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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 21536/2013

29/12/2016

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

N M L

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

Jansen J

Nature of Action:

[1] This action arises from a motor vehicle collision on 22 August 2010. The plaintiff injured her left knee. The taxi in which she was a passenger rolled.

[2] The plaintiff was taken by ambulance to the Potchefstroom Hospital where she was clinically evaluated and admitted on 22 August 2010. X-rays were taken. She was treated and discharged. However, her tibia had to be debrided and she had to return to hospital to have an abscess drained on 3 September 2010 as during the debridement, glass shards had been overlooked.

[3] The plaintiff was discharged on 3 September 2010 and attended follow up visits on 10 September 2010, 15 September 2010 and 27 October 2010.

[4] When the matter was called before me, general damages and future loss of earnings were the only issues still in dispute.

[5] The plaintiff was left with ugly scars on her knee and can move her knee only 0% - 120% whereas the normal extension is 0% - 150%, which was the state of affairs when she was examined on 23 July 2013. She had tenderness behind the left patella and over the proximal aspect of the left tibia.

[6] Reference was made by a doctor, Theo Enslin, the independent medical examiner, to "the AMA Guides of the Sixth Edition" (the American Medical Association Guides), the primary purpose of which was to rate the plaintiffs impairment in order to assist the experts and the court in determining the compensation to be awarded to the plaintiff as a result of injury.

[7] The table used by Dr Enslin is set out at p 17 of his report: -

<i>Impairment due to:</i>	<i>Page ref. & Table</i>	
A Grade I laxity of the medial collateral ligament of the left knee	P.510, Table 16/3	10% LEI
		LEI stands for Lower Extremity Impairment
Left knee chondromalacia	P.509, Table 16/3	2%LEI
Left knee tendonitis in the infrapatellar tendon	P.512, Table 16/4	2%LEI
TOTAL IMPAIRMENT OF THE LEFT LOWER EXTREMITY		14% LEI 6%WPI (WPI stands for Whole Person Impairment)
Cosmetic Scarring		5%WPI
Post-Traumatic Stress Disorder		5%WPI
TOTAL IMPAIRMENT OF THE WHOLE PERSON Combined Value: 6% + 5% + 5%	P.604	15% WPI

[8] The terms used above require explanation. The Road Accident Fund Amendment Act 19 of 2005 (the "**Amendment Act**") came into effect on 1 August 2008. The Amendment Act has substantially curtailed claims for non-patrimonial loss, due to the new rules and procedures applicable to the qualification and assessment of such claims. Before such a claim may be made, the plaintiff's injury must be capable of being categorised as "serious".

[9] It may be termed a "serious injury" when in terms of the AMA Impairment Rating (the American Medical Association Guides), the injury results in 30% or more of the whole-person impairment. When the 30% bar is not reached, non-patrimonial loss may be

included when the injuries resulted in any of the consequences considered in the AMA Guides namely: 1) serious long-term impairment or loss of a body function; permanent serious disfigurement, 2) severe long-term mental or severe long-term behavioural disorder; 3) loss of foetus. It is important to note that Dr Enslin took into account both cosmetic scarring, and Post-Traumatic Stress Disorder in equal measure to conclude that the plaintiff had suffered a 10% WPI.

[10] L Steynberg and R Ahmed, **The Interpretation of the Amended Road Accident Fund Act 56 of 1996** with regard to "serious injury claims", state the following in the Potchefstroom Electronic Law Journal [2012] PER 22 et. seq.: -

(c) If the injury is not on the list of non-serious injuries, the medical practitioner may assess the injuries according to the "AM,4 Impairment Rating".¹ If the injuries result in 30 per cent or more of whole-person impairment (hereinafter referred to as "WP/") in terms of the 6th edition of the American Medical Association Guides² (hereinafter referred to as the "AM,4 Guides") non-patrimonial loss may be awarded. Alternatively if the injury is not on the list of non-serious injuries and did not result in 30 per cent or more of WPI, then non-patrimonial loss may still be claimed if the injuries fall within the following "narrative test":³

(aa) they resulted in a serious long-term impairment or the loss of a body function;

(bb) they constitute permanent serious disfigurement;

(cc) they resulted in severe long-term mental or severe long-term behavioural disturbance or disorder; or

(dd) they resulted in the loss of a foetus.

[11] Initially the plaintiff failed to follow the provisions of the Amendment Act regarding the filing of a RAF 4 form and the assessment by an independent medical practitioner and the further procedure set out by the Amendment Act⁴. This problem was rectified

¹ See par 4 of RAF 4.

² Reg 1(ii) sv "Definitions".

³ As per reg 3(l)(b)(iii); see par 5 of RAF 4.

⁴ Even had these procedures not been followed, the court's jurisdiction is not ousted where the merits of the case have been conceded.

and the independent medical practitioner assessed that under the narrative test, the plaintiff had suffered "cosmetic scarring and Post-Traumatic Stress Disorder".

[12] The argument in court was addressed by both parties on the basis that they accepted that the plaintiff had suffered permanent serious disfigurement with concomitant emotional distress.

[13] Dr Enslin's finding was that although the plaintiff had not reached the 30% whole person impairment bar, she qualified under the narrative test for general damages.

The Plaintiff's earning potential: -

[14] Ms L Gildenhuys, an occupational therapist, provided an expert report on 6 May 2016: -

[15] Summary of difficulties and Loss of Amenities of Life: -

Injuries Sustained:

The plaintiff sustained the following injuries in the accident in question:

- Grade 1 laxity of the medial collateral ligament of the left knee.
- Left knee chondromalacia.
- Left knee tendonitis in infrapatellar tendon.
- Symptoms of Post-Traumatic Stress Disorder.

[16] Subsequent to the assessment process, Ms Gildenhuys drew the following conclusions:

- Screening of the following aspects did not reveal any significant impediments as sequelae of the collision: cognitive abilities, social skills and interpersonal relationships.
- The clinical evaluation of physical abilities indicated diminished muscle strength of the left knee.

- The integrated assessment of pain indicated possibly mild to moderate presence of pain which would likewise have an influence on the plaintiff's participation in daily activities and work demands. Subjective symptom/disability reports, medical finding, responses on pain questionnaires and her pain behaviour mostly correlated with this. Scoring on the Oswestry did not correlate with other pain questionnaires and behaviour, possibly indicating some exaggeration behaviour.
- Emotional and cognitive components assessment results indicated possible mild to moderate difficulties. From the information obtained during the assessment, it appears that the claimant still suffers from diminished motivation, possible depressed mood, feelings of anxiety and apparent low self-esteem as a result of the accident under discussion.
- The assessment of Activities of Daily Living (ADL) and Instrumental Activities of Daily Living (IADL) did not indicate any significant difficulties.
- The assessment of driving ability, incorporating the results of the clinical - and functional assessments, indicated that the claimant neither has current hand-, arm-, foot- or leg difficulties or any diseases which could interfere with her ability to perform normal tasks associated with driving a vehicle, nor is she expected to have such future difficulties due to accident related sequelae.
- The assessment of domestic tasks, taking into account all other clinical and functional assessment results, indicated that the claimant probably has mild difficulty to take care of some domestic tasks such as spring cleaning even though it is not expected of her at present.

[17] Ms Gildenhuys further gave the following summary of the plaintiffs educational and work history:

- ***The claimant completed Grade 12 whereafter she gained some work experience as an administrative clerk on a contract basis.***
- ***The claimant completed work-related courses such as Computer Literacy, completed in 2010 (Basupi College).***
- ***At the time of her involvement in the collision, the claimant was unemployed although she was reportedly accepted to start with military training the following year at the South African Military Health Services. Her***

intention was eventually to study nursing through the military.

- *In 2011 she started working part time at Potchefstroom Hospital as an administrative clerk. The employment was on a 6 month contract basis. She returned to this position in 2013 for another 6 months. She is currently a first year nursing student at North West University.*

[18] Ms Gildenhuys continued by stating: -

"When contemplating alternative positions or training, her inherent physical and mental capacity, age, assessment results, educational history and work experience should be taken into account. In my opinion, based on Ms L.'s current functional capability, as presented during this assessment, Ms L. should be able to continue her nursing studies. She will however benefit from implementing good ergonomic principles in the workplace, including occasional rest breaks from standing and assistance with lifting weights exceeding her capabilities. It will furthermore be crucial for her to adequately manage her weight in order to limit the excess weight placed on her affected knee and thereby placing unnecessary strain on it which might lead to pain and even possible degeneration. It should be noted that there is a vast array of possible careers in the nursing field which can typically range between mostly light work (e.g. working in a pharmacy clinic) to heavy work (e.g. working in a spinal unit)."

[19] Ms Gildenhuys further listed the plaintiff's current accident-related complaints to be as follows: -

- *"Claimant reports occasional black-outs when stressed or under pressure. After such an incident she is unable to recall what occurred during that period (Deference is given to the relevant medical experts for further comment in this regard).*
- *Claimant reports that she finds it difficult to climb the stairs at the university (due to pain and fatigue in the left knee) and has to rest frequently.*
- *Experiences pain in her left knee when walking more than 30 minutes.*

- ***Experiences pain in her left knee when squatting e.g. when cleaning.***
- ***Claimant reports that she is unable to exercise and has gained a lot of weight since the accident***
- ***Experiences pain in her left knee when standing/or longer than 30 minutes.***
- ***Experiences occasional lower back pain."***

[20] She repeated that in terms of general work demands the plaintiff had no problem with sitting, walking or bending but with lifting and carrying.

[21] She concluded that it appeared that the plaintiff was capable of medium to heavy work at present. She also opined that this would remain the case in the future.

[22] She observed that prolonged standing and weight handling would remain a problem for the plaintiff but that when she was assessed in May 2015, the plaintiff was capable of medium to heavy work. She commented on the fact that the plaintiff's greatest physical drawback was her problem with obesity and that she would have to manage her excess weight in order to prevent unnecessary strain, pain and even possible degeneration.

[23] She also pointed out that it would be crucial for the plaintiff adequately to manage her weight in order to limit the excess weight placed on her affected knee, thereby placing unnecessary strain on it which might lead to pain and even possible degeneration. Nonetheless, she was of the opinion that the plaintiff would be able to continue with her nursing career, which could include less strenuous physical demands namely working in a pharmacy clinic, consulting, paediatric settings and the like. The plaintiff might therefore experience some limitation with regard to job freedom and career choices, but would be able to continue working.

[24] A second industrial psychologist Ms N Brink opined as follows after a thorough evaluation on 4 March 2015: -

"However, considering her post accident career and academic path, it is the writer's view that this was not affected by the accident and she would likely have followed the same, regardless of the accident.

She reported to the writer that her intentions are to complete (nursing) studies in 2018, whereafter, she would qualify as a Professional Registered Nurse.

Based on the available information, it is the writer's view that Ms L. would likely have completed her Nursing Degree in 2018 and entered the labour market, as a Professional Nurse, probably within approximately 6 months (mid-2019, at age 28). She would likely have entered the Department of Health on salary Notch 1 for Professional Nurse Grade 1 (General Nursing). The writer notes that the Salary Scales for Professional Nurses Grade I, II and III (General Nursing) consist of 6 Notches each, each notch being 3% higher than the previous. With satisfactory work performance Nursing staff qualify for a 1 notch increase every 2nd year.

Ms L.'s basic salary would, with acceptable performance and apart from any inflationary adjustments, probably have increased to the maximum salary of a professional Nurse Grade 1 in approximately 2029 (at age 38), to the maximum salary of Professional Nurse Grade II, in approximately 2041 (at age 50), and to Notch 4 of a Professional Nurse Grade III in approximately 2049 (at age 58).

Thereafter her income would probably only have increased based on inflationary pressure until retirement It should however be noted that overtime would have consistently remained a significant part of her income.

The writer therefore suggests that these uncertainties be dealt with by means of a slightly higher than normal pre-morbid contingency percentage, to be decided by the Court.

Retirement at age 60."

[25] She further opined that having regard to the collision: -

"Ms L. completed Gr 12 in 2008, at Botoka High School She attended Basupi FET College in 2010, for a 6-month course in Computers and she obtained a Certificate. She attended North West University in 2014, where she started studying Psychology, but discontinued her studies.

In 2015 she received a Government bursary and is currently a JS' year student at the North West University, studying towards a Nursing Degree. She expects to complete her studies in 2018 and become a Professional Registered Nurse. However, there was no guarantee that she would receive the bursary every year.

There is no evidence that she has suffered a past loss of income as a result of the accident.'

[26] She stated the following regarding future loss of income

She is at risk of not completing her Nursing Degree within the stipulated time period (in 2018). Furthermore, given that she is advised to seek employment in the nursing field that will not aggravate her symptoms (her career options have therefore been curtailed), she is also at risk of experiencing longer periods of unemployment when entering the labour market. She is also at risk of periodically not qualifying for the performance based notch increases and as a result she may experience slower than expected earnings progress and may not reach her likely pre-morbid career ceiling earnings. She may also be at risk of working fewer hours overtime. If she does not reach her likely pre-morbid career ceiling earnings, her monthly pension when she retires will also be lower than expected. The exact financial impact of these risks can however not be predicted reliably and it is recommended that this risk be dealt with by means of a higher than normal post- accident contingency, to be negotiated by the legal teams or determined by the Court.

[27] She sketched the plaintiff as having been rendered vulnerable and an unequal competitor in the open labour market and that her career choices had been curtailed. She also noted that an individual who suffers from pain and discomfort, as well as

residual psychological sequelae, may be subject to fluctuating concentration and reduced productivity, which will have an impact on the individual's efficiency. She pointed out that the plaintiffs symptomology might worsen and she might develop osteoarthritis or even have to obtain a total knee replacement.

[28] She stated that she would nonetheless likely have continued working until age 60, which is the normal retirement age for government employees.

[29] She concluded her report by stating that having regard to the accident, the plaintiffs income would have been the same as that predicted pre-morbid, except that a higher than normal post-accident contingency deductions, to be negotiated or determined by the Court, had to be applied.

[30] The clinical psychologist Dr L Roper stated that the plaintiff suffers from symptoms of Post-Traumatic Stress Disorder. Dr Roper stated that she was self-conscious of her scarring and placed her Whole Person Impairment due to permanent disfigurement and the effect thereof on her self-image at 10%.

[31] Dr Roper also noted that the plaintiff had a history of pre-morbid psychological vulnerability which he termed Major Depressive Disorder. Her mother had abandoned her at the age of three months and she had never met her. Her half-sister had passed away in 2008. Her father died a week after the accident and they experienced financial difficulties. These aspects contributed significantly to her psychological difficulties after the accident, impacting on her academic functioning, self-esteem and her quality and enjoyment of life.

[32] In contrast, Dr PT Kumbirai (also an occupational therapist) opined that Ms L. had a 20% chance of developing osteoarthritis of the left knee in the next 10-20 years which might worsen to warrant a total knee replacement. He opined that her Whole Person Impairment was rated at 8%. He believed that due to her problems standing, walking and weight-lifting, her reduction in work capabilities could be as high as 10%. He also opined that if she were to develop osteoarthritis of the left knee and continue working as a nurse, it was his opinion that she would retire 3 years before normal retirement age.

[33] Mr Potgieter (on behalf of GRS Actuarial Consulting) set out his calculations of the plaintiffs expected income as follows: -

Basic Salary:

- ***From 1 July 2019, a basic salary of R195'819 per year (Professional Nurse Grade 1 Notch 1 Public Sector; effective April 2015 after allowing/or the 7% increase)***
- ***Thereafter I allowed for:***
 - ***The usual notch increases of 3% every second year with the last notch increase in July 2049 (Professional Nurse Grade 3 Notch 4)***
 - ***Promotions between grades in July 2031 and July 2043***
- ***In addition to the notch increases above, I allowed for earning inflation of 6% in April each year from April 2015 until retirement at age 60.***

Fringe benefits:

- ***She would have received an annual bonus equal to monthly basic salary.***
- ***Ms L. would have been a member of the Government Employees Pension Fund and would have contributed 7,5% of basic salary towards this fund. At normal retirement at age 60, she would have become entitled to a pension calculated as 1/55 times years' service times average salary during the two years prior to retirement as well as a gratuity of 370% of annual pension. Based on service from July 2019, I allowed/or an initial pension of 57% of final salary as well as a gratuity of 370% of the initial pension. I further assumed that the pension after normal retirement would have increased with assumed price inflation.***

Future income having regard to the accident:

- ***Considering the above, I assumed that, having regard to the accident, Ms L.'s income would be the same as described above, except that higher contingency deductions, to be negotiated, might be applied.***

[34] In a further report he provided the following calculation results:

I calculated the present value of the future income to be as follows as at 29/05/2015:

	<i>Future Income</i>
<i>Income if accident did not occur</i>	<i>4'692'180</i>
<i>Income given accident did occur</i>	<i>4'692'180</i>

The loss of income, if any, could be taken as the above-mentioned present values multiplied by an appropriate contingency differential (for example, for every 1% contingency differential the estimated loss would be R46'922 (R4'692'180 x 1%)).

[35] As set out in various judgments where no actual loss of earnings can be demonstrated, no damages may be claimed. However, it is clear that certain injuries may manifest detrimental consequences only in the future, and it is within this context that the application of higher contingencies comes into play.

General Damages:

[36] The only basis upon which the plaintiff can claim general damages is due to disfigurement and concomitant emotional trauma.

[37] Professor PF Coetzee, a plastic, reconstructive and aesthetic surgeon, states in his report that the plaintiff has several unsightly large scars namely; -

- A fibriotic left pre-patellar scar that measures 5 x 3 cm. It is deeply contracted with a 2 cm contour deformity. There is hypo and hyperpigmentation present and the wound healed by secondary intention
- Two linear horizontal scars supra-patellar on the medial aspect of the left knee
 - 2 x 0.5 cm
 - 0.5 x 0.5 cm

Both are hypo-pigmented

- Superficial abrasion scars infra-patellar on the medical aspect of the left knee, hypo- pigmented
 - 1,0 x 0,5cm

- 1,0 x 1,0cm
- A vertical incisional scar on the medial aspect of the proximal lower leg left. It is 4 x 2 cm, smooth and hypo-trophic, hyper-pigmented and it healed by secondary intention.

[38] He added that the scarring could be improved moderately but should otherwise be accepted as permanent.

[39] Professor PF Coetzee placed her Whole Person Impairment due to disfigurement and the effect on her self-image at 3%. He added that according to Dr Roper she also suffers from symptoms of post-traumatic stress disorder and a depressed mood. All the factors contributing to this have been set out above.

[40] As has often been stated in case law there is unfortunately no expert who can place a value on non-patrimonial losses and the amount to be awarded lies in the discretion of the court.

[41] In ***Mpondo v Road Accident Fund [2011] 6 QOD FI-11 (EC)*** it was held that in considering past awards in the assessment of general damages, it is vital that a proper basis of comparison must first be ascertained. The court should look at the pattern of awards made in comparable circumstances rather than a singular award made in respect of injuries similar to the case at hand. Often parties (and the courts) make inaccurate comparisons when assessing general damages, resulting in wayward awards being made. The circumstances must be comparable.

[42] The particular circumstances of the plaintiff are that she was 20 when she was injured. There is according to Dr Peter T Kumbirai the specialist orthopaedic surgeon, a 20% chance that she will develop osteo-arthritis of the left knee in the next ten to twenty years which might worsen to a total knee replacement.

[43] The closest case that the plaintiff's counsel could find comparable to the plaintiff's injuries was the case of ***Titus v The Road Accident Fund 2003 (5) QOD E7-9 (CA)*** where the plaintiff had suffered soft tissue injury to the cartilage of the knee. There was

no abnormality to the knee. An amount of R80 000 was granted by the court as general damages (with the prospect of knee surgery in the future). In current terms such an amount equates to R161 000. In this regard, it is important to note that the plaintiff cannot rotate her leg fully. As far as the plaintiff's post-traumatic stress is concerned, her emotional life was impacted by various factors.

[44] Regarding the concomitant emotional trauma, Dr L Roper (a clinical psychologist) reported the plaintiff's entire emotional state as depressed, demonstrating negative feelings towards her future. Factors in her life such as her father's passing a week after the collision compounded her feelings, increased irritability, and decreased her levels of energy and motivation. He placed the plaintiff's impairment rating at 10% regarding mood and behavioural disorder.

[45] In ***Daniels v RAF2000 (5) QOD C3-1 (C)*** a 39 year old married woman who had endured whiplash of her neck in a collision and had suffered from post-traumatic stress disorder but who had responded well to treatment was awarded R80 000 in general damages which translates into R196 000 in today's terms.

[46] As the two species of non-patrimonial loss (scarring and concomitant emotional distress) suffered by the plaintiff largely overlap. An amount of R200 000.00 in general damages is considered to be a fair amount in the circumstances of this case.

[47] Regarding future loss of income, it has been pointed out that the actuary assesses no difference in her pre- and post-morbid earnings but proposes higher pre- and post-morbid contingencies. I agree with this proposition.

[48] Given the age of the plaintiff when the collision occurred a pre-morbid contingency of 25% is considered apt. A post-morbid contingency of 35%, is similarly regarded as apt in the circumstances.

The manner in which the matter has been handled:

[49] What is troublesome is the manner in which this matter has been dealt with - as is the case with most Road Accident Fund ("**RAF**") matters.

[50] Usually, at the commencement of a hearing, the court is told in a very curt address by the plaintiff's counsel that the merits have been settled and that the only matter in dispute is general damages and/or loss of future/part earnings. A bundle of expert reports are then handed to the Court, which clearly cannot be read in the allotted time. The advocates in the next matter already hover around at the back of the courtroom like vultures, impatient to finalise their case, earn their money and go home. This is a customary scenario in RAF trials. Proper preparation is usually not the norm. Trials are usually regarded as a quick "in-and-out" procedure.

[51] The time that the "hearing" will last is estimated at about 1.5 hours inclusive of argument. In most instances, the court is not furnished with heads of argument as they cannot be taxed absent a court order to that effect. Neither is the court taken through all the experts' reports. The advocate for the plaintiff cherry picks the sections which he/she believes favours the plaintiff's case and fails to highlight the chinks in the armour of the plaintiff's case. *In casu*, the advocate for the plaintiff failed to point out to the court that the plaintiff was overweight which would have a marked impact on her injured knee.

[52] The counsel for the RAF usually comes to court on a wing and a prayer, effectively without instructions and no expert reports or witnesses. The best the advocate may wish to accomplish is to find fault with the plaintiff's expert reports. Apparently the cause of this phenomenon is because the RAF first waits to see the contents of the plaintiff's expert reports before deciding whether it should incur the costs to appoint its own experts.

[53] In ***Standard Bank of South Africa Ltd v Hand 2012 (3) SA 319 (GSJ)*** it was held in paragraph 5 thereof that:

"It is improper for a litigant in motion proceedings simply to attach a (lengthy) document to an affidavit and then proceed to quote therefrom without any indication as to which paragraphs are indeed being quoted, and to expect a judge - in preparation for the matter - to struggle through what is often a quagmire of fine print to check if the quotes are in fact correct."

[54] Although motion proceedings were in issue in the **Standard Bank** matter, the same principle applies in RAF matters. It is not for the court, after a rushed "hearing", to spend hours perusing expert summaries in order to glean sufficient knowledge in order not merely to rubber stamp what it read to them by counsel as isolated excerpts taken at random from the expert reports. A court simply cannot function in this way.

[55] However, in our courts, this is what happens on a daily basis and the RAF has to pay thousands of rands sought for the preparation of expert reports which are relied in this very rushed and incomplete way - in most instances without oral evidence as the accuracy of the reports has been agreed upon by counsel. This money should rightfully go to those who suffer hardship. This practice is clearly wholly unsatisfactory.

[56] In this matter, counsel for the RAF indeed assisted the court. He had read the reports carefully and pointed out the difference in opinion between the experts. He emphasised that the majority of them are in agreement that the plaintiff would not suffer any future loss of income. But for him, the issue of the excess weight of the plaintiff and the impact thereof on the functioning of her knee would not have been brought to the court's attention.

Costs:

[57] It was argued at the hearing that the defendant had continually vacillated regarding its stance in respect of payments to be made to the plaintiff. At the previous court hearing of 4 June 2015 (the matter had already been set down for 29 May 2015 - but was removed for purposes of settlement) the defendant made an offer on 3 June 2015 and withdrew it on 4 June 2015. (At that hearing, the merits were conceded by the defendant.)

[58] The matter was then placed on the roll for 24 February 2016 and stood down until 8 March 2016 (because of a lack of judges) and continued to trial on 9 March 2016. Once again, the defendant made a new offer of payment of loss of earnings and general damages but withdrew the offer.

[59] There are various reasons for withdrawing offers - the offer may not be acceptable

to the other party or counsel may be of the opinion that the offer is unwarranted. In this matter, the counsel for the defendant said the offers were not accepted. Parties are entitled to their day in court and need not settle a matter. In this case, the facts that various experts opined that there was no loss of income on the part of the plaintiff allowed the defendant's counsel to argue this point and to point out the deficiencies and discrepancies in the plaintiff's case.

[60] One can understand the frustrations of the plaintiff's counsel, given the fact that the collision occurred in 2010, but that does not detract from the defendant's counsel's right to argue the matter.

[61] It was argued by the counsel for the plaintiff that the matter should be reported to the CEO of the defendants. I cannot agree. In my opinion, the defendant's counsel was entitled to put forward his arguments and to point out the fact that some experts opined that there was no loss of income and that none was payable. He was also entitled to point out to the Court that the plaintiff's excess weight exacerbated her knee injury.

[62] A draft order was emailed to me. I have deleted various paragraphs therefrom (in line with the defendant's submissions) with which I concurred and have signed next to such deletions.

[63] As regards the amount to be paid, the actuary did not make as bold as to propose contingencies. I have set out above which contingences I deem fair in the circumstances. I shall also assume, based on Dr Kumbirai's evidence, that the plaintiff would have retired 3 years earlier, namely at the age of 57.

[64] The actuary is instructed to calculate the loss of income applying the contingencies set out above and to accept that the plaintiff would have retired at the age of 57.

[65] Once the amount has been calculated, it can be inserted into the draft court order. The court is also to be provided with any contingency agreement (should there be such an agreement) and the customary affidavit pertaining thereto. The order, as completed, can then be made an order of court in chambers.

JANSEN J
JUDGE OF THE HIGH COURT

For the Plaintiff **ADV R STRYDOM 082 498 4336**

Instructed by **Gert Nel Incorporated, 1235 Cobham Road, Queenswood, Pretoria
(012 333 8290) (Ref No. GN6524/nb)**

For the Defendants **ADV R SHITLHELANA 0731 360 182**

Instructed by **Dyason Attorneys, 134 Muckleneuk Street, New Muckleneuk, Pretoria
(012 452 3500) (Ref No. E Rautenbach/sj/KH1058)**

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

On this the 10th day of March 2016 before the Honourable Justice Jansen J in Court 8F

CASE NO: 26536/2013

In the matter between:

L. N. M.

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER

After having read the papers of record filed, having heard counsel and considered the matter, **IT IS ORDERED THAT:**

1. It is recorded that the merits were previously resolved on the basis that the Defendant shall pay 100% of the Plaintiff's proven or agreed damages.
2. It is further recorded that the Defendant was ordered to furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) of Act 56 of 1996 for payment of 100% of the costs of future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to her resulting from a motor vehicle accident on **22 August 2010**, to compensate the Plaintiff in respect of the said costs after the costs have been incurred and upon proof thereof, which undertaking the Defendant has to date not furnished to the Plaintiff and the Defendant is accordingly ordered to furnish the Plaintiff with such undertaking within 20 (twenty) days of the date of this order.
3. The Defendant shall pay to the Plaintiff the sum of R_____.
4. In the event of the aforesaid amount not being paid timeously, the Defendant shall be liable for interest on the amount at the rate of 10.25% per annum, calculated from the 15th calendar day after the date of this Order to date of payment.
5. ~~The Defendant shall pay the Plaintiffs taxed or agreed party and party costs on the High Court scale, from 5 June 2015, up to and including 24 February 2016, and notwithstanding, and over and above the; costs referred to in paragraphs 7.2.1 below.~~
6. ~~The Defendant shall pay the Plaintiffs co on the High Court scale, and on a scale as between attorney and own 1ent, from 24 February 201, up to and including 8 March 2016, and notwithstanding, and over and referred to in paragraphs 7.2.1 below, as well as the cost of Adv R Strydom referred to in paragraph 7.2.3 below.~~
7. Paragraphs 5 and 6 above will be subject thereto that:

7.1 In the event that the costs are not agreed:

7.1.1 The Plaintiff shall serve a notice of taxation on the Defendant's attorney of record;

7.1.2 The Plaintiff shall allow the Defendant 14 (FOURTEEN) days from date of allocatur to make payment of the taxed costs.

7.1.3 Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 10.25% per annum on the taxed or agreed costs from date of allocatur to date of final payment.

7.2 Such costs shall include:

7.2.1 The costs incurred in obtaining payment of the amounts mentioned in paragraphs 3 and 4 above;

7.2.2 The costs of and consequent to the appointment of counsel, Adv W J Botha, on the Senior Junior Scale, including, but not limited to counsels' full fee for 24 February 2016, as well as his preparation;

7.2.3 The costs of and consequent to the appointment of counsel, Adv R Strydom, on the Senior Junior Scale, including, but not limited to counsels' full day fee for 8 March 2016, as well as his preparation, and with the proviso that Adv R Strydom's costs also be subject to paragraph 9 below;

7.2.4 The costs of all medico-legal, radiological, MR, sonar, pathologist, actuarial and addendum reports and/or forms obtained, all such reports and/or forms furnished to the Defendant and/or its attorneys, as well as all reports and/or forms in their possession and all reports and/or forms contained in the Plaintiffs bundles, including, but not limited to the following:

- 7.2.4.1 Dr Theo Enslin;
- 7.2.4.2 Leon Roper
- 7.2.4.3 Elzeth Jacobs and/or Liezel Gildenhuys;
- 7.2.4.4 Dr Kumbirai;
- 7.2.4.5 P C Diedericks and/or N Brink;
- 7.2.4.6 Professor PF Coetzee;
- 7.2.4.7 Johan Potgieter and/or George Schwalb.

7.2.5 The reasonable and taxable preparation, qualifying and reservation fees, if any, in such amount as allowed by the Taxing Master, for both 24 February 2016 and 8 March 2016, of the following experts, being:

- 7.2.5.1 Dr Theo Enslin;
- 7.2.5.2 Leon Roper
- 7.2.5.3 Elzeth Jacobs and/or Liezel Gildenhuys;
- 7.2.5.4 Dr Kumbirai;
- 7.2.5.5 P C Diedericks and/or N Brink;
- 7.2.5.6 Professor PF Coetzee;
- 7.2.5.7 Johan Potgieter and/or George Schwalb.

7.2.6 The reasonable costs incurred by and on behalf of the Plaintiff in attending all medico-legal examinations;

7.2.7 The costs of and consequent to the Plaintiffs trial bundles and witness bundles, including the costs of 6 **(six)** copies thereof;

7.2.8 The costs of and consequent to the holding of all pre-trial conferences;

7.2.9 The travelling costs of the Plaintiff, who is hereby declared a necessary witness.

8. The amounts referred to in paragraphs 3, 4, 5, 6 & 7 will be paid to the Plaintiff's attorneys, Gert Nel Incorporated, by direct transfer into their trust account, details of which are the following:

ABSA Bank

Account number: [...]

Branch code: 335545 REF: **GN6524**

- ~~9. The Chief Executive Officer (CEO of the Defendant, in his capacity as operational head of the Road Accident Fund (RAF), is ordered to identify the person or persons responsible for the instructions to the defendant's attorney in this matter, and to make such information available the Plaintiff before or on 17 March 2016, by formal service on the offices of the Plaintiffs' attorneys.~~
- ~~10. The CEO of the RAF, as well as the person(s) so identified by the CEO of the RAF are to serve and file affidavits setting out why the costs referred to -- paragraph 6 above, should not be paid by both the defendant and him/her/the *de bonis propriis*, the one to pay, the other to be absolved (the remaining issue), such affidavits to be filed before or on 31 March 2016.~~
- ~~11. The Plaintiff is to serve and file answering affidavits, if she chooses, before o on 14 April 2016. ———~~
- ~~12. The CEO and the persons so identified are to serve and underlying affidavits, if they so choose, before or on 28 April 2016. ———.~~
- ~~13. All such affidavits are to be filed with the registrar of the presiding officer.~~
- ~~14. The above Honourable Court **will** then render additional judgment on the remaining issue of the costs referred to in par. 6 above.~~

BY ORDER OF THE COURT

REGISTRAR OF THE HIGH COURT PRETORIA

GERT NEL INC

Plaintiff's attorneys

Ref: GN6524