FORM A
FILING SHEET FOR TRANSKEI DIVISION JUDGMENT

PARTIES**:**
ATLANTA ANGELIQUE PRINSLOO **Plaintiff**
and
ROAD ACCIDENT FUND **Defendant**

1. Case Number**: 3579/06**
2. High Court**: SOUTH EASTERN CAPE LOCAL DIVISION**

DATE HEARD: **4 – 7 November 2008**

DATE DELIVERED: **18 November 2008**

JUDGE(S): **Chetty, J**

LEGAL REPRESENTATIVES –

Appearances:

2. For the Plaintiff(s): **Adv B. Pretorius**
3. for the Defendant(s): **Adv H. van der Linde S.C.**

Instructing attorneys:
Appellant(s): **Schoeman Oosthuizen**
Respondent(s): **Wilke Weiss & Van Rooyen: ref: L Jansen**

CASE INFORMATION -
Nature of proceedings: ***Civil Trial***
Topic: ***Damages***
Key Words: ***Damages – Proof of – claim for personal injuries – loss of future earning capacity – Industrial psychologist disregarding equity considerations concerning prospects for promotion in South African Police Services – whether sedentary post by implication bar to promotion***

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH EASTERN CAPE LOCAL DIVISION)

In the matter between:	**Case No: 3579/06**
ATLANTA ANGELIQUE PRINSLOO	**Plaintiff**
and	
ROAD ACCIDENT FUND	**Defendant**

Coram:	**Chetty, J**
Dates Heard:	**4 – 7 November 2008**
Date Delivered:	**18 November 2008**
Summary:	*Damages – Proof of – claim for personal injuries – loss of future earning capacity – Industrial psychologist disregarding equity considerations concerning prospects for promotion in South African Police Services – whether sedentary post by implication bar to promotion*

JUDGMENT

CHETTY, J

[1] This is an action for damages resulting from a collision in which the plaintiff, Ms *Atlanta Angelique Prinsloo* suffered soft tissue injury of the

lumbar spine during a motor vehicle collision on 11 August 2005. The parties have reached agreement on the question of liability, the defendant conceding that the driver of the insured vehicle was solely at fault in relation to the collision. On 12 March 2008, Froneman J, in an opposed application for a postponement of the trial action brought by the defendant, granted the order sought and ordered the defendant *inter alia* to make an interim payment of R4 210, 81 and to furnish the plaintiff with an undertaking in terms of s 17 (4) (a) of Act 56 of 1996[1]. The wasted costs occasioned by the postponement was ordered to stand over for determination by the trial court. I shall in due course decide that issue.

[2] At the trial before me the only outstanding issues which remained for adjudication related to the plaintiff's claim for loss of earning capacity and general damages. With regard to the former, the plaintiff, in terms of the amended particulars, claims an amount of R2, 557 289, 00, alternatively, the sum of R965 615, 00. These amounts were calculated by an actuary, *Gerard Jacobson,* using salary scales postulated in a comprehensive medico-legal report compiled by Dr *R. G. Holmes* (Dr *Holmes*) following consultations with the plaintiff and references to a wide range of sources.

[1] Road Accident Fund Act

Loss of earning capacity

[3] It is apposite therefore to commence with the plaintiff's claim under this head of damage. The pleaded case is set out as follows in the amended particulars:

> *"10.4 Estimated future loss of earnings or loss of earning capacity on the following basis:*
>
> *10.4.1 Plaintiff is presently employed as an Inspector in the SAPS on a salary package of R146 040, 00;*
>
> *10.4.2 The salary scales for inspectors, captains and superintendents are as follows:*
>
> *Inspector I*
>
> | | | |
> |---|---|---|
> | *Band B1* | *1.* | *R135021* |
> | | *2.* | *R140418* |
> | | *3.* | *R146040* |
> | | *4.* | *R151878* |
> | | *5.* | *R157953* |
> | | *6.* | *R164271* |
>
> *Inspector II*
>
> | | | |
> |---|---|---|
> | *Band B2* | *1.* | *R162279* |
> | | *2.* | *R168774* |
> | | *3.* | *R175524* |
> | | *4.* | *R182544* |

	5.	*R189843*
	6.	*R197439*

Captain

Band C	*1.*	*R170844*
	2.	*R177675*
	3.	*R184785*
	4.	*R192177*
	5.	*R199866*
	6.	*R207861*

Superintendent

Band D	*7.*	*R216174*
	8.	*R224820*
	9.	*R233811*
	10.	*R243162*
	11.	*R252888*
	12.	*R263004*

10.4.3 Pre-accident the Plaintiff would have been promoted to captain in 2014 and to superintendent in 2019;

10.4.4 *If the Plaintiff is not accommodated in a sedentary post, in an ergonomically friendly environment where she performs only office*

work or is required to attend any physical courses or training sessions, she would be forced into early retirement;

10.4.5 *The Actuary Gerard Jacobson calculated her loss of earnings on early retirement or being boarded on medical reasons, at age 43, 48 and 53 as appears from the medico-legal report dated 17 October 2008 annexed hereto and marked as Annexure "AAP3" and the loss if retired at age 43 would be R2 557 289, 00;*

ALTERNATIVELY TO PARAGRAPHS 10.4.1 TO 10.4.5;

10.4.6 On the same assumptions as is set out hereinabove in paragraphs 10.4.1 to 10.4.3 above;

10.4.7 Plaintiff is placed in a suitable environment and in a suitable office and continues to work until age of 60;

10.4.8 *Due to Plaintiff's loss of promotion prospects, she is not post-accident promoted at all and remains at the level of an inspector;*

10.4.9 *The Actuary Gerard Jacobson calculated the Plaintiff's loss in a report dated 5th of November 2008 annexed hereto as Annexure "AAP4" in the amount of R965 615, 00;*

10.4.10 *On the same assumptions as set out hereinabove in paragraphs 10.4.6 and 10.4.7 above but post-accident the Plaintiff is promoted to captain at age 50, the Actuary calculated the Plaintiff's loss as R762 330, 00 as appears from Annexure "AAP4" hereto."*

(emphasis added)

[4] The legal position relating to a claim for diminished earning capacity is trite. In **Sanlam Versekerings Maatskappy v Byleveldt**[2] Rumpff JA, states the principle as follows:[3]

"In 'n saak soos die onderhawige word daar namens die benadeelde skadevergoeding geëis en skade beteken die verskil tussen die vermoënsposisie van die benadeelde vóór die onregmatige daad en daarna. Kyk bv., Union Government v. Warneke 1911 A.D. 657 op bl. 665, en die bekende omskrywing deur Mommsen Beiträge sum Obligationenrecht, band 2, bl. 3. Skade is die ongunstige verskil wat deur die onregmatige daad ontstaan het. Die vermoënsvermindering moet wees ten opsigte van iets wat op geld waardeerbaar is en sou insluit die vermindering veroorsaak deur 'n besering as gevolg waarvan die benadeelde nie meer enige inkomste kan verdien nie of

[2] 1973 (2) SA 146 (A)
[3] at p. 150B-D

> *alleen maar 'n laer inkomste verdien. Die verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik gemeet aan die standard van verwagte inkomste, is 'n verlies van geskiktheid en nie 'n verlies van inkomste nie."*

In similar vein, in **Dippenaar v Shield Insurance Co Ltd**[4], the same learned judge articulated the principle in the following terms:[5]

> *"In our law, under the lex Aquilia, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss if such loss diminishes the estate. This was the approach in Union Government (Minister of Railways and Harbours) v Warneke 1911 AD 657 at 665 where the following appears:*
>
> *"In later Roman law property came to mean the universitas of the plaintiff's rights and duties, and the object of the action was to recover the difference between the universitas as it was after the act of damage and as it would have been if the act had not been committed (Greuber at 269). Any element of attachment or affection for the thing damaged was rigorously excluded. And this principle was fully recognised by the law of Holland.*

[4] 1979 (2) SA 904 (A)
[5] at p.. 917B-D

See also Union and National Insurance Co Ltd v Coetzee 1970 (1) SA 295 (A) where damages were claimed and allowed by reason of impairment of loss of earning capacity."

[5] A person's all round capacity to earn money consists *inter alia*, of an individual's talents, skill including his/her present position and plans for the future and of course external factors over which a person has no control for instance, in *casu*, considerations of equity. A court has to construct and compare two hypothetical models of the plaintiff's earnings after the date on which he/she sustained the injury. In *casu*, the court must calculate on the one hand, the total present monetary value of all that the plaintiff would have been capable of bringing into her patrimony had she not been injured, and, on the other, the total present monetary value of all that the plaintiff would be able to bring into her patrimony whilst handicapped by her injury. When the two hypothetical totals have been compared, the shortfall in value (if any) is the extent of the patrimonial loss. That loss is, as adumbrated hereinbefore, calculated by the actuary on scenarios postulated by Dr *Holmes*.

[6] At the same time the evidence may establish that an injury may in fact have no appreciable effect on earning capacity, in which event the damage under this head would be nil. This is precisely what the

defendant contends. In order to determine therefore whether, as a result of the injury sustained, the plaintiff's earning capacity has been compromised the evidence adduced needs to be considered and evaluated in order to decide whether the onus has been discharged. As alluded to earlier, the plaintiff relies primarily on the evidence of Dr *Holmes* and to a lesser extent that of Ms *Corrie De Witt* (Ms *De Witt*), an occupational therapist and, besides herself, two other witnesses, Superintendent *Elma Rautenbach (Rautenbach)* and Ms *Madeleine Benade (Benade)*.

[7] Dr *Holmes* and Ms *De Witt* are undoubted experts in their respective fields of expertise and frequently testify in these courts. That they are both eminently qualified is beyond question. A court's approach to expert testimony was succinctly formulated in **Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another**[6] where the court stated[7]:-

> *"[36] . . . what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. That is the thrust of the decision of the House of Lords in the medical negligence case of Bolitho v City and Hackney Health Authority [1998] AC 232 (HL (E)). With the relevant*

[6] 2001 (3) SA 1188 (SCA)
[7] At p. 1200 para [36]; [37] and [40]

dicta in the speech of Lord Browne-Wilkinson we respectfully agree. Summarised, they are to the following effect.

[37] The Court is not bound to absolve a defendant from liability for allegedly negligent medical treatment or diagnosis just because evidence of expert opinion, albeit genuinely held, is that the treatment or diagnosis in issue accorded with sound medical practice. The Court must be satisfied that such opinion has a logical basis, in other words, that the expert has considered comparative risks and benefits and has reached 'a defensible conclusion' (at 241G-242B). . . .

[40] Finally, it must be borne in mind that expert scientific witnesses do tend to assess likelihood in terms of scientific certainty. Some of the witnesses in this case had to be diverted from doing so and were invited to express prospects of an event's occurrence, as far as they possibly could, in terms of more practical assistance to the forensic assessment of probability, for example, as a greater or lesser than fifty per cent chance and so on. This essential difference between the scientific and the judicial measure of proof was aptly highlighted by the House of Lords in the Scottish case of Dingly v The Chief Constable, Strathclyde Police 200 SC (HL) 77 and the warning given at 89D-E that

'(o)ne cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a Judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved – instead of assessing, as a Judge must do, where the balance of probabilities lies on a review of the whole of the evidence."

(emphasis added)

[8] Before I turn to deal with the evidence of Dr *Holmes* it is crucial to refer to the agreement reached by the medical experts. At the commencement of the trial and by reason of a divergence of opinion between Dr *R.J Keeley*, a neurosurgeon whom the plaintiff intended to call as a witness and the defendant's expert Dr *H.J de Jonge*, an orthopaedic surgeon, I directed that the aforesaid persons meet to resolve their differences. Arising therefrom three separate written agreements were handed in as exhibits "B1"; "B2" and "B3" of which the relevant portions read as follows:

B1

"Dr RJ Keeley and Dr HJ De Jonge agree that Mrs Atlanta Prinsloo would work until normal retirement age with the

provision that she is promoted to only office work, accommodated in an ergonomical friendly environment and never is required to attend any physical courses or training sessions.

We also agree that the injury on duty 22nd December 1997 is a cervical injury (neck) what was fully recovered in 1999."

B2

"In further discussions between Dr HJ De Jonge and DR RJ Keeley we agree that the result of radio frequency facet joint rhizotomy can not be guaranteed to its efficiency or the duration of the intended pain relief."

and

B3

"1. Ms Prinsloo would be ill-advised to continue working in her present physically demanding situation in the SAPS. This will hasten the progressing deterioration in the condition of her lower back. Therefore we advise a sedentary type of work forthwith.

2. We agree that her further treatment should commence immediately. This will include

(a) steroid (cortisone) and local analgesic fasette joint blocks at levels L4/L5 and L5/S1. relief will be short duration – possibly one month;

(b) radiofrequency rhizotomy of the L4/5 and L5/S1 fasette joints. Relief is expected for 18 months or longer. This may be replaced twice. Probability of pain relief is at least 80%;

(c) diagnostic discography – if this reproduces her pain then discectomy and disc replacement will be advised. This procedure can give her an 80% significant relief of pain."

[9] It appears to be accepted by all the parties that the plaintiff will henceforth have to be accommodated in a sedentary type of work. Captain *Wagg*, the plaintiff's immediate superior (whose evidence I will examine in greater detail later) gave the assurance that effect will be given to the expert opinion of the doctors. I have no reason to doubt such assurance. The evidence adduced on behalf of the plaintiff to prove the pleaded case rested primarily on the evidence of Dr *Holmes*. The essence of Dr Holmes' evidence, foreshadowed in his medico-legal report ,is that in her post-accident condition the plaintiff was unlikely to advance beyond the level of inspector within the South African Police Services; would also not be considered for active duty in the broader private security services sector and was likely, as a member of the South African Police Services to suffer a significant truncation of her

normal working life by either voluntarily electing to take early retirement or being compelled to do so by reason of her ill health.

[10] In his testimony he reaffirmed that notwithstanding the plaintiff's placement in a sedentary position whatever prospects the plaintiff may have enjoyed for promotion were substantially reduced if not entirely negated. That conclusion was based to an appreciable degree on the type of work the plaintiff previously did compared to the present sedentary role proposed by the medical experts.

[11] The plaintiff provided Dr *Holmes* with full details of her work situation prior to the injury. In her evidence she expanded thereon. She was born on the 14th December 1974. From a young age she was desirous of becoming a police woman. Thus when she matriculated in 1992, she joined the South African Police Services in 1993 and enrolled at the Hammanskraal training institute. After completion of her initial training she applied for the post of a physical training instructor at Hammanskraal and served in such position from 1993 to 1995. She then applied for a transfer to the Walmer police station in Port Elizabeth and was appointed a sergeant shortly before being stationed there. She discharged duties in the charge office and on the beat in divers situations, including crime prevention, investigations and patrol duties. She then applied for a posting to the crime unit and the physical aspect of her duties encompassed, *inter alia,* foot patrols, the

investigation of crime and the apprehension of suspects. In 1998 she was appointed an inspector, and during 2001 to 2004 she had the added responsibility of a shift commander.

[12] In 2005 she became a field training officer and although the exact parameters of her duties were never canvassed it appears that in addition to the theoretical knowledge which she imparted to her students, she also at times drilled with them and took them to observe crime scenes. The general tenor of her evidence was however, that she was a training officer and as such kept herself in peak physical condition not only because of her work demands but moreover, because she generally enjoyed the outdoors to such an extent that she played competitive sport and was an avid runner and cyclist. After the accident she joined the organised crime/drug task team but returned to her previous position as field training officer in 2007.

[13] Given the plaintiff's avowed love of the outdoors, her penchant for physically demanding activities and what Dr *Holmes* considered to be the rigours associated with her job as a field training officer, he opined that a sedentary working environment would cause her untold emotional trauma to the extent that she would become psychologically affected. Stagnation would set in and she would not flourish as she had hitherto done. Consequently and as a result of her not being able

to function optimally she would be forced into early retirement by a combination of psychological trauma and frustration.

[14] He expressed the view that as a result of the flair with which she accomplished her tasks her pre-accident employment prospects were such that *"disregarding the structural, procedural and ethnic considerations relevant to her position as a police officer in the South African Police Services, Ms Prinsloo should not have experienced any difficulty in proceeding to the rank of captain or even superintendent, in the medium-longer term. Importantly too, Ms Prinsloo would also have had a market value beyond the confines of the South African Police Services. She could have, like many other police officers, elected to travel abroad and to seek work opportunities in any number of the police services operating in countries such as the United Kingdom, Australia, New Zealand, United States of America and Canada.*

Ms Prinsloo would also have been well placed to seek alternative employment in the broader security services industry – either locally or abroad. Given her police record, level of expertise and experience gained as a police officer, entry to the security services sector at a supervisory level would not have been difficult – particularly in a country that is inadequately equipped and poorly resourced to cope with such high levels of crime as is now evident in South Africa (personal communication, Captain Bradley, 23 September 2008).

Had Ms Prinsloo not been promoted to a higher rank as a police officer in the South African Police Services, it is very likely that she would have sought to advance her career beyond the state organ.

Assuming continued good health and given the necessary job opportunities, Ms Prinsloo is likely to have enjoyed meaningful and rewarding growth in her career – either as a member of the South African Police Services or elsewhere on the open labour market (locally or internationally).”

[15] The aforegoing assumptions provided the basis for the actuary calculating the plaintiff’s pre-accident loss of earnings as set out in paragraph [3] hereinbefore. The reasoning underlying Dr *Holmes’* assumptions is in my view fallacious. It would be illogical to disregard those factors enumerated by him viz. “*the structural procedural and ethnic considerations”* in determining the plaintiff’s pre-morbid earning capacity. It is in this context that Captain *Wagg’s* evidence assumes critical importance. She stated that at present there is a surfeit of white female police officers within the hierarchy of the South African Police Services in the Eastern Cape. She herself, a white female, has occupied her present position as a captain for the past 16 years and it is clear from her evidence that equity plays an important role in career advancement prospects within the South African Police Services. In a nascent democracy such as ours it cannot be otherwise. In order to redress and repair past discrimination practices policies to benefit individuals previously unfairly discriminated against on the basis of race, are entirely permissible if not constitutionally enjoined. It is a matter of historical record that in our iniquitous past, race played a dominant role in almost every sphere of the civil service.

[16] Captain Wagg's uncontroverted evidence that prospects for promotion for white female police officers are, for the present at least, negligible, is completely at variance with Dr Holmes' assumptions that the plaintiff would have risen to the ranks postulated by him. During his cross-examination of Captain *Wagg*, Mr *Pretorius*, whilst conceding that there may be such a surplus in the Eastern Cape, suggested that a similar situation may not prevail elsewhere in the country. The plaintiff has indicated a willingness to be stationed elsewhere in the Republic and there may no impediments to her prospects for advancement. The suggestion is speculative in the extreme. There is no rational reason why similar situations should not prevail elsewhere. In my judgment, Dr *Holmes'* disregard for highly relevant considerations when determining the plaintiff's pre-accident employment prospects, is illogical. Consequently, the calculations made by the actuary are premised on false assumptions and cannot be sustained. The mere fact that Superintendent *Rautenbach (Rautenbach)* had a meteoric progression through the ranks and became a captain at the age of 29 and a superintendent at the age of 34, is not a pointer to the plaintiff's possible employment advancement. It would be wholly improper to chart the plaintiff's employment path using *Rautenbach* as an example. This is in effect what the plaintiff sought to achieve by calling *Rautenbach* as a witness and what Dr *Holmes* did when he provided the actuary with this projected career path for the plaintiff.

[17] Furthermore, I have grave reservations concerning Dr *Holmes'* opinion that pre-accident the plaintiff was likely to have enjoyed "meaningful and rewarding growth" in the open labour market, locally and internationally. It is unsupported by any other evidence and the plaintiff herself never adverted to considering employment in foreign police services or the open labour market whether locally or abroad.

[18] Dr *Holmes* expressed the opinion in his report that post-accident *"whatever prospects Ms Prinsloo may have enjoyed for promotion to the rank of captain, and, therefore, superintendent, would now be very reduced if not negated".* Ergo, he concluded that the plaintiff was unlikely to proceed beyond the level of inspector and was likely to suffer emotional trauma, become frustrated in her normal working life and, as a result, be compelled to opt for early retirement. During his testimony Dr *Holmes* laid stress on the fact that given the plaintiff's penchant for the physical demands of her job, the growing realisation that she could no longer do so, would cause her such frustration that she would no longer be able to perform optimally and would gradually lose interest to such an extent that she would virtually give up.

[19] This conclusion is in my view untenable. The impression I gained is that the plaintiff, notwithstanding the injury, has not allowed it to

impact on her performance. She admittedly has some difficulties for instance in driving for long distances or standing for prolonged periods but these aside, she never adverted to the fact that she was not coping. In fact when regard is had to her performance plan, (exhibit "F") compiled and scored by her, it shows, unequivocally that the plaintiff consistently excels in her work situation. The results of the performance plan are inconsistent not only with Dr *Holmes'* findings but with the plaintiff's evidence regarding her present work performance.

[20] Dr *Holmes'* further conclusion that the plaintiff's promotion prospects in work of a sedentary nature are virtually nonexistent has no proper factual foundation. The plaintiff's performance plan (exhibit "F") describes the purpose of the post of a field training officer as being "*to provide, guide, mentor and role model and be responsible for the training, development and assessment of the trainees and reservists at station level."* During her testimony the plaintiff gave details of the type of work she was engaged in but at no stage did she pertinently raise the issue that it was required of her to perform physically exacting tasks. She did so of her own volition. Captain *Wagg* described the nature of the work a field training officer entailed. The import of her evidence was that it was largely sedentary in nature, the physical aspects being handled by various instructors. Captain *Wagg's* evidence that progression through the ranks of the South African Police Services results in a conversion to

work of a sedentary nature and that it gradually becomes less physical is entirely convincing. There is nothing to counter such evidence. There is therefore no rational basis to suggest, as Dr *Holmes* does, that there is less likelihood of promotion in work of a sedentary nature.

[21] The evidence of Ms *De Witt* does not in any manner advance the plaintiff's claim under this head of damage. Her report and the evidence adduced by her is primarily concerned with the plaintiff's ability to cope given the pain she admittedly endures. The agreement reached by the medical experts suggests that the envisaged treatment would result in an 80 % significant reduction of pain. Working in an ergonomically friendly environment, would also prove beneficial. Consequently her conclusion that the plaintiff's "*work abilities has also been severely compromised*" can no longer be sustained. It is regrettable to say the least, that despite being referred to the medical experts' agreement she steadfastly defended her conclusion.

[22] In my judgment therefore I remain unpersuaded that the plaintiff has discharged the onus resting upon her to show that her earning capacity has been compromised by her injury. No award can consequently be made under this head.

General damages

[23] Under this head of damage the plaintiff claims a sum of R200 000, 00 for pain and suffering, permanent disability and the loss of amenities of life. Dr *Keeley* assessed her disability at about 12 % and increasing slowly. As far as the pain and suffering is concerned there is no doubt that the plaintiff has since the accident endured severe pain for several years. During the latter stages of the trial she was hospitalized for procedures to alleviate her pain. Her loss of amenities of life has likewise been enormous. Her entire life has been spent in pursuit of physical perfection. Her love for the outdoors, reflected in her sporting endeavours has been drastically curtailed. The only pastime now available to her, albeit in a significantly reduced form, is cycling, the rest denied her as a result of the injury suffered. Counsel have referred me to a number of authorities dealing with awards and whilst these have proved useful for comparative analysis each case must be decided on its peculiar set of facts. Plaintiff's counsel has submitted that an award in the region of R170 000, 00 would be fair in the circumstances whilst defendant's counsel has urged me not to award an amount in excess of R80 000, 00. As alluded to earlier, the plaintiff has endured severe pain for several years now. Subsequent procedures will hopefully alleviate its intensity but, as the doctors have confirmed, not completely obliterate it. The loss of amenities is profound given the plaintiff's lifestyle. It would only be fair to award the plaintiff an amount of R120 000, 00 under this head.

[24] There are two further matters remaining, the first the reasons for refusing the plaintiff's application to reopen her case and lead further evidence, the second a decision concerning the wasted costs order.

The application to reopen the plaintiff's case

[25] The only witness called on behalf of the defendant was the plaintiff's immediate superior officer, Captain *Wagg*. During her testimony in chief, Mr *van der Linde* referred her to exhibits "F" and "G", the plaintiff's performance plan and a document styled "Job Description", respectively. These documents were handed in as part of the plaintiff's case. Dr Holmes was referred to various portions thereof. Section D of exhibit "G" under the rubric "Job Description Agreement", contains the signature of the plaintiff and her training supervisor, one Captain *Bradley*. Exhibit "G" proclaims the purpose of the post of a field training officer to be "*To provide, guide, mentor and role model and be responsible for the training, development and assessment of the trainees and reservists at station level.*" It then specifies the key performance areas to be:

> *"1. Implement Field Training at Station/Unit level in consultation with the Station Commissioner, Field Training Supervisor and Field Training Manager.*

4. *Train, monitor, evaluate the trainees performance and provide feedback.*
5. *Conduct assessment of trainees in accordance with guidelines for the implementation of assessment of the Field Training Learning Programme.*
6. *Complete administrative tasks."*

[26] During her testimony Captain *Wagg* was invited to comment on the plaintiff's evidence that her role as a field training officer was a physically demanding one. She responded by taking issue with the plaintiff's evidence and referred to exhibit "G" which supported her testimony. She conceded that the plaintiff may, during her training programs have performed physical manoeuvres, but that these were the prerogative of the instructors in the various facets of a trainees training schedule.

[27] Mr *Pretorius* submitted that he consciously omitted to lead the plaintiff fully on the exact ambit of her role as a field training officer by reason of the agreement reached by Drs *Keeley* and d*e Jonge*. I am at a complete loss to understand why such an agreement, which in essence cautions against the plaintiff's future involvement in physical training exercises, could have curtailed the ambit of the evidence tendered by the plaintiff. She fully explained the nature of her duties and, as

alluded to earlier in this judgment, the plaintiff did not adopt a mere passive role in her training programs but of her own accord sometimes performed physical training. No reasonably sufficient explanation was tendered why further evidence, to prove that she was required to perform physically demanding training manoeuvres, was not led during the plaintiff's case. For the reasons set out hereinabove I refused the application to reopen the plaintiff's case to enable inspector *Ferreira* to adduce evidence as to the manner in which he conducts his field training. Given the plaintiff's testimony his evidence would in any event be entirely irrelevant.

The wasted costs

[28] The trial action between the parties was initially set down on 12 March 2008. At the rule 37 conference held on 6 February 2008, the defendant conceded the merits and undertook to provide the plaintiff with an undertaking in terms of s 17 (4) (a) of the Act. The parties were agreed that as regard the quantum of the plaintiff's damages, only two issues remained in dispute *viz*. the claim for future loss of earning capacity and general damages. The minute records that the defendant alerted the plaintiff of its intention to possibly seek a postponement of the action in order to obtain expert reports from an orthopaedic surgeon, a neurosurgeon and an industrial psychologist by reason of an anticipated amendment by the plaintiff to substantially

increase the claim for future loss of earning capacity. The claim was eventually increased from the existing R50 000, 00 to R1587 037, 20 (during the trial it was further increased).

[29] Although the amendment was only effected on 20 February 2008, the defendant knew of its exact parameters at the conference on 6 February 2008. Thus, when the defendant indicated its intention to obtain further medico-legal reports the minute reflects the following:

> *"The Plaintiff invited the Defendant to obtain the reports and to conduct the further investigations as the matter is only set down for hearing on the 12th of March 2008 and further indicated that Dr Keeley mentions in his report that he does not think that further medical reports or independent collateral information is needed.*
>
> *The Defendant indicated that it does not believe that it will be able to obtain the further expert reports timeously.*
>
> *The Plaintiff indicated that it is in the process of obtaining an actuarial report from Mr Jacobson, an actuary, but that it does not appear that the Plaintiff's loss of income can be mathematically calculated and that the Plaintiff will probably need to claim for a loss of earning capacity."*

[30] A week later defendant's attorneys formally sought the plaintiff's consent to the action being postponed suggesting that the costs of the

postponement be costs in the cause. In response the plaintiff's attorneys objected to the postponement contending that the plaintiff would for a variety of reasons be severely prejudiced. The upshot of this exchange of correspondence was that on 12 March 2008 the trial judge was confronted with an opposed application for a postponement of the action and a counter application. After hearing argument the learned judge postponed the matter and made several orders including one reserving the wasted costs occasioned by the postponement for decision by the trial court. No order was made concerning the costs of the opposed application for a postponement or the counter application. It now appears that the parties are agreed that those are for the parties' own account.

[31] The main ground advanced by the defendant necessitating a postponement of the matter was notice of the amendment substantially increasing the claim for future loss of earning capacity. The defendant's attorney, who deposed to the founding affidavit in support of the application, alleged that ex facie the particulars of claim the plaintiff had not hitherto relied "on any early retirement in her claim for future loss of earnings". The plaintiff's back injury, he stated, was bona fide perceived to be not serious and it was only when Dr *Keeley's* report was served on 5 December 2007 that the defendant first became aware of the possibility of the plaintiff's premature

retirement. Under the rubric "Employability", Dr Keeley expressed the view that:

> *"she has been working since the time of her injury and continues to work. This being a degenerative condition, her backache is going to slowly increase causing further physical limitation and forcing her into a quieter more clerical situation. This will carry with it the probability of a more restricted chance of promotion and the accompanying increase in salary and subsequently, pension increments.*
> *The fact is that she was involved in an accident and the apportionment to be levied on the accident in her general situation has been suggested."*

[32] Even then there was no inkling of any possible increase in the amount claimed in respect of future loss of earning capacity. I am unable to hold that by virtue of the revelations in Dr *Keeley's* report the defendant was obliged to consult expert witnesses to investigate whether in fact the plaintiff would be forced into early retirement. The claim remained the same and the defendant cannot be faulted if it chose to accept that what was claimed was the extent of the plaintiff's loss of future earning capacity. Moreover after Dr *Keeley's* report was served on the defendant the plaintiff did nothing for a further two months. It appears from the Rule 37 minute that it was only on the day preceding the conference that notice of the amendment was

served on the defendant's attorney. By then the trial date was looming-less than 30 working days remained. Can the defendant thus be faulted by complaining that wholly insufficient time existed for it to respond properly to the belated significant amendment? I think not.

[33] An applicant who applies for a postponement seeks an indulgence and is required to provide reasons of substance. The reasons advanced by the defendant's attorney are such as would ordinarily justify the grant of such an application. The plaintiff's opposition was obstructionist, without merit and whatever the prejudice, of its own making. In such circumstances it would be iniquitous if the plaintiff was not ordered to be mulcted with the wasted costs.

[34] In the result therefore the following orders will issue:

3. The plaintiff's claim for damages for loss of future earning capacity is dismissed.
4. In respect of general damages the plaintiff is awarded the sum of R120 000, 00.
5. The defendant is ordered to pay the plaintiff's costs of suit including the qualifying expenses of Drs *Holmes*, *Keeley*, *Joubert*, *Jacobson* and Mrs *De Witt*.
6. The plaintiff is ordered to pay the wasted costs occasioned by the postponement.

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D. CHETTY
JUDGE OF THE HIGH COURT

Obo the Plaintiff: **Adv B. Pretorius**

(Instructed by Schoeman Oosthuizen)

Obo the Defendant: **Adv H. van der Linde S.C.**

(Instructed by Wilke Weiss & Van Rooyen: ref: L Jansen)