REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 09/35083

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

19·2·13
DATE

SIGNATURE

In the matter between:

NAUDÉ, NINA YVONNE (born KRUGER) Plaintiff

and

ROAD ACCIDENT FUND Defendant

J U D G M E N T

WEINER, J:

[1] The plaintiff, an attorney, sued the defendant, the Road Accident Fund for damages resulting from injuries she sustained in a collision.

[2] The parties had previously agreed the issue of liability and that the defendant would compensate the plaintiff for 100% of her agreed or proven damages. The matter was to proceed on the issue of quantum only.

FACTUAL BACKGROUND

[3] On 24 September 2007 at approximately 18h45 along the N1 Highway North of the Grassmere Toll Plaza, Gauteng, a collision occurred between a motor vehicle, bearing registration number DDH 576 GP, driven by one P R Mbuyisa ("*the insured driver*") and a vehicle with registration TRG 063 GP being driven by Ruahan Naudé ("*Ruahan*") the plaintiff's ex-husband.

[4] The plaintiff was a passenger in the motor vehicle driven by Ruahan. The plaintiff pleaded that the collision was caused solely by the negligence of the insured driver. The plaintiff pleaded and gave evidence that the vehicle in which she was travelling was hit and rolled twice. According to the plaintiff, it was a serious accident in that certain passengers who were travelling in a taxi that was also involved in the collision were killed. She was transported to the Olivedale Clinic where she was assisted by her brother-in-law a Dr Jean Viviers who is a GP and was the family physician. According to the plaintiff she suffered bodily injuries consisting of:

4.1 Soft tissue injuries to the cervical thoracic and lumber spine.

4.2 Anterior wedge compression fracture of the D(T)11 vertebra with injury to the ligaments.

4.3 Ongoing debilitating headaches, neck pain and backache.

4.4 Injury to the left shoulder.

4.5 Rupture of the left distal metacarpal ligaments.

4.6 Sprained left Achilles' ligament with swelling.

4.7 Multiple bruises.

4.8 Emotional shock and trauma.

4.9 *Sequelae* of the above injuries.

[5] She was discharged from the hospital that night having received medication and injections for her pain and being put into a neck brace. She wore such brace for two weeks and was prescribed pain medication and anti-inflammatory medication. On a follow-up treatment with Dr Fleming, it appeared that she had torn ligaments in her left hand. At the time, she discovered she was pregnant and therefore did not undergo surgery for her hand.

EXPERTS

[6] The experts in the matter provided joint minutes. In regard to the orthopaedic surgeons, Dr Golele and Dr Volkersz, both doctors agreed that the plaintiff sustained soft tissue injuries to her neck, back, left shoulder, left knee, left ankle and left hand and had a laceration of the left hand. The pain in her left shoulder, arm, left knee, left ankle and left hand has resolved completely. She however has residual symptoms with regard to the neck injury and thoracic lumbar injury. As it is five years after the accident, the

doctors agreed that the prognosis for both these injuries was guarded. The orthopaedic surgeons further agreed that adequate provision would have to be made for the conservative management of these injuries. Both doctors noted that she had sold two-thirds of her private practice after the accident and that she is not able to walk long distances, unable to sit upright or stand too long or do her washing. She relies on medication for most of the nights and is unable to carry heavy objects. The doctors deferred to the opinion of an occupational therapist and/or industrial psychologist with regard to the effect this would have on her productivity levels and future employability.

[7] The occupational therapists Ms S Murcott and Ms D Brümmer agreed that the plaintiff would benefit from occupational therapy, physiotherapy and biokinetics. It was noted by Ms Murcott, the plaintiff's occupational therapist that she no longer rode her horse regularly and employed a horse rider to ride her horses to keep them in a good condition. According to the occupational therapists, the plaintiff's work as an attorney in her partnership styled Kruger and Kelly Inc was interrupted by the accident for about two weeks whereafter she worked reduced hours for two to three weeks before resuming work on a full-time basis. She had been working in her own practice. Yvonne Kruger Inc from her home-based office in Kyalami since March 2010. It was agreed that she was functionally able to work as an attorney but experienced aggravation of neck and back symptoms in the course of carrying out her work. This according to the plaintiff resulted in reduced productivity and efficiency. Ms Murcott noted that the plaintiff estimated she is experiencing an overall 15% to 20% reduction in her work output with regard to productivity, quality and

efficiency of her work compared to what her capacity was prior to the accident. This aspect was not a point of agreement between the plaintiff and the defendant as it appeared from the financial information provided that the Plaintiff had not suffered any actual loss of income, which could be attributable solely to the collision. The defendant did not agree that the plaintiff would suffer an overall 15% to 20% reduction in productivity. This appeared to be the main point of contention between the parties. The occupational therapists further agreed that the plaintiff's residual functional capacity would restrict her work to sedentary and some selected light physical demands. A further issue which was dealt with by the occupational therapists was the plaintiff's dependency on her driver/assistant in respect of carrying out heavier tasks that she would have managed herself prior to the accident such as lifting and carrying heavy files, court bundles and her briefcase up and down stairs and assisting with heavier tasks in and around her office. She estimated that the driver was spending approximately half of his work time doing such tasks. They further agreed that her future work abilities would be subject to the progression of her condition over time and referred to the medical specialists in this regard. It was however agreed that deterioration in her condition from a functional prospective would result in a further decrease in work capacity and workday tolerance. She would have to be selective in taking on work within her residual capabilities and reducing her work hours. The plaintiff, in evidence, stated that she still suffered from neck and back pain and headaches.

PLAINTIFF'S EVIDENCE

[8] In dealing with her practice as an attorney, the plaintiff gave the following evidence: At the time of the incident, she was practising in partnership with one Kelly in Rosebank. At the end of February 2010, she terminated that partnership and began practising for her own account from 1 March 2010 in Midrand. She gave various reasons for this. Firstly, it took her approximately one and a half hours in traffic to travel from Midrand to Rosebank and back and this resulted in her back pain becoming more severe. In addition as her child needed to go to school, she wanted to have her practice nearer to where the child was to attend school which was in the Midrand area. She was presently practising from home. Her daughter was born on 3 June 2008. According to her, her back pain has got progressively worse over time. This was in her thoracic and lumber area. She has purchased ergonomic equipment for her office and has adjusted her lifestyle in this regard. After the collision she received some therapy from a sport's therapist one Francois Minnie once every fortnight which was paid for by her ex-husband until February 2010. After the birth of her child she took anti-inflammatory and pain medication and used transact patches and Voltaren gel and Mypaid. She did not attend physiotherapy immediately after the collision as she was being attended to by Francois Minnie and after her husband ceased paying for same she stated that she could not afford physiotherapy on her medical aid.

[9] The Plaintiff consulted with Dr Volkersz in May 2010 when she underwent a CT scan and X-rays. Dr Volkersz identified a fracture of her

thoracic spine which had not been picked up until then. According to Dr Volkersz on examination the plaintiff complained of pain on palpation from the spinal process of the D(T)11 downwards. She reported that after the initial X-rays revealed that there may be an anterior wedge compression fracture that has yielded the level of D(T)11. He decided to do further which showed the possibility of trauma at the D(T)11 level could not be excluded and that there was also evidence of previous Scheuermanns disease. This he stated could explain the pain that she experiences in that area going downwards into the lumbar spine. According to Dr Volkersz as a result of her spinal injuries the plaintiff had to reduce her physical activities and has also reduced time that she spends in her professional capacity being an attorney. He stated that the combined effect of these injuries could well lead to a loss of productivity between 10% and 20% in the future and that this would not improve in time. He however commented that an occupational therapist and/or an industrial psychologist would be in a better position to comment on this.

She thereafter consulted Dr Edeling, a neurosurgeon who sent her for MRI and other tests. She was currently being treated by Dr Edeling and was on anti-inflammatory medication. She was advised that surgery could lead to more serious problems and that alternative conservative medication in the form of anti-inflammatory and physiotherapy treatment would be preferable.

[10] In evidence, the plaintiff gave her version of how her amenities of life had been affected by her injury. According to her reports to the medical experts, she used to be more active with her dogs and horses and this is

being curtailed a lot. She used to scuba dive, partake in mountain biking, gym and horse riding. She in fact purchased a horse immediately prior to the collision for R75 000,00 which was to compete. She however had to pay someone else once a month to take it on an outride as she was unable to do so. In regard to her work situation she had a secretary at the office and an assistant messenger/driver. The driver, Mr Tshabalala, has to assist her in carrying heavy objects and transporting her to and from court when she has to carry such objects. She is unable to sit or stand for a long period of time and has to take many breaks. Accordingly it takes her longer to get the same output that she previously did. She was asked whether she had any other income from other sources. She explained that she had started a business with a veterinarian but that company had not shown any profit. Her vehicle was used in the business and Mr Tshabalala did the deliveries.

[11] Under cross-examination the plaintiff stated that she only sought physiotherapy in January 2011 when the pain became worse. She sought assistance from Dr Edeling in 2012 and also saw a homeopath a Mr Sa. She was questioned extensively on her social activities. It appeared that the defendant had consulted with Advocate JC Pieterse (Pieterse), a man with whom the plaintiff had previously had a romantic relationship. According to the plaintiff, this relationship ended acrimoniously when the Plaintiff broke it off. Pieterse had reacted adversely to the break-up and had harassed the plaintiff. The plaintiff was cross examined extensively and pedantically about virtually every aspect of her pre and post collision activities, on the basis that Pieterse would give evidence that she was being untruthful about them. Having

contributed to this attack, Advocate Pieterse then chose, at the proverbial 11th hour, not to give evidence.

[12] Plaintiff's evidence in regard to her golfing activities was that she had not played before the collision but went for lessons after the collision and was unable to play. In regard to her horse riding activities, she had been an avid horse rider in her youth and while she was at school. After matric however she did not continue riding until 2004 when her and her husband purchased two horses as colts. They purchased another in April 2008 and this horse was to compete. However, after the collision she was not able to ride and she hired a young girl to ride the horse for her three to four times a week. She was cross-examined comprehensively on an incident with a horse on 27 December 2010 when she had been on a short outride on the road around her property. According to her, a van came into the road and approached her as she was riding. He accelerated as a result of which the horse got a fright and stumbled and she slid off the horse onto the ground. According to the plaintiff, she did not sustain any injuries or seek medical attention and it was not related to her seeking physiotherapy in January 2011. It was put to her in cross-examination that Pieterse would give evidence that her back injury was not as a result of the collision, but as a result of this incident in December 2010; that she was severely bruised and required physiotherapy in January because of this. According to the plaintiff, this was a lie and she was not hurt in this fall. In addition, the fracture to which Pieterse was referring had been diagnosed earlier in 2010, prior to this incident.

[13] As stated above, the issues remaining to be dealt with relate to the Plaintiff's claim for R300,000.00 for general damages in respect of pain and suffering, disability and loss of amenities of life; and an amount of R2,219,009.00 in respect of the Plaintiff's future loss of earnings/earning capacity.

GENERAL DAMAGES

[14] In regard to general damages, the defendant referred to the evidence in respect of the injuries sustained by the Plaintiff as follows:

1. The medical report which forms part of the MMF1 form does not indicate a back injury;
2. The Plaintiff received treatment from Mr Minnie, a sports therapist, subsequent to the accident and until February 2010;
3. The Plaintiff stated that she did not receive physiotherapy thereafter because she could not afford it;
4. The Plaintiff consulted Dr Volkersz during May 2010;
5. For the period January 2011 to February 2011 the Plaintiff received physiotherapy from Dr Tyler on 5 separate occasions;
6. During May 2011 and July 2011 the Plaintiff received physiotherapy from Dr Tyler on 3 separate occasions;
7. On 18 June 2012 and 25 July 2012 the Plaintiff consulted Dr Edeling.

8. The Plaintiff received physiotherapy from Mr Sa but cannot provide any documentary confirmation to that effect.

9. No other treatment for her injuries was received by the Plaintiff for the period September 2007 to January 2011.

10. Dr Volkersz' report as at 17 May 2010 sets out the complaints to the neck; the lower thoracic spine; and the left shoulder, arm, hand and ankle.

[15] Because there is no specific complaint listed in respect of an injury to the lumbar spine, Defendant contends that such injury could not have been sustained as a result of the accident. However, Dr Volkersz did state that the D(T)11 level fracture could not be excluded and that this could explain the pain that she experiences in that area going downwards into the lumbar spine.

[16] The defendant disputed the plaintiff's level of pain as she had failed to seek treatment for many years. Defendant referred to the matter of *Mashaba v The Road Accident Fund*,[1]. In that matter, the Plaintiff went for only one visit to a physiotherapist because of financial constraints. The Court rejected that evidence given the fact that the Plaintiff was earning a substantial salary at the time. In the *Landzaard*[2] matter, the Court stated that

> *"There is no doubt that the Plaintiff has suffered injury as was confirmed by Dr Reid as well as the Plaintiff herself but the*

[1] *(2006) 4 All SA 384 (T)*
[2] *Unreported. Case Number 09/14443 GSHC, Date of Hearing: 11 November 2010*

Plaintiff's failure to mitigate the loss was apparent."

[17] The Court, taking the broadest general consideration in attempting to compensate the Plaintiff for her pain and suffering in respect of injuries sustained similar to those of the Plaintiff *in casu* awarded an amount of R100 000,00 in respect of general damages.

[18] The Defendant argued that Plaintiff exaggerated her loss of amenities in that post-collision, she was able to engage in mountain biking, go to the gym and only incur medical expenses of in the amount of R2157.12. Accordingly, defendant argues that the Plaintiff's curtailment of amenities of life compares very favourably in comparison to those of the Plaintiffs referred to in the authorities cited above.

LOSS OF EARNING CAPACITY

[19] The defendant, in dealing with plaintiff's claims, referred to the fact that the Plaintiff testified that there is no aspect of her work as an attorney that she is, subsequent to the accident, unable to perform. Plaintiff's claim relates to the fact that she now has to perform such work with a certain degree of pain and that it takes longer to do what she used to do. Accordingly, the Defendant contends that the Plaintiff has failed to prove that her loss of productivity has resulted in a loss of earnings/earning capacity. It was submitted that the claim for loss of earning capacity cannot be calculated by simply applying a contingency differential to the Plaintiff's scenario of "*but for* and *having regard*"

to the accident. This is the issue which this Court is called on to adjudicate upon.

[20] The question that arises is whether the loss of earning capacity claimed by the Plaintiff is in fact quantifiable as a separate patrimonial damage or whether it should fall under general damages. In the current matter, the Plaintiff argues that she has on a balance of probabilities clearly established that her loss of productivity will amount to a loss of earning capacity and, in turn, will have a result of her patrimony being diminished. It was submitted argued that no witnesses were called on behalf of the Defendant to counter this evidence.

The plaintiff's counsel referred to the matter of *Southern Insurance Association Ltd v Bailey N.O.*[3] The Court stated the following in this regard: -

> *"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future .... All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.*
>
> *It has open to it two possible approaches.*
>
> *One is for the judge to make a round estimate of an amount which seems to him to be fair and reasonable. This is entirely a matter of guesswork, a blind plunge into the unknown.*
>
> *The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions*

[3] *1984(1) SA 98 (A).*

resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

It is manifest that either approach involves guesswork to a greater or lesser extent..... There are cases where the assessment by the court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the court is bound to award damages'."[4]

[21] Plaintiff- submitted that when a trial Court assesses a Plaintiff's claim for loss of earning capacity and/or general damages, it has a wide discretion. (see *Legal Assurance Co Ltd v Botes*[5]) and each case should be assessed on its own merits and available evidence. For a Plaintiff to however be successful with a claim for loss of earning capacity, a Plaintiff must, as a requirement, prove that the reduction in earning capacity gives rise to a pecuniary loss.[6] The Court was referred to three more recent judgments dealing with the issue of loss of earning capacity, namely: -

23.1 *Deysel v Road Accident Fund*[7];

23.2 *Mark Allan Roe v Road Accident Fund*[8]; and

23.3 *Naidoo v Road Accident Fund*[9].

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4 *At 113G – 114B.*

5 *1963(1) SA 608 (A) at 614F.*

6 *Rudman v Road Accident Fund 2003(2) SA 234 (SCA) at 241H – 242B.*

7 *Unreported Case no 2483/09 GSHC Date of Hearing: 24 June 2011*

8 *[2010] JOL 25349 (GSJ)*

[24] In the matter of *Deysel v Road Accident Fund*, Bizos JA found that the Plaintiff's loss of earning capacity did not amount to a loss of income and instead awarded a higher amount in respect of the Plaintiff's claim for general damages. Plaintiff submits that this matter is however distinguishable from that in the *Deysel* matter because in *Deysel*, Plaintiff was a financial manager and she worked for a set monthly income; the fact that the Plaintiff was less productive during the day as a result of her bodily injuries, did not necessary equate to a loss of income as the Plaintiff was merely an employee who received her same salary at the end of the month. In the present matter, he Plaintiff is not an employee, but a self-employed person; a loss in productivity for the Plaintiff will amount to a loss of income as the Plaintiff gets out of her business that which she puts in; per the available evidence of the orthopaedic surgeon, occupational therapist and industrial psychologist, the Plaintiff's loss in productivity will amount to a loss of earning capacity, which in return will amount to a loss of income. The Plaintiff's orthopaedic surgeon testified that she had suffered a loss of earning capacity between 15 and 20 %; the occupational therapist confirmed this position and further stated that the Plaintiff's career path has been truncated; the Plaintiff's industrial psychologist stated that the loss of productivity would amount to a loss of income which should be calculated by using a 10 % contingency differential in the pre- and post-morbid scenario.

[25] In the matter of *Roux v Road Accident Fund*[10] the issue of loss of earning capacity was also dealt with by Van Oosten J. The Court accepted

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9 *Unreported, Case Number A5007/05GSHC Date of Hearing: 1 December 2005*

10 *Supra para 12 p 6*

that the *sequelae* of the injuries the Plaintiff suffered resulted in a diminishing of his ability to optimally perform in the workplace. The court enquired whether the disability the Plaintiff was suffering from would result in a pecuniary loss. The Court found that the Plaintiff's evidence on this score was less than satisfactory and found that the Plaintiff's disabilities had no real or any effect on his permanent or future earning capacity.

[27] In *Naidoo v Road Accident Fund*[11], a practising attorney claimed damages in respect of his future loss of earnings/loss of earning capacity on three bases, and , in particular, a loss of future income for less billable hours. In the current matter the Plaintiff claims damages in respect of loss of earning capacity which is calculated by applying a contingency differential between the pre- and post morbid scenario of the Plaintiff. In this regard, the Plaintiff's pre-morbid earnings are utilised as the base figure in the post-morbid scenario as well. Plaintiff contends that although it is clear that her loss of earning capacity will amount to a loss of income, it is difficult to quantify in rands and cents the exact loss of income suffered by the Plaintiff and hence a contingency differential should be applied.

[28] According to plaintiff, it was never put to the Plaintiff's industrial psychologist under cross-examination that her opinion that the Plaintiff's loss of productivity will amount to a definite loss of income, was fatally flawed and based on the incorrect assumptions. The plaintiff referred finally to the *Bailey*-matter[12] where the Court stated that one of the elements a Court can use in exercising its discretion is the making of a discount for contingency or the

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11 *supra*

12 *supra at 116G - 117A*

"vicissitudes of life". It was further stated that: -

> *"These include such matters as the possibility the plaintiff may in the result have less than a normal expectation of life; ...and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of each case... The rate of the discount cannot of course be assessed on any logical basis: The assessment must be largely arbitrary and must depend upon the trial judge's impression of the case."*

[29] The Court must accordingly do the best it can on the material available to it and in exercising its discretion the Court must consider an award which it considers to be just and fair under all circumstances.

[30] According to plaintiff, the losses must be calculated separately from the Plaintiff's claim for general damages by awarding damages to her in respect of:

30.1 her assistant; and

30.2 future time off work for medical treatment; and

30.3 her loss of earning capacity by applying a contingency differential to the Plaintiff's pre- and post-morbid scenarios in her actuarial calculations.

[31] The Court considers that, in its discretion it should award a separate amount for general damages. On the authorities quoted by both parties, it appears that an amount of R200 000.00 would be appropriate.

[32] The basis for the Plaintiff's claim for loss of earning capacity/future earnings is firstly for the past cost of an assistant attributable to the accident in respect of having had to employ Mr Tshabalala. In my view, this claim cannot succeed. I agree with the defendant's submission that such assistance would have and will be required in Plaintiff's practice irrespective of the collision and Plaintiff's injuries. This applies in the case of the claim for this future expense as well.

[33] The Plaintiff's claim for time off work is an amount of R74,394.00. This amount is calculated on the basis that the Plaintiff will require at least 6 to 8 weeks off work to attend to her treatment and has not been refuted by evidence.

[34] In respect of the Plaintiff's claim for future loss of earnings, a contingency differential is utilised between the pre- and post-morbid earnings scenarios to reflect a total loss of income in the amount of R1,159,893.00. Plaintiff arrives at this figure as follows:

34.1 The Plaintiff is currently 38 years old. In regard to the pre-morbid figures, if one accepts that the Plaintiff would have worked until retirement age of 65 years, it is

apparent that the Plaintiff, at the hearing of the trial, had 27 years left until her retirement age. Accepting Robert Koch's principle on a sliding scale of ½ % per year to retirement age, it is clear that the contingency deduction on the pre-morbid earnings should have been 13,5 %. The higher contingency of 15 % therefore favours the Defendant and it was submitted that the Court must accept that the pre-morbid contingency deduction should be 15 %.

34.2 In regard to the contingency applicable to the Plaintiff's post-morbid earnings, the normal contingency deduction for every day contingencies should also be applied to the Plaintiff's post-morbid earnings, being 15 %. Once this contingency deduction has been applied to the base figure at the post-morbid earnings of the Plaintiff, provision has been made on the pre- and post-morbid scenario for general life contingencies.

34.3 The Plaintiff's claim for loss of income is however based on the premise that the Court should apply a 10 % higher post-morbid contingency deduction to make provision for the Plaintiff's loss of earning capacity and hence a 25 % contingency deduction is applied to the post-morbid earnings of the Plaintiff. The difference in the contingency deduction in the pre- and post-morbid scenario is referred to as the contingency differential.

34.4 This contingency differential remains the prerogative of the Court, but as is set out in Robert Koch's Quantum Yearbook 2012 under the heading of *"GENERAL CONTINGENCIES"*: -

"Some judges seek advice from expert witnesses as regards to the appropriate deductions to make."

34.5 The Plaintiff in the current matter has presented undisputed evidence to the effect that her pre-morbid income, as per the Industrial Psychologists report (and the accompanying actuarial calculations, which calculations are not disputed by the Defendant) up until retirement age amounts to R11,784,913.00. As previously stated, almost the exact same base amount, apart from the loss of income for time off work, is utilised on the post-morbid scenario, which evidence also stands uncontested before the above Honourable Court. The Plaintiff's claim, *inter alia*, however lies therein that a different post-morbid contingency deduction should be applied to that than the pre-morbid scenario.

34.6 Plaintiff contends that the expert evidence of the Plaintiff's industrial psychologist stands undisputed and was based on the available medical evidence to the industrial psychologist at that stage. Plaintiff submits that the Court should apply a 10 % contingency differential between the Plaintiff's pre-morbid and post-morbid earning scenarios to compensate the Plaintiff for her loss of earning capacity,

as per the second approach adopted in the *Bailey*-matter[13] (i.e. based on actuarial calculations).

[35] The defendant's argument was that the plaintiff had suffered no loss of productivity. However, the plaintiff's experts as well as the defendant's occupational therapist all accepted that some loss of productivity would be experienced and that a contingency should be allowed in this regard. Accepting the plaintiff's calculations, the Plaintiff's total claim for loss of earning capacity/loss of income is an amount of R1,159,893.00 plus R74,394.00.

[36] The Defendant has tendered an undertaking in terms of Section 17(4) of the Road Accident Fund Act 56 of 1996. The parties have settled the Plaintiff's past hospital and medical expenses in an amount of R2 157,12.

As I have dealt with above, the cross examination of the plaintiff was intense and pedantic and embarked upon on the basis that Piterese was to testify. The issues were of a minor nature and subjected the Plaintiff to unnecessary trauma in having to relate some of the painful events relating to this relationship. The plaintiff's counsel, Ms Viljoen requested the assistance of senior counsel in anticipation of having to cross examine Pieterse who is a colleague and senior to her. I believe that this was warranted. Pieterse then declined to testify and a large part of the evidence put to the Plaintiff became inadmissible and irrelevant. I believe that a punitive order for costs is warranted. I also believe that this issue should be referred to the

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13 *supra*

Johannesburg Bar Council. I consider it unprofessional conduct for an advocate to make disparaging statements about another professional, undertake to prove same under oath and then simply renege from so doing, leaving the harm caused, to remain.

Accordingly the following order is made:

1. The Defendant is ordered to provide the Plaintiff with an undertaking in terms of Section 17 of the Road Accident Fund Act, 56 of 1996;

2. The Defendant is ordered to pay the Plaintiff's past hospital and medical expenses in the amount of R2,157.12;

3. The Defendant ordered to pay general damages to the Plaintiff in the amount of R200,000.00;

4. The Defendant is ordered to make payment to the Plaintiff in respect of the Plaintiff's loss of earning capacity/loss of income in the amount of R1 234 287.00;

5. The Defendant is ordered to pay the Plaintiff's costs on a party and party scale, save that in respect of the costs of the hearing, the costs are to be paid on an attorney and client scale, such costs to include the cost of senior counsel for 1½ days.

6. This judgment is to be referred to the Johannesburg Bar Council in respect of the conduct of Adv JC Pieterse.

SE WEINER
JUDGE OF THE HIGH COURT

Counsel for the Plaintff:	*Adv. A. Viljoen*
Plaintiff's Attorneys:	*Piet Uys Attorneys*
Counsel for the Defendant:	*Adv. C. De La Hunt*
Defendant's Attorneys:	*MSM Incorporated*
Date of Hearing:	*29 October 2012*
Date of Judgment:	*19 February 2013*