IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case number: **5181/2014**

In the matter between:

LOUISA MCEWAN Plaintiff

and

ROAD ACCIDENT FUND Defendant

CORAM: DAFFUE, J

HEARD ON: 16 APRIL 2019 & 10 MAY 2019

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 20 JUNE 2019

I INTRODUCTION

[1] On 5 March 2019, the first trial date allocated for adjudication of the merits, the Road Accident Fund ("RAF") threw in the proverbial towel as it does more often than not. It conceded the merits fully and by agreement appropriate orders were made, including that the matter be postponed to 16 and 17 May 2019 for adjudication of the *quantum* of plaintiff's claim.

[2] The matter went on trial and it is now my task to write a judgment, incorporating appropriate orders.

II THE PLAINTIFF

[3] The plaintiff is Me Louisa Mcewan, a 58 year old, a female Warrant Officer ("W/O"), Class I, in the employ of the South African National Defence Force (SANDF"). She was 51 years old when she was injured in a motor vehicle collision which occurred on 23 November 2012 on the N8 road between Petrusburg and Kimberley, Free State Province. At that stage she was a W/O Class II. She was represented during the trial by Adv M Combrink, duly instructed by Kruger & Co, c/o Pieter Skein Attorneys, Bloemfontein.

III THE DISPUTES

[4] During argument Mr P G Chaka for the RAF conceded that the usual undertaking in terms of s 17(4)(a) of the Road Accident Fund Act, 56 of 1996 ("the Act") should be provided and tendered it on behalf of his client. He also confirmed that the claim in respect of

past medical and hospital costs was not in issue. This concession and undertaking meant that the only outstanding disputes were the plaintiff's claims for past and future loss of income as well as general damages.

IV WASTE OF PUBLIC MONEY

[5] There is one aspect that I must deal with now and that is the RAF and its attorneys' apparent preference to waste money. I have expressed myself in this regard in no uncertain terms on numerous occasions, but nothing is done about this unacceptable state of affairs that continues unabatedly. I mentioned above that the RAF had thrown in the towel in respect of the merits. This happens on a weekly basis in the majority of cases. The RAF is seldom ready to tackle the merits head on insofar as no pre-trial preparations are undertaken. No proper investigations are undertaken and witnesses are seldom consulted and/or subpoenaed. If it were otherwise, cases will be settled long before the trial dates. It and its attorneys have no understanding of the enormous and unnecessary amounts of legal costs being wasted in the process. They drag out litigation as long as possible, only to concede the merits at the trial. I should not be understood to say that all cases should be settled. Fraudulent claims are filed from time to time and the RAF must be cautious. When two vehicles are involved in a collision, both drivers are often to be blamed and an apportionment of damages should be applied in accordance with the degree of negligence to be found. However, the so-called 1% cases – the claims of passengers and dependents to whom no negligence can be attributed – are on a different footing.

[6] *In casu*, plaintiff averred in her particulars of claim that the RAF had conceded liability on the merits as long ago as 14 August 2014. In its plea the RAF not only denied that plaintiff was a passenger in the vehicle which left the road and overturned, but also that it had accepted liability as alleged. Five years later concessions were made without the matter proceeding on trial.

[7] More pertinent to the present dispute is the attitude of the RAF and its attorneys pertaining to the reports of the experts that plaintiff intended to call. A week before the start of the *quantum* trial plaintiff's attorneys requested the RAF's attorneys in writing to admit the reports of Drs Sagor and Cronwright, orthopaedic surgeon and plastic and reconstruction surgeon respectively. They did not want to do that notwithstanding the fact that Dr Sagor and the RAF's expert agreed fully with each other and the RAF did not file a report of a plastic and reconstruction surgeon at all. After filing of the orthopaedic surgeons' joint minutes, the plaintiff's request was repeated, but to no avail. The RAF and its attorneys were well aware that these experts had to fly in from Cape Town and that thousands of Rands of public funds could be saved if that could be prevented. Eventually, not a single question was put to these two experts in cross-examination when they confirmed their reports under oath and explained pertinent aspects.

V THE EVIDENCE

[8] I prefer to first deal with the experts' evidence first, where after I shall consider plaintiff and Lt Col Meintjies' evidence.

The injuries of an orthopaedic nature

[9] Dr JS Sagor, an orthopaedic surgeon with thirty years' experience, testified for the plaintiff. He confirmed his two medico-legal reports dated 22 September 2014 and 2 April 2019 respectively. As was the case with Dr Cronwright, the RAF insisted on updated reports which had to be prepared at the proverbial last minute. I can do no better than to quote the most relevant parts of the reports emphasised by the expert during his testimony. The following appears from his first report. He found the following upon his clinical examination of plaintiff on 26 August 2014:

"**7.4 Left Lower Limb**

There is a gross loss of soft tissue circumferentially with associated skin graft applied to the areas, at and above the distal third of the femur.
There is scarring of the greater trochanter region.
The left hip joint appears to have adequate and normal movement.
The left knee has limited mobility, which ranges from 0-60°. It is clinically stable.

There is lymphodema over the left ankle and lower limb. There is a 10° equinous deformity of the left ankle, which flexes further to 20° of plantar flexion.
The subtalar joint is stiff.

7.4 Right lower limb

Scars are present on the thigh where skin graft had been removed.

There is an area of soft tissue loss over the lateral right knee region.
The right knee joint appears to be clinically stable with normal movement.

The right ankle also has a 10° equinous deformity, but plantar flexion is possible to 30°.
The subtalar joint is stiff.

Minor scars are present over the right ankle, where the previous operative fixation had been applied.

There is adequate protective sensation in both lower limbs and feet.

Leg lengths are equal.

7.5 Gait

The claimant walks slowly using a three point walking stick to aid ambulation."

The expert commented as follows on the plaintiff's disability:

"10.1 The claimant suffered from polytrauma.

10.2 A crush injury was suffered to the cervical spine and subsequently a fusion was done. This appears to have healed satisfactorily. There is limited mobility of the cervical spine as a result of the fusion. However, she has reasonable movement for her needs. No further treatment for this injury is indicated.

10.3 A fracture was suffered to the left femur. It was a compound fracture with associated severe degloving injuries. The fracture has united anteriorly and laterally. The intramedullary nail and screws are still in situ and need to be left as is. There is associated soft tissue trauma

with scarring. There is secondary lymphedema of the left ankle and foot region. This is secondary to the soft tissue trauma suffered.

10.4 The left knee joint has limited mobility, which may improve slightly in time and with further physiotherapy treatment. There is also a 10° equinous deformity of the left ankle. Further rehabilitative treatment will be required for these areas.

10.5 Ligament injuries were suffered to the right knee. The lateral collateral ligament has been repaired. There was also concern regarding the right anterior cruciate ligament, but the right knee joint is stable. Normal movement is present.

10.6 Fractures were suffered to the right ankle which have been stabilised operatively. There is also a 10° equinous deformity of the right ankle and this may improve functionally with proposed physiotherapy treatment.

10.7 The claimant mobilises slowly, using a walking stick. She may improve functionally with time. It is unclear as to whether normal function will ever be regained. This is probably unlikely.

10.8 The claimant has lost various amenities of life following the accident event. She was hospitalised for a long period of time and still uses a walking stick to mobilise. She is still functionally limited and needs assistance with certain domestic chores. She may improve in time and more physiotherapy treatment, but normal function is unlikely to be regained.

10.9 The claimant has been disabled and functionally impaired by the injuries suffered. There may be some improvement with proposed treatment, but it appears unlikely that normal function will be regained. There will always be some physical limitations with regard to mobility and function.

10.10 Regarding employment, the claimant worked in the navy as a caterer. I do not envisage that she will be able to return to this format of work. In my opinion, she is permanently unemployable as a result of the injuries sustained in the accident."

Dr Sagor again examined the plaintiff clinically on 28 March 2019 and noted his findings in the followings terms:

"General assessment:
Unchanged.

Cervical spine:
Loss of flexion and extension, as well as rotation.
The loss of mobility is slightly less than originally recorded in my report, dated 22.9.2014.
The axial compression test is equivocal.

Left lower limb:
Scars noted as previously described.
Left Knee joint movement ranges from 0-80°. The joint is stable.

The left ankle has 10° of dorsiflexion and 25° of planter flexion.
The sub-talar joint is mobile.

Right lower limb:
Scars noted as previously described.
The right knee joint is stable.
Movement ranges from 0-100°.

There is improvement mobility of the ankle joint, compared to my initial assessment in 2014.
The sub-talar joint is mobile.

The claimant walks with difficulty and requires a walking stick to aid ambulation.

The expert made the following comments pertaining to the plaintiff's injuries in paragraph 7:

"I confirm that the following injuries sustained as noted in my original report.

1. Compound fracture left femur junction middle and lower thirds.

2. Severe degloving injury left lower limb with soft tissue loss in the region of the left knee.
3. Degloving injury to right lower limb with anterior cruciate and lateral collateral ligament injuries to the right knee and possible lateral tibial plateau fracture.

4. Bi-malleolar fracture right ankle.

5. Degloving injury to left lower limb.

6. Crush injury to C5 vertebra."

He concluded as follows in paragraph 8:

"The injuries sustained are listed above and I refer to my original clinical findings, now confirmed with re-assessment on 29.3.2019.

The claimant remains significantly disabled and functionally impaired due to the injuries sustained to her lower limbs.

No further treatment is likely to improve her functionally. Treatment options have been listed on page 11 of my original report and theses are still valid."

Dr Sagor explained in summary in paragraph 9 that:

"There is no discrepancy relating to the injuries sustained as listed in my original report.

My only omission is a possible lateral tibial plateau fracture of the right knee joint.

She remains physically disabled and functionally impaired due to the lower limb injuries sustained."

Injuries relating to disfigurement

[10] Dr K Cronwright, a plastic & reconstructive surgeon with vast experience, confirmed his two medico-legal reports. The following are extracts from the first report:

"3.2 **Lower Limbs**

3.4 Severe disfigurement.

3.8 Chronic lymphoedema left leg (permanently swollen).

3.9 Exuberant ridge of scar tissue left popliteal fossa (behind knee) – obstructs / restricts flexion of left knee (bending).

3.10 **Neck**

3.11 Moderate disfigurement.

3.12 **Scalp Scar**

3.13 Alopecia (hair loss) in all probability secondary to claimant developing pressure sore due to her prolonged period of immobilisation in ICU."

Dr Cronwright emphasised that it would take five years to try and reconstruct the tissue, but made it quite clear that plaintiff's legs cannot be fixed and that anyone daring to operate would do it at his/her own peril. The photographs taken by Dr Cronwright which form part of his first report, especially those showing the degloving injuries to both legs of the plaintiff, are objective evidence of a severely disfigured person.

Evidence of the occupational therapist

[11] After lunch on the first day of the hearing, defendant admitted the three reports by Ms Marion Fourie, an occupational therapist, dated 22 June 2015, 27 February 2019 and 29 March 2019 respectively. It is necessary to point out that the expert concluded as follows in her report of 27 February 2019:

"**5. Conclusions**

5.1 I confirm my earlier finding that her **physical capacity** is reduced in respect of:

- General tolerance for physical activity.
- Weight-bearing tolerance.
- Agility.
- Agility to perform activities with heavier physical demands.

5.2 **Employability**

5.2.1 I confirm my conclusions in this regard – detailed in 5.4 of my earlier report.

5.2.2 The additional demands to which the claimant is now subjected travelling to and from work are considered to be burdensome – and add to her levels of fatigue and pain.

5.2.3 It is considered highly unlikely that the claimant will join the Reserve Force once she formally retires at the end of 2020.

5.3 I confirm the recommendations detailed in my earlier report.
I wish to stress that, in my opinion, provision should be made for point-to-point transport to and from work."

In Ms Fourie's last report she states the following:

"3. She (the plaintiff) informs that not only does she not feel sufficiently secure / confident to travel to and from work using public transport but having her son with her at work is useful should she need anything from other parts of the naval base or on the Main Road during the course of the work day.

6. I highlight again my opinion that provision should be made for point-to-point transport to and from work."

Evidence of the industrial psychologist

[12] Ms J J (Anneke) Strauss, an industrial psychologist, testified and confirmed her report. She relied in her report and *viva voce* evidence on Lt Col Meintjies' version relating to plaintiff's loss of

earnings due to late promotion and her inability to be deployed externally. The loss of earnings relating to the external deployment adds up to R612 000 according to the witness, (R608 268 according to my calculations) as calculated on pages 106 to 109 of exhibit C. I shall return to the evidence of Lt Col Meintjies. She also referred to annexure C of her report, p 85 of exhibit A, to wit the table consisting of the differences between the salaries of a W/O I and II during the period 1 April 2014 to 31 March 2019. The witness accepted that plaintiff could have been promoted to W/O I earlier, were it not for her injuries, and that she was only promoted on 1 October 2018. The witness also dealt with plaintiff's evidence that she had lost the opportunity to cater for private functions after retirement. She indicated that plaintiff was over-optimistic to work on profit margins as testified to by her. According to the witness – based on information obtained from a collateral source after plaintiff had testified - a profit margin of between 50 and 70% might be achieved in rural areas such as Saldana Bay. Fact of the matter is that this information is still not sufficient for the reasons explained when dealing with plaintiff's evidence.

The admitted evidence contained in the joint minutes

[13] The following joint minutes were handed in by agreement:

(a) orthopaedic surgeons, Drs Sagor and Dr Moloto;
(b) occupational therapists, Ms Marion Fourie and Ms Success Moagi;

(c) industrial psychologists, Ms Anneke Strauss and Ms Pat Matla.

[14] Save for the fact that it was recorded by the orthopaedic surgeons that plaintiff was still employed by the SANDF, the experts agreed with regard to the injuries sustained, the clinical findings, disablement and functional impairment.

[15] The occupational therapists agreed that plaintiff was no longer deployable and that she has a sympathetic employer that accommodated her medical condition. They also agreed that provision should be made for point-to-point transport to and from work and for personal business. Full-time domestic help and the services of a gardener were regarded as reasonable.

[16] The industrial psychologists did not agree on several issues, but they were in agreement that plaintiff was regularly deployed internally and externally, inter alia to countries such as DRC and Nigeria. In respect of other issues, Me Matla deferred to factual information and was not prepared to make any concessions.

The viva voce evidence of plaintiff and Lt Col Meintjies and an evaluation thereof

[17] Plaintiff, a single mother of four major sons, some of whom are still dependent on her, joined the South African Navy in 1996. Initially she was based in Saldana Bay, but later transferred to Simon's Town. She progressed through the ranks from seaman to W/O II as time went by. She was always one of the fittest

females in her unit and during basic training she received an award as being the fittest female. She started catering in the Navy in 1998 as an able seaman.

[18] She was involved in the aforesaid collision on 23 November 2012, about two weeks before her 52nd birthday. She testified about the trauma and pain experienced immediately after the collision. She was admitted at Pelonomi hospital in Bloemfontein where she received surgery as more fully explained in Dr Sagor's first report. She does not remember much about her hospitalisation as she was experiencing severe pain and painkillers were regularly administered to her. She was at a stage transferred to Universitas hospital in Bloemfontein and on 23 January 2013 to 2 Military ("2 Mil") hospital in Wynberg, Cape Town. She was hospitalised at 2 Mil for a further three months. After her discharge she recuperated at home for about a year and returned to work during March 2014. Although she returned to the Military as a caterer, she was not "hands on" anymore, but allocated an administrative job and became office bound. She had to rely on her second in command and juniors to take over some of the functions. Initially she ambulated by making use of a wheelchair, but later she used a walking frame and tripod crutch. She used the tripod crutch during 2014 and 2015. In 2016 she started using two crutches, but is able to ambulate with the use one crutch at the moment. She identified the photographs of herself taken by Dr Cronwright and handed in as exhibits A1 – A6 and confirmed that her legs are still in the same condition as depicted on the photographs.

[19] In her capacity as W/O II plaintiff was in charge of the mess at Simon's Town. In 2012 she acted as caterer when internally deployed to De Brug in the Free State. She was injured during her deployment at De Brug. Her medical status changed from G1K1N1 – healthy and fit – to G4K3, which she stated to be equal to "a cabbage." She socialised regularly before the accident, but thereafter she did not enjoy any social life at all. She does not want to wear swim suits or shorts as she needs to cover her scars all the time.

[20] During 2007 to 2009 and whilst stationed at Saldana Bay plaintiff earned extra income in the form of profits deriving from certain semi-formal functions – as she called them - that she catered for. These were held with the approval and assistance of her employer and properly explained during her evidence with reference to some vouchers she managed to locate after all these years. Vouchers and other relevant documents were handed in as exhibit D. This evidence was clearly tendered to show that plaintiff always had the capacity – pre-morbid - to act as a private caterer. Much of her evidence was spent on this issue. This, together with her experience as caterer for the SANDF in official capacity, will be considered when her future loss of earnings are adjudicated. More will be said about this later.

[21] Plaintiff cannot make use of public transport such as buses. Initially her employer arranged transport by means of a Dial-and-Ride system to and from work for which she paid, but that service was terminated in 2017. He one son is now responsible to

transport her to and from work and to see to her private commitments.

[22] Plaintiff testified that she had been deployed externally to Nigeria in 2004 and to the DRC in 2010. She was the only female W/O that was deployed externally at the time. According to her she would have applied for and be accepted to do a further two or three external deployments before retirement, were it not for her injuries. She applied for deployment in the past as she, being a single mother who cared for her children and an extended family, was always in need of extra income. Due to her physical handicap it was impossible to apply for deployment, but in any event, only members with a G1K1 medical status may be deployed. External deployment in particular is financially well worth the effort as explained by Lt Col Meintjies to which evidence I shall return.

[23] According to her testimony SANDF members usually get promoted after having been five years in a particular rank on condition that they pass the applicable courses. She was promoted to the rank of W/O II in 2008 (she initially incorrectly said 2007) and expected to be promoted to W/O I in 2013. However she was only so promoted in 2018 after she had filed a grievance for the failure to promote her. Plaintiff's income as W/O II and as W/O I is not in dispute. The same applies to the extra income she would have received if she was deployed externally for another two years during July 2014 to June 2015 and July 2016 to June 2017.

[24] Plaintiff testified if it were not for the injuries she sustained, she would have returned to Saldana Bay upon retirement – the age of 60 – and start up a catering business. According to her she is "more popular" there and there are more opportunities on the West Coast. She knows a lot of people and have already received a phone call to establish her availability. She made certain guestimates and stated that if she could do "two very strong functions in a month" she could earn R70 000 per month gross. She also mentioned a net figure of R31 000 per month.

[25] Plaintiff's evidence was not seriously challenged in cross-examination and no evidence was adduced to contradict her version. However, I need to point out that uncontested evidence does not have to be accepted as correct. This is particularly relevant where a party testifies about future projections which are often highly speculative. Plaintiff did not rely on any market analysis. No fieldwork and/or proper market research have been undertaken. No study of consumer behaviour and consumerism has been undertaken. By the time plaintiff retires, she would have been away from Saldana Bay for more than a decade. We do not know anything about competitors, opportunities and threats in the market environment. There may be young, energetic, qualified, experienced and established chefs and caterers conducting viable businesses in the area. The slow-down in the economy and the chances of an upswing have not been considered. It must also be understood that it takes time to grow a business and entrepreneurs very seldom make money from the start. If plaintiff is so well-known and there is such a huge opportunity in the market as she tried to portray, she may

still open a business, but employ a chef/manager to do the actual work, which will obviously impact on her net income. In conclusion, there is a dearth of information pertaining to the number of residents in the target area, their social and economic standing, the number and nature of functions held in a financial year, the strengths and/or weaknesses of competitors and the opportunity to penetrate the particular market.

[26] Lt Col Meintjies is an independent witness who presented valuable insight into the SANDF policies pertaining to deployment and promotion. She is an experienced member of the SANDF and a Human Resource Planner. She confirmed plaintiff's salary advices to be correct. She also explained external deployment by the SANDF in particular with reference to the medical and fitness requirements, remuneration and the obligation on the SANDF to provide personnel on a regular basis in order to execute duties in several African countries from time to time.

[27] Lt Col Meintjies confirmed the calculation of income on pages 106 to 109 of exhibit C for plaintiff if she qualified and would have been deployed externally during the two years, 2014/5 and 2016/7. These are the figures relied upon by Ms Anneke Strauss referred to above. Lt Col Meintjies testified in cross-examination that plaintiff might have been deployed externally on three occasions from 2012 until retirement, were it not for her injuries. The witness stated that plaintiff did not qualify for deployment due to her medical status, but also made it clear, after having observed plaintiff at court, that she would not be able to cope at all as a consequence of her physical disabilities.

[28] Lt Col Meintjies testified that catering is a scarce skill in the SANDF insofar as catering internally has been outsourced to an extent. These outsourced personnel do not qualify for external deployment. Based on plaintiff's previous experience, there would be no reason disqualifying her for external deployment, was it not for her medical condition. The witness accepted that plaintiff would be able to be deployed externally on at least two occasions, were it not for her injuries. She testified about promotion as well. A member cannot do courses when deployed and therefore plaintiff would probably only be in a position to attend the required course during the middle of 2012 or in 2013. In this regard she again emphasised the scarcity of senior catering personnel in the SANDF and the policy to fast-track women and especially members of the previously disadvantaged communities. The witness confirmed the table depicting the differences in salary between a W/O II and W/O I as shown in exhibit A, p 85. The document was drafted on the basis of plaintiff's possible promotion on 1 April 2014. The information contained therein is not in dispute.

VI PAST AND FUTURE LOSS OF INCOME

[29] There is no doubt that plaintiff suffers from a physical disability, but that does not mean, on its own, that she is suffering a reduction of her patrimony. Proof of actual loss must be established. Dr Sagor submitted in paragraph 10.10 of his first report that plaintiff was "permanently unemployable" and he did not foresee that she would be able to return to her pre-morbid format

of work. The evidence has proved him wrong, although I must immediately concede that plaintiff struck me as a dedicated person prepared to carry on with life notwithstanding her disability.

[30] In order to assess plaintiff's past and future loss of earnings a comparison should be made between what she would have earned pre-morbid and what she was (and is) likely to earn post-morbid. *In casu*, the plaintiff was injured more than six years ago and her past loss could not, as is generally the case with the adjudication of future losses, be determined with mathematical precision because of unknown and to an extent speculative evidence. Having said this, I am satisfied that plaintiff has produced the best available evidence to prove her monetary damage in respect of past loss of earnings and although it is still not of a conclusive character, it will be possible to make a finding in her favour.[1]

[31] The application of contingencies must be considered. General contingencies, also referred to as normal contingencies, have generally become accepted at 5% and 15% in respect of past and future loss of earnings respectively. In a recent judgment of the Supreme Court of Appeal,[2] Willis, JA referred to the normal range of contingencies in respect of future loss of earnings as between 15 and 20%. However, the 'sliding scale' approach in terms whereof ½% is allowed for each year to retirement is also applied

[1] Esso Standard South Africa (Pty) Ltd v Katz 1981 (1) South Africa 964 (A) at 970D-H.
[2] NK v MEC for Health, Gauteng 2018 (4) SA 454 (SCA) at par [16].

by our courts.[3] In *Kerridge*[4] the majority held that "(C)ontingencies are arbitrary and also highly subjective" and "(I)t is for this reason that a trial court has a wide discretion when it comes to determining contingencies."

[32] The plaintiff is entitled to loss of earnings in respect of the late promotion. The figures on page 85 of exhibit A have been considered in order to arrive at a just amount. Plaintiff was promoted on 1 October 2018 and thus during the 2018/2019 financial year. W/O II's received an extra increase during the 2014/2015 financial year. Having considered this, the total loss based on late promotion is R237 616.00. A contingency deduction of 20% shall be applied and therefore plaintiff is entitled to R190 093.00. This is more than the customary 5 to 10% for past losses, the reason being that we do not rely on loss of income of a fixed and proven income such as a salary. It is common cause that Government put in place several austerity measures over the past few years. Even judges felt it in their pockets insofar as they have not received incremental increases in line with inflation. The SANDF's budget has been cut and this must have had an effect on promotion of staff. There is no certainty that plaintiff would have been promoted on 1 April 2014, if uninjured, notwithstanding the evidence tendered.

[33] I accept that there is no reason why plaintiff would not have been deployed externally for at least two stints of one year each as testified. Again, uncertainty about such deployment and the loss

[3] See the discussion in RAF v Guedes 2006 (5) SA 583 (SCA) at par [9] and also the eventual 20% contingency percentage applied at paras [17] & [18] in the 'but for scenario'.

[4] RAF v Kerridge 2019 (2) SA 233 (SCA) at paras [41] – [44].

of earnings allegedly suffered cannot be disregarded. Plaintiff, uninjured at the time, might have found the love of her life and decided not to apply for external deployment in order to enjoy life with her loved one. She might have suffered from illnesses such as malaria or other injuries which prevented her from being deployed or caused an earlier return to the country. She is a single mother who cares for an extended family and although the extra income would always be needed, family and/or personal circumstances might have resulted in her rather staying at home instead of being an absent mother in excess of a year at a time. Consequently, I am satisfied that also in this case a 20% contingency should be applied to the loss of earnings, which according to my calculations amounts to R608 268.00. The amount to which plaintiff is entitled in this regard is R486 614.00.

[34] Plaintiff relies on loss of income on the basis of expenses incurred relating to her transport to and from work. I believe that she has made out a proper case. The amounts due to her for private transport (less what she would have spent on public transport) in order to allow her to continue working have been calculated to be R25 920 in respect of past expenses and R29 160 in respect of future expenses from now until her retirement end of next year. These amounts are so small that it is not necessary to allow for any contingencies and/or to remit them to an actuary for an actuarial calculation. I am satisfied that the amounts should be awarded as claimed.

[35] Finally under this heading is the alleged loss of earnings for plaintiff's private catering business which she intended to run after

retirement. Mr Combrink submitted that plaintiff would be able to carry on doing private catering for ten years after retirement, were it not for her injuries, alternatively for a period of at least five years. I have made some remarks in this regard above, and merely wish to reiterate the following. It is one thing to do semi-formal functions as plaintiff has done a decade ago with the support of her employer and having the advantage of its infrastructure and financial backup, but a totally different kettle of fish to embark on your own new business. It is not too difficult to invent menus and invitation cards and to use your employer's money to buy stock and pay for personnel, but it is much more onerous to run your own business. Functions are arranged months or even a year in advance and residents in a rural area such as Saldana Bay do not hold big functions every week. In between functions overheads must be paid, even if temporary staff is used. Advertising must be done. Stock must be bought from one's own resources and the best entrepreneurs often find themselves cash-stripped. Although plaintiff intended to remain in the same business environment she is used to – she does not for example intend to start a fast food franchise – I have not been persuaded that she would be able to run a viable business after retirement. There is no rational connection between plaintiff's experiences as Navy caterer in a sheltered environment more than a decade ago and a successful private business after retirement. I do not have to repeat my concerns mentioned above.[5]

[5] Para [25].

VII GENERAL DAMAGES

[36] Mr Chaka referred to three judgments, to wit *Grobbelaar*[6], *Alla*[7] and *Tlhakane*[8]. In *Grobbelaar* the plaintiff sustained a fractured left femur and patella. Pins and screws had to be inserted in his leg. R300 000.00 was awarded which equals R367 500 today. The injuries sustained in *Grobbelaar* are not closely as severe as in the present matter. In *Alla* the plaintiff sustained a fracture of her ankle which resulted in displacement of the distal tibio-fibula joint. Surgery in the form of open reduction and internal fixation was required. Save for a risk of degenerative arthritis which might lead to a fusion of the ankle and the normal consequences related to these injuries, the position of the plaintiff was uneventful. R200 000 was awarded which equals R290 200 in today's terms. In *Thlakane* R280 000 was awarded which is equal to a present value of R343 000. The plaintiff suffered from a right tri-malleolar ankle fracture which necessitated implants in the form of a plate and screws. The plaintiff presented with a right antalgic gait and had to use a crutch to mobilise.

[37] Awards in similar cases should be used as guidance in the exercise of a judge's discretion in order to prevent a situation that one judge awards R100 000 for a fractured ankle and the next judge awards R1m for exactly the same injury. It would not be possible to exercise one's discretion judicially by ignoring comparative awards, although it must always be kept in mind that

[6] Grobbelaar v RAF 2015 (7E3) QOD 1 (GNP).
[7] Alla v RAF 2013 (6E8) QOD 1 (ECP).
[8] Thlakane v RAF 299632/2014 [2015] ZAGPPHC 853.

no two cases can be on all fours. Willis, JA[9] held that "where the *sequelae* of an accident are substantially similar, (awards) should be consonant with one another, across the land. Consistency, predictability and reliability are intrinsic to the rule of law." I considered the injuries suffered by the plaintiffs in the judgments referred to by Mr Chaka, but am of the opinion that none of the cases can be compared with the matter at hand.

[38] Mr Combrink referred to several judgments in order to persuade the court that an award of R750 000 would be appropriate. In *Aeschliman*[10] R300 000 was awarded which translates to R510 600 in 2019. The plaintiff suffered a compound injury to her right knee, a fracture of the medial tibial plateau and a rupture of her posterior lateral crucial ligaments. She was left with an unstable weak joint. In *Rieder*[11] R300 000 was awarded which is equal to R457 000 in 2019. The plaintiff suffered a right-sided tibial plateau fracture, fracture of the right ankle, an injury to the peroneal nerve and damage to the muscle groups of the lower leg. The injuries in these two cases are not comparable with the injuries of the plaintiff *in casu*.

[39] Mr Combrink referred to two further cases. *Van Rensburg*[12] *v AA Mutual Insurance Co Ltd* was decided in 1969, fifty years. The award of R12 000 is equivalent to R949 548 in today's money. Bearing in mind more recent comparative judgments, it is really

[9] "NK v MEC for Health, vide footnote 2, at par [13].
[10] Aeschliman v RAF 1378/07 [2009] ZAECEHC 7 (7 April 2009).
[11] Rieder v RAF 2011 (6E6) QOD 1 ECG.
[12] Van Rensburg v AA Mutual Insurance Co Ltd.

unnecessary to go back so far in history and consider this judgment. The next judgment, *Nel*[13] is more relevant. Mr Nel's injuries bear some resemblance to the injuries of plaintiff in the instant matter. He suffered fractures of his right tibia and fibula and degloving injuries to his right foot. His right leg was shortened which resultant in a marked limp, whilst his right big toe had to be amputated following the degloving injury to the foot. This caused loss of balance which compelled the plaintiff to use a crutch to ambulate. He also suffered traumatic amputation of his right fifth metacarpal and little finger. The award of R750 000 is equal to R826 500.

[40] In *E M Litseo v RAF*[14] I referred to several other judgments in paragraphs [25] – [31] and eventually awarded R700 000 to the plaintiff. Ms Litseo suffered three distinct injuries, to wit to her right upper leg and knee, the right lower leg and ankle and also the left knee and lower leg. It was found that there was a mal-united right femur shaft fracture and a severe leg length discrepancy of more than 6 cm, that the bi-malleolar fracture of the right ankle united, but osteo-arthritis was diagnosed. Finally, a depressed malunited lateral plateau fracture was diagnosed on the left leg with osteo-arthritis to that knee. It was accepted that the plaintiff would require multiple surgeries in future.

VIII CONCLUSIONS

[13] Nel v RAF 2017 (7E4) QOD 26 (GP).
[14] Free State Division case number 5637/2016, a judgment delivered on 2 May 2019.

[41] I am satisfied that plaintiff's orthopaedic injuries are substantially similar to that in *Litseo supra,* but the nature of plaintiff's degloving injuries and her serious permanent disfigurement as depicted in the various photographs put this matter in a different category. I conclude that plaintiff has made out a case for payment of general damages in the amount of R750 000. There is no doubt that she has sustained serious injuries which have changed her life for ever. An energetic, fit and outgoing woman has been transformed into a physically disabled, shy and anti-social character who has been trying her best to cope with her disabilities by continue working for a sympathetic employer. This award is fair and reasonable and not inordinately high to place an unnecessary burden on the public purse.

[42] I indicated that plaintiff should be awarded compensation in respect of loss of income due to the fact that she missed two vital opportunities, firstly to be promoted when promotion was due and secondly, from earning extra income during two sessions of external deployment. It is not necessary to defer these aspects to an actuary as the amounts are not in dispute. I indicated why and at percentage contingencies should be applied. Plaintiff is entitled to past loss of earnings in the amount of R702 627.00 calculated as follows:

Loss pertaining to late promotion

less 20% contingencies R

190 093.00

Loss pertaining to external deployment

less 20% contingencies R 486 614.00

Past expenses in respect of private transport R 25 920.00

Plaintiff's evidence as to her prospective income after retirement, if uninjured, has not persuaded me to make any award in that regard for the reasons explained.

Plaintiff should be awarded R10 000.00 for past medical and hospital expenses as agreed.

Therefore, the total amount to be awarded is R1 491 787.00, calculated as follows;

Past medical and hospital expenses	R10 000.00
General damages	R750 000.00
Past loss of earnings	R702 627.00
Future loss of earnings	R29 160.00

[43] I already expressed serious criticism pertaining to the manner in which the RAF and its attorneys have litigated. Unnecessary costs have been incurred. It would be appropriate to consider costs orders *de bonis propriis*[15], but no such request was forthcoming. Instead a punitive costs order on the scale as between attorney and client is sought. Such order will have a negative effect on the public purse to the detriment of taxpayers whilst the real scapegoats are not punished. In the exercise of my discretion and having considered all aspects, I decided to grant the customary costs orders.

[15] L v MEC for Health, Gauteng 2015 (3) SA 616 (GJ), quoting with approval Mlatsheni v RAF.

IX ORDERS

[44] Consequently the following orders are made:

1. The defendant shall pay to plaintiff the sum of **R1 491 787.00**, (One million four hundred and ninety one thousand seven hundred and eighty seven Rand);

    1.1 In the event of default on the above payment, interest shall accrue on such outstanding amount at 10.25% *per annum* (the *mora* rate of 3.5% above the repo rate on the date on this order, as per the Prescribed Rate of Interest Act, 55 of 1975, as amended), calculated from due date as per the Road Accident Fund Act until the date of payment;

2. Defendant shall pay the plaintiff's taxed or agreed party and party costs which costs shall include, but not be limited to the following:

    2.1 The fees of senior junior counsel, such costs to include his travelling and accommodation costs and of preparing heads of argument;

    2.2 The costs of obtaining all expert medico-legal, actuarial, and any other reports of an expert nature, including the supplementary reports, which were furnished to the defendant and/or it's experts as well as in respect of the joint minutes;

2.3 The costs of obtaining documentation / evidence, scans, considered by the experts(s) to finalise their reports;

2.4 The reasonable taxable qualifying, preparation, reservation and attendance fees of all experts, including the costs of consultation fees with the legal teams, if any, and with specific reference to Dr J Sagor, Dr K Cronwright, Ms M Fourie, Ms A Strauss and Ms M Cartwright;

2.5 The reasonable travelling and accommodation costs, if any, incurred by all or any of the above experts as well as the costs in transporting the plaintiff to all medico-legal appointments;

2.6 The reasonable travelling and accommodation costs of plaintiff and her son, Marlon Mcewan, in relation to transport from Cape Town to Bloemfontein and the travelling and accommodation costs of Lt Col Meintjies;

2.7 The above-mentioned payment with regard to costs shall be subject to the following conditions:

2.7.1 The plaintiff shall, in the event that costs are not agreed, serve the notice of taxation on the defendant's attorney of record; and

2.7.2 The plaintiff shall allow the defendant 14 (fourteen) calendar days to make payment of the taxed costs;

2.7.3 In the event of default on the above payment, interest shall accrue on such outstanding amount at the prescribed *mora* rate on the date of taxation / settlement of the bill of costs, as per the Prescribed Rate of Interest Act, 55 of 1975, as amended calculated from due date until the date of payment.

3. The RAF is ordered, by agreement, to provide the required and customary undertaking in terms of section 17(4)(a) of the Road Accident Fund Act to plaintiff.

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J P DAFFUE, J

On behalf of plaintiff	:	Adv M Combrink
Instructed by	:	Kruger & Co c/o Pieter Skein Attorneys BLOEMFONTEIN

On behalf of defendant	:	Adv P G Chaka
Instructed by	:	Maduba Attorneys BLOEMFONTEIN