IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

APPEAL CASE NUMBER: A295/2020

COURT *A QUO* CASE NUMBER: 82/2014

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: **16/08/2023**

SIGNATURE:

In the matter between:

THEUNA HELENA BRUMMER

APPELLANT

And

ROAD ACCIDENT FUND RESPONDENT

JUDGMENT

OOSTHUIZEN-SENEKAL AJ (Tolmay *et* Senyatsi JJ concurring)

Introduction

[1] This matter comes before this full Court on appeal from the court *a quo* which

found that the appellant had failed to prove, on a balance of probabilities, that she sustained any injuries during a rear end motor vehicle accident. Further, that there was a *nexus* between the motor vehicle accident, the negligent conduct of the insured driver and the *fibromyalgia* she suffers from. In the result the appellant's claims for past medical expenses, general damages, loss of earnings and/or earning capacity were dismissed with costs.

[2] On 10 September 2020 the court *a quo* granted the appellant leave to appeal the judgment to the full Court of this Division.

[3] The appellant contends that the trial court erred in fact and in law in dismissing her claims. In the notice of appeal, the grounds for appeal can be outlined as follows —

a. The trial court erred and misdirected itself in law and/or fact in ordering the dismissal of the plaintiff's claim for general damages when in fact this head of damages was settled by the parties in the course of the trial during the plaintiff's closing address, in the amount of R350 000,00 (three hundred and fifty thousand rand),

b. The trial court erred and misdirected itself in law and/or fact in failing to order payment by the defendant of the plaintiff's claim in respect of past medical expenses when in fact this head of damages was settled by the parties during the course of the trial in the amount of R14 504,07 (fourteen thousand five hundred and four rand and seven cents),

c. The trial court erred and misdirected itself in finding that the plaintiff failed to prove that the motor collision caused and/or resulted in her suffering any bodily injuries whatsoever, and

d. The trial court erred and misdirected itself in law and/or fact in finding and concluding that the plaintiff's condition of *fibromyalgia* was not caused by the motor vehicle accident in question, alternatively, that the

plaintiff failed to prove any *nexus* between the motor vehicle accident concerned and her condition of *fibromyalgia.*

[4] Therefore, on appeal before us, the appellant sought to overturn the judgment. The appellant argued that this court is in as good a position, as the court *a quo* would be, to make an award in respect of the appellant's loss of earnings and/or earning capacity, which would avoid needless further delay and additional costs being incurred if the determination of *quantum* is remitted to the court *a quo*.

[5] The respondent did not oppose the appeal, despite being properly notified of it.

Facts

[6] It is *common cause* that the claim arises from a rear end motor vehicle accident which occurred on 10 November 2011 at the intersection of Herman and Kuscke Streets in Meadowdale. The collision took place between motor vehicles M[...] 2[...] G[...], driven by the appellant and W[...] 2[...] G[...], the insured motor vehicle, driven by a certain Mr Frank Lovel, the insured driver.

[7] The appellant avers that as a consequence of the said collision she sustained the following injuries:

a. A soft tissue injury of the neck and back;

b. Concussion; and

c. A blunt chest injury, and

d. *Fibromyalgia*.

[8] On 12 May 2014, Msimeki J granted the following order —

a. Declaring the respondent is in default for failing to enter an appearance to defend in respect of the aforementioned action.

b. Granting default judgment in favour of the applicant against the respondent in respect of the merits of the action on the basis that the applicant is entitled to recover 100% of her proven or agreed damages, resulting from the injuries sustained as a result of the accident. Granting default judgment in favour of the applicant in respect of the quantum of the applicant's action, the extent and amount of the award to be postponed *sine die*, to enable applicant to present evidence *viva voce* or by way of affidavit.

c. That the respondent must pay the applicant's taxed party and party costs of this action to date inclusive of the costs of this application on a High Court Scale.

[9] During the cause of litigation, the parties settled the appellant's claims in respect of past medical expenses in the amount of R14 504.07 (fourteen thousand five hundred and four rand and seven cent) and general damages, in the amount of R 350 000.00 (three hundred and fifty thousand rand). In respect of future medical expenses an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996 ("the Act") was furnished to the appellant.

Issues in the Appeal

[10] The issues arising for consideration in the appeal before us are threefold, and can be broadly summarised as follows —

a. Firstly, whether the appellant is entitled to orders for payment of her claims in respect of past medical expenses and general damages;

b. Secondly, whether the appellant proved her claimed entitlement to an order for payment in respect of her claim for loss of earnings and/or earning capacity; and

c. Thirdly, the question as to the *quantum* of the appellant's claim for loss of earnings and/or earning capacity.

Past Medical Expenses and General Damages

[11] At the outset, it is prudent to deal with the issues regarding the omission of the court *a quo* to deal with the agreement reached between the parties relating to the past medical expenses and general damages.

[12] During closing arguments, counsel for the appellant informed the court *a quo* that the appellant's claim for past medical expenses was settled in the amount of R 14 504.07 (fourteen thousand five hundred and four rand and seven sent). The said settlement was confirmed by the respondent.

[13] The settlement of past medical expenses in the agreed amount was also recorded in the draft order which was handed up to the court *a quo.* There is accordingly no doubt whatsoever that the court *a quo* erred in neglecting to make an order for payment of the amount of R14 504.07 (fourteen thousand five hundred and four rand and seven cent) in respect of the claim for past medical expenses.

[14] Although the claim for general damages remained in issue for most of the trial, the parties nevertheless managed to also settle this head of damages at the finalisation of the trial. The claim for general damages was settled in the amount of R 350 000.00 (three hundred and fifty thousand rand). This was again recorded in the draft order handed up immediately before the court *a quo* adjourned, after having reserved judgment.

[15] Accordingly, there is no doubt whatsoever that the court *a quo* erred in neglecting to make an order for payment of the amount of R 350 000.00 (three hundred and fifty thousand rand) in respect of the claim for general damages.

Evidence- Loss of Earnings and/or Earning Capacity

[16] The following witnesses testified during the trial —

a. The appellant, Ms Theuna Helena Brummer;

b. Dr Rehana Bhorat, Rheumatologist;

c. Mr Wessel J, Industrial Psychologist;

d. Ms Tracey Holshausen, Occupational Therapist, and on behalf of the respondent,

e. Mr Z L Kubheka, Educational Psychologist.

[17] The court *a quo* summarised the evidence led during the trial comprehensively. On the reading of the record the summary is perfectly accurate. It would serve no purpose to reiterate that summary other than in the shortest relevant terms for purposes of this appeal.

Appellant's study and career history

[18] At the time of the motor vehicle accident the appellant was an audit clerk at Nwanda Incorporated in Bedfordview. She commenced employment at Nwanda Incorporated in 2009 and resigned in 2012.

[19] During 2009 she also enrolled for a B Comm Financial Accounting degree which she completed in 2013. Of cardinal importance is that had it not been for the accident in question and the impact it had on her capacity to work and study, she would have completed her degree a year earlier.

[20] As a result of the accident and the injuries the appellant sustained, she did not further her studies. She also did not complete her three-year training contract ("articles") and she was unable to write the Qualifying Board Examinations in order to qualify as a chartered account. ("CA")

[21] On 6 August 2012 the appellant was employed as a finance clerk at Marco Polo Gaming (Pty) Ltd in Cape Town. She was promoted to junior financial accountant on 1 July 2013. She resigned during April 2018 because she relocated to Johannesburg.

[22] On 18 September 2014 she accepted employment at Galaxy Gaming & Entertainment (Bingo Vision (Pty) Ltd) as a junior accountant. Since date of her employment, she was promoted to various higher positions and in July 2017 she was promoted to financial manager. The appellant left the company on 30 April 2018.

[23] The appellant, on 1 May 2018 accepted a position as financial manager at Global Logistics Internet SA. However, she resigned on 31 March 2019 due to extreme pain and pressure at work, furthermore, her duties demanded her to travel, which she was unable to handle due to her ill health.

[24] During April 2019 she obtained employment at the Western Cape Blood Service as an accountant. The appellant is still employed in this capacity as at the date of hearing the appeal.

Court *a quo* - Judgment

[25] In paragraph [35] and [36] of the judgment the court *a quo* stated the following —

> "[35] The issues that the Court is called upon to determine are the Plaintiffs claims in respect of:

35.1 earnings and earning capacity;

35.2 general damages.

All the evidence in respect of claims is to be found in the admitted records, the joint minutes and the oral evidence placed before the Court. Very little of the oral evidence has been challenged. As pointed out earlier, the evidence of Khubeka does very little to challenge the Plaintiffs evidence. That evidence would, in my view, have been relevant had the Plaintiff claimed past loss of earnings. As pointed out somewhere *supra*, very little of the Plaintiffs entire testimony was challenged. This include(*sic)* the oral evidence of the Plaintiff, Dr Bhorat. Ms Holtzhauzen and Mr Wessels. The Plaintiffs expert medical reports were deemed to be admitted. There would therefore be no challenge to any such report.

[36] The witnesses that testified made good impressions in the witness box. There was no iota of proof that the experts tried to embellish their testimony. They all gave evidence to the best of their abilities. The expert witnesses stuck steadfastly to their reports. They explained very clearly the contents of their reports and gave candid and solid reasons for the conclusion that they have reached."

[26] It is important to note that at paragraph [40] the following finding was made;

"[40] I now turn to analysing the evidence. That the Plaintiff was involved in a motor collision on 10 November 2011 is not in dispute. It is furthermore not in dispute that she told the medical staff at the hospital that she sustained certain injuries as a consequence of the motor accident is also not in dispute…

Dr TA Birrell, Orthopaedic Surgeon
In his medico-legal report, Dr Birrel states the following under head and neck: "The patient indicated a central neck pain in the upper and lower cervical area

due to neck discomfort. There was a mild loss of neck extension and the rotation, but the rotation did improve with her lying down." …

He reported that: "I also had sight of the NIRI and I am satisfied that the changes such as the L4/L5 degeneration and mild posterior disc bulging is not marked. However, at this point a young age of 23, these changes could be considered pathological, and noting also the narrowing of the neuro- foramina bilaterally. These changes, although early, could well be in part, at least due to the accident….

Dr Michael A Scher, the orthopaedic surgeon, had something to share with regards to this L4-L5 degeneration. In his medico-legal report he observed that: 'The L4-5-disc degeneration demonstrated on MR Imaging (June 2014) may be due to premature aging and was possibly aggravated by the traumatic incident or was maybe directly accident related. Allowing the disc degeneration was coincidental to the accident, the back sprain supports that her previously decompensated but asymptomatic back became symptomatic injury.'"

[27] In conclusion the court *a quo* stated that:

"[41] In conclusion, this Court does not have any evidence upon which to make a finding that as a consequence of the motor collision in question, the Plaintiff suffered many injuries, nor does it have any accident expert evidence that supports the Plaintiffs version that she sustained the injuries referred to in her particulars of claim as a result of the motor collision in question.

[42] … I have already found that the Plaintiff has failed to prove that the motor collision resulted in her suffering any bodily injury. It follows therefore that her claim for loss of earnings and/or earning capacity must also fail."

Legal Principles: Appeal on facts

[28] It is trite that a court of appeal will not interfere with a trial court's finding unless a material misdirection has occurred. It is a principle of our law that a trial court's findings of fact are presumed to be correct in the absence of a clear and obvious error. This presumption is rebutted, by an appellant convincing a higher court that the trial court's factual findings were plainly wrong.

[29] A court of appeal should be mindful that the court *a quo* would have been steeped in the atmosphere of the trial and with this advantage been able to make the necessary credibility findings.[1]

Evaluation facts and Conclusion

[30] In essence, the crisp issue to be determined in this appeal relates to the question whether the court *a quo* erred in finding that the appellant did not sustain any injuries as a result of the rear end motor vehicle accident and whether the injuries sustained triggered the *fibromyalgia* ("chronic pain syndrome") that the appellant suffers from.

[31] Proving a causal connection between the respondent's negligent act and the appellant's injuries, on a balance of probabilities, may be difficult in certain instances.

[32] In the present matter the injuries caused by the accident, a causal connection between the respondent's negligent act and the appellants injuries is relatively easy to establish. The court *a quo* accepted the evidence of the appellant relating to the collision and the injuries she sustained as a result of the accident.

[33] The appellant during her testimony provided uncontested and detailed evidence as to how the motor vehicle accident occurred. She testified that on the day of the incident she was driving a Toyota Corolla and while she was

[1] *R v Dhlumayo & Another* 1948 (2) SA 677(A) at 705 -706, *Sanlam Bpk v Biddulph* 2004 (5) SA 586 (SCA) paragraph [5]*; Roux v Hattingh* 2012 (6) 428 (SCA) paragraph [12].

stationary at the robot and waiting for oncoming vehicles to pass in order to turn right, the insured vehicle hit her vehicle from behind. She testified that due to the impact the back rest hinges of the seat broke and collapsed after which her body was propelled forward. During the motor vehicle accident, she was wearing her seat belt and as her body was moving forward, the safety belt restrained the forward movement and as a result her body was forced backwards where she ended up lying on her back.

[34] The appellant further testified that as a result of the impact of the collision the radio was forced out of its compartment in the dashboard.

[35] The appellant testified that after she alighted from the motor vehicle she experienced extreme neck, lower back, shoulder and hip pain. She was transported from the accident scene by ambulance to the hospital. On arrival at the hospital the appellant stated that she was informed that she was still in the three-month waiting period regarding her medical aid. As she was unable to afford private medical care, she therefore only received intravenous medication whereafter she was discharged from hospital with a brace fitted to her neck.

[36] The defendant during cross examination did not challenge the evidence of the appellant as to how the motor vehicle accident occurred, neither was the evidence questioned as to the impact of the collision on her body as well as the injuries she sustained. In fact, the evidence of the appellant in this regard was accepted and uncontradicted.

[37] It is evident from the description provided by the appellant on how the motor vehicle accident occurred and even though she did not sustain any visible injuries, there must have been some sort of consequence following the collision on her body. She even stated that due to the impact the diver seat back rest hinges broke and furthermore her motor vehicle was unrepairable after the incident.

[38] Furthermore, Dr Birrel, the Orthopaedic Surgeon, stated that he was satisfied that the changes such as the L4/L5 degeneration and mild posterior disc bulging is not marked. Dr Birrel concluded that these changes, although early, could well be in part, at least due to the motor vehicle accident.

[39] The court *a quo* erred in finding that the appellant did not prove, on a balance of probabilities, that she indeed sustained injuries, more specifically a whip lash injury during the motor vehicle accident.

Fibromyalgia

[40] It is evident that the chronic pain syndrome, better known as *fibromyalgia* raises some interesting questions not only in the present matter, but also in the medical and legal field.[2]

[41] Therefore, the expert evidence of Dr Bhorat, the Rheumatologist, is of the utmost importance in the matter. Dr Bhorat testified that rheumatology is the study of arthritis, joint pain and chronic pain syndrome. A rheumatologist therefore, treats painful joints and muscles, osteoarthritis, rheumatism arthritis and *fibromyalgia.*

[42] The appellant approached Dr Bhorat in 2014 as she experienced constant bodily pains, debilitating headaches and constant fatigue after the motor vehicle accident in question. Dr Bhorat has treated the appellant as a patient since then. She diagnosed the appellant with *fibromyalgia.*[3] She also

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[2] Fibromyalgia is a mysterious chronic pain disorder that is difficult to treat. Its causes are also still largely in the dark. The disorder is characterised by recurring pain as well as various other symptoms, including sleep disturbances, depressive moods, chronic fatigue and digestive problems. On average, it takes 16 years before a diagnosis is made. (Fibromyalgia: Pain out of control, April 5, 2023: Ruhr-University Bochum)

[3] Fibromyalgia's name comes from "fibro" (the Latin term for fibrous tissue), "myo" (the Greek word for muscle) and "algia" (the Greek word for pain). In 1990 the American College of Rheumatology (ACR) set out criteria by which a person can be diagnosed with fibromyalgia. When an individual has a history of chronic widespread pain, together with a minimum of 11 out of 18 tender-points on examination, he is, according to the ACR, suffering from fibromyalgia. The pain must be present for at least 3 months and must involve the left, as well as the right side of the body, be present below and above the waist, as well as in the axial skeleton. https://rheumatology.org>fibromyalgia

assessed the appellant for purposes of this matter on 1 February 2018, whereafter she compiled a report.

[43] Dr Bhorat testified that *fibromyalgia* is a long-term, or chronic, condition. It is a medical condition defined by the presence of chronic widespread pain, abrupt sleep patterns, fatigue, headaches, migraines, cognitive symptoms, cramps and depression. A person with f*ibromyalgia* experience joint ("arthalgia") and muscle ("myalgia") pains.

[44] During Dr Bhorat's testimony she stated that even though various studies have been conducted on what the cause/s of *fibromyalgia* are, there are still uncertainties. However, a trigger for *fibromyalgia* is a motor vehicle accident and particular a whip lash injury sustained during an accident. She emphasised that such injury need not to be of severe nature to serve as a trigger for *fibromyalgia*. In conclusion Dr Bhorat stated the following;

> "… if you look at it from my point of view as a doctor, listening to her saying that she was well before the accident or she perceived herself to be well before, she had an accident and she is now sick. It is probably likely that the accident in this case was the trigger and whether there was maybe an emotional element, whether it was a traumatic event more than physical trauma and the problem with fibromyalgia is because we do not understand what causes it, we do know however that is due to, very simply put, all the active parts pain." [my emphasis]

[45] Dr Bhorat highlighted during her testimony that following the accident the appellant experienced constant pain in her neck area and sporadic pain along her spine area, shoulders and knees. She also presented with headaches, poor sleep patterns and extreme fatigue.

[46] On 25 August 2019, Dr Bhorat and Dr Pettipher, a rheumatologist appointed by the respondent, compiled a joint minute relating to their findings relating to the appellant condition.

[47] Amongst others, the following aspects were agreed upon by Dr Bhorat and Pettipher:

1) Since the motor vehicle accident, the appellant suffers from chronic pain, headaches, poor sleep end fatigue.

2) They agreed that the appellant suffers from *fibromyalgia* syndrome and that she was not receiving adequate therapy for the condition.

3) That the appellant's anxiety and depression will aggravate her *fibromyalgia* syndrome.

4) They recommended a combination of medical therapy, rehabilitation in the form of exercise and physiotherapy, as well as cognitive behavioural therapy and management of her anxiety and depression.

5) That there was no history of *fibromyalgia* syndrome, chronic pain or anxiety and depression prior to the motor vehicle accident. They found that although it is difficult to prove, it is most likely that the stress of the motor vehicle accident precipitated her *fibromyalgia* diagnosis. [my emphasis]

6) They agreed that *fibromyalgia* does not lead to long-term disability or joint and muscle damage and that *fibromyalgia* is a chronic pain amplification syndrome which is best managed with adequate pain medication, exercise and psychiatric input where necessary.

Conclusion

[48] It is evident that the evidence of the appellant in that she suffered a violent whiplash injury during the accident was uncontested evidence. Furthermore, the appellant testified regarding the injuries she sustained and the *sequelae* thereof.

[49] In fact, ample expert evidence of the injuries suffered by the appellant in consequence of the accident was placed before the court *a quo*. Furthermore, the expert evidence of Professor Fritz, a neurologist, Dr Shevel, a psychiatrist, Dr Greeff, a general surgeon and Dr Scher, an orthopaedic surgeon strengthen the conclusion that the motor vehicle accident was the trigger event causing the *fibromyalgia* syndrome. The evidence can be summarised as follows:

1. Professor Fritz, a neurologist concluded that the appellant, "sustained a whiplash neck injury with complications of cervicogenic headaches and migraine headaches every two months. She had no headaches prior to the accident and this is her major problem."

Under the heading "Whole Person Impairment", Professor Fritz states that:

"From a neurological point of view, she has whole person impairment only related to pain, specifically the two types of headaches and she would warrant 3% whole person impairment because of the severe headaches.

She also has chronic depression and this has contributed towards her change in career and is related to the pain and she will require treatment for the depression. She would warrant 10% whole person impairment based on chapter 14 of the American Medical Association Guidelines, volume 16, 6th Edition. Her cognitive loss appears to be related to her behavioural problems and would not warrant whole person impairment in its own right. She has had normal MRI scans of her neck and back and probably does not warrant whole person impairment for her musculo-skeletal problems but I defer this to an orthopaedic surgeon."

2. Dr Shevel, a psychiatrist, concluded that the physical injuries that the appellant sustained during the accident have impacted negatively on her quality of life socially and occupationally. He further stated that she presents with ongoing psychiatric *sequelae* and these could be summarised as follows;

1. Depressed mood;
2. Decrease in confidence/feelings of uselessness and worthlessness;
3. Needs to put in extra hours to complete work;
4. Emotional Lability/tearfulness;
5. Irritability;
6. Memory difficulties;
7. Difficulty sustaining concentration;
8. Dyssomnia with predominantly mid-cycle insomnia;
9. Daytime fatigue;
10. Weight gain;
11. Decreased socialisation;
12. Post-accident decline in libido;
13. Overall decline in general enjoyment of life; and
14. Severe anticipatory anxiety.

3. Dr Greeff, a general surgeon concluded that the appellant “mostly sustained back injuries” during a motor vehicle accident.

4. Dr Scher, an orthopaedic surgeon, assessed the appellant on 20 October 2016 and concluded that the appellants "neck symptoms are suggestive of mechanical type pain secondary to soft tissue cervical spine sprain".

[50] The record and the evidence tendered in this matter, clearly substantiate that the appellant suffered soft tissue injuries of the neck, thoracic spine and lower back injuries as a result of the accident. The finding of the court *a quo* that the appellant has failed to prove that the accident resulted in her "suffering any bodily injuries" is without a proper basis. The court *a quo* acknowledged that "very little of the oral evidence has been challenged", "the witnesses that testified made good impressions in the witness box", "the expert witnesses stuck steadfastly to their reports" and "they explained very clearly the contents of their reports".

Causation

[51] The *onus* is on the appellant to show, on a balance of probabilities, that the injuries were directly caused by the negligent driving of the insured driver, alternatively that it was causally connected with the negligent driving of the insured driver at the relevant time, and that such driving was therefore, a *sine qua non* thereof.

[52] The well-established principles applicable to the question of causation were authoritatively restated in *International Shipping Co (Pty) Limited v Bentley*[4] as follows:

> "As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as 'factual causation'. The enquiry as to factual causation is generally conducted by applying the so-called 'but-

[4] 1990 (1) SA 680 (A) at 700E-I.

for' test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test, one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical cause of lawful conduct and the posing of the question as to whether upon such an (*sic)* hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued. If the wrongful act is shown in this way not to be a causa sine qua non of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a causa sine qua non of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called 'legal causation'."

[53] It is settled law that our courts follow the so-called flexible approach to determining legal causation, in which various theories of causation may serve as criteria reflecting legal policy and convictions as to when legal liability should be imposed.

[54] In answering the question of factual causation, it must be shown that 'but for' the 2011 accident the appellant would not have suffered from *fibromyalgia*.[5] The enquiry is whether it was more probable than not that the *fibromyalgia* suffered by the appellant were caused by the accident.[6] This question need not be answered with absolute certainty but must be established on a balance of probabilities.[7]

[55] Dr Bhorat stated the following —

[5] *Life Healthcare Group (Pty) Ltd v Dr Suliman* [2018] ZASCA 118; 2019 (2) SA 185 (SCA) paragraph [12].
[6] Ibid paragraph [16]
[7] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SAA 431 (SCA) at 449E-F.

"It is possible that Ms Brummer had a predisposition to *fibromyalgia* prior to the accident and that the motor vehicle accident served as a trigger for the worsening of the symptoms." [my emphasis]

[56] In addition to Dr Bhorat's evidence, the appellant testified that immediately prior to the collision she did not suffer any physical restrictions and experienced no chronic headaches, neck spasms and pain, back spasms and pain and that her hips were intact and her general physical condition was well without any limitations to her physical exercise parameters.

[57] The evidence presented by the appellant satisfies the requirements of the "but for" or the *condictio sine qua non* test for determining factual causation. There can be no doubt that the evidence shows that the accident was a *causa sine qua non* for the appellant's ensuing condition of *fibromyalgia* syndrome, or put differently, that "but for" the accident and consequent injuries the appellant would not have developed *fibromyalgia*.

[58] Accordingly, on the probabilities, the court *a quo* should have found that the appellant succeeded in proving her case. It is clear that the court *a quo* erred in founding that no factual causation exits between the 2011 accident and the condition of *fibromyalgia*.

[59] Even if it is accepted that the appellant had undiagnosed *fibromyalgia* prior to the accident, as opposed to a mere predisposition to develop *fibromyalgia*, it would not be the end of the enquiry into causation. In such a case the appellant's undiagnosed condition of *fibromyalgia* would constitute a so-called pre-existing medical condition and the question arises as to whether or not the condition of *fibromyalgia,*

a. was aggravated or worsened by the injuries caused by the accident, and or

b. caused and/or contributed to the causation of the appellant's ensuing disability and loss of earning capacity.

[60] It is evident from the evidence of the appellant and Dr Bhorat that prior to the motor vehicle accident the appellant's condition of *fibromyalgia* was latent or asymptomatic. Undoubtedly the injuries sustained by the appellant as a result of the motor vehicle accident, triggered and brought forward the onset and subsequent diagnosis of *fibromyalgia*. Therefore, it follows that even if the undiagnosed *fibromyalgia* existed at the time of the accident, the accident aggravated the condition.

[61] The evidence conclusively proves that the appellant's f*ibromyalgia* syndrome caused, or at least contributed to the causation of the appellant's disability which has resulted in her loss of earning capacity.

[62] Therefore, the appellant has established that the injuries sustained by her in consequence of the accident have aggravated, exacerbated or worsened the already existing medical condition (*fibromyalgia* syndrome) as such, the appellant is in law entitled to be compensated to the full extent of the loss occasioned by the *sequelae* of both the injuries resulting from the collision and the pre-existing medical condition.

Powers of Appeal Court- Deciding Quantum

[63] It was submitted before us by counsel for the appellant that it was permissible for the Appeal Court to determine quantum in the matter. Section 19 of the Superior Courts Act, Act 10 of 2013 provides as follows;

"19. Powers of court on hearing of appeals

The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law—

(a) dispose of an appeal without the hearing of oral argument;

(b) receive further evidence;

(c) remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Supreme Court of Appeal or the Division deems necessary; or

(d) confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require."

[64] As a consequence of the decision reached by the court *a quo*, the issue of *quantum* of damages was not dealt with. Nevertheless, the facts relevant to the assessment of *quantum* were sufficiently ventilated in the court *a quo*.

[65] There was some debate during argument as to whether the issue of *quantum* should be remitted to the court *a quo* for determination.

[66] In *Diljan v Minister of Police,*[8] the Supreme Court of Appeal stated the following regarding remitting a matter to the court *a quo* for determination of an award for damages;

"Although this option appeared attractive at first blush, it soon became clear that to remit the matter to the trial court for this purpose would result in a wastage of scarce judicial resources. This was so because, at the end of the day, it seemed that this Court was in as good a position as the trial court to consider the issue of quantum."

[67] Therefore, the matter is not to be remitted to the court *a quo* in order to determine the *quantum* of loss of earning capacity due to, firstly, evidence

[8] 746/2021) [2022] ZASCA 103 (24 June 2022) at paragraph [13].

relating to *quantum* was fully ventilated during the trial, secondly, in remitting the matter to the court *a quo* would cause unnecessary costs and wastage of judicial resources, and lastly, remittance would only lead to further delay in the matter, as it is evident the motor vehicle accident occurred as far back as November 2011, nearly twelve (12) years back.

Quantum-Loss of Earnings and/or Earning Capacity

[68] Regarding the quantification of loss of earning capacity the court considers the following evidence and/or expert reports in the matter;

a. Ms Brummer, the appellant;

b. Ms Holshausen, the occupational therapist;

c. Mr Wessels, the industrial psychologist, and

d. Mr Whittaker, the actuary.

[69] At the time of the accident the appellant was 21 years old. She was employed at Nwanda Incorporated Chartered Accountants as an article clerk. She commenced her articles of clerkship in January 2009 and her article contract was registered with the South African Institute of Chartered Accountants ("SAICA").

[70] In 2008 she commenced with her B Comm Accounting degree with the view to qualify as a chartered accountant.

[71] Prior to the accident she was employed as a senior audit clerk as a member of an auditing team. She experienced no physical restrictions in her capacity as a senior audit clerk.

[72] However, following the accident, she was experiencing severe neck and back pain for which she was prescribed pain medication. During 2011/2012 she was

repeatedly off work due to debilitating pain and headaches. She received physiotherapy which provided limited relief. Eventually her salary was halved in view of the time that she was absent from work.

[73] In August 2012 the appellant resigned as audit clerk at Nwanda because she was unable to manage the high demands of her employment as well as the demands relating to her studies. As a result of the agonizing back and neck pain she was experiencing difficulty in concentrating which resulted in her falling behind with her audit duties. She had to work long hours overtime in order to complete her tasks, which in turn affected her studies.

[74] The appellant gained employment as a financial clerk which was less demanding and strenuous, in order to complete her B Comm Auditing degree. In consequence of her change of employment she was precluded from completing her auditing articles. In 2014 the appellant completed her B Comm Accounting degree.

[75] The appellant stated that since the accident she experiences pain to her lower back, neck and hip. She also suffers from headaches and migraines.

[76] Dr Bhorat stated that in her opinion the appellant presents a severe case of *fibromyalgia* syndrome and despite optimal treatment she will not be fortunate enough to be without any disability in future.

[77] Ms Holshausen, the occupational therapist stated as following in her report following her assessment of the appellant on 8 July 2016 —

"**<u>Discussion</u>**

Taking into account the reports of Dr Scher and Dr Shevel and her presentation during the assessment Mrs. Brummer is expected to comply with her current work demands, which fall within the sedentary category of work. She does appear to perceive her pain as severely restrictive to her functional performance and she did present with some challenges related to sustained sitting and concentration. Deference is given to the relevant expert regarding

her perception of her pain. In the writer's opinion her current work performance would be expected to be below her pre-accident potential and this would not be effortless or pain free. [my emphasis]

She would be expected to be able to comply with studying demands in her chosen field, should she wish to pursue this, although she would again be seen to benefit from recommended treatment and use of ergonomic equipment in order to relieve her pain/discomfort. In the presence of persisting pain and depression, she could be expected to perform below her pre-accident potential with regards to her studies and these may be more effortful for her post-accident."

[78] On 19 February 2019 Ms Holshausen compiled a follow-up report wherein her conclusion remained to a large extent the same. However, under the heading, "Factors impacting on her residual work capacity"[9] the following is noted —

"In the writer's opinion the following factors impact on her present work capacity/ability to work:

- Mrs. Brummer continues to experience some limitation with regards to sustained sitting, which would indicate occasional use (6-33%) of this position within her workday. She reported pain and discomfort with regards to prolonged sitting and she was required to take rest periods frequently, standing up from her position. In the writer's opinion she would be seen to benefit from compliance recommended treatment, application of appropriate neck/back hygiene as well as ergonomic structuring and equipment.

- Note is taken of her diagnosis of fibromyalgia which would be impacting on her perception of her pain and would be expected to be limiting to her functional performance at present. It would be seen to correlate with her reported perception of her pain as being severe or

[9] Paragraph [9.7]

crippling as noted in the self-report questionnaires. This is further impacted on by her depression and anxiety. It is noted that she has a favourable diagnosis with regards to this condition and it would be beneficial for her to start exercising under the guidance at a Biokinetist in order to help establish a safe and effective exercise programme.

- Mrs. Brummer again presented with performances on the WRAML-2. which were adequate in terms of general memory, including verbal and visual memory as well as concentration/attention. Her reported depression, anxiety and perception of her chronic pain may be impacting negatively on these areas, especially over prolonged work hours.

- She may be exerting more effort in order to maintain levels of accuracy and efficiency.

- She continues to experience her motivation and drive as being reduced and this may be expected to impact on her ability to show initiative or 'go the extra mile' in the workplace.

- Her short temper and irritability may be expected to impact negatively on interpersonal relationships within the workplace.

Dr Birrell reported '...She is experiencing a number of problems such as frequent absenteeism due to lower backache, but she slates she is allowed to work from home at times. She states she has an unsympathetic employer and complains of diminished work speed...In my last report I estimated the loss of work capacity between 6% to 7%, I allowed her 6 to 9 months of early retirement, assuming the retirement age of 66 as I expected a slow increase in her loss of work capacity...From an orthopaedic perspective I remain with the views that I expressed previously and above relating to her loss of work capacity. However, it is quite clear that this patient has need of psychological support...'

Prof Fritz reported 'It is of significance that she gave up attempting to complete her articles in Accountancy and downgraded her career aspirations. She does appear to be working and coping adequately with her present job but the potential of long term (*sic*) earning would be lower than that of an accountant.'

Dr Bhorat reported 'It is my opinion, that she should make a full recovery to work and social function with the correct intervention.'"

[79] Ms Holshausen stated that;

- "Mrs. Brummer was involved in a motor vehicle accident on the 10th November 2011. She reportedly sustained soft tissue injuries to the cervical and thoraco-lumbar spine.

- The sequelae have resulted in reduced and altered capacities related to pain/discomfort over the neck, mid-back, lower back, right/left hips and headache, reduced cervical spine functional strength, reduced range of motion of the lumbar spine, reduced mobility and agility. postural asymmetry and reduced stamina for sitting, standing, walking.

- These impact on her daily functioning and there has been a decline from her previous level of occupational performance related to self-management, home management and leisure pursuits. She is currently working as a financial manager and has been able to sustain this position, which is sedentary in nature. She reports the need for extra hours in order to manage her workload. In the writer's opinion she would be able to continue in her current position, although this may not be effortless or pain free and would be at a reduced level compared to pre-accident."

[80] Mr Wessels, an industrial psychologist, assessed the appellant on 5 July 2016, 12 February 2019 and during March 2019, whereafter he compiled a report wherein he dealt comprehensively with her pre-accident work history and earning capacity as well as her employability. Mr Wessels, thereafter postulated the appellant's probable pre-accident career progression as follows:

"**Probable pre-accident career progression scenarios.**

(i) Qualifying as a Chartered Accountant

The plaintiff would probably have commenced continued working while completing the CTA studies and would in all probability have followed the same career path as was the case post-accident with the difference that she would have completed the contractual articleship. She would have continued to complete the CTA examination (1 to 2 years: 2014/2015) and the Board examinations to be a Chartered Accountant (+/- 2016).

Having completed the Board examinations and having qualified as a Chartered Accountant, she could follow a wide variety of careers within the financial industry and later in her career in general management positions. The qualification opens entry to all positions found in the financial industry, i.e., Audit firms, Banking, Corporate finance, General accounting, self-employment etc. Progression at this stage depends on the ability and competence of the individual. It is anticipated that purely based on the qualification, she would have been capable of dealing with job content complexity at the Paterson Job Grade D4 level (50^{th} percentile / Grand Total Package). Given all the factors available, it is suggested that she may have reached the indicated maximum earnings level at age approximately 45 years with inflationary increases until retirement at age 65 years.

It is suggested that a straight line (*sic)* increase be applied from career entry point. i.e.,

R 144 000.00 per annum (As at Marco Polo Gaming (Pty) Ltd.) until the career ceiling at the approximate Paterson Job Grade D4 level (50th percentile / Grand Total Package) as this results in a decreasing pattern of real increases in earnings, with inflationary increases thereafter.

(ii) Recommendation

It is difficult to project whether the plaintiff would have successfully completed the Chartered Accountant qualification. However, based on her adamancy (*sic)* that she would have completed the Chartered Accountant's qualification, her stated academic intentions, the completion of the B. Compt. (Accounting) Degree studies despite the accident and its aftermath, her career trajectory post-accident as well as the favourable collateral information provided by the employer, it recommended that benefit of doubt be given to the attainment of the Chartered Accountant qualification as the probable scenario.

The writer defers to the prerogative of the legal teams / Court with the regards to the application of pre-accident contingency deductions.

Post-accident work history and earnings capacity.

The plaintiff returned to same employment 25 November 2011. (*As per employment report form*)

Postulations/Conclusions: Post-accident earnings capacity.

It is evident from the above that the plaintiff remains with orthopaedic, functional and psychological sequelae following the injuries that she sustained and which has a curtailing effect on her productive capacity. The aforementioned has been substantiated by collateral information sourced from her employers.

Taking note of available expert medico-legal opinions as well as the findings and conclusions of the writer, it is recommended that the following aspects be considered in formulating and quantifying the plaintiff s medico-legal claim:

Future loss of earnings.

General

The plaintiff managed to progress in her career despite the aftermath and sequelae of the injuries that she sustained. She has now however reportedly reached a stage where she cannot continue to deal with and endure the pain and discomfort caused by the pressures of a Financial Managers' position and responsibilities.

She has resigned from her Financial Manager's position and has accepted a lesser position as a General Accountant in a less stressful and demanding work environment. She has also taken a lower remuneration package. She will as such now earn less that what would have earned had she remained in her capacity as a Financial Manager. It is anticipated that she will continue to earn less as she has indicated that she will now occupy a position where she hopes she will be under less pressure and will as such be more able to deal with her disposition.

Conclusions

The writer defers to medical opinion with regards to the plaintiff's disposition and the impact on her career vis a vie the injuries that she sustained and the effects of fibromyalgia.

The result of the above however is that the plaintiff will now earn less than what she could have earned but for the accident. The loss in earnings will be the difference between her postulated probable pre-accident career trajectory versus her post-accident career progression and the new position that she about to occupy. Little is known about the new position yet and the assumption is made that she will remain in the new capacity until retirement with annual increases probably inflation based.

Contingencies

It recommended based on the above that a higher post-accident contingency deduction be applied.

The application of contingency deductions is acknowledged as being the prerogative of the legal teams / the Court involved."

[81] Mr Whittaker, an actuary compiled a report dated 28 March 2019, whereafter he compiled the first addendum to the report on 8 August 2019 and the second addendum on 27 August 2019.

[82] Mr Whittaker addressed the loss of earning capacity of the appellant as follows per the scenario – Mr Wessels:

Loss before the application of the limit

Future loss

Value of income uninjured:		R	17,482,657	
Less contingency deduction:	20%	R	3,496,531	
		R	13,986,126	
Value of income injured:		R	9,991,268	
Less contingency deduction:	20%	R	1,998,254	
		R	7,993,014	
Total nett loss:				R 5,993,112

Loss after the application of the limit

Nett future loss:	R	5,567,870
Total nett loss:	R	5,567,870

Evaluation of Loss of Earning Capacity

[83] It is trite that the appellant must prove on a preponderance of probabilities her loss of earnings as well as the amount of damages that should be awarded in this regard. In assessing the compensation, the court has a large discretion, as was stated in *Legal Insurance Company Ltd v Botes*[10] where it was held:

> "In assessing a compensation, the trial Judge has a large discretion to award what under the circumstances he considers right. He may be guided but is certainly not tied down by inexorable actuarial calculations."

[84] Hartzenberg J explained in *Road Accident Fund v Maasdorp*[11] that:

> "The question of loss of earnings and loss of earning capacity is a vexed one and is often considered by our courts. Usually, the material available to the court is scant, and very often, the contentions are speculative. Nevertheless, if the court is satisfied that there was a loss of earnings and/or earning capacity, the court must formulate an award of damages. What damages the court will award will depend entirely on the material available to the court."

[85] This court was provided with an actuary report in order to ascertain the appellant's loss of earning capacity due to the accident.

[86] Koch[12] describes the role of the actuary as an expert witness as follows:

> "It would seem that the role of the actuary as an expert witness is not that of a valuator but rather that of an expert calculator, economist and statistician who makes his skills available to assist the court in arriving at a fair and proper value for the loss. ... An actuary may thus appropriately be seen to act as a calculation assistant to the court in circumstances where the court does not itself have the necessary technical ability. In acting in this capacity, the actuary does not have an unfettered discretion to exercise his own judgment as to what

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[10] 1963 (1) SA 608 (A). Also see *Lambrakis v Santam* 2002 (3) SA 710 (SCA).
[11] [2003] ZANCHC 49.
[12] Koch *Damages for Lost Income* 7.

is fair, for the law is responsible for the purpose and framework within which the calculations are to be performed."[13]

[87] In respect of the claim for loss of earning capacity or future loss of income Nicholas JA explained in *Southern Insurance Association Ltd v Bailey*[14] two possible approaches to be followed by the court:

> Any enquiry into damages for loss of earning capacity is of its nature speculative … 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. That 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 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. But the Court cannot for this reason adopt a *non possumus* attitude and make no award. ... In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an 'informed guess', it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's 'gut feeling' (to use the words of appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess."[15]

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[13] See also *Krugell v Shield Versekeringsmaatskappy Bpk* 1982 4 SA 95 (T) 101A: "Myns insiens sou dit foutief wees om, waar die gegewens wel beskikbaar is wat 'n aktuariële berekening prakties moontlik maak, daardie handige middel eenvoudig oorboord te gooi en dit te vervang met 'n lukrake raaiskoot wat bloot op intuïsie gegrond is. Ek sal dus van die syfers wat by wyse van aktuariële berekeninge bereik is, gebruik maak. Dit beteken nie dat ek van mening is dat sulke berekenings in alle gevalle blindelings gevolg moet word nie.

[14] *Southern Insurance Association Ltd v Bailey* 1984 1 SA 98 (A) 113H-114E.

[15] *Griffiths v Mutual & Federal Insurance Co Ltd* 1994 1 SA 535 (A) 546F-G: "In a case where there is no evidence upon which a mathematical or actuarially based assessment can be made, the Court will nevertheless, once it is clear that pecuniary damage has been suffered, make an award of an arbitrary, globular amount of what seems to it to be fair and reasonable, even though the result may be no more than an informed guess"; *Roxa v Mtshayi* 1975 3 SA 761 (A) 769G-770A: "While

[88] There is no reason why the calculation provided by the actuary should not be accepted in determining the appellant's loss of future earning capacity. The calculations in this regard are therefore accepted by this court.

[89] Accordingly, and in view of the above, the following order is made:

Order

1. The appeal is upheld and the responded is ordered to pay the costs of the appeal including the costs of senior counsel.

2. The judgment of the court *a quo* is set aside and replaced with the following: -

3. The Respondent shall pay the total sum of R 5,932,374.07 (five million nine hundred and thirty-two thousand three hundred and seventy-four rand and seven cents) to the Appellant's attorneys, Adams & Adams, in settlement of the Appellant's action, which amount is calculated as follows:

Past and Future Loss of Income/Earning Capacity	**R**	**5, 567,870.00**
Past Medical Expenses	**R**	**14,504.07**
General Damages	**R**	**350,000.00**

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evidence as to probable actual earnings (but for the injury) is often very helpful, if not essential, to a proper computation of damages for loss of earning capacity, this is not invariably the case. In the present case the imponderables were vast. The Court had to consider the position of a young child struck down almost in infancy... When one further considers that the working period under consideration stretches some 30 or 40 years into the future, it becomes clear that any attempt at an actual calculation of loss of future income would be a fruitless exercise". The trial Judge took a broad view of the situation and awarded a globular amount which he considered appropriate in the circumstances. Also see *Union and National Insurance Co Ltd v Coetzee* 1970 1 SA 295 (A) 301D-E; *Guardian National Insurance Co Ltd v Engelbrecht* 1989 4 SA 908 (T) 911G-I.

	R	**6,932,374.07**
Less Interim Payment	**R**	**1,000,000.00**
TOTAL	**R**	**5,932,374,07**

4. The aforementioned total sum of R 5,932,374.07 (five million nine hundred and thirty-two thousand three hundred and seventy-four rand and seven cents) shall be payable by direct transfer into the trust account of Adams & Adams, details of which are as follows —

   Nedbank Account number: 1[...]
   Branch number: 1[...]
   Pretoria
   Ref: DBS/MQD/P296

5. The Respondent is liable for payment of interest on the award above calculated from 14 days after the date of judgment of the court *a quo*, being 23 June 2020 to date of payment thereof at the prevailing statutory interest rate as at that date.

6. The Respondent shall, over and above any previous cost orders including the costs of the appeal as set out in [1] and granted in favour of the Appellant against the Respondent, also make payment of the Appellant's taxed or agreed party and party costs of the action on the High Court scale, subject to the discretion of the Taxing Master, which costs shall include, but not be limited to the following —

   i. The fees of Senior-Junior Counsel, inclusive of but not limited to Counsel's full day fees for 28 August 2019, and that of Senior Counsel inclusive of his full day fees for 5, 6 and 7 November 2019 as well as 7 June 2023, on the High Court Scale, inclusive

of but not limited to the costs of preparation of the Heads of Argument;

ii. The reasonable, taxable costs of obtaining all expert, medico-legal, addendum, RAF4 Serious Injury Assessment and actuarial reports from the Appellant's experts, which were either furnished to the Respondent and/or included in the trial bundles;

iii. The reasonable taxable costs associated with arranging and convening joint meetings of the parties' experts and the preparation and obtaining the minutes thereof;

iv. The reasonable, taxable preparation, qualification, travelling and reservation fees, if any, of the following experts for 28 August 2019, 5,6 and 7 November 2019 of whom notice have been given, being—

1. Dr Birrell (Orthopaedic Surgeon);
2. Dr Carpenter-Kling (ENT);
3. Dr J Pearl (Neurologist);
4. Ms T Holshausen (Occupational Therapist);
5. Dr D A Shevel (Psychiatrist);
6. Dr Greeff (General Surgeon);
7. Dr Bhorat (Rheumatologist);
8. Ms Wessels (Industrial Psychologist);
9. Mr G Whittaker (Actuary).

v. The costs of all consultations between the Appellant's attorneys, and/or Counsel and/or the witnesses, and/or the experts and/or the Appellant in preparation for the hearing as well as consultations with such experts in preparation for the hearing on 28 August 2019 and 5 November 2019 as well as to discuss the terms of this order;

vi. The reasonable travelling and accommodation costs of the Appellant's expert, Dr Bhorat, for attending the court proceedings on 28 August 2019 and 5 November 2019;

vii. The reasonable, taxable accommodation and transportation costs (including Toll and E-Toll charges and return air flights) incurred by or on behalf of the Appellant in attending all medico-legal consultations with the parties' experts, all consultations with her legal representatives and the court proceedings on 28 August 2019 and 5 November 2019, the quantum of which is subject to the discretion of the Taxing Master;

viii. The allowance of R1,500.00 contained in Rule 70(3) for the fees of the experts listed below on the specified dates shall not apply and the Appellant shall be entitled to recover in respect thereof the reasonable fee charged by the said expert in this regard, subject to the views of the Taxing Master as to the reasonableness —

1. Ms Bhorat for attending court on 28 August 2019 and 5 November 2019; Ms Holshausen for attending court on 5 and 6 November 2019; and

2. Mr Wessels for attending court on 6 November 2019.

ix. The above costs shall also be paid into the aforementioned trust account; and

x. It is recorded that the Appellant's attorney does not act herein on a contingency fee agreement.

7. The following provisions shall apply with regards to the determination of the aforementioned taxed or agreed costs—

i. The Appellant shall serve the notice of taxation on the Respondent's attorneys of record; and

ii. Should payment not be effected timeously, in full or at all, Appellant shall be entitled to recover interest on the taxed or agreed costs from date of allocator or settlement thereof (whichever date occurs first) to date of final payment in accordance with the prevailing statutory interest rate at such date.

CSP Oosthuizen-Senekal
Acting Judge of the High Court
Gauteng Division, Pretoria

I agree

RC Tolmay
Judge of the High Court
Gauteng Division, Pretoria

I agree

M Senyatsi
Judge of the High Court
Gauteng Division, Pretoria

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 16 August 2023.

DATE OF HEARING: **7 June 2023**

DATE JUDGMENT DELIVERED: **16 August 2023**

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