got the impression that it was so highly recommended that I got the sense that she was*

saying that it was the best option for me. And I don't want antidepressants because I'm not depressed. I really just wanted someone to help me through the fear of driving and the associated problems...I decided I didn't want to take antidepressants. So I actually called [Ms Stretton] and told her that I was okay and that I would call her if I need to see her again.'

[85] After that she never went for psychotherapy, until she commenced a course of anti-depressants again in 2013. Now, years later, in 2014 more reasons about why the plaintiff has been avoiding treatment are added and factors inhibiting her from seeking help are listed, which might I add, could have been made more complicated by her struggling with her psychological difficulties over a prolonged period of time, if one has regard to Lewis' report of 06 February 2014.

[86] Another reason she mentioned during the trial was that she was not prepared to spend further money on a psychologist given what the accident had caused her and how expensive sessions were for her as a small business owner. The plaintiff testified that for years, Aspeling had advised her to see a psychologist. Aspeling has an honours degree in psychology, although he never practised. Aspeling was also not convinced of psychological treatment, but did concede that if someone had an ailment it was reasonable to seek help to alleviate the symptoms. The plaintiff said she administered self-help based on the research she did. She took a three month course of anti-depressants at the beginning of 2013. She did not feel that she obtained much benefit compared to the side effects which included changes in appetite and drowsiness as well as headaches. Whilst the plaintiff has adopted self-help methods over the years, she failed to follow the recommendations of the experts or even explore alternative methods with the experts themselves. That in my view cannot be found to be reasonable. The point is, even if Lewis' findings of treatment avoidance are accepted, in my assessment the plaintiff still needed professional help in order to deal with her problem, which she reasonably failed to do. I have considered submissions made by both counsel in light of the prevailing case law on general damages and, my view is that an amount of **R200 000.00**

would be fair to both sides. The plaintiff's failure to follow treatment recommendations constitutes a failure to mitigate her loss, which in my view should result in a reduction of the amount awarded for general damages to **R180 000.00**.

[87] In the circumstances I make the following order:

1. The defendant is to pay plaintiff the sum of R **2 185 704.37** in settlement of her claim in the manner and on the date set out in paragraph 2 hereunder.
2. The defendant shall pay the full capital sum within 14 days of the date of the order, by way of electronic transfer into the plaintiff's attorneys' trust banking account.
3. The defendant shall provide an undertaking in terms of Section 17(4) (a) of the Road Accident Fund Act 56 of 1996 ("the undertaking"), to compensate the plaintiff for the costs relating to the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the said plaintiff for her benefit arising from the collision on 17 December 2007, after the costs have been incurred and on proof thereof.
4. The defendant shall pay the plaintiff's taxed or agreed costs on the high court scale as between party and party, including costs of counsel, preparation, qualifying and reservation fees of Mark Edwards, costs of the experts listed below as well as all reasonable costs attached to the procurement of the reports and supplementary reports, if any, prepared by these experts:
   Dr R Jaffe (Orthopaedic Surgeon);
   Drs Morton & Partners (Radiologists);
   Susan Human (Occupational Therapist);

Graeme Lewis (Clinical Psychologist);

Norma Colley (Industrial Psychologist);

Mark Edwards (Forensic Accountant);

Munro Consulting (Actuaries);

5. The defendant shall pay the costs of preparing a transcript of the Court proceedings.

6. Payment of the taxed or agreed costs reflected above shall be effected within 14 (fourteen) calendar days of agreement or taxation (the due date) and shall likewise be effected by electronic transfer into the plaintiff's attorneys' trust banking account.

7. Should the said capital and costs not be paid on the due date, then the defendant will be liable for interest thereon at the prescribed statutory rate.

N P BOQWANA

Judge of the High Court

APPEARANCES:

For the Plaintiff: Adv W Coughlan

Instructed by: DSC Attorneys, Cape Town

For the Defendant: Adv Bhoopchand

Instructed by: Mayats Attorneys, Claremont c/o S S Qali Attorneys, Cape Town