REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 12/3663

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

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DATE SIGNATURE

In the matter between:

FOURIE, URSHA YVONNE Plaintiff

And

RONALD BOBROFF & PARTNERS INCORPORATED Defendant

JUDGMENT

WEINER J:

1. This is a claim by the Plaintiff, an erstwhile client against a firm of attorneys, Ronald Bobroff & Partners Incorporated, for damages allegedly suffered by Plaintiff in her personal capacity and on behalf of her minor child, Lincoln. This claim is based upon the alleged under

settlement on 1 August 2011 of her and her son's claims against the Road Accident Fund ("RAF").

Background

2. The original claims against the RAF were instituted as a result of a motor vehicle accident which occurred on 27 June 2005. As a result of the accident, Plaintiff's husband passed away. Some weeks after the accident, her minor daughter, Cayleigh, who had also been injured in the accident, also passed away. Plaintiff and her minor child Lincoln both suffered physical injuries as well as psychological and emotional injuries.

3. Plaintiff's claim is based on the alleged negligent breach by Defendant of the mandate given to Defendant to institute and pursue the claim against the RAF with the standard of diligence, care and skill which could reasonably be expected of a practising attorney. In this matter, it is accepted by Defendant that it was a firm specialising in personal injury claims.

4. Defendant denies that it was negligent in the execution of its mandate, alternatively, if it is found to have been negligent, then that negligence constituted so-called "*negligence in the air*". It is submitted that the amount of another settlement or the likely award a Court would have made on 1 August 2011, would, in all probabilities, not have been more than the amount of the actual settlement which Plaintiff accepted at the time.

5. The amount of the settlement on 1 August 2011 was the amount of R1 777 810-50, which, according to the evidence led at the trial, was computed as follows :

    a. Loss of support in respect of Plaintiff R838 804-60
    b. Loss of support in respect of Lincoln R323 509-00
    c. Past medical and hospital expenses - Plaintiff R61 947-46
    d. Past medical and hospital expenses – Plaintiff R61 947-46
    e. Past medical and hospital expenses on behalf of minor daughter – Cayleigh R283 549-55
    f. General damages – Plaintiff R200 000-00
    g. General damages – Lincoln R70 000-00

    Total R1 777 810-50

6. Plaintiffs claim is that the following amounts (in addition to the claims set out in 6 above) would have been awarded, had the matter gone on trial on 1 August 2011 or had a proper settlement been sought by Defendant:-

    a. In respect of a loss of earnings claim for Plaintiff R5 380 000-00
    b. In respect of general damages for Plaintiff R800 000-00
    c. In respect of general damages for Lincoln R430 000-00

    Total R6 610 000-00

7. The Court is, at this stage, called upon to decide on the issue of the under-settlement as set out in Claim A of the Particulars of Claim, and

not upon Claim B, which deals with an alleged overreaching of Defendant resulting from an alleged invalid contingency fee agreement. Save for what is set out in prayer 2 of the order, Claim B is to be dealt separately by another Court at another time.

The current litigation

8. The current litigation commenced when Plaintiff, on or about 27 September 2012, issued Summons against Defendant.

9. Plaintiffs current claim is based upon the failure to pursue the loss of earnings claim and an under-settlement of general damages.

10. When the summons was issued in September 2012, Plaintiff's claim was based on the following premise:- Plaintiff had the capacity to earn not less than R31 000-00 per month as a personal assistant/bookkeeper, but, that, as a consequence of the injuries and their *sequelae,* she lost the capacity to be engaged in any remunerative activity, and in particular to exercise a right to earn the R31 000-00 per month for a period of not less than 10 years from age 50 to 60. (She was 39 at the time of the collision and 44 when the matter was settled). Thus the claim appeared to suggest early retirement at 50 as opposed to 60. She could continue to work until age 50.

11. In the actuarial report filed by Plaintiff during September 2013, Plaintiff's case was that her claim for loss of earnings was based on a loss as a result of early retirement, i.e. age 57½ instead of age 62½.

I.e. she could work until the age of 57½ (that is 13,5 years after August 2011).

12. When this trial commenced on 21 October 2014, Plaintiff's counsel indicated that the Particulars of Claim would be amended to allege that, as a consequence of the injuries and the *sequelae,* Plaintiff lost the capacity to be engaged in any remunerative activity and in particular to exercise a right to earn R36 000-00 per month for a period of not less than 18½ years from the age of 44 to age 62.5. In other words, at the stage of the commencement of this trial, the basis of Plaintiff's claim changed to a claim that, as at 1 August 2011, when Plaintiff was 44 years old, she had already lost her entire earning capacity for her remaining working lifespan until age 62½. [It also implied that immediately after the collision, in 2005, she was unable to work again].

13. It was only on the third day of the trial that the amendment was filed to state the basis of Plaintiff's amended claim.

14. The amendment was allowed by the Court. It was however ordered that no reliance could be placed on the evidence of any experts who compiled reports after 1 August 2011 and reference to such reports was not allowed.

The Relevant Legal Principles

15. The relevant legal principles relating to the liability of an attorney for negligence are summarised by Harms in ***Amler's Predecents of Pleadings, Seventh Edition*** at page 59 as follows:-

"*The liability of an attorney towards a client for damages resulting from that attorney's negligence is based on a breach of the contract between the parties. It is a term of the mandate that the attorney will exercise the skill, adequate knowledge and diligence expected of an average practising attorney. An attorney may be held liable for negligence even if he or she committed an error of judgement on matters of discretion, if the attorney failed to exercise the required skill, knowledge and diligence.*

In order to succeed the client must allege and proof :

(a) the mandate;

(b) breach of the mandate;

(c) negligence in the sense as described above;

(d) damages, which may require proof of the likelihood of success in the previous proceedings;

(e) *that the damages were within the contemplation of the parties when the contract was concluded*."

See also ***Mouton v Mynwerkersunie*** 1977 (1) SA 119 (A);
Slomowitz v Kok 1983 (1) SA 130 (A).

16. The following principles appear from J.R. Midgley, ***Lawyers' Professional Liability*** Juta 1st edition 1992.

a. Where a Plaintiff alleges that he/she has suffered a loss because a settlement was too low, he/she needs to prove that the amount recovered is less than the amount which would have been determined by a properly negotiated settlement or that

which a Court would have ordered. The award will be the difference between the two amounts. (p 172)

b. Every lawyer has a duty to establish the facts and evidence which can best assist his client. Where the settlement figure, as a result of his failure to investigate properly was too low, an attorney will be held liable.

c. Damages suffered by a client as a result of breach of the mandate should be assessed at the time when the agreement was concluded containing the alleged under-settlement. It is then when the loss is crystallised. The Court dealing with a second action to claim the damages suffered as a result of the under-settlement will thus have to establish the amount which would have been recovered on a balance of probabilities at the time of the under-settlement and with the information then available (p 68).

17. Plaintiff's case was that Defendant should have pursued both a loss of support claim and a loss of earnings claim at the time of the trial/settlement.. Plaintiff submits that Defendant is relying on the case of ***Santam Insurance v Fourie***1997 (1) SA 611 (A) in claiming that the two claims are mutually destructive. Plaintiff refers to various other cases in which it has been held that the two are not mutually destructive, one arising out of the death of the deceased and the other as a result of the Plaintiff's own injuries (***Evins v Shield Insurance Co Ltd*** 1980 (2) SA 814 (A). However, as will appear later in this

judgment, in assessing the amounts payable in respect of each claim they are not completely distinct claims. The loss of support claim that Plaintiff lodged and for which she received approximately R800 000,00 assumed that Plaintiff was unemployable and would rely totally on the deceased's income for the rest of her life.

18. However, in the loss of earnings claim, Plaintiff contends that a totally different assumption should be used, namely that Plaintiff had been working prior to the accident, and would have entered the formal labour market again a few years after the accident, and would have remained employed as an accountant until retirement age.

19. The same assumptions must be used in both calculations. In other words, if it iscontended by Plaintiff that she had an earnings potential and career path prior to and after the accident, this cannot be simply ignored in the loss of support claim.

20. At some point in the future these two claims would have clashed with each other. Plaintiff, at the time of the settlement, was earning approximately R36 000,00 and the deceased was earning approximately R11 000,00 as at his death. When Plaintiff became employed she would no longer require support from the deceased at all and would not have a loss of support claim from that day onwards.

21. It seems the two claims are not mutually destructive but the calculations need to take into account the variables which are described above. In other words, if Plaintiff's claim for loss of earning

capacity would have succeeded as Plaintiff claims and she would have received an amount of say R2,9 million, from the date such claim became operative, her loss of support claim would have ceased (because her earning capacity was in excess of his).

Plaintiff's evidence

22. Plaintiff's evidence was the following:-

a. In 2011, she was in a very poor emotional state as she had, *inter alia*, used up all her sick leave and had no money for doctors. She consulted a physiotherapist, biokineticist, homeopath and chiropractor in regard to her physical problems. In regard to her psychological problems, she used a homeopathic remedy.

b. She would get very emotional around the time of the accident or on birthdays and anniversaries and would suffer physical pain including abdominal pain, as a result of which it was difficult for her to work. She did not consult a clinical psychologist or psychiatrist as she believed in alternative medication.

c. The reason she had resigned from her employment at the church was because of her physical injuries which influenced her psychological wellbeing. She experienced muscle spasms over the neck and right shoulder and also had abdominal pain. She consulted a medical practitioner, but cannot remember what the cause of the pain was, although she was told that she had

developed ulcers. She also had a hysterectomy in 2010. She referred to an “unhealed rib” which gave her much pain, despite the fact that X-rays showed that her ribs had united in a good position.

23. In regard to what she told the experts who assessed her and Phillipa Farraj (“Farraj”, the attorney from Defendant acting on Plaintiff’s behalf), in regard to her claim that she was totally unable to work, Plaintiff testified as follows:-

    a. She never told Professor Vorster (“Vorster”), Defendant’s psychiatrist, that she was unable to work and was tired because Vorster never asked that question. Vorster had advised her that she should take medication for her depressive disorder. She did not go with the recommended treatment of Vorster as she could not trust the medical and pharmaceutical companies as they were only after money.

    b. She was not working at the time of the collision but started work in December 2005. Had the accident not happened, she would have waited until her daughter was 4 or 5 years old and then continued working for the church until retirement at age 65. She did plan with her husband previously to develop the plot of land on which they lived, either for an overnight stop or a B&B but she would have had to continue working and this would happen after retirement.

c. She wanted to start her own business because she was tired and unable to work. If this was not in the reports, it was because the experts were in a hurry and did not have time for her. She conceded that it was not in any of the reports that she was so tired and in so much pain that she could not work any longer.

d. She was also cross-examined on the appraisals from her employers and she stated that they were a correct reflection of her abilities in 2007 to 2011.

(In general, the appraisals describe her, over the period of 2005 to 2011, as exceeding expectations, and only in 2011 (when the accounting procedures changed slightly) was she described as achieving the standard level, but not exceeding same).

Defendant's alleged negligence

24. Defendant's negligence is set out by Plaintiff as involving the following conduct, it:-

a. failed to investigate, prepare and prosecute Plaintiff's claim in a reasonable period of time. It took 6 years and 8 days for Defendant to settle Plaintiff's claim. Defendant could and should have prosecuted Plaintiff's claim for loss of support immediately in order to obtain sufficient funds to enable them to survive and recover from their loss. (Although, this period appears excessive

and could, perhaps, have formed the basis of a claim, the only claim would have been one for interest, which was not claimed).

b. failed to properly investigate Plaintiff's claim for loss of earning capacity by:

    i. relying entirely upon the "crude calculations" executed by Farraj as a basis for deciding that the loss of earnings claim was not worth pursuing; and

    ii. failing to timeously employ a qualified, experienced actuary to calculate what Plaintiff's loss of earning capacity would have been on the date that the accident occurred and using that as a basis to decide whether it was prudent to abandon that claim;

    iii. negligently abandoned the claim for Plaintiff's loss of earning capacity in circumstances where that claim:

        1. existed in law;

        2. was supported by the opinions contained in the reports of all of the medical experts employed by Defendant; and

        3. had not been properly assessed by a qualified, experienced actuary;

    iv. negligently failed adequately to prepare for trial in that:

1. Farraj failed to instruct the experts to meet in order to obtain the necessary joint minutes which would ensure that:

    a. Farraj and Justin Erasmus (Erasmus), the advocate briefed to appear on trial could properly assess the risks of prosecuting Plaintiff's claim; and

    b. in the event that the matter did not become settled, it could and would be eligible for allocation to a Judge on Monday 1 August 2011;

c. negligently under settled:

    i. Plaintiff's claim for general damages; and

    ii. Lincoln's claim for general damages.

25. Several medical experts submitted reports. In addition, Plaintiff called an expert, Daniel Weideman, who had practiced in the field of liability claims and personal injury for in excess of 27 years. While his evidence was of interest to the court, I believe that a court is well able, itself, knowing the rules and procedures and the way in which the courts and practitioners operate, to ascertain whether or not Defendant acted in accordance with correct practices and procedures and/or negligently.

26. It is common cause that the calculations of Farraj were based upon an actuarial report in regard to the loss of support claim, and only on a "crude calculation" in respect of the loss of earnings claim. Obviously it would have been more prudent for Farraj to obtain an actuarial report in respect of the latter but, having not done so, it is this courts duty to assess whether or not this, in fact, constituted negligence and whether the "under-settlement of the claim" is apparent from the evidence now tendered.

27. The Defendant did appoint all the relevant experts and obtained medico-legal reports from all of them. The fact that Farraj did not obtain joint minutes for the court and comply with the practice manual in regard to dates upon which these should be obtained might be negligent insofar as the practice of an attorney is concerned, but, once again, this court must assess whether it has any impact on the final decision as to whether defendant was negligent, and whether or not Plaintiff suffered damages as a result of that negligence.

Summary of the expert reports

28. Plaintiff summarises the reports of the medical experts as, at the 1st of August 2011, as follows. It is common cause or not seriously in dispute that, as a result of the accident and at 1 August 2011, Plaintiff:

    i. was suffering from Major Depressive Disorder (Vorster), Extended Bereavement Reaction together with Depression (Fine);

ii. sustained, *inter alia*, internal abdominal injuries (Scheepers), and was suffering from abdominal pains and neck, shoulder and back pain (Read);

iii. sustained some loss of employment potential and as a result of being depressed (Vorster), her productivity could be affected by her neck symptoms and ongoing depression. It was not possible to indicate to what extent this would have a negative impact on her income (Van Huysteen). Her depression resulted in some loss of employment potential;

iv. Plaintiff's career and earning potential would be negatively affected (Shaik).

29. What was, at the time of the trial, and remains in dispute is, firstly the extent to which the accident and its physical, psychological and emotional after effects affected Plaintiff's income earning capacity. Secondly, whether Defendant was negligent in not assessing Plaintiff as unemployable and failing to pursue the consequent claim.

Plaintiff's earning capacity

30. Mrs. Harris and Mr. Rothman gave evidence on behalf of Plaintiff regarding her performance as an employee of the church. Harris stated that Plaintiff was unable to cope with the work and had placed a large burden on her colleagues from her shortfall in productivity. Rothman stated that her post-accident output was substantially compromised as

a result of the accident. They both testified that neither of them had been contacted by Defendant in regard to Plaintiff's claim. (The appraisals were only tendered by Defendant through the witness, Denise Butterfield, after these two witnesses gave evidence, so they were not cross-examined on them).

31. Plaintiff alleges that Farraj should have obtained an actuarial report in respect of the loss of earnings claim. The actuary had calculated the loss of support claim at the sum of R1.1 million (for both Plaintiff and Lincoln). She also did a "crude calculation" based upon the information she had in her possession about Plaintiff's future employment and ascertained that any loss of support claim would be minimal as it would be "wiped out" by the loss of earnings claim and vice versa. She considered it better to pursue the loss of support claim.

32. Farraj's version is that Plaintiff was not employed at the time of the collision, as she had stopped working because of her pregnancy and the birth of Cayleigh. In August 2011, Plaintiff informed Farraj that she was initially employed on a contract basis by the church in December 2005 and later in 2006, she took up a permanent position. She did not inform Farraj that she could no longer work and that she was not coping at all with her working life and was totally unemployable. It was common cause that Plaintiff had always worked and intended to go back to work when her daughter was 4 or 5. She had informed one Candice, an assistant employed by Defendant on 5 February 2007 that

she wasn't coping at work. There is a file note to this effect. However she continued in full-time employment until 2011. Farraj stated that, in her crude calculations, she used the reports of the experts to assess that Plaintiff had lost approximately 10% of productivity and earning capacity and calculated the loss of earnings in the region of R400 000,00. When cross-examined on the fact that Dr. Read's report only referred to her orthopaedic injuries and did not take into account the psychological injuries, Farraj stated that, having looked at the reports of both sides, she assessed that Plaintiff would have bouts of grief on a long term basis, but that she would be able to be employed and operate satisfactorily, if she received the suggested medical treatment. Farraj stated that she looked at the report of Plaintiff's industrial psychologist (Shaik) which was the most favourable to Plaintiff, which stated that Plaintiff would have reached the Paterson scale level D1/D2, but for the accident. Shaik did not state that Plaintiff was unemployable. None of the experts reported that Plaintiff was unemployable.

33. It is trite that in order to assess whether Defendant was negligent the court has to look at the situation as it was as at the 1st August 2011 to determine whether or not the Defendant acted negligently. In this regard the following must be taken into account:-

    a. The precise nature of Plaintiff's medical condition;

    b. The income that Plaintiff was earning at the time;

c. Whether or not Plaintiff's earning capacity was totally extinguished; and/or

d. Whether or not it was partially extinguished and if so by what percentage.

34. As is evident from what is stated above, Farraj claims that the percentage of loss of production that she took into account in her crude calculations was 10%. Plaintiff, on the other hand, in terms of the 2014 amendment claimed that she was totally unemployable and that this was the position as at August 2011. As is apparent from the history of this matter, this was not the initial basis of Plaintiff's claim which was, either, that she would be unable to work after 50 years old, or, alternatively, that she was required to take early retirement at 57½. In argument at the close of the case Plaintiff's counsel utilised figures on the basis that her residual earning capacity was 30% (not *nil*).

35. I have referred to the experts' reports above at 24. In addition there is the evidence of Harris and Rothman that Plaintiff was in "*sympathetic employment*". However both of them related this to her psychological well-being which manifested itself intermittently whereas Plaintiff, in evidence, relied more heavily on her physical pain stating that she could not work anymore because of the physical pain which she experienced in her abdomen and shoulder. Obviously, this also led to emotional stress.

36. On the other hand, Plaintiff herself confirmed the views in her assessment reports where it appeared that up until 2011 Plaintiff was exceeding expectations as far as her work was concerned. In 2011 she did experience a slight setback but was still operating at a satisfactory level even though new programs were introduced in the Accountancy Department. However, she had worked consistently for 6 years as at August 2011 and, according to Farraj, Plaintiff informed her that she would continue to do so.

37. Although there is some confusion as to Plaintiff's intentions at the time that the matter was settled, it appears to be common cause that she wanted to purchase a maths study franchise and operate same. She was intending to resign from her employment in order to pursue this avenue and business interest. According to Farraj, Plaintiff did not indicate at the time that she was totally unable to work and that was the reason that she needed to give up work at the Church. This is, however, her evidence at present and what she says she stated to various of the experts.

38. Plaintiff further submits that Defendant failed to consult with any of her employers and/or co-workers to ascertain how her injuries, both physical and psychological, had impacted on her work capability. Farraj states that, according to the information given to her by Plaintiff and from the reports of the experts, she did not consider this necessary as Plaintiff indicated that she wished to carry on working but in a different

capacity by buying a franchise which she was able to do once the settlement amount was paid to her.

39. Simplistically, this case turns on whether Defendant was negligent in assessing that Plaintiff was still able to work and that her income earning capacity was only diminished by 10 percent.

Test whether Defendant was negligent

40. I have set out above the grounds upon which Plaintiff alleges Farraj was negligent. Basically Plaintiff contends that Defendant should have pursued both a claim for loss of support and a claim for loss of earning potential as they were not mutually destructive.

41. In this regard, I refer to the following authorities. Firstly, Gauntlett in ***Quantum of Damages In Bodily And Fatal Injury Cases,*** Volume 1, 4th Edition dealt with the widow's duty to mitigate her loss and that her earnings and prospective earnings during widowhood constituted a pecuniary advantage derived causally from the death of the deceased.

42. In the case of ***Peri-Urban Areas Health Board v Munarin*** 1965 (3) SA 367 (A) it was held that to suggest that she is obliged to mitigate her damage by finding employment is to mistake the nature of her loss. "*What she has lost is a right – the right of support. She cannot be required to mitigate that loss by incurring the duty of supporting herself. If she does obtain employment, it is more appropriate to regard her*

earnings as been the product of her own work, and has consequent upon her husband's death."

43. Defendant contends that ***Munarin's*** case and other cases such as ***Santam Insurance Co v Fourie*** *(supra)* are cases wherein the principle was stated that where a widow had never worked before her husband's death, it cannot be expected from her now to mitigate her damages by seeking employment to reduce her claim for loss of support. However Farraj contends that where, according to the facts of a specific case, a widow had in fact earned an income prior to the deceased's death and in all probability, had it not been for the accident would have been gainfully employed and would have earned remuneration, then and in that event such actual earnings during the period of potential earning capacity is relevant to the question as the amount of support which the deceased would have provided in the future, but for his death. [emphasis added] See ***Gauntlett*** *(supra)* p 72. See further the remarks of Vieyra J in ***Ongevallekommissaris v Santam Versekeringsmaatskappy Bpk*** 1965 (2) SA 193 (T) at 203 where the learned judge stated:

> "*In this latter regard I agree with the remarks of VIEYRA J in* ***Ongevallekommissaris v Santam Versekeringsmaatskappy Bpk 1965 (2) SA 193 (T) at 203*** *where the learned Judge said :*
>
> > *'The duty to mitigate by seeking employment can arise only if the prospective earnings are relevant to the loss. They cannot become relevant because of a duty to mitigate. I have no difficulty about the relevancy of the*

> *widow's earning capacity in so far as that must be considered for the purpose of determining what proportion of the husband's earnings, had he lived, would have gone to the support of his wife. Although not bound to seek employment she may during her husband's lifetime in fact have earned an income by engaging in some remunerative occupation or professional activity, even despite the necessity of raising a family. Or the evidence may show that at some stage she would in all probability have undertaken remunerative work. These are factors which in my view have bearing on the position, because they are germane to the determination of what in all the circumstances the husband would in fact have afforded to his wife had he not been killed"*. [emphasis added]

See further ***Milne v Protea Assurance Co Ltd*** 1978 (3) SA 1006 (C) at 1007A-E and 1013A-D.

44. Accordingly it seems that Defendant's initial response that the two claims were mutually exclusive needs to be modified as Defendant conceded by the answer which it gave in the paragraph 7 of the pre-trial minutes;-

    a. *Based on the report of the industrial psychologist Z. Shaik dated 17 July 2011, the assumption was that Plaintiff would have raised her children until a date within a few years from the date of the accident, and that she would from then on have remained employed as an accountant on a senior level in the formal labour market at the remuneration at the middle between a Paterson Level C2/D5. In other*

words on a Paterson C5 Level, which is in the middle of a C2 and D5. The assumption was that the estimated date on which she would have started working would have been 1 January 2010.

b. *The correct approach would have been to assume that she would have worked until retirement age which according to the industrial psychologists Shaik was 60 to 65 years (in other word 62 ½ years). It would have been reasonable to assume that she would have reached the maximum of her earnings ceiling at a Paterson Level D1/D2 at retirement age. Plaintiff is referred to the report of the actuary mr G.A. Whittaker dated 17 September 2014 which is attached hereto, wherein a calculation is made on these assumptions. This calculation shows that the Plaintiff and her son suffered a total gross loss of support in the amount of R342 816-00, and that she suffered a total net loss of income of R243 688-00 based on the assumptions as set out in the report which Defendant contends are the correct assumptions."*

45. Had Plaintiff started working fulltime, it would have been, on her version, from the 1st January 2010, when Cayleigh would have been 4 or 5 years old. On that basis, having regard to the fact that the settlement was reached on 1st August 2011 and on the authorities set out above, Plaintiff would have had no claim for future loss of support as at August 2011.

46. I have dealt above with the medical reports and Plaintiff's ability/inability to work and the way in which Farraj calculated what Plaintiff's loss of earnings would be. The question is then to ascertain whether Farraj, in choosing to pursue the loss of support claim as

opposed to the loss of earning capacity claim, acted negligently. This turns, essentially on whether Farraj's assessment of Plaintiff's ability to work was totally compromised.

47. One therefore has to put oneself in the position of Farraj at the time that the claim was settled to ascertain whether or not she was negligent in any of the ways contended for by Plaintiff. Defendant states that even if it was negligent in the execution of the mandate then the negligence is "*negligence in the air*" as the amount of the settlement would have exceeded the amount that Plaintiff would have received if the loss of earnings claim had been pursued. This, Farraj bases on the fact that, as at August 2011, Plaintiff was employed and was intending to remain employed or at least intending to continue working in some or other capacity (and earning more, according to her). Plaintiff had always worked and was employed at the date of the settlement. On her own version, she would have gone back into full-time employment in 2010, when Cayleigh was 4 or 5. Thus, she had every intention of re-joining the labour market in 2010.

48. It should be kept in mind that at the time the particulars of claim in the current matter were issued Plaintiff's claim was based on the premises that she had the capacity to earn not less than R31 000,00 per month as an accountant but that, in consequence of her injuries and the *sequelae* she lost the capacity to be engaged from ages 50 to 60. She was 44 at the time.

49. During September 2013, in terms of the actuarial report filed by Plaintiff, her claim was that her loss of earnings occurred as a result of early retirement that is at age 57½ instead of age 62½ and not total unemployability as at the 1st August 2011.

50. It was only on the 21st October 2014 during opening address that Plaintiff's counsel indicated that the particulars of claim would be amended to allege that, as a consequence of the injuries and the *sequelae,* Plaintiff lost the capacity to be engaged in *any* remunerative activity and she was totally unemployable for a period of not less than 18½ years from the age of 44 to the age 62½. On this scenario, at the date the trial was settled, in August 2011, when Plaintiff was 44 years old, she had already lost her earning capacity for her remaining working lifespan until age 62½. It is alleged that Farraj should have conducted Plaintiff's case on that basis. It must however be borne in mind that, at August 2011, Plaintiff had been working consistently from December 2005. She was not working only because of finances. She was well-qualified and was achieving excellent reports at work, despite her physical and emotional pain. This flies in the face of Plaintiff's evidence that she was suddenly unable to work.

51. The importance of these amendments and developments cannot be ignored because either Plaintiff herself and/or her present attorneys have changed their view on her employability from time to time. Although a total loss was claimed when the trial commenced, this changed to a 70% loss in argument. Plaintiff's case is unfortunately

hampered by the uncertainty of what her employment prospects were as at August 2011. The court however has to place itself in Farraj's position in August 2011 and ascertain Plaintiff's condition as assessed by Farraj at that time.

52. The report of Shaik in July 2011 indicated that Plaintiff would have reached the maximum of her earning ceiling at a Paterson level D1/D2 at retirement age (62½). Shaik assumed that Plaintiff would have raised her children until a date within a few years from the date of the accident and estimated that she would have started working full time on the 1st January 2010. She would then have remained employed as an accountant on a senior level in the formal labour market at the remuneration at the middle between the Paterson level C2/D5 (in other words on a Paterson C5 level). This is the basis upon which Farraj calculated Plaintiff's loss of earning capacity.

53. In calculating awards for loss of earnings reference should be made to the case of ***Southern Insurance Association Ltd v Bailey*** *NO* 1984 (1) SA98 (A) at 99B-E where the following was held at 99B-E:-

> "*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, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible 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 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. In a case where the Court has before it material on which actuarial calculations can usefully be made the first approach does not offer any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an 'informed guess', it has the advantage of an attempt to 'ascertain feeling' as to what is fair and reasonable is nothing more than a blind guess. It is true that, in the case of a young child, the assessment of damage for loss of earnings is speculative in the extreme. Nevertheless, even in such a case, it is not wrong in principle to make an assessment on the basis of actuarial calculations."

And Margo J in ***Goodwill v President Insurance Co Ltd*** 1978 (1) SA 389 (W) at 392H put it succinctly when he stated the following:

"*In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art of science of foretelling the future, so confidently practised by ancient prophets and soothsayers, and by modern authors of a certain type of almanac, is not numbered among the qualifications for judicial office*."

54. The question then is whether or not Farraj was negligent in settling the claim based upon the facts set out above.

55. In dealing with this the court has to find that Plaintiff has proved the elements set out above.

56. In particular, if this court finds that there has been negligence as described, Plaintiff has to prove damages which requires proof of the likelihood of success in the previous proceedings and that the damages were within the contemplation of the parties when the contract was concluded. See ***Slomowitz v Kok*** 1983 (1) SA 130 (A).

57. The negligence relied on is that Farraj failed to obtain the joint minutes of the experts, failed to consult necessary witnesses, failed to obtain the actuarial report in respect of Plaintiff's loss of earnings, and under settled in respect of both that claim and general damages. There are other criticisms of Farraj's conduct, such as the fact that could find no notes of her consultations and conduct in this matter. These appear to be legitimate , but again, the question is whether this "negligence" is relevant to the issue to be decided.

58. Although there was non-compliance with the practice manual by the failure to file joint minutes, this is negligence in the air and I must ascertain whether or not it had any effect on the ultimate results. In my view it did not. Whilst it seems clear that Defendant was not ready to proceed to trial (as no joint minutes had been requested and filed), this must be seen in the light of the actual settlement. In regard to the loss of earnings claim, it would, of course, have been prudent for Farraj to have obtained an actuarial report. However, a report has now been put up by Defendant showing that, had Farraj obtained an actuarial report based on the information that she had and her assessment of Plaintiff's

condition based on the expert reports, the total net loss in respect of loss of earnings would have been (depending on contingencies) between R576 600,00 and R816 334,00. This is based on a report of an actuary Algorithm Consultants and Actuaries dated the 29th October 2014 and handed to the court for information purposes. Thus again, I reiterate that the real issue is not whether Farraj failed to obtain the actuarial report, but whether Farraj's assessment of Plaintiff's employability was negligent. As stated above, Farraj had run the case according to correct practice and procedure by having Plaintiff assessed by all the necessary experts for both sides. She based her assessment on these reports, Plaintiff's own discussions with her and her discussions with counsel.

59. The actuary took into account the agreed income of Plaintiff and the deceased. He calculated that, on the basis of the above earnings and assumptions, the loss of support in respect of the deceased's dependants from the date of the accident until 1 August 2011 after an application of a contingency deduction of 5% would have been R19 452,00 in respect of Plaintiff and R20 644,00 in respect of the minor child Lincoln.

60. He calculated that the future loss of support was *nil* (based on Plaintiff's earning capacity). In regard to the Plaintiff's claim for loss of income as at the 1st August 2011, the actuary made the following assumptions:

1. The chances of survival were based on the life table of Dr R J Cox the Quantum Yearbook 2011. Tax tables have been utilised and net earnings had been capitalised at a net discount rate of 2,5% per annum compound.

2. The pre-accident earnings are taken as R447 036,00 per annum increasing uniformly to earnings of R536 296,00 per annum at (the equal to an average between a median package of the Paterson D1 level and the median package of the Paterson D2 level in July 2011 as per Shaik's report). From the 1st August 2011 earnings had been capitalised at a net discount rate of 2,5% per annum compound until retirement at instructed age of 62,5. He then applied a 20% contingency deduction to the present value of future uninjured income (which was described as slightly high because of a number of uncertainties as the fact that she wanted to start her own business and not continue on the salary that she had been receiving).

61. Post-accident the earnings were taken as at R438 241,32 per annum. This has been capitalised at a net discount rate of 2,5% per annum until retirement at age 62,5. A contingency of 25% deduction, alternatively 30%, was applied to the value of future injured income. On the two scenarios the future loss of income, taking into account the

25% contingency deduction, was R576 600,00 and on a 30% contingency deduction was R816 334,00.

62. Plaintiff accepts the value of the uninjured income in Farraj's calculation, but submits that the post-accident income should be based upon a 30% residual earning capacity. The value of the injured income would have been 30% of R4 172 608,00 that is R1 251 782,40 and thus the claim (without contingencies) would have been a claim for R2 920 825,00 in respect of loss of earnings. This is based upon a 70% loss of capacity to work.

63. Plaintiff's future loss of income was quantified on the basis of the available evidence contained in the reports of the industrial psychologists. According to the reports, Plaintiff's loss had to be quantified on the basis that Plaintiff probably would have progressed further in her career with a commensurate increase in remuneration if the accident had not occurred, but that she probably would not progress further now, having regard to the accident.

64. The present value of Plaintiff's future income if the accident had not occurred was calculated on the assumption that Plaintiff's earnings would have increased to an average between the median package of Paterson D1 and D2 and that she would have retired at age 62½, as per Shaik's report of July 2011.

65. The present value of Plaintiff's future income having regard to the accident was calculated on the assumption that Plaintiff's earnings would not have increased at all in future and that she would also have retired at age 62½, and was similarly based on Shaik's expert report. It was thus assumed that Plaintiff would have stagnated from 1 August 2011 onwards as Shaik advised.

66. The actuary was instructed to apply a 20% contingency deduction on the calculated present value of Plaintiff's future income if the accident had not occurred and 25% (scenario1)[1] / 30% (scenario 2)[2] on the calculated present value of Plaintiff's future income having regard to the accident.

67. Farraj testified that she provided for a 10% contingency in her "crude calculations". She discussed the contingency deductions with Erasmus, and he was satisfied. Defendant contends that they applied their minds to the calculation and the contingency to apply and cannot be found liable if this Court is of the opinion they should have applied a higher contingency.

68. Defendant contended that a 10% to 15% loss of productivity does not equate to an equal contingency spread. Reference was made to ***Union and National Insurance Co v Coetzee*** 1970(1) SA295; ***Redman v RAF*** 2003(2) SA @ [11] SCA.

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[1] In other words a 5% spread.
[2] In other words a 10% spread.

69. Defendant contends further that the approach followed by Farraj in respect of contingencies was a reasonable approach and complied with the legal principles relating to contingencies. Even if the Court is of opinion that somewhat different contingency deductions should have been applied, it is submitted that the approach followed by Farraj and Erasmus at that stage was sufficiently in proportion to what should have been applied that they cannot be found to have been negligent.

70. Farraj calculated that based upon Shaik's report, and Read's report (read with those of the other experts), Plaintiff's income had been affected by 10%. This might have been low in the circumstances but it is not so disparate from what this Court believes that it can be held that Farraj acted negligently. Even on the best case scenario for Plaintiff, one must take into account that from any amount awarded for loss of earning capacity must be deducted the amount Plaintiff received in the loss of support claim. If the 10 percent deduction was low, perhaps a 20 percent deduction would have been more appropriate. Thus the loss of earning capacity claim would have been R834 521,00. Plaintiff's loss of support claim would have been *nil.* She would have received slightly less than the amount settled upon.

71. In order for this Court to find that Farraj was negligent at the time it will be necessary to find that Farraj ignored facts which were raised in the expert reports as well as in Plaintiff's consultations, that Plaintiff was suffering so badly that she was contemplating leaving work and never working again. The evidence at that stage did not point to that. Even at

this stage it does not appear that Plaintiff is totally unemployable. The fact that she is in pain and still has some psychological *sequelae* does not render her unemployable and certainly did not render her totally unemployable at the time that the settlement was reached.

72. The actuarial calculation of Mr Whittaker of Algorithm Consultants and Actuaries dated 29 October 2014 is a proper calculation of Plaintiff's claims for both loss of support and loss of income on the available facts;

73. The total value of Plaintiff's loss of support / loss of earnings claims according to the calculation of Algorithm Consultants and Actuaries dated 29 October 2014 is either R596 052.00 (R19 452.00 + R576 600.00), or R835 786.00 (R19 452.00 + R816 334);

74. The acceptance of the offer of the RAF in respect of loss of support in the amount of R1 162 313.60 (including R838 804.60 allocated to Plaintiff) was a favourable settlement of Plaintiff's loss of support / loss of earnings claims and Defendant cannot be held to have been negligent in settling as it did.

75. Taking into account the evidence of the witnesses, the reports of the experts on Plaintiff's condition at the time of the settlement and the information which Plaintiff conveyed to her attorney and to the experts, it is this Court's view as at August 2011, it would not have been in the contemplation of Farraj that Plaintiff was totally unemployable, alternatively, that Plaintiff had lost 70% productivity.

76. Plaintiff's reasons for retiring from the church were not at the time the reasons she gives now. It appeared that she wanted the settlement in order to operate a franchise. However, after purchasing it and failing, I believe that it then occurred to Plaintiff that the money which she had received was insufficient for her needs, having given up the job at the church. The court also has to take into account that despite being diagnosed and suffering from a major depressive order with extended bereavement reaction and suffering from abdominal pains, Plaintiff chose not to seek conventional medical treatment and if she is still suffering from the same disorder at present it must be found that she has not exhausted all remedies in an attempt to find some sort of relief from this (see ***Allie v RAF*** QOD Vol V K3-1). According to Read her orthopaedic injuries only contributed to between 10 and 15% of her loss in productivity and it appears from Plaintiff's evidence as well as the evidence from members of the church where Plaintiff was employed that even if she did lose some productivity her salary was not affected by it.

General damages

77. Plaintiff claims that Defendant under settled in regard to the general damages for Plaintiff and Lincoln. Plaintiff claims that in terms of the medico-legal reports, Plaintiff's orthopaedic and other extensive bodily injuries, as well as the psychiatric and psychological injuries and their

sequelae, were serious. She contends that at the 1st of August 2011 they had had a profound impact on her. Accordingly, the general damages in the sum of R200 000,00 was “so inappropriately low” that it induces a sense of shock to any reasonable person. Plaintiff submits that an appropriate award would be between R650 000, 00 and R750 000, 00 in 2011.

78. The factors which need to be taken into account in regard to general damages are the following:-

    a. Plaintiff’s husband and daughter, Cayleigh, passed away as a result of the injuries sustained in the collision;
    b. Plaintiff’s husband was 37 years of age at the time and they had been married for 9 years;
    c. Her husband passed away at the scene of the collision;
    d. Cayleigh was 10 months old at the time of the collision and passed away approximately 1 month later;
    e. Plaintiff was 37 years of age at the time of the collision and 44 years of age at the time of the trial in August 2011.
    f. Plaintiff suffered physical injuries consisting of fractured ribs, a soft tissue neck injury, a soft tissue injury to her right shoulder, a clavicular fracture, haematomas to her right upper and lower leg and an abdominal injury. She was admitted to the Vereeniging medi-clinic on the date of the collision and transferred to the Milpark hospital where she remained until the 8th of July 2005.

g. Plaintiff was informed of the death of the deceased at the hospital by her pastor.

79. In addition to assessing the general damages, Farraj had to consider whether the offers made by the RAF in respect of the claims for general damages, would place Plaintiff at risk. The RAF offered R200 000,00 in respect of Plaintiff's general damages.

80. In regard to referring to other cases when considering an appropriate reward, I am aware of the judgment of ***Minister of Safety and Security v Seymour*** 2006 (6) SA 320 (SCA) where Nugent JA said the following:-

> "*The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other Courts have considered to be appropriate but they have no higher value than that....*
>
> *The dangers of relying excessively on earlier awards are well illustrated by comparing the award in [May v Union Government 1954 (3) SA 120 (N)] to the award that was made in Maphalala v Minister of Law and Order [unreported WLD of 10 February 1995]* ".... *Whether the award in May was excessive, or the award in Maphalala was niggardly, is beside the point. I use them only to illustrate that the gross disparity of the facts in each case is not reflected in the respective awards, and neither is in those circumstances a safe guide to what is appropriate.*"

81. Bearing in mind the words of Nugent JA, I will consider certain other cases simply as a useful guide to what other courts have considered to be appropriate in similar circumstances.

82. Defendant referred to various cases which it submitted would serve as a good indicator of an appropriate award for damages because of the similarity of the injuries and of the circumstances surrounding them. In the matter of ***Allie v RAF*** *(supra)* the Plaintiff sustained personal injuries in a collision in which his wife and unborn baby died. He had sustained a fracture of the C6 vertebra and his neck pain was not likely to be eradicated even though it could be managed with medication. In addition, he sustained injuries to both knees and would require surgery. He also sustained an injury to the chest which left him with occasional residual pain. An injury to the right forearm healed. The court accepted that the pain experienced by him at work had impacted adversely on his performance. In addition he witnessed his pregnant wife being flung through the windscreen and watched her bleeding to death while a policeman on the scene refused to call an ambulance until his superior arrived. Allie also suffered a major depressive disorder which the court accepted would never be completely cured and that the residual psychological impairment impacted negatively on his ability to work. He resigned from his longstanding employment and could not return as a result of the combination of the physical and psychological injuries. The Plaintiff, according to the quantum yearbook 2011 Robert J Coch, was

awarded general damages of R88 000,00 in December 2002 which adjusts to R132 000,00 at 2011.

83. There are several cases that refer to the emotional shock which is suffered by a party after becoming aware of the loss of loved ones. In ***Kritzinger & Kritzinger v RAF*** QOD Vol V K3-21, the Plaintiff was informed of a collision and discovered his two daughters had been killed when he arrived at the scene. He suffered from chronic bereavement reaction with contracted grief, chronic post-traumatic stress disorder and chronic major depressive disorder. He was awarded R150 000,00 in March 2009. The adjusted value was R166 000,00.

84. In ***Majeet v Sandton*** QOD Vol IV K3-1 the Plaintiff discovered the body of her 9 year old son lying in the road shortly after he had been struck and killed by a motor vehicle. She suffered a major depressive disorder and was awarded R35 000, 00 in May 1997 which adjusts to R79 000,00 at 2011.

85. What the above shows is that awards for emotional shock alone are relatively small. Similarly, awards in respect of abdominal injuries which do not require surgery, are also not substantial. Awards for soft tissue neck and back injuries are treated similarly.

86. A case which is also similar to that of Plaintiff (in regard to her physical injuries) is the matter of ***Daniels v RAF, Corbit & Honey*** Vol V at C3-1 where the Plaintiff was injured in a motor vehicle accident as a result of which she sustained a mild whiplash injury. Her chest was bruised with tenderness in the midline, her left hip was painful. Initially she was treated with analgesics and anti-inflammatories. Thereafter she experienced discomfort in her neck. Her doctor's assessment of the discomfort was that she suffered from a whiplash syndrome. She was subsequently boarded from work. She experienced pain in her shoulder and neck which was exacerbated by the increasing anxiety levels. She had a diminished range of movement of her neck, of flexion and extension, rotation and lateral flexion. She was diagnosed to have suffered severe psychological disorder which had become chronic. On two occasions she attempted to commit suicide as a result of her mood state; she experience episodes of panic attacks and agoraphobia. She was on anti-depression medication and was receiving psycho-therapy. In respect of general damages for the whiplash injury and the psychological *sequlea* thereof she was awarded R80 000,00 (the value of which in 2011 was R152 000,00).

87. Having regard to the authorities referred to above, it appears reasonable, and not negligent, that the Defendant accepted the sum of R200 000,00 as general damages for Plaintiff.

88. In respect of Lincoln, R70 000,00 was awarded as general damages. His physical injuries were minor and he was not hospitalised. In regard to his emotional *sequelae,* obviously the death of his father and sister had an effect on him which might have caused his tendency to misbehave. However the sum of R70 000,00 does not appear to be so inappropriate that a court would have found differently.

Conclusion

89. Defendant submitted that it properly investigated the quantum of Plaintiff's claim and the merits and considered that the settlement offer received from the fund was a reasonable offer. According to Farraj and Erasmus, they discussed these issues and also the choice between pursuing the loss of support claim, on the one hand, as opposed to the loss of earnings claim on the other. In considering the loss of earnings claim, she took into account that Read had stated that Plaintiff only suffered a loss of productivity in the order of 10 to 15 percent. She also took into account the fact that, according all to the experts, Plaintiff still had full residual earning capacity at that stage and therefore (with an applicable contingency as per Shaik) she believed that the loss of earnings claim would be minimal. It has to be remembered that as at August 2011 Plaintiff had been employed in a permanent position for approximately 5 years and that it appeared that she was fully able to continue with her work despite post-traumatic *sequelae* such as muscle spasms and emotional stress. Defendant refers to actuarial

calculations which it submitted during the trial in regard to the loss of income for Plaintiff. According to Farraj, this calculation is based on the best case scenario for Plaintiff. It takes into the account the report of Shaik, and disregarding any concessions that Shaik may have made in a meeting with Van Huysteen (who followed a far more conservative approach) yields an amount of R243 688,00 in respect of loss of income for Plaintiff. The loss of support claim for both Lincoln and Plaintiff was calculated in the amount of R342 816,00.

90. According to Farraj, when she deducted a 5 percent contingency to a accrued loss of support and 20 percent to prospective loss of support and further deducted 22 percent for remarriage as per the remarriage tables in Koch's quantum yearbook, the amount for loss of support for Plaintiff was R824 997,00 and the loss of support for Lincoln was R323 509,00. Farraj accordingly submits that even if she had instructed an actuary to apply a higher contingency deduction than the 10 percent contingency she applied in her crude calculation, the loss of earnings would still not have exceeded the R824 997,00 which she was able to settle on for Plaintiff's loss of support.

91. It is my view that Plaintiff has failed to prove causal negligence as against Defendant. Even if Defendant did not conduct itself at the highest standard of an expert personal injury lawyer, Plaintiff still has to prove that a higher award would have been obtained if Plaintiff

proceeded to trial on the loss of earnings claim. Having regard to the calculations set out above, this does not appear to be the case.

92. Plaintiff has failed to prove that, as at the date of the settlement, she was totally unemployable, nor has she proven that her productivity had decreased by 70 percent and that Defendant, being aware of this, failed to take the necessary steps.

93. Plaintiff's physical injuries, although persistent, are being dealt with through conservative medication – physiotherapy and such other medical interventions which are all covered by the certificate which Plaintiff obtained for future medical expenses. In regard to her psychological and posttraumatic condition, Plaintiff has refused conventional medical treatment and she has not shown that if she had received treatment in this regard, she would still be in the same psychological condition . It is to be borne in mind, as stated above, that Plaintiff was in fulltime employment as at August 2011 and only resigned from same once she received the settlement and decided to purchase the franchise. It has not been shown, despite the evidence of Harris and Rothman, that Plaintiff was in sympathetic employment. Whilst it might be that the employer treated her with a certain amount of consideration, it appears that she was still fulfilling her tasks and receiving her salary as before.

94. In regard to general damages Plaintiff has not shown that the amount of the settlement was startlingly inappropriate.

95. Although Claim B is not being adjudicated upon in this court, the attorney and client Bill of costs prepared by Defendant was dealt with in some detail in Farraj's testimony. She could not explain, and no-one else from Defendant was called to explain, why the amount of hours and days charged for in the attorney and client Bill were substantially higher than those reflected in the party and party bill of costs. The inference seems inescapable that the attorney and client Bill was manipulated in order to obtain a higher fee from the Plaintiff. This issue requires investigation by the Law Society.

Accordingly

1. Plaintiff's claim is dismissed with costs, including the costs of two counsel and the costs of all medico-legal reports obtained after August 2011.
2. The issue of the fees debited and the time periods charged for in Defendant's attorney and client Bill of costs is referred to the Law Society of the Northern Provinces for investigation.

WEINER J

Counsel for the Plaintiff: Adv B Ancer SC; Adv A Berkowitz

Plaintiff's Attorneys: Norman Berger & Partners Inc

Counsel for the Defendant: Adv D Mills SC; Adv F Grobler

Defendant's Attorneys: Gildenhuys Malatji Inc

Date of Hearing: 21 October 2014

Date of Judgment:10 December 2014