

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

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

**13 January 2025**

Case No:9083/2021

In the matter between:

**ADV Y ISAACS N.O OBO SIPHOKUHLA JENNIFER YANTOLO** Plaintiff

and

**THE ROAD ACCIDENT FUND** Defendant

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**JUDGMENT**

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**SK HASSIM J**

**Introduction**

[1] The plaintiff sues in her capacity as *curatrix ad litem* to Siphokuhle Jennifer Yantolo (hereinafter referred to as “the plaintiff”) an adult female born on 12 June 1997. On 6 January 2019, Ms Yantolo was struck by an unidentified motor vehicle while walking on a pavement. She was 21. She was admitted to Helderberg hospital on 6 January 2019 and transferred to Tygerberg hospital on 7 January 2019.

**Common Cause Issues**

[2] The defendant has conceded that it is liable to pay to the plaintiff 90% of her proven damages. It has also conceded that it is liable to pay general damages due to the

pelvic fracture, sciatic nerve injury and the undisplaced fracture of the right superior pubic ramus.

### **The experts**

[3] The plaintiff delivered reports from the following experts who have confirmed the contents of their reports in an affidavit:

- (a) Neurosurgeon: Dr Z Domingo;
- (b) Psychiatrist, Dr T Sutherland;
- (c) Orthopaedic Surgeon, Dr J Sagor;
- (d) Dr D Ogilvy, Speech and Language Therapist;
- (e) Neuro Psychologist, R de Witt;
- (f) Occupational Therapist; M le Roux;
- (g) Industrial Psychologist, K Kotze; and
- (h) Actuary, Munro Consulting.

[4] The defendant did not deliver any expert reports.

[5] The defendant does not dispute that the plaintiff will require future medical treatment. The plaintiff does not persist in her claim for past medical expenses. During argument the plaintiff did not resist the defendant's suggestion that a deduction for contingencies of 10% should be applied to the plaintiff's uninjured past earnings as opposed to 5% suggested by the plaintiff. The parties agree that a deduction of 15% should be applied to the plaintiff's uninjured future earnings. They also agree that the plaintiff's injured past loss is R8 300.00 and a deduction for contingencies is not necessary.

### **The disputes**

[6] Two issues remain. The one whether the plaintiff is employable, and if so, what her future injured earnings would be and what deduction for contingencies should be applied thereto. The other is a fair and reasonable award for general damages.

[7] The plaintiff applied in terms of rule 38(2) that the expert evidence adduced on behalf of the plaintiff be given on affidavit. The defendant did not oppose the application, and I granted it. Although the defendant has no expert evidence of its own, it disputes some of the facts and opinions expressed by the plaintiff's experts. In view of the election not to present expert evidence or cross examine the plaintiff's witnesses I am constrained to accept the correctness of the facts reported to the experts and the opinions expressed by the experts in the absence of countervailing evidence unless I reject the correctness of the facts or the expert's reasoning <sup>1</sup>.

### **The injuries**

[8] According to the EMS ambulance record the collision occurred at 19h04 on 6 January 2019. The paramedics arrived at the scene at 19h13. At 19h37 the plaintiff's GCS score was 15/15 <sup>2</sup> and she was orientated. <sup>3</sup> The plaintiff was admitted to Helderberg ("Helderburg") Hospital at 20h01. <sup>4</sup> She was transferred to Tyberburg Hospital ("Tyberberg") where her GCS score on admission to the trauma unit <sup>5</sup> is recorded as 15/15, and she was orientated. <sup>6</sup> Tyberberg's admission record notes a head injury and bruising on the left shoulder and lower limbs. <sup>7</sup> An X-Ray revealed pelvic fractures. The plaintiff was discharged from hospital on 23 January 2019.

### **The orthopaedic injuries: Dr Sagor, the orthopaedic surgeon's evidence**

[9] The Orthopaedic Surgeon, Dr Sagor's first assessment of the plaintiff occurred on 21 September 2021. He synthesised the injuries and, the treatment administered in hospital. He noted that the plaintiff suffered fractures of the pelvis involving mainly the left hemi pelvis. There was a lateral compression fracture with a mild vertical shear of the left hemi pelvis. There was an associated and secondary sciatic nerve injury. The CT scans of the brain and spine were normal as well as a CT cystogram.

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<sup>1</sup> Bee v Road Accident Fund 2018 (4) S A 366 (SCA) at paragraph 22.

<sup>2</sup> CL 034-9

<sup>3</sup> CL044-25.

<sup>4</sup> CL 034-15; CL 044-25.

<sup>5</sup> On 7 January 2019 at around 2h30. CL 034-34.

<sup>6</sup> CL034-15

<sup>7</sup> CL 034-45

[10] Open reduction and internal fixation of the pelvis was performed at Tygerberg hospital on 14 January 2019.

[11] According to Dr Sagor most of the plaintiff's symptoms in hospital were due to a left foot drop and loss of sensation on the dorsum of the foot. The left sciatic nerve symptoms which were noted pre-operatively and were present post-operatively, will be ongoing. The radiological assessment of the pelvis performed on 9 September 2021 showed a deformity of the pelvic inlet due to a minimal residual vertical displacement of the left hemi pelvis.

[12] The plaintiff complained that she found it difficult to stand for long periods because of left lower limb discomfort, there was weakness in the left leg when walking distances and she could not run properly, she had a feeling of having lost mobility of the left ankle and toes. She also experienced bladder urgency.

[13] The plaintiff was not in distress or discomfort during the clinical examination by Dr Sagor. The contour of the lumbar spine was found to be normal, and had good movement, the pelvis was normal when standing upright and there were no symptoms on compression of the pelvis. There was a 15° loss of external rotation and a 15° loss of abduction on the left side of the hip compared to the right side. The straight leg raising was 90° bilaterally. There was a slight decreased sensation on the dorsum of the left foot. The drop foot had recovered when Dr Sagor examined the plaintiff, and the motor function of the ankle and foot was normal. The associated left sciatic nerve injury that had been causing damage to the left peroneal nerve and which affected mainly the left foot function had virtually resolved. The plaintiff's gait was normal and, she was able to stand on the tips of the toes and, go down onto her haunches. There were residual symptoms of discomfort in the left lower limb when the plaintiff was active. Dr Sagor was hopeful that the discomfort would abate in due course. However, it was speculative whether the physical limitations due to the plaintiff's left lower limb symptoms would abate completely in time to come. While the plaintiff had initially been taking analgesics regularly, she was taking them now only as needed.

[14] Dr Sagor concluded that while the plaintiff had initially lost various amenities of life, was disabled, and was functionally impaired for some time, the symptoms had largely abated. There was however ongoing discomfort in the lower limbs.

[15] He opined that while the plaintiff could permanently not do heavy manual work, or activities that required climbing ladders and stairs repetitively, or sitting in uncomfortable situations, she should be able to do sedentary or semi-sedentary work in the future.

[16] Dr Sagor assessed the plaintiff for the second time on 17 April 2024 and prepared an addendum to his earlier report. The plaintiff complained of episodic pain in the left leg and that she was not able to run, experienced pain in the left lower limb and lower lumbar spine on walking rapidly or for more than 10 minutes, and lower leg discomfort during inclement weather when walking long distances. These symptoms radiated to the left foot. The plaintiff also complained of a loss of mobility and agility, episodic urinary incontinence and occasional occipital headaches which tended to radiate to the left parietal region. Additionally, she complained of some cognitive symptoms.

[17] Dr Sagor found the pelvis to be asymptomatic on compression and the hip joints had normal movement. The plaintiff had a normal straight leg raising bilaterally. There was however decreased L5/S1 sensation in the lower limb. Motor function was intact. The plaintiff walked with a normal gait and could stand on tip toe. There was no residual footdrop. Even though the previous footdrop had resolved, the pain was ongoing. The plaintiff experienced slight discomfort going down on her haunches. Though the true leg lengths were equal, there was a slight left leg shortening between 1cm-2cm as a result of the displaced left hemi-pelvis. He recommended a shoe raise on the left side. The lumbar spine injury required ongoing symptomatic treatment, and the left sciatic nerve injury supportive treatment.

[18] In his view, the plaintiff remained disabled and functionally impaired mainly due to the effects of the pelvic and associated left sciatic nerve injuries.

[19] When the two reports are considered in conjunction there has been an improvement, not a deterioration, in the plaintiff's condition. In the first report Dr Sagor opined that even though the plaintiff permanently could not do heavy manual work or

activities requiring climbing ladders or stairs repetitively or sitting in uncomfortable positions, she remained employable until retirement age. However, in the addendum to the report, he states that due to the plaintiff's level of education and being totally reliant on performing physical work, he envisaged her being unemployable in the future.

[20] However, the plaintiff's level of education must have been known to Dr Sagor when he assessed the plaintiff on 21 September 2021. He must also have known that the plaintiff was reliant on her ability to do physical work. There is no explanation why the prognosis changed from employable until retirement age if she did not perform heavy manual work or activities requiring climbing stairs or a ladder repetitively or sitting in uncomfortable positions to being unemployable in the future because she was reliant on her ability to perform physical work. This especially in view of the improvement in the plaintiff's condition. In the absence of an explanation by Dr Sagor, I cannot find that on Dr Sagor's evidence the plaintiff is unemployable.

### **The traumatic brain injury**

[21] All the plaintiff's experts hold the view that the plaintiff's neurocognitive impairments and behavioural deficits are the result of a traumatic brain injury.

### **The traumatic brain injury: Dr Domingo, the neuro-surgeon's evidence**

[22] Dr Domingo, the neurosurgeon examined the plaintiff on 18 July 2022. On an examination of the central nervous system Dr Domingo found no neurological deficits, there was no evidence of "any macroscopic structural brain injury" on the CT scan and the plaintiff had no focal neurological deficits as a consequence of the "brain injury".

[23] According to him the plaintiff suffered a traumatic brain injury resulting in mild cognitive deficits. This opinion forms the basis for the other experts' claim that the plaintiff suffered a traumatic brain injury.

[24] According to Dr Domingo the plaintiff was assessed at the hospital of having sustained a traumatic brain injury. This fact is the foundation for his opinion that the plaintiff sustained a traumatic brain injury. In paragraph 1.5.1 of his report <sup>8</sup>Dr Domingo states-

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<sup>8</sup>

CL005-6

“Ms Yantolo was seen in the emergency unit at Tygerberg Hospital. X-rays and scans were performed. She was assessed as having sustained a traumatic brain injury in addition to a fracture of the pelvis.” (My underlining)

[25] Dr Domingo’s opinion that the plaintiff sustained a traumatic brain injury is not based on any findings by him but is based on his understanding or assumption that the plaintiff had been assessed as having sustained a traumatic brain injury, seemingly at the hospital after her admission.

[26] However, the Tygerberg records which are the only hospital records before the court do not bear this out. Even though not all the notes are legible, I have been able to decipher a reference to a “head injury”<sup>9</sup> but none to a “brain injury”. There is a single reference to “headache” and one to “retrograde amnesia”,<sup>10</sup> but this could not have formed the basis of the opinion because Dr Domingo does not mention these in his report. Apart from these references to a “head injury”<sup>11</sup>, “headache” and “retrograde amnesia” there is no record of the plaintiff complaining of a headache, amnesia or forgetfulness during her hospitalisation.

[27] Dr Domingo notes in his first report that the plaintiff had lost consciousness, but he does not disclose who reported this to him. Dr Domingo appears to have overlooked the plaintiff’s GCS score of 15/15 when the paramedics attended to her at the scene and upon admission to hospital.

[28] The plaintiff had reported to Dr Ogilvie, the speech therapist, at a consultation on 1 December 2022 that on impact she went “blank” but remained conscious thereafter. She also reported to Dr Ogilvie that she sustained a “bump on her head”. According to her mother’s report to Dr Ogilvie she visited the plaintiff in hospital a day after the accident. She noticed that while the plaintiff was relating the accident, she lost track of her thoughts, repeated information and appeared to forget what she was told. Dr Domingo does not note these facts. Had the plaintiff conveyed these to him, he would have mentioned it in his report.

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<sup>9</sup> CL: 034-15.

<sup>10</sup> CL: 034-45; note dated 7 January 2019.

<sup>11</sup> CL 034-15.

[29] The plaintiff reported mild cognitive problems to Dr Domingo and complained of intermittent headaches, poor memory and concentration, a tendency to be short-tempered and irritable, blurred vision and nosebleeds. I do not know whether these complaints formed the “available information” which led to the conclusion that the plaintiff had suffered a traumatic brain injury.

[30] Dr Domingo opines that “based on the available information, the plaintiff sustained a mild traumatic brain injury”. I do not know what information led him to conclude this.

[31] In the circumstances, I do not know how, or why, Dr Domingo came to conclude that the plaintiff suffered a traumatic brain injury in the accident.

[32] According to Dr Domingo the plaintiff’s mild cognitive deficits due to the brain injury, together with the chronic pain she experiences and the psychological impact of the accident, will have a negative impact on her cognitive functioning. As far as the post traumatic headaches are concerned, he is of the opinion that they will respond to “simple” analgesia.

[33] Dr Domingo prepared an addendum to his report following on an assessment of the plaintiff on 18 April 2024. Regarding loss of earnings his earlier opinion that the accident has a negative impact on her employability in the open labour market changed to the plaintiff “will have difficulties obtaining and retaining employment and is likely to remain unemployed”. No explanation is given for this nuanced opinion from the accident having a negative impact on the plaintiff’s employability in the open labour market to her likely remaining unemployed.

[34] I am not satisfied on Dr Domingo’s evidence that the plaintiff has proven that she suffered a brain injury or that the cognitive deficits of which she complains are due to the collision.

### **The traumatic brain injury and the plaintiff’s neurocognitive deficits: Evidence of Dr Sutherland, the psychiatrist**

[35] The plaintiff was assessed by a psychiatrist, Dr Sutherland for an opinion whether she had suffered a brain injury and/or a mental disorder secondary to the motor



vehicle accident, and if so the nature and severity thereof. The report is stated to be based on a clinical assessment and information at the psychiatrist's disposal. Dr Sutherland's diagnosis of a traumatic brain injury and neurocognitive disorder secondary to a traumatic brain injury is based on Dr Domingo's assessment that the plaintiff had sustained a traumatic brain injury. In this regard Dr Sutherland states the following at paragraph 8 of his report-

**"8. CONCLUSION**

Ms Yantolo has been previously assessed as having sustained a traumatic brain injury (Dr Domingo) with deficits across all domains on cognitive assessment (R. de Wit) as well as receptive and expressive communication impairments in keeping with deficits expected following a traumatic brain injury."

[36] The plaintiff's mother informed Dr Sutherland that the plaintiff's early development was typical. Dr Sutherland concluded that the plaintiff's complaints are indicative of a brain injury, but he did not explore whether the complaints existed prior to the accident. According to Dr Sutherland the ongoing cognitive difficulties reported to him by the plaintiff were consistent with her presentation during the clinical interview and on cognitive screening tests performed. He found signs suggestive of cerebellar dysfunction.

[37] It was brought to his attention that the plaintiff had passed grade 10 but failed grade 11 which the plaintiff intended repeating when the accident occurred. Dr Sutherland appears not to have explored whether the cerebellar dysfunction could have been a pre-accident condition.

**Traumatic brain injury and neuro-cognitive deficits: Evidence of Dr Ogilvie, speech therapist:**

[38] Dr Ogilvie, the speech therapist sets out the neuro-cognitive deficits which led him to conclude that the plaintiff suffered at least a mild traumatic brain injury, what, in my view, cannot be excluded on his report is that there were no neuro-cognitive deficits present prior to the accident.

**The cause of the neuro-cognitive deficits**

[39] According to what was told to Dr Ogilvy the plaintiff had failed at least two grades before the accident. She failed Grade 11 in 2017, and perhaps even twice. She

had also failed grade 6. According to the occupational therapist Ms le Roux, based on when she commenced schooling and the year when she enrolled for Grade 4, there is a year or two which is not accounted for. There is no evidence of the plaintiff's performance at school nor of her strengths and weaknesses. Such evidence would have given insight into the plaintiff's cognitive functioning pre-accident.

[40] I am not persuaded that the plaintiff did not repeat Grade 11 due to the accident. She told the neurosurgeon and Ms le Roux, the occupational therapist, that she has a grade 10, failed grade 11 in 2018 with the intention to repeat it in 2019 but was unable to do so as a result of the accident. Ms le Roux records that the plaintiff told her that she did not return to school because she felt she would not cope owing to her acquired forgetfulness/cognitive limitations. However, what she told the neurosurgeon, and the occupational therapist is inconsistent with what she told the industrial psychologist, Ms Kotze and what she told these experts is inconsistent with what she told the speech therapist Dr Ogilvy. She told the industrial psychologist Ms Kotze that she passed Grade 10 in 2016 and attempted grade 11 in 2017.<sup>12</sup> However, she failed grade 11 and then abandoned schooling due to financial constraints. She told Dr Ogilvy that she failed Grade 11 twice and left school at the end of 2017.<sup>13</sup> There are three inconsistencies in the reports to these experts. The first being the year the plaintiff failed Grade 11, the second, the number of times she failed Grade 11 and the third, the reason for abandoning schooling. The plaintiff did not give evidence. In view of these inconsistencies, I am not able to find that the plaintiff intended repeating Grade 11 in 2019 but did not do so due to the accident. There was no investigation into her scholastic performance. While the experts' reports discuss the complaints and difficulties experienced by the plaintiff since the accident it appears that there was no investigation into the plaintiff's cognitive functioning prior to the accident. The reports are devoid of any information on the plaintiff's pre-accident condition. None of the experts explored the possibility that the plaintiff abandoned her schooling due to cognitive deficits which existed prior to the accident. The conclusions on the existence of cognitive deficits seem to be based on

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<sup>12</sup> CL: 005-125, para 3.1 and 005-111 at para 6.1(c).

<sup>13</sup> CL: 005-72; para 3.2.2

the mere say-so of the plaintiff and her mother that the difficulties she presents with were not present when the accident occurred.

[41] I am not convinced that the plaintiff's cognitive deficits are due to the accident.

[42] Though I accept that the plaintiff suffers from headaches, experiences blurred vision and nosebleeds, is forgetful and her concentration and attention abilities are impaired, I am not persuaded on the evidence that the plaintiff suffered a traumatic brain injury. Nor am I persuaded that the deficits and impairments are the result of an accident-related injury.

### **Deduction for contingencies on uninjured income**

[43] The parties are agreed that the fair and reasonable deduction for contingencies on uninjured future earnings is 15%.

[44] The plaintiff had attempted to persuade me that a deduction of 5% on uninjured past income was reasonable. In his response to the defendant's closing argument the plaintiff's counsel accepted, in my view correctly, that a 10% deduction for contingencies would not be inappropriate in the circumstances.

[45] In view of the resolution of the dispute on the deduction for contingencies on uninjured past and future income, I do not have to consider whether the one-year pre-accident unemployment should be taken into account in the assessment of an appropriate deduction for contingencies on the uninjured income.

### **Assessment of impact of orthopaedic injuries on earnings**

[46] While I am not satisfied that the plaintiff sustained a traumatic brain injury and suffers the sequelae complained of, I am satisfied that she sustained a pelvic injury which has left her with chronic pelvic pain and residual sciatic nerve damage with weakness and altered sensation in the left foot. The plaintiff has a foot-drop type gait abnormality and disturbed bladder function. She experiences pain in the lower back, the left hip and leg which is exacerbated by physical activity and during inclement weather. She is unable to remain static for prolonged periods, is unable to walk medium to long distances, handle medium to heavy objects or run.

[47] According to the experts the plaintiff's occupational functioning from a physical perspective has been adversely impacted by the accident. I accept this. They opine that the extent of the plaintiff's pelvic injuries and the chronic pain restricts her to sedentary or semi-sedentary work in future. According to them she is best suited to work that allows her to alternate frequently between standing and walking, requires only occasional bending, limits load to sedentary to light. She would be compromised if her work requires crouching and kneeling in combination with bending. However her level of education excludes her from sedentary to semi-skilled work. Therefore, they opine that the employment options open to the plaintiff are dependent on her ability to perform physical work.

[48] Based on the plaintiff's report to the experts that she abandoned her job at Jackie's Cleaning Services due to her inability to cope with the physical demands of the job the overwhelming view is that the plaintiff will be permanently unemployed. According to the experts the combination of the physical, neuropsychological, and psychological difficulties has rendered the plaintiff essentially unemployable in the open labour market. The defendant's case on the other hand is that the plaintiff secured employment after the accident and is not unemployable. Her loss if any, is of earning capacity and not of earnings. Ms Kgoebane argued that the plaintiff is not unemployable. She submitted that the case should be approached on the basis that the plaintiff's earnings in her uninjured state and her injured state are the same and that a higher-than-normal deduction for contingencies should be applied to the injured future earnings. She argued that a 35% deduction for contingencies would reasonably cater for her diminished earning capacity.

[49] I am not satisfied that the plaintiff has established that she stopped working because of limitations caused by the accident.

[50] The plaintiff commenced her first job on 1 October 2019 with Jackie's Cleaning Services <sup>14</sup> as a cleaner in terms of a three-month fixed term contract. This was almost

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<sup>14</sup> There is an unexplained discrepancy between the information in the occupational therapist's report and the industrial psychologist's report relating to the plaintiff's employment. According to the occupational therapist the plaintiff was employed by Liesbet's Cleaning Services from 10 October 2019 to 13 December 2019. According to the industrial psychologist she was employed by Jackie's Cleaning Services from 1 October to 14 December 2019. An affidavit is deposed to by the owner of Jackie's Cleaning Services in

10 months after the accident. Based on her report to the experts that she abandoned her job at Jackie's Cleaning Services two weeks before the three-month contract expired because she was unable to cope with the demands, they find that the plaintiff is unemployable.

[51] I am not persuaded that the plaintiff left Jackie's Cleaning Services because she could not cope with the physical demands of the job and is unemployable due to the injuries sustained in the accident. This being so, I do not accept the finding by the experts that the plaintiff is unemployable because she cannot cope with a job with physical demands such as that of a cleaner.

[52] The plaintiff's past unemployment history is relevant to assess whether the plaintiff is unemployed due to her inability to cope with the physical demands of the job of a cleaner post-accident or whether she may be unemployed for other reasons.

[53] If the plaintiff was a scholar when the accident occurred, then she was not unemployed. However, if she was not a scholar then she had been unemployed for a year before the accident and there is insufficient evidence to explain the reason for this. Without evidence on the number and types of jobs applied for I am not able to find that despite attempts to secure work she could not do so.

[54] The version given to the various experts on when she discontinued schooling and why she abandoned schooling was not consistent. These inconsistencies are not explained.

[55] According to Ms Kotze, the occupational therapist and Dr Domingo, the neurosurgeon, the plaintiff was a scholar at the time of the accident; she had failed Grade 11 in 2018 and intended repeating it when the accident intervened. On the other hand, she reported to Dr Ogilvie, the speech therapist that she failed Grade 11 twice and left school at the end of 2017. The industrial psychologist appears to have interrogated the plaintiff's schooling considering that she lists the subjects the plaintiff completed when she was in Grade 10 in 2016 and that the plaintiff failed grade 11 in 2017. On the

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which she confirms the correctness of both the information in the occupational therapists report as well as the information in the occupational therapist's report. They both cannot be correct.

industrial psychologist's evidence, the plaintiff completed grade 10 in 2016<sup>15</sup> at the age of nineteen. She failed grade 11 in 2017 after which she abandoned schooling. This aligns with what she told the speech therapist, Dr Ogilvy. The plaintiff had thus been unemployed for approximately one year after discontinuing her schooling.

[56] The industrial psychologist's finding that the plaintiff abandoned school in 2017 explains the one year which the occupational therapist found was unaccounted for in the plaintiff's schooling. I do not accept that the plaintiff was a scholar at the time of the accident nor that she intended repeating Grade 11 in the year of the accident (i.e., 2019). I find that she was unemployed for a year when the accident intervened and that on the probabilities she completed schooling in 2017 at the age of 21 rather than in 2018 at the age of 22. Finding that the plaintiff completed Grade 10 and failed Grade 11 in 2017 leads to one-year unexplained pre-accident unemployment. This leads me to doubt whether the plaintiff abandoned her job at Jackie's Cleaning Services two weeks before the contract came to an end because she could not cope with the demands of physical work, or whether it was related to her inability to secure a job for one year prior to the accident.

[57] At Jackie's Cleaning Services the plaintiff was one of a team of three cleaners cleaning mainly residences where she was required to clean bathrooms and stairs, porches and internal floors. The plaintiff reported encountering difficulty performing duties which required frequent to constant standing and prolonged bending which are movements for sweeping, mopping, scrubbing toilets, washing out baths, shower floors and lower walls for instance. Notwithstanding these difficulties the plaintiff was able to complete her work in time but occasionally was assisted by a fellow cleaner. She reported to the speech therapist that she discontinued her contract two weeks before it expired because she was unable to cope with the demands of the job due to pain in the left hip and left leg especially when she had to walk up and down stairs, bend a lot and stand for long periods of time and has been unemployed since then. The reason she gave to Dr Domingo for discontinuing her job was somewhat different. She reported to

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<sup>15</sup> The occupational therapist states that the plaintiff failed grade 11 in 2018 but does not say when she passed Grade 10.

him that due to her inability to cope with the physical demands of the job she was told she was unfit to work as a cleaner.

[58] The plaintiff's employer's evidence does not support either of these versions. The plaintiff's supervisor informed Ms le Roux, the occupational therapist that while she knew of the accident, she was not aware of the plaintiff experiencing difficulties nor did the plaintiff complain about difficulties. She also did not know why the plaintiff absconded. I find it implausible that the plaintiff's performance was not affected if the limitations which she claims to have endured now render her unemployable. This begs the question how it is that the plaintiff's performance was not adversely affected. And if her performance was adversely affected why her employer failed to disclose this to the occupational therapist. It seems to me unlikely that the employer would have been oblivious to the plaintiff's poor performance, or to the fact that other employees had to assist her in completing her tasks as she reported to Ms le Roux. There is no evidence regarding (i) how frequently she needed assistance from a fellow employee, (ii) what form the assistance took and in respect of which tasks; (iii) which two members of their team of three assisted her. These questions could all easily have been answered if the plaintiff testified *viva voce*.

[59] Furthermore, I find it incredulous that the plaintiff endured the pain and limitations brought on by her injuries for two-and-a-half-months yet with only two weeks of a 3-month contract lapsing she left employment because she was not coping. There is no explanation why she left without notifying her employer. I am not satisfied that the plaintiff has established that she left Jackie's Cleaning Services because she could not cope with the work due to her physical limitations. I reject her version that she was informed that she was not fit for the duties of a cleaner. I do not accept the finding by the experts that the plaintiff is unemployable because she cannot cope with a job with physical demands such as that of a cleaner.

[60] I am not persuaded that the plaintiff is indeed unemployable. She was employed after the accident. Her case is that the activities she had to performed caused pain. Because bending movements according to her brought on lameness of the lower back and left leg, she would rather kneel which resulted in the right knee having to bear her

weight. Even though according to her this slowed her down she nonetheless completed her work in time, did not complain and took medication for the pain. Occasionally she was assisted by a fellow employee, However, there is no evidence of the medication she took nor how frequently she took it. I do not know whether the medication brought on any relief, to what extent and for how long.

[61] The plaintiff elected not to testify about her attempts at finding work after she left Jackie's Cleaning Services. I have not heard from her what impact her injuries have had and continue to have on her ability to work. While I accept that she is vulnerable, I am not prepared to accept that there is no prospect at all of the plaintiff securing employment due to her injuries. She told Ms le Roux the occupational therapist that she has not applied for a disability grant years after the accident. If her injuries are of such a nature that she is unable to work at all, I would have expected her to at the very least have applied for a disability grant.

[62] The plaintiff was employed at Jackie's Cleaning Services,<sup>16</sup> her first and also last job, from 8h00 to 17h00 five to six days a week. The experts have all approached the plaintiff's case on the basis that she will not be able to sustain employment where she is required to work for 6 to 7½<sup>17</sup> hours per day for 5 to 6 days per week. The industrial psychologist states in her report that "[w]hen evaluating the plaintiff's post-accident career prospects, cognisance is taken of her residual physical capacity". I do not find anything in the report that supports that this approach was indeed adopted.

[63] While a daily job spanning 6-7½ hours may be challenging, none of the experts explored whether a day or two of rest between the days the plaintiff works, is a viable option.

[64] Ms Kgoebane argued that a deduction of 35% on injured earnings would be fair and reasonable. In my view this overlooks the fact that the plaintiff may not have a daily job or may have a job that pays less because the type of tasks she is able to perform

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<sup>16</sup> This is identified as the plaintiff's employee in the industrial psychologist's report. But the occupational therapist identifies Liesbet's Cleaning Services as the employer. On the face of it, it seems that the plaintiff was employed by different employees. However, Ms Rautenbach is identified as the owner of Jackie's Cleaning Services as well Liesbet's Cleaning Services.

<sup>17</sup> Calculated at cleaning 3 houses per day at 2-2 ½ hrs per house.



are confined to those that do not require bending, kneeling, and prolonged periods standing.

[65] A shorter working week or intermittent periods of unemployment in my view can be catered by a larger deduction for contingencies than submitted by Ms Kgoebane. I am not convinced that in the circumstances a deduction of 35% on injured future earnings as suggested by Ms Kgoebane is fair and reasonable. In my view an appropriate, fair and reasonable deduction for contingencies would be 50% on injured future earnings. The defendant argued that the loss of earnings/earning capacity should be assessed on the basis that the plaintiff's earnings in her uninjured and injured state will be the same. Having found that the plaintiff is not unemployable, and that she has suffered monetary damage, I am bound to award damages and "it is necessary for the Court to assess the amount and make the best use it can of the evidence before it".<sup>18</sup> I have in assessing the fair and reasonable award for loss of earnings/earning capacity adopted the approach suggested by the defendant.

[66] The industrial psychologist is of the view that the plaintiff's post-accident earnings would probably have been temporarily affected by the impact of the Covid-19 pandemic on employment. In her view this should be catered for by an appropriate contingency deduction. The issue was however not argued before me.

### **General damages**

[67] Adv Laubscher submitted that an amount of R1 750 000 would be reasonable. He referred in this regard to the decision in Nel v RAF<sup>19</sup> where the award to the plaintiff in current monetary terms translates to R1 115 269.00. The plaintiff in the case sustained closed fractures of the right tibia and fibula, a traumatic amputation of the right fifth metacarpal and little finger, a degloving injury to the right foot leading to the amputation of the right big toe. He also sustained fractures of the right lower leg. A shortening of the right leg by 3 cm resulted in a marked limp and loss of balance. He had to use a crutch to ambulate and was unable to walk long distances or run. The other

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<sup>18</sup> Hersman v Shapiro & Co 1926 TPD 367 at 379.

<sup>19</sup> 2017 (7E4) QOD 26 (GP).

decision on which the plaintiff relies is that of Zarrabi v RAF<sup>20</sup> where general damages in an amount of R 2,197,000, in current monetary terms was awarded to the plaintiff. A thirty-year old female had suffered a severe diffuse axonal brain injury with severe neuro physical, neurocognitive and neuropsychiatric consequences amongst others. In my view neither of these cases are comparable. In the case of Nel the orthopaedic injuries were far more severe than the plaintiff's. In view of my finding that a brain injury has not been established, Zarrabi's case does not guide the assessment of an appropriate award for general damages to the plaintiff. However, I am not satisfied that R500 000.00 for general damages proposed by Ms Kgoebane is fair and reasonable. I was referred to the decision in Ramelobeng v Lowveld Bus Service<sup>21</sup> where the award for general damages is equivalent to R860 000.00 in current monetary terms. The orthopaedic injuries were more severe but there are other limitations and deficits that the plaintiff's injuries have brought on.

[68] The plaintiff was hospitalised for close to three weeks. She was functionally impaired for some time She used crutches for three months before full weight bearing was possible. She endured severe pain for some time after the accident. She continues to endure chronic pain in the limbs and lower back. The pelvic injury resulted in a sciatic nerve injury and a 1cm-2cm shortening of the left lower limb. She experiences ongoing discomfort in the lower limbs. The pelvic injury has caused a pelvic deformity resulting in an inability to deliver an infant normally. The plaintiff will have to undergo a caesarean section. This will of course bring on additional pain and discomfort antenatally. I do not know whether the pelvic deformity will cause a more challenging pregnancy or not; it is not unlikely that it may. The plaintiff is currently just over 27. She has many child-bearing years left. She also has bladder control problems, which likely cause her embarrassment and anxiety. In view of the plaintiff's age and the factors I have listed, an award of R800 000.00 for general damages is fair and reasonable in the circumstances of this case.

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<sup>20</sup> 2006 (5B4) QOD 231 (T).

<sup>21</sup> 2012 (7C5) QOD 29 (GNP).

## Costs

[69] There is no reason why the general rule that costs follow the event should not apply. The plaintiff seeks an order that the plaintiff's counsel's costs as well as the *curatrix ad litem's* costs are allowed on scale C. The defendant argued that the case is not complex and that counsel's costs should be allowed on scale A.

[70] I find that this case is no different from the hundreds of third-party matters on the roll every week. The plaintiff has not advanced reasons why this case warrants costs on scale C and I am not able to find any. Accordingly, counsel's costs and the *curatrix ad litem's* costs are allowed on Scale A.

## Protection of funds

[71] The plaintiff's experts recommend the protection of funds. The defendant is not opposed to this. I intend making such an order.

## Order

[72] In the circumstances, the plaintiff is directed to obtain an updated actuarial calculation of the plaintiff's loss of earnings catering for the following deductions for contingencies:

- (a) Uninjured past earnings: 10%.
- (b) Uninjured future earnings: 15%.
- (c) Injured future earnings 50% on the basis that the plaintiff will earn in her injured state what she would have earned in her uninjured state.

[73] The parties are directed to prepare a draft order setting out the loss of earnings calculated on the basis set out in paragraph [72] above to which must be added the past injured loss of earnings of R8 300.00 and general damages in an amount of R800 000.00. Contributory negligence of 10% must be provided for. The order must also cater for the provision of an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, Act No 56 of 1996, costs of the action with counsel's costs as well as the *curatrix ad litem's* costs allowed on scale A and include *mutatis mutandis* the contents of the last draft order uploaded to Caselines by the plaintiff.



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**S K HASSIM**  
Judge: Gauteng Division, Pretoria

Plaintiff's Counsel:      Adv A Laubscher  
Defendants' Counsel      Ms Kgoebane

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 13 January 2025.