IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

Case No: 3671/2014

Date heard: 20 – 22 May 2019

Date delivered: 29 August 2019

NOT REPORTABLE

In the matter between:

XOLELWA GATYA **Plaintiff**

And

THE MEMBER OF THE EXECUTIVE COUNCIL,
DEPARTMENT OF EDUCATION, EASTERN CAPE **First Defendant**

MISS MADIKANE **Second Defendant**

JUDGMENT

Goosen J:

[1] On 31 July 2013 the plaintiff suffered a bi-lateral ankle fracture when she jumped from the first floor of a school building. At the time she was 15 years of age and a learner in Grade 10 at the school. The circumstances giving rise to the incident resulted in action being instituted against the defendant for recovery of damages suffered by the plaintiff. On 30 May 2016, by agreement between the parties, the issue of liability was settled on the basis that the defendant is liable to compensate the plaintiff for 80% of such damages she is able to prove.

[2] The damages sought by plaintiff are claimed under several heads viz. general damages; costs of future medical treatment; and loss of earning capacity. Apart from the plaintiff's own testimony she presented the evidence of several expert witnesses. These included Dr *Oelofse*, who testified in respect of the orthopaedic injuries and future medical treatment required; Ms *Ansie van Zyl*, an occupational therapist, who testified about the plaintiff's physical work and other capabilities; Mr *Dennis Stigant*, a clinical psychologist, who testified to the psychological sequelae arising from the injuries suffered and Dr *Peter Whitehead*, an industrial psychologist, who dealt with plaintiff's employability and projected earnings. The plaintiff also presented the evidence of Mr *Loots*, an actuary, who calculated the losses based on the evidence presented. The defendant presented only the evidence of Dr *Thomas*, an orthopaedic surgeon.

[3] It is common cause that the plaintiff suffered bi-lateral fractures of the ankles and that such injury is regarded as serious. She was treated conservatively with Plaster of Paris. According to the plaintiff she was in plaster casts for approximately three months.

[4] At the time of the incident the plaintiff was in Grade 10. Following treatment she returned to school and successfully completed the grade. She testified, however, that prior to the injury she was active in sport, playing netball for the Flamingos. Following the injury she was unable to participate in sporting activities and was accordingly not physically active. She gained weight as a result. The plaintiff proceeded to Grade 11 in 2014 which she passed and thereafter to Grade 12 in 2015. She did not pass mathematics, science and economics and accordingly did not pass her matric. In 2016 she repeated the examinations in the three subjects, but only passed economics. She accordingly does not have a matric certificate.

[5] As indicated, the plaintiff claims damages under several headings. The claims for future medical treatment and general damages were largely uncontested, as will be demonstrated hereunder. The principal focus of the case concerned the plaintiff's claim for loss of earning capacity. Her claim was premised upon her orthopaedic injuries and sequelae and upon psychological fall-out, in the form of a post-traumatic stress disorder (PTSD), consequent upon the injuries. It was the plaintiff's case that her failure to obtain a Grade 12 pass was causally associated with the incident inasmuch as she suffers from PTSD as a result thereof and that said PTSD compromised her ability to obtain matric. She accordingly claimed a post-morbid loss of earning capacity.

[6] It is appropriate to begin with the claim for future medical care and treatment since there was no dispute that such treatment would be required.

[7] Dr *Oelofse* examined the plaintiff on three occasions, viz. 2014, 2017 and in 2019. He prepared three reports which were submitted in evidence. In his assessment in April 2019, shortly before trial, Dr *Oelofse* noted some deterioration in

the condition of the plaintiff's ankle. In this regard the plaintiff complained of functional impairment in that she is now unable to run or to squat due to stiffness in the ankles and plain. On examination he found that her muscular strength was normal. He noted, however, a limited range of movement on the left ankle resulting in a 50% loss or range. On the right ankle he noted a 20% loss of range. According to him the radiographs indicated some signs of deterioration.

[8] In his opinion, given that the injury involved high impact which would usually result in cartilage damage, it is likely that the plaintiff will experience deterioration of the ankle joints over time. In his view, the right ankle would require conservative treatment in the form of medication and physiotherapy. He, however, agreed with the opinion expressed by Dr *Thomas* that the right ankle may require a ligament reconstruction in the future.

[9] In regard to future treatment of the left ankle Dr *Oelofse* stated that surgery would be required. This would take the form of debridement of the joint by arthroscopy. If that did not resolve the problems it may be necessary to provide for a total replacement alternatively an arthrodesis or fixing of the joint. Provision will need to be made for a revision of these procedures given that the plaintiff is still at a young age.

[10] It was Dr *Oelofse'*s evidence that the probability of the plaintiff requiring arthroscopy and debridement was between 30% and 50%. Such debridement would in all probability need to be repeated. For illustrative purposes the plaintiff utilized 40% as the probability and calculated the total based upon the current cost of the procedure at R60 000.00, as being R48 000.00.

[11] It was Dr *Oelofse's* opinion that there was only a 20% chance that the plaintiff would require arthrodesis. Both Dr *Oelofse* and Dr *Thomas* expressed the view that an arthrodesis was to be preferred over an ankle replacement. The plaintiff accordingly calculated the provision for such treatment as being R20 000.00. According to Dr *Oelofse* provision for revision thereof should be made. He expressed the view that there was a 30% chance that revisions will be required.

[12] Based on this evidence the plaintiff submitted that the quantum of the claim for orthopaedic treatment was R148 000.00. This figure was very close to the calculation based upon Dr *Thomas'* evidence, albeit that Dr *Thomas* envisaged different treatment for the plaintiff's orthopaedic injuries. For instance, Dr *Thomas* was of the view that the left ankle could be managed more conservatively whereas the right ankle may require a ligament reconstruction. According to Dr *Thomas'* testimony the total costs for his envisaged future treatment regime would be in the order of R149 200.00.

[13] It is unnecessary to make any findings as to the future treatment that the plaintiff is likely to require. That is so because plaintiff's counsel, reasonably and fairly, approached the calculation on the basis of the aggregate costs as provided by the respective experts, being R148 600.00, and provided for 80% thereof in accordance with the previously agreed apportionment. The defendant conceded the resulting claim of R118 800.00.

[14] It was the evidence of Mr *Stigant* that the plaintiff suffers from a post-traumatic stress disorder arising from the incident giving rise to her physical injuries. He conducted an assessment of the plaintiff pursuant to a need identified by Ms *Ansie van Zyl*, the occupational therapist.

[15] Mr *Stigant* conducted his clinical evaluations in July 2017, 4 years after the incident. He conducted the Minnesota Multiphasic Personality Inventory-2 (MMPI2) test to assess her mental state and personality functioning. Although she did not present as being in psychological distress, her elevated scores on the clinical assessment scales indicated that she suffers from a post-traumatic stress disorder.

[16] I shall return hereunder to consideration of the evidence of Mr *Stigant* insofar as it concerns the assessment of the plaintiff's claim for general damages and more particularly in relation to the claim for loss of earning capacity.

[17] Insofar as the claim for future medical treatment is concerned it suffices to record that Mr ***Stigant's*** diagnosis and its causal relationship to the incident was not disputed. It was Mr ***Stigant's*** evidence that the plaintiff will require psychotherapy in order to enable her to deal with the effects of post-traumatic stress. The defendant conceded this and, furthermore, accepted Mr *Wim Loots'* quantification of the claim in the amount of R49 400.00. Eighty percent of said claim, to which the defendant agreed, is an amount of R39 520.00.

[18] A final aspect concerning the plaintiff's claim for future medical treatment and care concerns a claim for certain specialised equipment and domestic assistance. Plaintiff based this claim upon the evidence of Ms *Ansie van Zyl*.

[19] Ms *van Zyl* consulted the plaintiff on 16 October 2016, some 3 years after the incident. She assessed the plaintiff's physical strength and movement functions. She noted stiffness in both ankles. She found that the plaintiff walked functionally and could jog, albeit a short distance. Plaintiff was also able to manage stairs. Walking

on uneven terrain, however, presented some difficulty. According to Ms *van Zyl* the plaintiff was capable of managing a job with light physical demands. This type of work would need to be sedentary in nature.

[20] She again consulted the plaintiff in April 2019. In her updated report she records that the plaintiff presented with a limp. Ms *van Zyl* reported that the plaintiff is limited in tasks requiring prolonged standing and walking. She is able to manage basic domestic tasks although she requires rest between tasks. In respect of her working capabilities Ms *van Zyl* expressed the opinion that, based upon the assessment of her physical mobility, strength and repetitive task performance, the plaintiff demonstrated a residual capacity to manage a job with light physical demands or a sedentary position.

[21] In regard to special and adaptive equipment Ms *van Zyl* recommended that provision be made for a shower/bath chair after surgery; a trolley for shopping, a bucket on wheels and long-handled broom. In regard to assistance it was recommended that the plaintiff be provided with a domestic worker and gardener 1 day per week when she lives alone. The capitalized value for specialized equipment and assistance was calculated by the actuary to be R315 199.00. The calculation was not challenged. It appears from exhibit “J” that the capitalized value of the provision for domestic assistance is given as R315 199.00 and that the total does not include the capitalized values of the assistive devices. The effect of this is that the total capitalized value of the assistive devices, viz. R8 017.00 must be added to the amount of R315 199 in order to obtain the total present-day value.

[22] In his evidence Mr *Loots* stated that he applied a discount rate of CPI plus 1% to determine the value of the specialised equipment. He did so because such

equipment is readily available. Accordingly a normal price inflation factor ought to be applied. He indicated that the figure for the domestic assistants utilized a similar factor.

[23] In respect of both components of the claim it was his evidence that general contingencies can apply since the expenditure may be subject to a wide variety of future contingencies. He suggested between 5% and 10%. It appears from the table setting out the calculation that he did not apply such contingency factor.

[24] The value of the claim having regard to the apportionment applied to the adjusted total (as set out above) amounts to R258 572. 80. In a draft order submitted by plaintiff's counsel this figure is presented. It appears, however, that the error in exhibit "J" (where the total does not include the costs of assistive devices) is repeated in the plaintiff's heads of argument. Ms *van Zyl's* evidence regarding the need for certain assistive devices was not seriously challenged. Her opinion, based upon her assessment of the plaintiff, was that these would be required. I accept her evidence in this regard.

[25] The same is not true of the recommendation as to the requirement for domestic assistance. Ms *van Zyl* noted that the plaintiff is in fact able to perform the basic domestic tasks. She qualified her opinion by stating that such assistance may only be required if the plaintiff lives alone.

[26] The plaintiff confirmed that she presently manages domestic and similar tasks. She is living with her parents in her parental home. She hopes to marry in the future.

[27] In my view, the evidence does not support a finding that the plaintiff will require domestic assistance in the future. The onus is upon the plaintiff to establish, on a balance of probabilities, that such assistance is now or will in future be required. Apart from an expressed opinion that it may be required no factual basis was laid upon which the probabilities could properly be determined. In the circumstances the costs of domestic assistance must be disallowed.

[28] I turn now to deal briefly with the plaintiff's claim for general damages. The plaintiff testified that prior to the incident giving rise to the injuries she was an active person who participated in sporting activities. She played netball. She enjoyed school and led a normal life of socialising. As a result of the injuries she was (and is) no longer able to play netball. She does socialise although she cannot enjoy activities such as dancing. She experiences pain, particularly in cold weather. She is unable to stand for prolonged periods or walk long distances. Since the injury she had gained weight. The medical reports suggest she is obese, although she did not present as such at trial. Her evidence regarding her physical symptoms is supported by the clinical assessment, although the extent of her current symptomatic pain may not correlate with the opinion expressed by Dr *Thomas*.

[29] As already indicated she has been diagnosed with a post-traumatic stress disorder. The defendant did not dispute that she is suffering from such disorder. Nor was it disputed that the impact of the disorder has left her withdrawn, self-doubting, insecure and anxious. According to Mr *Stigant* she suffers from low self-esteem.

[30] Counsel for the plaintiff submitted that the physical injuries suffered were of a serious nature. These, together with the psychological trauma with resultant development of PTSD have resulted in a significant loss of amenities. It was

submitted that an award of general damages in the amount of R360 000.00 would reasonably compensate the plaintiff. In support of the estimate of damages the plaintiff relied on two, apparently comparable, awards.

[31] In the matter of ***Rieder v Road Accident Fund***[1]Eksteen J awarded a 43-year-old qualified artisan the sum of R300 000.00 for general damages (R458 000.00 at current value). The matter is, however, distinguishable. In that matter the plaintiff suffered a right-side tibial plate fracture, a fracture of the right ankle, an injury to the peroneal nerve with associated soft tissue injuries and damage to the muscle group to the lower legs. These injuries are, in my view, significantly more serious than those suffered by the plaintiff in this matter. The case summary of the ***Rieder*** matter records the following:

> "The consequences of these injuries were devastating to the plaintiff and deprived him entirely of the enjoyments of various sporting activities which formed a major part of life. Due to the injuries the plaintiff's employment was terminated and he has been unable to return to work since the accident whilst he was previously a highly motivated, dedicated and skilled worker employed in a technically skilled capacity where there is a well-documented skills shortage in South Africa. Plaintiff is now able to cope with even a sedentary job due to his emotional and cognitive fall-outs as well as low mental endurance capacity and will never become a competitive employee on the open labour market. On an emotional level he has greatly reduced motivation, on-going moods of depression, increased irritability and angry outbursts resulting in family members evading him and the loss

[1] Case No 1864/2009 QOD Vol VI E6-1

> of the entire circle of family friends. His personality also changed significantly."

[32] The other matter to which reference was made was ***Coetzee v Union and National Insurance Co Ltd***[2]. In that matter the trial court awarded an amount of R6200.00 (R1200.00 for pain and suffering and R5000.00 for loss of amenities) as general damages to a 20-year-old student a fractured ankle and dislocated shoulder. He underwent a reconstruction operation with arthrodesis of the ankle. This was partially successful and as a result further operations would have to be undertaken in the future. The present value of the award is R482 000.00.

[33] The trial court's award of damages for future loss of earnings (an amount of R9000 .00) and for loss of amenities (R5000.00) went on appeal. In ***Union and National Insurance Co Ltd v Coetzee***[3] the then Appellate Division noted that the award for general damages was undoubtedly high but declined to reduce the award because it found that there was no misdirection or exceptional circumstances which warranted interference with the award. For reasons not germane to the present matter it reduced the award for future loss of earnings.

[34] Both ***Rieder*** and ***Coetzee*** would constitute awards not justified in the present circumstances. No doubt for this reason plaintiff's counsel pressed for a lower award. The amount was accepted by counsel for the defendant to be reasonable and, defendant accordingly conceded the claim. I too am satisfied that it represents a fair and reasonable estimate of the damages for pain and suffering and loss of amenities of life. The amount accords more closely with that made by Dambuza J (as she then

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[2] The Quantum of Damages in bodily and fatal injury cases C & B (Vol II) at 55
[3] 1970(1) SA 295 (A)

was) in ***Alla v Road Accident Fund***[4]. In that matter a 41-year-old Correctional Officer suffered a fracture of the ankle with displacement of the tibial-fibula joint and soft tissue injury. The case note records the following:

> "Pain still experienced in ankle resulting in difficulty in walking long distances, standing for lengthy periods of time, ascending or descending stairs, walking on uneven surfaces, carrying heavy objects and getting in or out of a vehicle. Unable to run or walk fast or play active sports. In the future there was a risk of degenerative arthritis in which case an ankle fusion or ankle replacement procedure would be necessary."

[35] An award of R200 000.00 was made. The present value is R321 000.00. In the result an award of R360 000.00 for general damages is reasonable.

[36] This brings me to the claim for loss of earning capacity. Although the claim formed the primary focus of the trial, its determination rests upon a fairly narrow dispute. That issue concerned the question as to the causal nexus between the injury, together with its attendant psychological fall-out, and the plaintiff's failure to secure a matric pass. It was the plaintiff's case that but for the injury, both physical and psychological, she would have obtained a matric pass and thereafter have pursued a career either as a police officer or traffic officer. In consequence of the psychological injury she has been unable to procure a matric, thus precluding a range of possible earning opportunities including that of police officer or traffic officer. Her physical injuries, in any event, render her unsuitable for anything other than light sedentary work.

[4] Case No 338/2010 QOD Vol VI E8-1

[37] It was the plaintiff's evidence that she was progressing well in her school career at the time of the incident. She stated that she was achieving a mark of 50% in her subjects. It is common cause that she was 15 years old and in Grade 10 at the time she suffered the injury. The plaintiff's industrial psychologist, Dr *Peter Whitehead*, stated that this was an age-appropriate level of secondary school.

[38] Dr *Whitehead* obtained collateral information regarding the plaintiff's family and educational background from the plaintiff. It was to the effect that the plaintiff's father had obtained a Grade 12 pass and works as a machine operator. The plaintiff's mother has a Grade 11 pass and works as a cleaner at a hotel. The plaintiff has two siblings both of whom are attending school. Dr *Whitehead* operated from the assumption, which he regarded as safe, that in her pre-morbid state the plaintiff would have obtained a matric qualification. He based this assumption upon the general observation that children tend to perform better than their parents. He also founded his assumption upon the fact, accepted by him, that the plaintiff had maintained a 50% grade achievement up to Grade 10 and that she had passed both Grades 10 and 11 subsequent to the injury.

[39] He states in his report that:

> "It is imperative to regard the Clinical Psychologist opinion, with regards to the sequelae of her injuries and how this impacted on her educational and work abilities in order to ascertain her Pre-Morbid educational and career potential.
>
> - In his report, **Stigant, Clinical Psychologist,** indicates that currently Ms Gatya suffers poor self-esteem and difficulty adapting

> to environmental pressures. She has suffered from PTSD since the incident and has a result has withdrawn behaviour and difficulty interacting with teachers following the incident, whilst still at school. As such, he regards her Grade 12 *failure as a direct result of her emotional challenges* due to her chronic PTSD." (*Sic*)

[40] Dr *Whitehead* accordingly accepts the causal nexus between the injuries and sequelae and the capacity to earn an income. In doing so Dr *Whitehead* discounts the plaintiff's explanation for her failure to obtain a matric pass. It is recorded in the report under the heading "*Observations During Consultations*" that:

> "It appears her subject choices were the reason she failed grade 12 and again the year thereafter."

[41] Elsewhere in the report it is recorded that the plaintiff reported that she failed Grade 12

> "As the subjects were difficult and often the teachers were not available"

[42] It was stated by Dr *Whitehead* and Mr *Stigant* that the plaintiff's explanation for her failure to pass the subjects reflects a lack of insight into the nature of her mental state/psychological condition. Her reaction to more stressful circumstances would be affected by her psychological condition. It was on this basis that Mr *Stigant* formed the opinion that the diagnosed post-traumatic stress syndrome contributed to her failure to obtain her matric pass.

[43] It is important to note that the defendant adduced no evidence to gainsay the opinion expressed by Mr *Stigant*. The challenge focussed upon the fact that the plaintiff had, after the incident, passed Grade 10 and Grade 11 notwithstanding that she was by then already suffering post-traumatic stress, albeit undiagnosed. Mr *Stigant* stated that the nature of a post-traumatic stress disorder is that it becomes "*embedded*" or chronic over time and that it affects the personality. He stated also that the plaintiff had reported that her performance at school had deteriorated over time after the incident.

[44] Her reported weight gain after the incident (which she confirmed in evidence) would accord with a pattern of comfort-eating stimulated by her underlying psychological trauma. Mr *Stigant* records in his report that the plaintiff had to face the teacher who was responsible for the incident giving rise to her injuries daily at school. This was traumatizing. It resulted in a lack of motivation and resulted in her becoming withdrawn and being beset with self-doubt.

[45] As indicated this evidence was not challenged. It is significant that the defendant accepted, as indicated hereinabove, that the plaintiff indeed developed a post-traumatic stress disorder in consequence of the incident and that it is chronic. No evidence was presented by the defendant to disturb the probabilities, established by the evidence presented by the plaintiff, that she would pre-morbidly have attained matric. I accordingly find that on a balance of probabilities, but for the incident giving rise to the injuries suffered by the plaintiff her pre-morbid earning capacity is to be determined on the basis that she would have attained a matric pass.

[46] It is trite that a plaintiff who seeks damages for loss of earning capacity must prove a loss of patrimony. In ***Prinsloo v Road Accident Fund***[5] Chetty J held:

> "[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.
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> [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. . . ."

[47] This was endorsed on appeal to the Full Bench in ***Prinsloo v Road Accident Fund***[6]. See also ***Rudman v Road Accident Fund***[7]where it was held that:

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[5] 2009 (5) SA 406 (SECLD) at par [5] and [6]
[6] Unreported, Case No. CA139/2009 Delivered 25 February 2010
[7] 2003 (2) SA 234 (SCA) at 241I-242B

> "A physical disability which impacts upon capacity to earn does not necessarily reduce the estate or patrimony of the person injured. It may in some cases follow quite readily that it does, but not on the facts of this case. There must be proof that the reduction in earning capacity indeed gives rise to pecuniary loss. Thus, in *Union and National Insurance Co Ltd v Coetzee* which is referred to in the passage quoted above from *Dippenaar*'s case and which deals with a lump sum award for loss of earning capacity, Jansen JA makes the point that
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> ''*n (b)*epaalde liggaamlike gebrek bring egter nie noodwendig 'n vermindering van verdienvermoë mee nie of altyd 'n vermindering van gelyke omvang nie - dit hang o.a. af van die soort werk waarteen die gebrek beoordeel word'."

[48] The principle is not confined to physical injury. It applies irrespective of the injury. What must be established is that the plaintiff has suffered a diminution of her patrimony giving rise to a pecuniary loss.

[49] In this case the plaintiff's claim is founded upon a patrimonial loss which flows from her failure to obtain a matriculation pass and her consequent inability to enter the labour market with that qualification. It was the plaintiff's case that after she had been unsuccessful in obtaining her matric pass in 2015 she had enrolled for the three courses at Iqhayiya College and had re-written the examinations in 2016. On this occasion she passed economics, but again failed mathematics and physical science. No evidence was led regarding any subsequent attempts at obtaining her National Senior Certificate. It appears from the reports of Ms *van Zyl* and Dr *Whitehead*, however, that the plaintiff undertook a computer literacy course in 2017 and successfully completed it. She also took and completed a security course.

[50] It was not suggested by Mr *Stigant* that the plaintiff was incapable, by reason of the post-traumatic stress disorder from obtaining a matriculation qualification or indeed other qualifications of similar nature. His evidence was that the fact of a PTSD explained why she had been unsuccessful in her attempts in 2015 and 2016.

[51] Dr *Whitehead's* assessment of the plaintiff's earning capacity proceeded on the basis that pre-morbidly she would have obtained a National Senior Certificate. On this basis, notwithstanding plaintiff's expressed desire to pursue a career as a police officer or traffic officer, he based his assessment on a generic career path utilizing the Paterson B scale as a framework. In regard to the plaintiff's post-morbid capacity he assumed an A scale progression, but took account of her physical limitations.

[52] I have already indicated that it must be accepted that the plaintiff would have, but for the injuries sustained, obtained her matric. In these circumstances the earnings capacity calculated on a generic basis (i.e. the postulated Paterson B scale) is in my view, appropriate. Dr *Whitehead* was not challenged in this regard. Dr *Whitehead's* projected earnings progression in the Paterson B band was also not challenged. The defendant presented no evidence to contradict the assumptions used nor to establish an alternative basis for the calculation.

[53] In the circumstances the evidence as to the plaintiff's pre-morbid earnings capacity, and the actuarial calculation thereof, must be accepted. To these calculations general contingency deductions of 5% for past loss and 15% for future loss were applied. The defendant also did not specifically challenge these contingency deductions as being too low in the circumstances. That does not, however, mean that the proposed contingency deductions, are to be accepted.

There are no "*standard*" or "*normal*" contingency deductions. It is for the trial court to exercise a discretion in determining, with reference to the facts what would be appropriate in the circumstances. See ***Road Accident Fund v Kerridge***[8].

[54] In this case the plaintiff is still very young. Age is an important factor in determining contingencies for the simple reason that, as noted in ***Kerridge***[9],

> "The younger a claimant, the more time he or she has to fall prey to vicissitudes and imponderables of life. These are impossible to enumerate but as regards future loss of earnings they include, *inter alia*, a downturn in the economy leading to reduction in salary, retrenchment, unemployment, ill health, death, and the myriad of events that may occur in one's everyday life. The longer the remaining working life of a claimant, the more likely the possibility of an unforeseen event impacting on the assumed trajectory of his or her remaining career. Bearing this in mind, courts have, in a pre-morbid scenario, generally awarded higher contingencies, the younger the age of the claimant. This court, in Guedes, relying on Koch's Quantum Yearbook 2004, found the appropriate pre-morbid contingency for a young man of 26 years was 20% which would decrease on a sliding scale as the claimant got older. This, of course, depends on the specific circumstances of each case but is a convenient starting point."

[55] In my view, a deduction of 15% for future earnings is too low. It does not adequately address the extent of the vicissitudes referred to above, having regard to the plaintiff's age. Nor does it adequately reflect the state of the economy and the

[8] 2019 (2) SA 233 (SCA) par 42-43
[9] Supra at [44]

high levels of unemployment and under-employment which beset youthful entrants into the labour market. In these circumstances I consider that a contingency deduction of 25% would be appropriate. Mr *Mouton*, for the plaintiff, conceded during argument that this would be a fair deduction in the circumstances.

[56] The result is that the future earnings (in respect of each of the three scenarios addressed by Dr *Whitehead*) and as calculated by the actuary is to be reduced to R4 764 649.50 so that the total projected pre-morbid earnings is an amount of R5 155 990.50.

[57] In regard to plaintiff's post-morbid projected earnings Dr *Whitehead* utilized earnings scales for employment at a Basic Skills level with progression over time to a lower semi-skilled occupational level (i.e. Paterson A level band of earnings). He postulated three scenarios viz. one involving consideration only of the plaintiff's physical injuries; one having regard to both the physical injuries and psychological condition, and a third involving sedentary work only. He accepted that the plaintiff would only be capable of performing light work or sedentary work.

[58] The three scenarios, in essence, involved the application of a contingency deduction to the projected earnings. The starting point in each was the same value for the projected earnings. In the case of the first scenario, a deduction of 50% was applied. This was based on the fact that the plaintiff would be precluded from medium to heavy manual work. In the second scenario, in which the PTSD is taken as rendering her less likely to sustain employment a contingency of 60% is applied. In the third scenario, which postulates sedentary work, a lower contingency is applied, namely 30%. This is based on the fact that since she is capable of

sedentary work it is likely that she will sustain such employment for a longer period of her productive working life. It was Dr *Whitehead's* opinion that higher than normal contingencies ought to be applied to plaintiff's post-morbid earnings. This, he opined, was because apart from the physical sequelae of her injuries, her emotional struggles would continue to impede her.

[59] This latter factor appears to be based on the view expressed by Mr *Stigant* that PTSD creates an impairment in functioning. He explained that the condition is difficult to treat, particularly if chronic. He nevertheless was of the view that physiotherapy and psychotropic medication would assist, in particular with anxiety. He recommended treatment on the basis that it would result in an improvement in the plaintiff's condition. Thus, while Mr *Stigant* accepted that the plaintiff's condition would impact on her functioning as far as employment is concerned he did not suggest that it would disable her to any great extent. It is no doubt on this basis that Dr *Whitehead* postulated a greater residual earning capacity in relation to sedentary work, should she obtain such work.

[60] Mr *Mouton* moved for determination of the plaintiff's loss of earnings to be based upon the second of Dr *Whitehead's* scenarios namely one where her physical impairments preclude certain type of work and her PTSD additionally impacts her employability. In my view, that scenario (which involves a 60% deduction) is unduly generous to the plaintiff.

[61] It is the court which is called upon to apply contingency deductions to projected earnings. In this instance the calculation of plaintiff's residual earning capacity proceeds on the basis of application of the Paterson A band earning potential until age of retirement. That is fair and reasonable. It is to this earning

potential that general contingencies are to be applied. The earnings band includes both physical and sedentary earnings opportunities. Whilst the plaintiff's earnings may be more impacted by reason of her physical constraints that is not so in respect of more sedentary type work. There is no reason to conclude that she will not be able in due course to obtain such work. She has in fact already acquired some qualifications in computer literacy.

[62] I accept that a general contingency deduction which is higher than may normally be applied is warranted. This will take into account the fact that the plaintiff is injured, and therefore at a disadvantage in the labour market. It must equally, however, take cognisance of the fact that the earnings scenarios developed are conservative. Dr *Whitehead* envisaged that if the plaintiff obtained sedentary work a 30% contingency would be appropriate. He did, however, postulate that such work would require a sympathetic employer given the plaintiff's physical limitations. I do not think that Ms *van Zyl's* testimony supports the extent of the limitations envisaged by Dr *Whitehead*. I am, however, prepared to accept that it may be more difficult for the plaintiff to obtain employment and accordingly propose to apply a slightly higher contingency than suggested by Dr *Whitehead*. I am accordingly of the view that a deduction of 35% would be reasonable in the circumstances.

[63] As indicated the post-morbid earnings as calculated by the actuary, Mr *Wim Loots*, for each of the scenarios was the same amount, namely R3 007 895.00. In coming to this figure Mr *Loots* applied, an actuarial assumption of earnings inflation at CPI plus 1% resulting in a nett discount rate of 2.50%. These assumptions were not challenged and they accord with assumptions usually applied in matters of this nature.

[64] Application of a contingency deduction of 35% results in post-morbid earnings of R1 955 131. 75. In the result the pecuniary value of the plaintiff's patrimonial loss is the difference between the projected pre-morbid earnings as set out above and the post-morbid earnings, namely R3 200 858. 75.

[65] Finally, there is the question of costs. The draft order submitted by Mr *Mouton* makes provision for the costs of two counsel. Plaintiff's heads of argument do not address the matter and in oral argument these were not pursued. I am, in any event, not persuaded that the issues in the trial, albeit important to the plaintiff, were of such complexity as to warrant the employment of two counsel.

[66] The trial was postponed on 22 November 2017 and the costs were reserved. Mr *Dala* submitted that these should be paid by the plaintiff since the postponement followed upon a substantial amendment of the plaintiff's claim. Mr *Mouton* submitted that the postponement arose so as to enable the plaintiff to consult its own experts. Although the order granted by Chetty J on 22 November 2017 does not include this phrase, the draft order submitted to the learned judge reflects that this was the agreed reason for the postponement. In the circumstances the reserved costs should be costs in the cause.

[67] In the result I make the following order:

1. The defendant is ordered to pay to the plaintiff the sum of R3 200 858.75 (Three Million Two Hundred Thousand Eight Hundred and Fifty Eight Rand and Seventy Five Cents) in respect of the plaintiff's claim for loss of income, payable within 14 days (fourteen) calendar days of date of this Order, together

with interest thereon at the rate of 10.25% per annum, calculated from a date 14 (fourteen) days after date of this Order, until date of payment.

2. The defendant is ordered to pay to the plaintiff the sum of R118 880.00 (One Hundred and Eighteen Thousand Eight Hundred and Eighty Rand) in respect of the plaintiff's claim for future orthopaedic medical expenses, payable within 14 (fourteen) calendar days of date of this Order, together with interest thereon at the rate of 10.25% per annum, calculated from a date 14 (fourteen) days after date of this Order, until date of payment.

3. The defendant is ordered to pay to the plaintiff the sum of R8 017.00 (Eight Thousand and Seventeen Rand) in respect of the plaintiff's claim for specialised equipment payable within 14 days (fourteen) calendar days of date of this Order, together with interest thereon at the rate of 10.25% per annum, calculated from a date 14 (fourteen) days after date of this Order, until date of payment.

4. The defendant is ordered to pay to the plaintiff the sum of R39 520.00 (Thirty-Nine Thousand Five Hundred and Twenty Rand) in respect of the plaintiff's claim for psychotherapy sessions, payable with 14 days (fourteen) calendar days of date of this Order, together with interest thereon at the rate of 10.25% per annum, calculated from a date 14 (fourteen) days after date of this Order, until date of payment.
5. The defendant ordered to pay to the plaintiff the sum of R360 000.00 (Three Hundred and Sixty Thousand Rand) in respect of the plaintiff's claim for

general damages, payable with 14 days (fourteen) calendar days of date of this Order, together with interest thereon at the rate of 10.25% per annum, calculated from a date 14 (fourteen) days after date of this Order, until date of payment.

6. The defendant is ordered to pay the plaintiff's costs of suit, as taxed or agreed, on a party and party scale together with interest calculated thereon at the rate of 10.25% per annum payable within 14 days (fourteen) calendar days after date of taxation or agreement until date of payment; such costs to include the reserved costs of the trial set down for 22 November 2017; and

6.1 The costs of the reports and supplementary reports, if any, of:

6.1.1 Dr L A Oelofse, orthopaedic surgeon;

6.1.2 Dennis Stigant, clinical psychologist;

6.1.3 Ansie van Zyl, occupational therapist;

6.1.4 Dr Peter Whitehead, industrial psychologist;

6.1.5 Wim Loots, Actuary.

6.2 The reasonable qualifying fees and expenses, if any, of:

6.2.1 Dr L A Oelofse, orthopaedic surgeon;

6.2.2 Dennis Stigant, clinical psychologist;

6.2.3 Ansie van Zyl, occupational therapist;

6.2.4 Dr Peter Whitehead, industrial psychologist;

6.2.5 Wim Loots, Actuary.

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G.G. GOOSEN

JUDGE OF THE HIGH COURT

Obo the Plaintiff:	*Adv P. Mouton / Adv T. Rossi*
Instructed by:	*Johan Cronje Attorneys* *c/o Heine Ungerer Attorney, 25 Cape Road, Port Elizabeth* *Ref: Jaco Jansen* *Tel: 041 374 3773*
Obo the Defendant:	*Adv I. Dala*
Instructed by:	*State Attorney, 29 Western Road, Central, Port Elizabeth* *Ref: M Govender* *Tel: 041 585 7921*