REPUBLIC OF SOUTH AFRICA

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

2/9/2016.

CASE NO: 72554/2014

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

..... 2 SEPTEMBER 2016
SIGNATURE **DATE**

In the matter between:

DB GHANY Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

J U D G M E N T

MSIMEKI J,

[1] INTRODUCTION

The action concerns damages suffered by the plaintiff for personal injuries she sustained in a collision on 31 January 2014 when she was a driver of a motor vehicle. The plaintiff is alleged to have sustained, *inter alia*, a concussive head injury. She, as a result, sues the defendant, the RAF, under the **Road Accident Fund act 56 of 1996** (**"the Act"**).

[2] On 13 April 2015, an order by consent, was made regarding the following issues:

1. Liability was apportioned in favour of the plaintiff for 90% of her proven damages;
2. A post apportionment figure of R385 922 16 was settled for general damages;
3. An undertaking in terms of **Section 174 of the Act** was given;
4. Costs.

[3] The remaining issue to be determined is loss of income.

BRIEF BACKGROUND

[4] The trial which was to run for 3 (three) days, commenced on 2 February 2016 and ran for 8 (eight) days. On 11 February 2016 the plaintiff and the defendant closed their cases. The plaintiff handed up a summary of her closing submissions and the matter was then adjourned to enable both Counsel to deliver their Heads of Argument.

[5] The plaintiff called 8 witnesses, 6 expert witnesses, the plaintiff and Ms Brenda Modisane (Brenda). The expert witnesses are:

1. Dr Colin Barlin, an Orthopaedic surgeon whose report is dated 13 March 2015.

2. Dr Mayaven Naidoo, a Psychiatrist whose report is dated 25 February 2015.

3. Dr Riaan Bothma, an industrial Psychologist whose report is dated 5 February 2015.

4. Dr Tommy Bingle, a Clinical Neuropsychological surgeon whose report is dated 20 February 2015.

5. Mr Digby S Ormond-Brown, a Clinical Neuropschycholical screening expert whose report is dated 19 January 2015.

6. Ms Rosalind Macnab an Educational and Counselling Psychologist with special interest in Neuropyschology whose report is dated 23 February 2015. Her expertise was challenged.

Aside from the expertise of Ms Macnab which was challenged, the expertise of the other expert witnesses was never challenged.

[6] This Court, as shown above, is to determine the remaining issue which is the plaintiff's loss of income. The issues for trial therefore, are:

1. Whether or not the plaintiff sustained bodily injuries in the collision referred to above;

2. If so, the nature and the extent of such injuries; and

3. The quantum of the plaintiff's damages for such loss of income.

[7] The parties, at the pre-trial conference, agreed that all the documents in the trial bundles are what they purport to be. The documents are inclusive of the hospital and ambulance records. The plaintiff's Counsel, Advocate Goodenough ("Ms Goodeenough"), at the close of the plaintiff's case, applied from the bar for an order admitting the documentary hearsay evidence contained in the ambulance record and the hospital records of the Netcare Garden City into the evidence. During the trial, reference was made to these records by several expert witnesses that the plaintiff called. The submission by Ms Goodenough is that the Court should, in terms of **Section 34 of Civil Proceedings Evidence Act 25 of 1965** as amended, admit the ambulance and the hospital records.

[8] **Section 34** provides:

"34. Admissibility of documentary evidence as to facts in issue

(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to

establish that fact shall on production of the original document be admissible as evidence of that fact, provided -

(a) the person who made the statement either -

(i) had personal knowledge of the matters dealt with in the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with therein are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had or might reasonably have been supposed to have personal knowledge of those matters; and

(b) the person who made the statement is called as a witness in the proceedings unless he is dead or unfit by reason of his bodily or mental condition to attend as a witness or is outside the Republic, and it is not reasonably practicable to secure his attendance or all reasonable efforts to find him have been made without success.

(2) The person presiding at the proceedings may, if having regard to all the circumstances of the case he is satisfied that undue delay or expense would otherwise be caused, admit such a statement as is referred to in sub-section (1) as evidence in those proceedings -

(a) notwithstanding that the person who made the statement is available but is not called as a witness;

(b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof proved to be a true copy. (my emphasis).

(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

(4) A statement in a document shall not for the purposes of this section be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the provisions of this section, any reasonable inference may be drawn from the form or contents of the document in which the statement is contained or from any other circumstances, and a certificate of a registered medical practitioner may be acted upon in deciding whether or not a person is fit to attend as a witness".

[9] Ms Goodenough submitted that the ambulance and hospital records are also admissible under **Section 34 (1) (c) (i) to (iv)** of **the Law of Evidence Amendment Act 45 of 1988**. This, because the records are already admitted to be what they purport to be with the remaining question to determine being how likely the contents thereof are to be true. The expert witnesses, according to Ms Goodenough, were not surprised by the contents of the records. Only Dr Bingle was puzzled by the reference to "multiple concussion". Ms Rosalind Macnab, in her evidence, explained that the term "multiple concussion" refers to a situation where a head injured patient has previously sustained a concussive head injury. The plaintiff, in her evidence,

confirmed this. Ms Goodenough submitted that Dr Bingle could have been puzzled by "multiple concussion" either because he had not noticed or had forgotten that the plaintiff had stated that she had many years previously sustained a concussive blow to the head. This, according to the plaintiff, was the case as she, the plaintiff, was once injured by the one she had loved.

[10] I indicated above that Advocate J Roos, (Mr Roos), on behalf of the defendant, challenged the expertise of Ms Rosalind Macnab. Ms Macnab, in her testimony, demonstrated that she, indeed, is an expert. Digby S Ormond-Brown, in his evidence, when asked if he regards Ms Macnab as an expert, he answered "yes, certainly". Ms Macnab's evidence, in its entirety, coupled with how she is perceived by fellow experts, satisfied me that she, indeed, is one of the experts who testified on behalf of the plaintiff. Her expertise has successfully been proved. Dr Bingle testified that a psychiatrist, neurosurgeon and neuropsychologist were better qualified than an occupational therapist.

[11] Apart from the reports referred to above there are further reports by Ms Kelly, the occupational therapist, dated 13 January 2015, the radiologist report of Dr Suliman and the actuarial calculations by Mr Kramer dated 10 February 2016 which were handed up at the close of the plaintiff's case.

[12] Ms Goodenough submitted that the defendant and the plaintiff had seen the defendant's occupational therapist and an industrial psychologist and that the defendant, although requested to serve the two reports on the plaintiff's attorneys, failed to do so. Ms Goodenough, as a result, correctly

concluded that the defendant had no expert reports to counter those of the plaintiff. Indeed, the defendant did not deliver any expert report.

[13] The defendant, although requested to indicate which aspects of the contents of the plaintiff's expert reports were admitted and which in dispute declined to do so causing the plaintiff to call even the experts who ordinarily would not have testified. Every sentence in every expert report expressly or impliedly remained in issue.

[14] It is noteworthy that despite the rigorous cross-examination of the plaintiff's witnesses by Mr Roos, it was never suggested or put to any of the plaintiff's expert witnesses or to the plaintiff's lay witnesses that their evidence was not correct or truthful. The plaintiff, in that event, as correctly submitted by Ms Goodenough, was entitled to conclude that the correctness of their evidence was accepted (See: **President of South Africa v South African Rugby Football Union 2000 (1) SA 1 CC at page 54F**).

[15] Evidence demonstrates that the plaintiff sustained:

1. Concussive head injury;
2. Cervical whiplash injury; and
3. Right Knee injury.

[16] The expert witnesses reports and evidence reveal the following:

1. Orthopaedic injuries: Dr Barlin diagnosed as follows:

    1.1.1 persistent neck pain and stiffness

1.1.2 frequent migraine headaches

1.2 A soft tissue injury to the lumbar spine resulting in frequent episodes of lumbar backaches

1.3 A blow to the right knee

2. Neurosurgeon: Dr Bingle

He found a mild concussive brain injury with significant neurological sequelae. The neurological, neurocognitive and neuropsychological problems that were recorded by the neuropsychologist, according to evidence, were caused by the accident.

3. Psychiatric Diagnosis: Dr Naidoo

He found:

1. Post Traumatic Stress Disorder;
2. Major Depressive Disorder; and
3. Moderate analgesic abuse.

4. Neuropsychological diagnosis: Ms R Macnab

She diagnosed trauma associated with the plaintiff's accident and accident related injuries and related sequelae. Plaintiff, according to her, experienced changes that have affected her physical status and her

neuro-cognitive and psycho-emotional profiles. The plaintiff, according to her, presented with significant neuro-cognitive and emotional problems and symptoms of Post-Traumatic Stress Disorder (PTSD) which will make coping with stress of working very difficult. She found her work related ability restricted.

[17] Regarding current sequelae of the plaintiff, the expert witnesses observed as follows:

Dr Barlin

1. Plaintiff, according to him, complained of persistent neck pain and stiffness and frequent migraine-like headaches of cervical origin which causally related to a whiplash;

2. Frequent lumbar backache episodes; and

3. Persistent symptomatic chondromalacia accompanied by episodes of swelling of the right foot and ankle.

Dr Ormond-Brown noted:

1. Erratic concentration and slow work speed and processing;

2. Severely impaired response inhibition;

3. Defective short term memory;

4. Well below average performance on constructional praxis;

5. Profoundly abnormal verbal categorisation;

6. A poor prognosis as plaintiff was injured later than the critical age threshold; and

7. Premorbid prognosis and hypertension which are negative prognosis indicators.

[18] Ms R Macnab noted:

1. Migraine headaches which occurred 3 times a week;

2. Nausea which is associated with headaches;

3. Neck pain associated with headaches;

4. Leg pain;

5. Muscle weakness in her ankle and knee;

6. Mental and physical fatigue;

7. Worsened hypertension;

8. Post accident personality changes such as plaintiff being short tempered; verbally aggressive "like a mad person"; easily irritable and frustrated; often angry; depressed; crying for no apparent reason;

9. That the plaintiff suffers from panic attacks in the car;

10. She hates company and prefers to be alone at home;

11. The plaintiff is told that she often repeats herself;

12. She has impaired memory and orientation. The plaintiff told her that she once took a taxi without knowing where she was headed to.

[19] Dr Bingle noted:

1. Neurocognitive sequelae;

2. Psychological sequelae;

3. Chronic headaches;

4. Disturbed sleep;

5. Panic attacks;

6. Neck pain;

7. Swelling in feet and ankles;

8. Vertigo;

9. Tinitus;

10. Social withdrawal.

Dr Bingle, regarding the plaintiff's occupational future, deferred to the relevant experts.

[20] Dr Naidoo recorded the same sequelae which the other expects record. Dr Suliman radiological report adds an additional feature namely "mild kyphosis of the cervical spine".

[21] It is noteworthy that all the expert witnesses testified about the plaintiff's poor prognosis. Her condition, according to them will not improve. This, according to Ms Goodenough, is indicative of the fact that the plaintiff's current problems are permanent in nature. The recommended treatment, according to her, "is not intended to be curative but only palliative".

[22] The plaintiff called Brenda Modisane (Brenda), Wesizwe's recruitment manager at its Rustenburg Platinum Mine for which the plaintiff works as her witness. Brenda has vast experience in the field of Human Resources and

holds a Bachelor's degree in Law and also has post-graduate training in her field. Her testimony reveals that she has extensive knowledge and experience of her employer's recruitment, interviewing and hiring policies and practice. She participates in job interviews and in the subsequent discussions with the hiring managers as to the selection of job candidates. Brenda, by virtue of her work, has detailed knowledge of the respective personal qualities, strengths and abilities of the respective employees of the employer including the plaintiff.

[23] Brenda's testimony is that the plaintiff, before the accident, performed optimally. She was an outstanding worker who was held up as an example to others. The plaintiff, according to her, was considered as the type of employee who deserved a promotion if the right vacancy became available.

[24] The plaintiff, according to Brenda, ever since the accident, is not performing her job properly as she makes serious mistakes. She is forgetful, cannot follow instructions and behaves badly at times. Brenda gave examples which clearly demonstrated this. Asked, during cross-examination, whether she could give more examples of the plaintiff's incompetence and verbal aggression, she answered that she could not unless if she could go and check her e-mails. She then could give "many examples" as, according to her, there were many other examples. Mr Roos did not pursue this line of cross-examination in order to get Brenda to produce the referred to e-mails. I found this strange.

[25] Brenda testified that the plaintiff, after the accident, has become an altered human being as she now is verbally aggressive, forgets or incorrectly carries out instructions and makes severe mistakes in the important documents that she drafts. She sat in Court and listened to the evidence of Ms Macnab for two days ending up more convinced that the plaintiff, because of her neuro-cognitive problems, is incapable of doing any type of job. No person with the plaintiff's handicap could get a job with her employer or Lonmin. The plaintiff, according to her, remains employed because the employer values her past outstanding work and her devotion thereto before the accident. She testified that the employer is helping the plaintiff out of sympathy adding that this could not go on for long due to the problems currently experienced by the Platinum Mining houses.

[26] Brenda's evidence regarding the plaintiff's pre and post- accident levels of functioning was never challenged. Brenda's further unchallenged evidence is that the plaintiff will lose her job within the next two years.

[27] She is a witness who knew her facts and what she testified about. Although the plaintiff is based in head office and she in Rustenburg where the mining is done, she has had a lot to do with the plaintiff whom she knows very well. The plaintiff, according to her, out-performed the rest of her team. She was always used as an example according to Brenda. The plaintiff's performance, after the accident, according to Brenda, has taken such an unexpected and dramatic turn to a point where the company has had to employ Tshepiso Khoza to monitor her job.

[28] Brenda was an honest and reliable witness whose evidence, in my view, remains unchallenged. The court has no reason to reject her evidence which is of a good quality.

[29] Ms Goodenough, after the plaintiff's case was closed, applied from the Bar that the hearsay evidence of Jason Nokana, the Human Resources Manager of Wesiwe be admitted into evidence. Dr Bothma's report refers to the hearsay evidence which the doctor also testified about.

[30] Dr Bothma, in his report, refers to the telephone interview which he had with Jason Nokana. He states:

> *"Workplace feedback: Jason Nokana, HR Manager at Wesizwe Platinum Ltd was contacted telephonically on 9 March 2015 to obtain information about Ms Ghany's work performance. He indicated that Ms Ghany changed dramatically after the accident. Pre-accident, she was a very productive and effective worker, and her performance was above average. He indicated that her post-accident work performance is below average. He estimated that she currently experiences a productivity loss of more than 45%. She is often ill. She struggles to cope emotionally. She is very forgetful, makes many mistakes, and often has to redo her work. Her mistakes are an embarrassment to the HR department, as she works with the payroll, where there is little tolerance of mistakes. Mr Nokana noted that her work is in definite danger, as they are planning to demote her".*

[31] The Dr, in his testimony, confirmed that this is what Nokana told him over the telephone. Ms Goodenough implored the court to admit the hearsay evidence. The admission of such evidence, according to Ms Goodenough, is covered by **Section 3(1)(c) (i) to (vii) of the Law of Evidence Amendment Act 45 of 1988** which provides:

> ***"3 Hearsay evidence***
>
> *(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unles-*
>
> *(a) ...*
>
> *(b)...*
>
> *(c) the court, having regard to-*
>
> *(i) the nature of the proceedings;*
>
> *(ii) the nature of the evidence;*
>
> *(iii) the purpose for which the evidence is tendered;*
>
> *(iv) the probative value of the evidence;*
>
> *(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*
>
> *(vi) any prejudice to a party which the admission of such evidence might entail; and*

(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice". (my emphasis).

[32] It is Ms Goodenough's submission that the hearsay evidence ought to be admitted because it was noted down contemporaneously by Dr Bothma, the plaintiff's expert witness who interviewed Nokana telephonically. It is easy for me to agree because the evidence is corroborated by Brenda in her testimony. The evidence, as a result, is reliable and has probative value. (**Section 3(1) C)(iv) of Act 45 of 1988**). Nokana did not testify. The Court was informed that Nokana would be the plaintiff's first witness and that he had not come to court necessitating his being subpoenaed. The subpoena, erroneously it appears, was not served on him resulting in him not testifying. Ms Goodenough submitted that getting him to testify, at that late stage, would have been time consuming. The remaining Court time, according to her, had been limited. I find the submission plausible particularly if regard is had to the fact that the subpoena is exhibit 'J' in the matter. (**Section 3(1)(c)(v)**).

[33] Ms Goodenough submitted that the defendant could demonstrate no prejudice to be suffered by it if the hearsay evidence were to be admitted into evidence. Given the fact that Brenda testified and confirmed the evidence, I must agree. Ms Goodenough submitted that the defendant's Industrial Psychologist (IP), in any event, had interviewed and assessed the plaintiff during February 2015 and that the IP could have telephoned Nokana had the defendant or the IP so wished. There is merit in this. Dr Bothma's report which

contained Nokana's hearsay evidence was served on 4 May 2015. (**Section 3(1)(c)(vi)**).

[34] Ms Goodenough submitted that Nokana's hearsay evidence corroborates the unchallenged *viva voce* evidence of Brenda and that it would be safe to admit the hearsay evidence as proof of the truth of its contents. I agree. It, in any event, would be in the interests of justice to admit the hearsay evidence if regard is had to what is discussed above.

[35] Regarding the further examples of the plaintiff's incompetency, Brenda, after retrieving the e-mails from her computer, furnished the plaintiff's attorneys with a bundle thereof. The bundle, according to Ms Goodenough, was tendered to the defendant and the Court. The defendant objected to this but Ms Goodenough placed on record that the e-mails comprised of 35 pages; that the defendant was invited to follow up on any information therein contained; that the defendant was entitled to tender the e-mails whether or not they harmed the plaintiff's case. Mr Roos reserved the defendant's right to seek a postponement to allow further investigation and to obtain further evidence arising from the e-mails. This did not eventuate because the defendant, two days later, on 11 February 2015 closed its case without having done anything about the e-mails and the postponement. Ms Goodenough, as a result, submitted that this justified the conclusion that the e-mails support the plaintiff's case and confirm Brenda's oral evidence. There is merit in this.

[36] The plaintiff was present in Court throughout the trial proceedings and heard the evidence of the witnesses who testified. The witnesses testified about what she had told them. She confirmed this. Mr Roos's submission that the plaintiff did not testify and lay the basis of her evidence , therefore, cannot be correct. She, indeed, testified that she had told the expert witnesses the truth. The truth, in the main, is confirmed by Brenda, Nokana and the expert witnesses tests and conclusions. The fact that the plaintiff had told the expert witnesses the truth was, indeed, never challenged.

[37] The defendant only challenged the fact that the plaintiff had lost her consciousness. The rest of her oral evidence was never challenged. In any event, Dr Bingle later on, in his evidence, successfully explained the aspect of the "unconsciousness" of the plaintiff after the collision. This, according to Ms Goodenough, entitles the Court to accept the entire factual basis of the opinions expressed by the plaintiff's expert witnesses as correct.

[38] In clearing up what had initially seemed to be a contradiction or a lie, Dr Bingle testified that when a person sustains a head injury and his/her state of consciousness is altered as a result, "such a person is in the nature of things incapable of being aware of being unconscious or otherwise in that there is, subjectively, a gap in the memory of the injured person regarding the flow of events". This was never challenged. Dr Bingle further testified that a mild head injury can even result in a mere two seconds of an altered state of consciousness. This too was never challenged. The defendant in the absence of reports could not.

[39] The nub of the evidence of Dr Bingle, Dr Naidoo, Dr Barlim and Dr Ormond-Brown is that:

1. The plaintiff's current problems are caused by the accident;
2. But for the accident, the plaintiff would have been able to continue to work and earn as before;
3. The plaintiff's inability, since the accident, to perform occupationally is a direct result of the accident and that
4. The plaintiff is, as a result, permanently unemployable.
5. The totality of information recorded in the ambulance and hospital records supports the view that the plaintiff sustained a head injury in the accident.

This is confirmed by the use of the C Collar, head blocks and a spine board at the scene of the accident and the fact that the plaintiff, thereafter, complained of neck pains, dizziness and headaches which are consistent with a head injury.

[40] The hospital records reveal that the plaintiff "was hit by another car at a robot on the side, and car span out hitting the pavement and airbags delayed". Dr Bingle, in detail, explained what happens to the brain of a person who finds himself in the position of the plaintiff at the time of the collision. The

brain, according to him, is subjected to acceleration and deceleration forces causing the brain to collide with the inside of the skull. This, because the brain is soft and floats in cerebrospinal fluid. The axons of the neurons in the brain invisible even on a CT scan are injured.

[41] Dr Bingle, Dr Naidoo and Mr Ormond-Brown testified that the GCS score of 15/15 did not necessarily mean that the plaintiff's brain injury is insignificant. The result of their calculation is that the plaintiff arrived at the hospital at 9h55 which was an hour and forty minutes after the collision which was at 8h15. What the GCS means, according to Dr Bingle, is that after an hour and forty minutes or more of the collision the plaintiff's GCS score was 15/15. There was, according to evidence, no record of her GCS score before the noted time.

[42] Dr Bingle testified that the fact that the plaintiff was dazed and confused indicates that her GCS score was, at the time, less than 15/15 for the period within the first one hour and forty minutes after the accident. It was Dr Bingle's further evidence that the plaintiff's GCS scale could have fluctuated in the first few hours after the accident.

[43] Macnab got the report that the plaintiff was briefly unconscious at the scene and was woken up by someone who was asking her questions. The plaintiff recalled getting out of the car and shouting at everyone around like a crazy person dazed and disorientated. Dr Bingle's report is that the plaintiff "saw stars and was out for a bit". The next memory she has is a bystander

asking her "ma'am are you fine? She got out of the vehicle, screaming and shouting. She felt dazed, shaky and confused".

[44] That the plaintiff, after her discharge, was moody and suffered from mood swings, was impulsive and irrational and has, since the accident, undergone cognitive behavioural and mood changes point to the conclusion that she sustained a significant head injury with permanent sequelae recorded during the neuropsychological testing conducted by Ms Macnab and Mr Ormond-Brown has not been challenged.

[45] Dr Bingle and Mr Ormond-Brown, when asked by Mr Roos, testified that the plaintiff, according to them, had not been malingering. I do not agree with Mr Roos that the plaintiff's case should be dismissed.

[46] It will be recalled that only loss of income remains for determination. Income received before and after the accident, according to Ms Goodenough, is based on information contained in the plaintiff's pay slips. Proof of income was furnished to the plaintiff's industrial psychologist. The calculations in the plaintiff's various actuarial reports are also based on the contents of the pay slips. It has not been suggested that the pay slips do not come from the plaintiff's employer. Neither has it been denied that the pay slips are genuine and that they relate to the plaintiff.

[47] The following is noteworthy:

1. The plaintiff was off work recuperating for 24 days. She received sick pay while so recuperating.

2. She returned to work to do her pre-accident job on 25 February 2014.

3. Evidence reveals that a marked degeneration in memory at work as well as forgetting to perform important tasks at work became apparent once she was back at work.

4. The plaintiff, according to evidence, is not coping with her job and is likely to lose it within two years.

5. According to Mr Barlin the plaintiff has suffered decreased work efficiency and could face retirement in a year or two.

6. Ms Macnab states that the plaintiff's work ability has been restricted by her injury and sequelae.

7. Dr Bothma, in his report, and in conclusion, says:

"5.2 The inference drawn from the newly acquired expert findings at hand, with particular reference to those reported by Ms Macnab (2015, p. 46), is that Ms Ghany's cognitive difficulties, physical limitations, and emotional disturbances as a result of her accident-related injuries have restricted her work-

related ability. Ms Macnab reported that, as a result of Ms Ghany's brain injury and associated neuropsychological sequelae, Ms Ghany will inevitably experience difficulties in the workplace. She will have difficulty working under pressure and meeting time demands, as well as focusing on tasks at hand. These deficits will thwart her ability to function optimally in a position that requires mental acuity and cognitive competence.

5.3 In addition, Ms Ghany appears to have been rendered more vulnerable from a psychiatric/psychological and/or emotional perspective. Ms Macnab confirmed that Ms Ghany suffers from severe depression, and indicated that she also suffers from severe anxiety, coupled with symptoms of post-traumatic stress disorder. Dr Naidoo (2015, p. 16) diagnosed Ms Ghany with a severe major depressive disorder. Ms Ghany, furthermore, reported experiencing various psychological difficulties-refer to par. 6.1 of Writer's initial report, as well as par. 7.7 (p. 11). Psychological interventions have been recommended by Ms Macnab; however, although this may serve to improve her psychological adjustment difficulties, it should not be considered curative in terms of the neuro-cognitive consequences of the accident.

5.4 Taking the nature of the brain injury into account (traumatic with an array of cognitive fallouts), as well as the

workplace feedback obtained (see par. 4.7, p. 6, of Writer's initial report), Ms Ghany's risk of dismissal is considerable. No final decision has been taking regarding Ms Ghany's future employability. Should she be dismissed, she would suffer a considerable loss of earnings. Should she be retrenched, she would receive a severance package. ***It is highly unlikely that Ms Ghany will be able to secure and maintain alternative employment if she loses her job, in light of the severe cognitive difficulties and emotional disturbances.***"

8. After writing his report and addendum, Dr Bothma while in Court, listened to the oral evidence given by Brenda Modisane and other plaintiff's expert witnesses regarding the degree of severity of her neurocognitive neuropsychological and other disabilities. He, during his testimony, expressed a view that the plaintiff is indeed, unemployable in the open labour market and that once she loses her job in a year or two, will probably not get or keep another job again.

[48] Mr Roos criticised the fact that the plaintiff was not the first witness and that no factual basis upon which the experts would tender an opinion was laid. The plaintiff, in my view, testified: She is the one who provided the expert witnesses with the information that they worked on. She testified that she had told them the truth when they interviewed

her. Her evidence was confirmed by the evidence of Brenda and the hearsay evidence of Nokana.

[49] Mr Roos submitted that this is a trial on the plaintiff's loss of income and not on the amount of general damages to be determined. It is Mr Roos's view that the plaintiff needed to prove that she earned an income as well as an amount of income. Mr Roos further holds the view that the plaintiff needed salary advises and corroborating evidence to prove this. In other words, the defendant feels that pay slips are not enough to prove the income. The plaintiff produced pay slips of her employer. It has not been denied that the pay slips are indeed those of her employer. Neither has it been denied that the amounts thereon reflected have been so reflected by the plaintiff's employer and that they reflect the amounts that the plaintiff earned. The payslips, as correctly submitted by Ms Goodenough, in my view, are sufficient proof of the plaintiff's income.

[50] Mr Roos submitted that a witness cannot corroborate herself. By implication the submission is that the plaintiff merely corroborated herself. Having regard to the evidence at the disposal of the court I am unable to agree with the submission. There is more than enough corroboration. The position of the plaintiff is well documented and testified about. There is more than sufficient evidence to find for the plaintiff. Evidence was not challenged. The evidence is sufficiently supported. The cases that Mr Roos referred to in support of his submissions are, in my view, distinguishable. Tests and

interviews were conducted in the plaintiff's case. The expert witnesses are backed up by what they observed and noted when they were with the plaintiff. They corroborate one another. They are further supported by evidence that was tendered by Belinda as well as the hearsay evidence of Nokana. The Court safely accepts the evidence. The defendant neither has expert witnesses nor reports. It is, indeed, so that the defendant testifies where it is necessary but this is one case which needed evidence from the side of the defendant. The plaintiff was seen by two experts in the presence of the defendant but no reports, despite demand by the plaintiff, have been forthcoming. This speaks volumes. If tests were not conducted, if Belinda had not testified and if the hearsay evidence was not noted then, the position, in that event, would be different.

[51] That the plaintiff did not testify, in the face of the evidence at the disposal of the Court, cannot be correct. That some of the witnesses were not called by the plaintiff, in light of the evidence tendered, is clearly unhelpful. I indicated and I repeat that there is sufficient evidence to find for the plaintiff. The plaintiff, in my view, did not adapt her version of events as Mr Roos incorrectly submitted. The evidence tendered supports the findings and opinions of the expert witnesses who corroborate one another.

[52] The available testimony reveal that the expert witnesses had evidence on matters which require specialised skill and knowledge. This was sufficiently demonstrated. The witnesses are qualified experts. The guidance that the experts offered is sufficiently relevant to the matter in issue which the Court

has to determine. The opinion evidence in no way usurps the function of the Court. The findings of the expert witnesses are demonstrably accurate. There is sufficient evidence to corroborate this. (See: **Holtzhauzen v Roodt 1997 (4) SA 766 (W)**).

[53] The submission that the plaintiff's case ought to be dismissed cannot be sustained and is not acceptable.

[54] Regarding the plaintiff's loss of income the following should be borne in mind:

1. The plaintiff was born on 2 March 1969;

2. She worked for Wesizwe Platinum Limited, as a Human Resources and Payroll Administrator since 2005 and still works in the same position earning R451 557. 00 per annum.

[55] But for the accident she:

1. Would have remained in the same position at Wesizwe or equivalent position working for a different employer;

2. With inflationary increases, she would have continued to earn R451 557.00 per annum until retirement at age 62.5 years;

3. The capitalised gross prospective value of her income would have been R4 489 294. 00;

4. After deducting the appropriate pre-accident contingency deduction of 7.5% the capitalised gross prospective value of her income would have been R4 152. 596. 00.

[56] The accident considered:

1. Save for inflationary increases until 1 August 2017, the plaintiff will continue in her current job earning the same salary she now earns;

2. Following the evidence, from 2 August 2017 and for the remainder of her life, she will be unemployed and will receive no income;

3. The capitalised gross prospective value of her income will be not more than R540. 055. 00;

4. Her future loss of income is therefore not less than R3 612 541.00;

5. The plaintiff's claim, after applying the statutory prescribed cap, is reduced to R3 066 350. 00;

6. the question of liability having been settled on the basis that the defendant is to pay 90% of the plaintiff's damages, the

defendant, according to Ms Goodenough, should be ordered to pay to the plaintiff the amount of R2 759 715 which is 90% of the amount of R3 066 350. 00.

The calculations and the amounts have not been challenged or controverted by the defendant. Initially the plaintiff had claimed payment of the sum R 3 920 000.00. The necessary amendment has been effected and the amount claimed in respect of past and future loss of income is, namely, R2 759 715.00 is now in line with the actuarial calculations.

[57] Ms Goodenough submitted that the hearsay evidence of Mr Jason Nokana, HR manager of Wesizwe, referred to by Dr Bothma in his report and evidence should be admitted into evidence. In light of the evidence tendered by Belinda, the hearsay evidence is hereby admitted. In the absence of evidence gainsaying it, the truth of the contents of the hospital records and the contents of the medical report that forms part of the RAF1 form, as correctly submitted by Ms Goodenough, is accepted as reliable documentary hearsay evidence.

[58] The plaintiff, in my view, has made out a case to be entitled to the order that she seeks. My decision has rendered it unnecessary to determine whether or not further documents should be accepted.

COSTS

[59] Ms Goodenough submitted that the defendant unduly and unnecessarily delayed the finalisation of the matter which was scheduled to be disposed of in 3 (three) days. The case was ultimately disposed of in 8 (eight) days and not the 3 (three) days which had been envisaged. Ms Goodenough, in substantiation of her submission asking for a punitive costs order, highlighted the following:

1. That the defendant, unreasonably, placed in issue the expertise of Ms Rosalind Macnab;

2. That the defendant unreasonably refused to admit any portion at all of any of the plaintiff's expert reports despite having been requested to do so which, unnecessarily, resulted in the calling as witnesses by the plaintiff of several expert witnesses;

3. That the evidence of the expert witnesses, despite lengthy cross-examination, remained unchallenged which, according to Ms Goodenough, amounted to abuse of the process of the Court; and

4. That the defendant's conduct of handling the trial resulted in unnecessary delay in the finalisation of the matter and the incurring of unnecessary costs.

[60] Indeed, from time to time, during the trial, Ms Goodenough remarked that she would argue that the conduct of the case by the defendant had warranted a punitive costs order against the defendant. The fact that the evidence of expert witnesses called by the plaintiff remained unchallenged is indeed indicative of the fact that the calling of those expert witnesses could have been obviated. This, because of the defendant's attitude never eventuated. The plaintiff's application for a punitive costs order, therefore, has merit and I agree therewith.

[61] The amount that the plaintiff claims as her actual loss of income which has been arrived at through the assistance of Mr Kramer, the actuary, is in my view and in the circumstances of the plaintiff's case, reasonable and appropriate.

[62] **The following order, in the result, is made:**

1. **Judgment, in favour of the plaintiff, against the defendant is granted for the payment of the amount of R 2 759 715. 00.**

2. **The defendant is ordered to pay the said amount of R 2 759 715. 00 into the plaintiff's attorneys trust account for the benefit of the plaintiff within 14 (fourteen) days after the date of this judgment.**

3. **The defendant is ordered to pay interest on the said amount of R 2 759 715. 00 at the rate of 9% per annum calculated**

from 14 (fourteen) days from the date of this judgment to date of payment.

4. The defendant is ordered to pay the plaintiff's costs of suit including the qualifying fees of Ms Rosalind Macnab; Dr Barlin; Mr Digby Ormond-Brown; Dr Tommy Bingle, Dr Mayaven Naidoo and Dr Riaan Bothma and the costs of obtaining the reports and addenda of such expert witnesses on the basis set out below:

4.1 The defendant is ordered to pay the fees of plaintiff's Counsel and Attorney of 2 February 2016; 3 February 2016 and 4 February 2016 on the scale as between party and party.

4.2 The defendant is ordered to pay the reasonable amounts of the fees actually debited by the plaintiff's attorney and Counsel for 5 February 2016; 8 February 2016; 9 February 2016; 10 February 2016 and 11 February 2016.

4.3 the defendant is ordered to pay the qualifying fees of Ms Rosalind Macnab and Dr Riaan Bothma on the scale as between party and party.

4.4 The defendant is ordered to pay the reasonable amounts of the qualifying fees actually debited by Dr Colin Barlin, Mr Digby Ormond-Brown; Dr Tommy Bingle and Dr Mayaven Naidoo.

5. The plaintiff's expert witnesses who testified are declared necessary witnesses.

6. The attendance of Dr Riaan Bothma who was in attendance on 2 February 2016; 3 February 2016; 4 February 2016;9 February 2016 is declared necessary.

7. Ms Brenda Modisane is declared a necessary witness and the Taxing Master is directed to allow on taxation the loss of income suffered by her as a result of having to take 3 (three) days leave from her employment in order to attend the proceedings on 2 February 2016; 3 February 2016 and 4 February 2016.

M. W MSIMEKI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION OF THE HIGH COURT,
PRETORIA