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IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 22039/2015

In the matter between:

Y Z	Plaintiff
and	
ROAD ACCIDENT FUND	Defendant

Coram: Justice J Cloete
Heard: 11, 12, 13 June 2018 and 21 August 2018
Delivered: 16 November 2018

JUDGMENT

CLOETE J:

Introduction

[1] The plaintiff claims damages of R3 012 697.66 arising from a collision on 5 October 2014 in Chris Hani Street, Ilingelethu, Malmesbury. In particular, she alleges that while she was standing on the pavement a Toyota Tazz motor vehicle bearing registration number C[…] driven by Mr Abongile Joka mounted it and collided with her.

[2] It is common cause that due to the collision the plaintiff sustained a grade 3B compound fracture of the left tibia and fibula, resulting in a below knee amputation, a mild concussive head injury and multiple abrasions to the face, left thigh and right knee, which injuries qualify as serious as envisaged in s 17(1)(A) of the Road Accident Fund Act.[1]

[3] During the course of the trial is also became common cause that Joka was the driver of the vehicle in question and the collision occurred sometime around midnight while a party was being held for the plaintiff at her nearby home.

[4] In its amended plea the defendant averred that Joka was driving along Chris Hani Street when he was suddenly and unexpectedly confronted by a group of dancing females, including the plaintiff, who effectively and unreasonably blocked his path of travel. These women, without due regard for their safety or concern for their wellbeing refused to get out of the way when Joka hooted and his vehicle came to a standstill. It was still idling when these women, who

[1] Act 56 of 1996.

probably included the plaintiff, bounced and danced on the bonnet of the vehicle, thereby damaging it.

[5] It was further alleged that the plaintiff should have reasonably foreseen that she could be injured as a result of her obstructing the vehicle's path of travel and/or dancing on the bonnet of the vehicle but, despite this, she nevertheless persisted and in so doing consented to the risk of injury. This amendment was pleaded as a further alternative to a denial of negligence, alternatively contributory negligence on the plaintiff's part.

[6] The issues in dispute were narrowed down further once Joka testified that he was unable to identify any of the women in question, did not know if the plaintiff had been one of them, whether she had been standing in the road or sitting on the bonnet of his vehicle, or indeed where she was at all when the collision occurred. He did not dispute the fact of the collision but maintained that he had not seen, heard or felt it happening.

Evidence on the merits

[7] The plaintiff testified and called two witnesses, her brother Mr O Z and a friend, Ms K M. The only witness who testified for the defendant was Mr Joka.

[8] All of these witnesses agreed that Chris Hani Street is a straight, narrow road and is not wide enough for two vehicles to pass each other. They also agreed that it is a busy road, and there are always people either walking in the road or next to it on the pavement, one of the reasons being that there is a tavern

not far from the plaintiff's home. It was also not in dispute that the road is well lit by streetlights at night, and that this was the case on the night of the collision.

[9] Mr Z, who was standing on an elevated ledge adjacent to the house where the party was being held, testified that he noticed the vehicle driving slowly up the road. Some of those who were dancing in the yard moved out into the road as the vehicle approached. Loud music was playing at the party and people were drinking alcohol.

[10] As the vehicle approached where the party was being held, it slowed down even further until it was idling, but began to rev in what he described as a *'jiving'* way to the music. By this stage there was a group of women dancing in front of the vehicle in the road. They were joined by others who were approaching from the opposite direction, probably from the tavern. Joka switched off the vehicle but only for a matter of seconds or a few minutes. He thereafter started it again *'…and I just saw him taking off, that's when he knocked my sister over where she was standing on the side of the road speaking to a friend of hers'.*

[11] With reference to a set of photographs Z identified the spot where he saw the plaintiff standing just before the collision. He marked it with a rectangular shape on photo 3 as "OZ2". It is clear from this mark that the plaintiff was in fact standing, not on the side of the road, but on the adjacent pavement. His testimony was further that after Joka started the vehicle he revved it again and took off at high speed. The plaintiff was facing away from the vehicle as

she spoke to her friend. After Joka knocked the plaintiff down he drove over her as he sped off.

[12] Z did not notice if the vehicle's lights were on or if the driver's window was open. From the direction in which Joka approached as well as Z's description of the scene and the place where he was standing on the ledge (which he marked on photo 2 as "OZ1") it is evident that the front and rear passenger side of the vehicle was closest to him. He conceded that he had also consumed alcohol that evening. He organised the party but had not placed a sign in the road to alert drivers passing by because it had not been his plan to hold a street party. He agreed that the plaintiff would have been aware of the presence of the vehicle as she stood with her back to it, although she would not have been able to see what the driver was doing.

[13] He denied that any of the women climbed onto the bonnet or that Joka had hooted and shouted at them to get off. His testimony was further that when the vehicle came to a stop in the road it remained squarely in the road and did not pull over to the side. Before Joka switched on the ignition again his vehicle was 3.5 to 4 metres away from the plaintiff.

[14] Z denied that this was the only route that Joka could follow to his home (a fact which was later conceded by Joka himself in his testimony, although he claimed to have forgotten about this on the night of the incident). Z was referred to a statement he made to the police on 27 November 2014, in which he stated that when the vehicle arrived in Chris Hani Street many people were already jiving, with some of the women in the road. He replied that he had

informed the police official concerned that there were people moving up and down the road, including from the tavern, but when they heard the music from the party they started to dance. It bears mention that the account which Z gave in his testimony was consistent with the remaining contents of that statement in all material respects. He added that Joka was alone in the vehicle and would have been able to see people in the road from some distance as he approached.

[15] Ms M attended the party. She testified that she was inside the house when Joka's vehicle arrived. She did not witness any of the events that followed until she emerged from the house to see the plaintiff lying on the pavement and the rear of the vehicle reversing over her leg before driving away.

[16] She identified the spot where she found the plaintiff with a circle on photo 1 as "KM1". A comparison between the two spots pointed out by M and Z shows that they are almost identical. Both place the plaintiff squarely on the pavement. Her evidence was further that the vehicle had half mounted the pavement but *'just slightly so because the road is very narrow'* when she saw it reversing over the plaintiff's leg.

[17] She conceded it was possible that when she entered the house earlier to use the bathroom there were people dancing in the street although she had not noticed. When she left the plaintiff to go inside the house the plaintiff was still in the yard talking to a friend. M had not heard a vehicle hooting. When she entered the house she saw Z standing on the ledge as he had testified. She could not recall how long she was in the house because she had spoken to a

few guests after leaving the bathroom, but guessed that it could have been 10 to 15 minutes.

[18] The plaintiff testified that she also consumed alcohol that night. She first saw the vehicle as it pulled up in the road next to the house. She could not recall if she was still in the yard at that stage. She described the vehicle as having *'a jiving motion… I thought he was playing, jiving with his car, and the people there followed suit by jiving too… I also jived, we went next to the car and jived and other people also approached…'* including some from the direction of the tavern. There were a number of people. At this stage she was in the road. As she was dancing she noticed a friend who had arrived at the party. She ran over to hug her at the gate to the yard. Because of the noise she and her friend moved a short distance away on the pavement. She had her back to the vehicle facing her friend. She identified the spot where she was standing with an asterisk on photo 3 as "YZ1" which is a few centimetres from the spot pointed out by Z and M.

[19] While facing her friend the plaintiff saw her jump away to her left. As the plaintiff turned to see what was happening she was hit from behind and fell to the ground. She could only see the lights from the vehicle. She recalled being lifted but only later regained consciousness in hospital.

[20] The plaintiff did not see anyone on the bonnet of the vehicle but accepted that once she started talking to her friend she could not see what was happening behind her. She did not pay attention to whether the vehicle was still there or whether the others were still dancing next to it in the road. She conceded

having been aware that the vehicle would drive away at some stage, but pointed out that she had expected it to continue its journey along the road. She had not anticipated that it would veer onto the pavement. It was the only vehicle in the road at the time and in her experience it was only necessary for vehicles to move onto the pavement in order to pass each other from opposite directions. She did not hear the driver hoot or shout at any stage and had not noticed if he opened his window (she had been dancing next to the opposite side of the vehicle adjacent to the pavement and the yard).

[21] She was referred to the report of the plaintiff's expert witness, clinical psychologist Elspeth Burke, who assessed her for purposes of her *quantum* claim on 18 November 2015. At paragraph 5 of that report Ms Burke recorded the plaintiff's account of the incident as follows:

> *'It was going to be her 21st birthday and they were having a party that evening, she remembers she was standing outside the gates of her house in Malmesbury on the pavement "chatting with friends and dancing to music". Friends in a vehicle stopped and she went to speak to them, there was another vehicle behind her and she felt a "bump" on her back. This caused her to fall, she tried to get up, to turn around to ask for help when she was knocked a second time. She could hear the engine running "but the car was stuck on my left leg", she lost her balance and fell over again. She "woke up after the car was gone, everyone was calling my name" and on looking down her leg "was full of blood and the bone was sticking out". She felt "very angry… I could not get up and do something" and shortly thereafter her brother helped lift her into a car because the "leg was loose" and they drove her to Swartland Hospital.'*

[22] The plaintiff conceded that the version recorded by Burke could only have come from her but was adamant that she must have misunderstood her as

she had given the exact account that she gave when she testified. She accepted that nowhere in Burke's report was mention made of the vehicle mounting the pavement, but responded that Burke had never asked her where she was when the collision occurred. Burke did not testify in the trial.

[23] The plaintiff was also referred to her affidavit dated 28 November 2014 where at paragraph 4 she stated that *'I was chatting with my friend, when I was knocked from behind by a motor vehicle. Due to the impact, I fell on the road'.* This, it was contended, was yet another version. However, a reading of that affidavit as a whole supports the plaintiff's version given during her testimony. In paragraph 2 she stated that *'…I was beside the road in Chris Hani Street…'* and in paragraph 8 *'I submit that I am not to blame for this accident as I was beside the road when the motor vehicle collided with me'.* It is also noted that in Burke's report this affidavit was not listed as one of her sources of information.

[24] The plaintiff was also referred to the police accident report dated 5 October 2014, where the brief description of the incident was recorded as follows:

> *'According to victim she walked in the road and MVA drove over her and drove away.'*

[25] The accident report reflects that it was completed at 2am on 5 October 2014, about 2 hours after the collision, when the plaintiff was clearly unable to have furnished any description of the incident. The plaintiff's evidence was that she

did not know who had furnished that description to the police. That no reliance can be placed thereon is any event illustrated by the recordal in that report that there were no injuries.

[26] Joka testified that he was returning home from work. As he approached the house where the party was being held he saw people in the road and on both pavements. His vehicle lights were on and *'I approached them very slowly and all the more slowly thinking that these people would give way for my car to pass but they didn't'.*

[27] When he realised they were not moving he hooted while still advancing slowly and then brought the vehicle to a standstill with the engine idling. The people did not move away but began to surround his vehicle. He opened the driver's window and called out to them to move. Again they did not listen and he heard them say that *'this is a roadblock party'*. Loud music was playing. He began to panic as some women closest to the vehicle jumped onto the bonnet, jiving and shouting. According to him there were 7 or 8 women on the bonnet. Despite his panic *'I drove off slowly but in such a manner that no one might get hurt… They started sort of sliding off the car as they were seated, they didn't jump off'.* All that he noticed as he drove away was the noise caused by friction against the engine due to his bonnet being dented.

[28] It was also his evidence that his vehicle was fitted with low profile tyres which made it necessary to pass over an obstruction such as a speed bump slowly at an angle, or as he put it *'in a zig zag manner'*. He denied having *'jived'* the vehicle or having done anything to attract those who approached. He

maintained that due to his low profile tyres it would not have been possible to mount the left pavement (where the plaintiff alleged she was standing) but only the right.

[29] With reference to photo 1 he attempted to demonstrate that the right pavement was *'flatter'* than the left although it is clear from this photograph that there is no visible difference between the two and both lie at almost the same level as the road itself. He maintained that, despite his state of panic, there was no need for him to veer onto the pavement that night. He also claimed that if he accelerated from the road onto the pavement his tyres might have burst. He denied having moved off the road as he drove away or that he reversed at any stage. Because his tyres were so sensitive he would definitely have felt it if he drove over the plaintiff's leg.

[30] It was common cause that there is a speed bump in the road some 20 metres away from the plaintiff's home. Joka's evidence was that he drove over it shortly before he saw people in the road. He conceded that about 10 metres before the speed bump there is a turn to the right which, if taken, would link up with Chris Hani Street again further along from the plaintiff's home. He initially maintained that this option only dawned on him the following day although he conceded that the area was well known to him. Later in his evidence he denied that he should have considered this as an option because in his experience people walking in the street generally moved out of the way for a vehicle to pass through. He also denied that it would have been reasonable to simply reverse and take the alternative route once he realised

that the people were not prepared to move because his visibility to the rear was obscured by others and *'it's a narrow street'.*

[31] It was clear that Joka tailored his evidence in various material respects. He initially claimed that despite the presence of street lights as well as those of his own vehicle his visibility was *'not all that clear'* as he approached the people in the street, but had to concede, with reference to photo 1, that a street light is positioned directly above where they were standing. Whereas he initially testified that his vehicle lights were switched to dim as he approached he later maintained that after crossing the speed bump he switched them to bright so that he could see the people more clearly, immediately switching them back to dim as he did not want to blind them. He conceded that in any event, as his vehicle moved forward, the people became even more visible and that by the time he brought his vehicle to a standstill he was already *'onto them'.*

[32] On Joka's version there were 7 to 8 women on the bonnet of his small vehicle as he slowly moved off. To this he added that others were leaning against the left side of the bonnet (i.e. on the same side as the plaintiff alleged she was standing on the pavement). This notwithstanding, he maintained that his visibility was not materially obscured because there were *'some spaces between them'*. He conceded however that he was focused on those sitting on the bonnet and paid no attention to those leaning on the left side, in the street or on the pavement. He also eventually conceded that his vehicle could mount the left pavement as long as he drove it *'in the correct manner'.*

[33] Joka also conceded that despite his visibility being obscured to a certain extent on his own version, he nonetheless decided to drive away, but denied that this was reckless. For the first time he claimed that he drove off because he feared for his personal safety as well as that of his vehicle since *'many people get attacked'.* Given this allegation, he was asked whether he felt threatened by the people in the street to which he replied in the affirmative. He was unable to satisfactorily explain why, in these circumstances, he had proceeded towards the risk instead of retreating from it, finally resorting to the explanation that *'I never got the thought of reversing from the threat because even at my rear there was somewhat danger'.*

[34] He was referred to a statement that he gave to the defendant's investigator on 10 September 2017. The statement was recorded in Afrikaans although according to Joka he has limited understanding of that language. During his evidence in chief he confirmed the contents of that statement as being correct, later maintaining that he had only done so because his signature appeared thereon.

[35] Paragraph 4 of that statement (and this is my English translation) reads as follows:

> *'On the day in question I was travelling in Chris Hani Street… I crossed over the speed bump and was driving slowly. Across from number 5720 Chris Hani Street… was a group of people in the road. They were busy with a party. I hooted and the following moment a group of women jumped onto the bonnet of my vehicle. There were about 7 to 8 women. I could not see where I was*

> *going. I asked them why they were doing this and they replied that it was a roadblock party.'*

[36] Joka denied that he had informed the investigator that he could not see where he was going. The investigator was not called to testify. Joka also made mention of a statement that he apparently gave to the police the day after the incident but this statement was not produced or referred to during the trial.

Evaluation of the merits

[37] The plaintiff and her witnesses impressed as patently honest and were consistent in their testimony, unshaken in cross-examination and were not evasive. Where necessary they made the appropriate concessions. When they could not remember something they were candid. Where there were contradictions between their versions these were not material and in my view served to demonstrate that they had not conspired to present an identical version to the court.

[38] Most significantly, their testimony established on a balance of probabilities that at the time of the collision itself the plaintiff was standing, not in the road, but on the pavement. It was not suggested by the defendant that any vehicle other than Joka's had collided with the plaintiff. Joka himself had no idea where the plaintiff was standing when he drove away and no witnesses were called by the defendant to refute this version of the plaintiff and her witnesses.

[39] On the other hand Joka did not impress. He came across as evasive and expedient. It is clear that he tailored his version whenever he realised he was painting himself into a corner.

[40] It is highly unlikely that on his own version Joka's visibility was not significantly obscured by the time he decided to drive away, given the number of people on the bonnet and those surrounding his vehicle. The road in question is extremely narrow as are the adjacent pavements which, as I have observed, are almost level with the road itself. The spot indicated by the plaintiff and her witnesses as to where she was standing is not far from the pavement edge.

[41] Counsel approached their arguments on the basis that the versions of the plaintiff and her witnesses on the one hand, and Joka's on the other, were mutually destructive. This approach warrants closer scrutiny. The evidence, properly analysed, shows that in fact there was ultimately very little in dispute which required the court to make credibility findings. The plaintiff did not know whether people were seated on the bonnet of Joka's vehicle. Nor did M. Z denied this but nothing much turns on it because, even if I accept Joka's version on this aspect, then he was even more negligent because this caused his visibility to be significantly impaired. Despite that knowledge, coupled with the knowledge that there were a number of people, not only in the street but also on the pavement, he nonetheless drove off.

[42] I am satisfied that Joka's primary concern was not that of his personal safety or of those on his bonnet or in the immediate vicinity (one of whom was the plaintiff standing with her back to him on the pavement a few metres away)

but rather the damage that he feared was being caused to the bonnet of his vehicle. In these circumstances it is also highly probable that as he drove away Joka mounted the pavement, at least with his front left tyre, thereby colliding with the plaintiff. I do not accept his version that his low profile tyres would have burst had he accelerated, nor do I accept that his tyres were so sensitive that he would only have been able to mount the pavement in a particular, careful way. This is simply not supported by the objective evidence.

[43] Joka saw people in the road at least 20 metres away as he approached. He was driving slowly. He had the option of an alternative route which would have enabled him to completely avoid those in the road with little inconvenience to him, given that the alternative route links up with Chris Hani Street some distance ahead of where the people were standing and dancing. His belated excuse that he drove off with people still on his bonnet because he feared for his personal safety does not ring true. There was no suggestion that anyone behaved towards him in a threatening manner. Had this indeed been the case it is difficult to accept that he would nonetheless have continued driving towards the risk.

[44] I also do not accept that he was unable to take the alternative route as soon as he saw those standing in the road because there was danger to his rear. There was simply no evidence to support this and it was proffered by him as an afterthought. He clearly had the opportunity to take evasive action by following the alternative route some 20 metres before he brought his vehicle

to a standstill when he could progress no further because of the presence of those in the road.

[45] He conceded that Chris Hani Street is always busy with people moving up and down and alongside it. On his own version loud music was playing, which logic dictates indicated a celebration of some kind. Again on his own version, by the time he came to a standstill he was already aware that those in the road would not move away because they had failed to respond to his hooting. Moreover, given that it was just after midnight and he knew that there was also a tavern in close proximity, it is fair to accept that he must reasonably have foreseen that some of the people in the road might be intoxicated.

[46] The defendant did not plead a sudden emergency requiring evasive action. In *Mosaval v Minister of Posts and Telecommunications*[2] the plaintiff had been standing very near to the edge of the pavement, facing in the opposite direction, when he was hit from behind by a lorry whose wheels either mounted the pavement or some other part protruded over its edge. Van Heerden J held as follows:[3]

> *'On the evidence before me, as I have already said, I am satisfied that plaintiff was on the pavement when he was hit. That is in accordance with the evidence which I have accepted. Mr Stanford has conceded that a sidewalk is regarded as a sanctuary for a pedestrian and that it would be negligent* prima facie *if a motorist collided with a pedestrian while he is on the sidewalk. I think there is support for that in the decision of* Mashigo v. Santam Assuransie Maatskappy Bpk.*, 1973 (1) S.A. 156 (A.D.), where the Appellate Division held*

[2] 1978 (1) SA 368 (CPD).
[3] At 369H-370G.

in the circumstances of that case that a pedestrian on a sidewalk was not obliged at the entrance to every premises to look and see whether there is not perhaps a vehicle on the point of turning in from the street. To have to do that it was held would conflict with the whole purpose of a sidewalk, which was that part of the street allotted to him. I think it would be fair to say that a pedestrian in walking along a sidewalk even when he is near the edge thereof or even if he is standing on the edge of the sidewalk would not be obliged to look behind him to see whether he was going to be hit by cars coming from behind. It seems to me that if a pedestrian on a sidewalk is hit by a motorist, either because the wheels have mounted the pavement or some part of that vehicle has protruded over the edge of the sidewalk, then, as far as that motorist is concerned, it would be prima facie *negligence. There is support for that in the English Court of Appeal in the case of* Laurie v Raglan Building Co. *(1941) 3 All E.R. 332, where Lord* GREEN*, the Master of the Rolls, said at p. 335:*

"I cannot see why any distinction is to be drawn for the purpose of the rule relating to a prima facie *case of negligence between a case where the wheels of a vehicle actually mount the pavement and one where a portion of a vehicle sweeps across the pavement. In each case the vehicle is in a position where it has no right to be. No vehicle has a right so to manoeuvre itself that its tail or its radiator or whatever it may be projects over the pavement to the injury of pedestrians lawfully there."*

With respect, I would accept that that also reflects our own law on this subject.

In the present case, as I have said, there is no direct evidence that the wheels of the Post Office van mounted the pavement. I cannot see, however, the necessity for such evidence. To my mind it is sufficient that plaintiff was on the pavement when he was hit by the Post Office van and that, to my mind, without any explanation being given, constitutes negligence.

It is clear in this case that the driver, Lind, of the Post Office van, was negligent. On his own admission, he did not keep a proper look-out and, moreover, he drove his vehicle in a way that was dangerous to people on the sidewalk.'

[47] The evidence of both the plaintiff and Z, which I accept, was that she had her back to the vehicle at the time of the collision. Although she was aware of its

presence in the nearby vicinity, and conceded that she foresaw that it would drive off at some stage, there was no ostensible reason for her to foresee that in doing so Joka's vehicle would mount the pavement. Moreover, the plaintiff's evidence that she only became aware of Joka's vehicle on the pavement when it collided with her stands unrefuted, and there was no suggestion that she was in a position to take evasive action and failed or neglected to do so.

[48] Taking the totality of the evidence viewed against the inherent probabilities and the objective facts, it is my conclusion that Joka was not only negligent but that his negligence was the sole cause of the collision. The defendant is thus liable for 100% of such damages as the plaintiff may prove.

Quantum

[49] At the commencement of the trial the parties agreed that the contents of the reports of the plaintiff's experts Dr Jason Sagor (orthopaedic surgeon), Mr Eugene Rossouw (orthotist and prosthetist), Burke and Dr Keith Cronwright (plastic surgeon) could be admitted into evidence on the basis that the defendant admitted their observations, opinions and conclusions.

[50] It was also agreed that the reports and joint minute of the respective occupational therapists, Ms Marion Fourie (plaintiff) and Ms Rosslyn Bennie (defendant) would serve as evidence before the court, as would the reports and joint minute of the respective industrial psychologists, Dr Michelle Nobre (plaintiff) and Mr Gregory Shapiro (defendant) save for two limited areas of

disagreement. The two industrial psychologists testified on these and I will return to them later.

[51] The full details of the plaintiff's injuries and their *sequelae* were comprehensively set out in the relevant expert reports and I shall thus only summarise them as briefly as possible.

[52] Dr Sagor reported that following admission to hospital, the plaintiff was assessed, the various wounds debrided, the fracture stabilised and antibiotics given. Repeated debridements and vacuum dressings were done and a Taylor Spatial Frame was applied to the fractured tibia. Subsequently, muscle and skin flaps were swung to cover the exposed bone.

[53] In December 2014 the plaintiff was discharged with crutches and follow-up was arranged. In January 2015, infection developed and she returned to hospital where further treatment was provided. Due to an inability to contain or control the infection, a below-knee amputation was performed in February 2015, and the plaintiff was discharged 10 days thereafter.

[54] During her assessment the plaintiff complained of right and left knee discomfort that is experienced with inclement weather. Because of the amputation, mobility and agility have been affected on a permanent basis and it was further Dr Segor's opinion that pain is likely to have been severe in view of the polytrauma suffered. Numerous operative procedures were performed to the plaintiff's left lower limb. She was initially hospitalised for 5 to 6 weeks and again in early 2015 for a further 3 to 4 weeks. Regular analgesia

medication was provided whilst in hospital and for some weeks after her discharge. The plaintiff suffered a mild concussion, but appears to have recovered from this and multiple abrasions to her face, left thigh and right knee have healed, but have left significant scarring. The plaintiff is mobilising with a below-knee prosthesis and at the time of assessment still required one crutch to aid ambulation. According to Dr Sagor she lost various amenities of life, is functionally impaired and the functional disability is permanent.

[55] Dr Cronwright described the injuries to the plaintiff's face, right and left lower limbs from a perspective of disfigurement as being permanent (the disfigurement is clearly evident from the photographs in his report as well as the court's own observations of the plaintiff's face when she testified). He reported that the disfigurement to the lateral canthus/eyelid/cheek can be reconstructed utilising the Z-p plasty technique with an anticipated improvement of 70%. The area of hyperpigmentation is permanent.

[56] Rossouw reported that the plaintiff's residual limb is suitable for prosthetic fitting but that the amputation has left her permanently physically disabled and has a severe impact on her performance of activities of daily living, her ability to continue with her studies and/or her general quality of life. Dr Cronwright in turn gave the opinion that the quality of the stump scar is poor and might potentially in the long term cause problems. Additionally, the discoid area that has been skin grafted on the side might also become problematic in terms of friction/contact with her prosthesis. Furthermore the spur of bone on the distal end of the tibia appears to be fairly sharp and consequently it may contribute

to future stump related problems. Cronwright advised that the stump scar should be revised wherein the scar tissue is excised and the spur of bone is *'nibbled-back'* prior to closure of the wound, and further suggested serial excisions/flap reconstruction to the skin grafted thigh.

[57] Burke (clinical psychologist) reported that the plaintiff is aware of her losses and that her life has been permanently changed, but wants to forge ahead and not become a victim. Not being able to play club and team netball is painful for her. She misses exercising and feeling fit and worries about her weight gain. The idea of depression is anathema to her and, at the time of interview, did not find herself to be too anxious about traffic or vehicles, although she is now a more vigilant pedestrian and aware of her increased vulnerability.

[58] Burke also reported that the facial scar which is very obvious had not detracted from her beauty, and she was not concerned about it, and was still able to wear preferred tight jeans. According to Burke, the plaintiff had achieved a great deal in a short time which boded well for her future, and it was likely that she would continue to maintain her psychological equilibrium. She cannot, however, have escaped completely unscathed psychologically from such a traumatic event, despite her stoicism, her robust outlook or her resourcefulness.

[59] Fourie and Bennie agreed that the plaintiff's physical capacity is restricted in terms of mobility, in particular endurance and agility. Standing tolerance, the ability to handle medium/heavy weights and the execution of tasks requiring

lifting, carrying, bending or working with upper limbs away from her body, as well as her ability to participate in a full and normal round of activities of daily living, are restricted. Certain activities will take longer to perform, additional energy is required when ambulating on a prosthesis and this in turn will impact on energy available for participation in other activities. She will also require assistance for certain activities and her employability is affected. They also agreed that she is effectively only suited to work which is sedentary or semi-sedentary and as such, the range of job alternatives available to her is compromised.

[60] As previously stated Burke assessed the plaintiff in November 2015. The plaintiff testified in the trial on 12 June 2018, some two and a half years later. When asked how the collision and the loss of her lower left leg have impacted on her life she responded:

> *'Firstly at my employment I cannot lift anything heavy or use stairs. There are many times I become ill and have to be absent. Sometimes I cannot sleep because of the pain, I have to use painkillers, and eventually get to sleep around 4am. Plus there are so many sick leaves – when the bus is full I have to stand and I get to work with a swollen leg. By the time I get to work I am already struggling with pain and have to take painkillers and don't perform well because I am drowsy and in pain. If I flag down a taxi I have to check the seats because some I can't be comfortable in.*
>
> *Before the accident I was a keen netball player. I played for a club over holidays and at college and also attended trials in the Western Cape. Currently there is a team I started for young children. I'm their coach.*
>
> *My mood at present – there are times when I feel I don't want to be with others and to just cry. It also affects my relationships because I have to explain to someone new about the loss of my leg. My temper is also affected*

because sometimes I feel people take advantage of me because of the loss of my leg – they feel I can't do anything to them. And my concentration and memory are affected at times although I can use my memory well. I also have occasional nightmares about the accident.

I still have problems with my prosthetic leg because sometimes I get sores around the stump [it would seem from friction].*'*

[61] In relation to her scars, the plaintiff explained that sometimes people call her derogatory names. She has to cover the scars to her right eye and cheek with makeup which makes her feel self-conscious. She can only wear jeans or trousers that fit around the prosthesis and when she walks long distances her leg swells and she experiences pain at the back of her knee. She also tires easily. She has gained weight since the loss of her leg because she no longer exercises or takes long distance walks. Her ability to stand for long periods is also affected.

[62] The plaintiff confirmed that Burke accurately recorded what she reported to her but stated that this was how she had felt at that time. The plaintiff also testified that she is not angry with Joka because this will not bring back her leg. The stoicism she displayed when testifying is to her credit, but it does not minimise the severe impact that this collision has had on the plaintiff's life.

[63] While causation requires proof on a balance of probabilities, with quantification recognition is given to possibilities, as opposed to probabilities,

and contingencies. Although it may be clear that losses have been incurred, the quantification thereof may sometimes be difficult.[4]

[64] A court must assess *quantum* as best it can on such evidence as is available and a plaintiff cannot be non-suited because in the nature of things her damages cannot be computed in exact figures.[5] If it can do no better, the court must assess damages on the basis of an *'informed guess'* or a *'rough estimate'*.[6] A plaintiff must present to the court such evidence as is available, even if that evidence is not sufficient to remove all of the uncertainties with regard to matters bearing upon the *quantum* of damages.[7]

[65] The plaintiff claims damages for past medical expenses, future hospital and medical expenses, past and future loss of earnings and general damages. Past medical expenses were agreed in the sum of R213 059.54. Future hospital and medical expenses shall be covered by an undertaking as envisaged in s 17(4)(a) of the Road Accident Fund Act.

[66] The plaintiff was born on 21 October 1992. At the date of the collision she was almost 22 years old. She matriculated in 2010 after passing each school year. From January to June 2011 she studied an introductory course in human resources at Standford Business College in Cape Town. She did not enjoy it and did not complete the course. She did not study or work for the remainder of 2011. In 2012 she completed an N4 and N5 in Financial Management at

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[4] *De Klerk v ABSA Bank Ltd* 2003 (4) SA 315 (SCA) at para [28].
[5] *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A) at 969H-970B.
[6] *Caxton Ltd v Reeva Forman (Pty) Ltd and Another* 1990 (3) SA 547 (AD) at 573H-J.
[7] *De Klerk v ABSA Bank* (*supra*) at para [37].

Northlink College, which she passed. In 2013 she started her N6 but either failed or abandoned her studies because she was diagnosed as HIV positive and became very ill. Having received treatment she is currently asymptomatic. During the latter half of 2014 she resumed her N6 studies through the College of Cape Town, but was not able to complete them due to the collision. In July 2015 she again resumed her N6 studies at False Bay College. When Dr Nobre assessed the plaintiff on 14 September 2015 it was her plan to commence an internship the following year. The plaintiff also reported that she would perhaps like to study further. She told Nobre that she wants to work with money and with people.

[67] Nobre produced her second report on 31 August 2017. By that stage she established that the plaintiff had completed her N6 Financial Management course in December 2015, but had not secured suitable placement for the 18-month practical component of her studies. During 2016 the plaintiff completed a 4 month disability internship at Reeds Cape Town as accounting clerk. In April 2017 she commenced a disability internship at Xinergistix Management Services in the position of administrative/financial clerk. This internship was due to end in September 2017.

[68] In her further supplementary report dated 21 May 2018, Nobre reported as follows:

> *'Based on my follow-up telephonic consultation with Claimant, her contract at Xinergistix Management Services indeed expired at the end of September 2017. She was not employed thereafter for the remainder of 2017. From*

January to March 2018, she engaged in a Community Works Programme where she worked in an administrative position receiving a stipend of R3 500 per month. She has not worked since, despite searching for employment.

During my follow-up telephonic consultation with Mr Conradie, Financial Manager (and Claimant's direct Supervisor) [Xinergistix] *he confirmed that she was no longer employed and further confirmed his experience of the Claimant, as he had previously expressed. He confirmed that she experienced pain, was often off from work and struggled to traverse stairs. He further confirmed that her overall work performance was average, but believes that pain impacted on her productivity.'*

[69] In their joint minute of 19 October 2016 the industrial psychologists agreed as follows:

'*uninjured career prospects and income:*

- *Plaintiff would have entered the open labour market as a trainee/intern for an initial two year period in 2015 to 2016, whereafter she would have progressed in 2017 from a Paterson B1 level to a Paterson B3 level on a straight line until her career plateaued at the age of 42 in 2034;*
- *an average between Basic Median Salaries and Total Package Median Salaries for the various grades on which Plaintiff would have functioned should be utilised for actuarial purposes;*
- *Plaintiff would have retired at age 62.5.*

Injured career prospects and income:

- *Plaintiff's post-morbid career is likely to be similar to her pre-morbid career, subject to a one year delay in progression;*
- *higher than normal post-morbid contingencies should be allowed [to be negotiated].*

[70] In her further supplementary report Nobre also expressed the opinion that while the plaintiff's residual physical capacity (i.e. suitability to sedentary work) is in line with her qualifications, based on the collateral information she received, the plaintiff is clearly struggling with pain and with coping in the work environment. These challenges are likely to impact on her employability as well as her functioning. She suggested that *significantly higher* than normal post-morbid contingencies be applied. She also later changed her opinion that there would post-morbidly be a one year delay in career progression because the passage of time had proven that it was in fact a two year delay. Shapiro disagreed. Their difference of opinion was thus limited to the extent of the contingency deduction to be applied to future post-morbid earnings, i.e. whether it should be a *substantially higher* or a *higher* than normal contingency, or the one/two year delay.

[71] During her testimony Nobre explained the reasons for her opinion as follows. Around the time of their joint minute in 2016, given that the plaintiff was or had recently been employed as an intern, both experts factored in the possibility of permanent employment. However that has not transpired and as time has progressed the situation is looking ever more bleak, with a particular pattern emerging.

[72] As a direct result of her disability, and as a fact, the plaintiff has only been able to secure two temporary disability internships, neither of which resulted in permanent employment. She has therefore not been able to establish a track

record which makes her a less attractive candidate and places her at a disadvantage when competing with fellow prospective employees.

[73] In addition, statistics show that only between 1 to 3 % of disabled individuals secure permanent employment, *inter alia* because employers are reluctant to assume the risk of injury to these individuals in the workplace. These considerations must be added to the obvious physical challenges which the plaintiff faces. In Nobre's view the plaintiff's prospects of securing and sustaining future employment have been reduced to 50%, not including how it has impacted on her career path progression, and even taking into account the statistical probability of 1 to 3 %. Nobre agreed that her prediction in her first report of 9 November 2015, namely that the plaintiff would struggle to compete for employment given her difficulties and the context of the South African labour market, has proven correct with the passage of time. In that first report, Nobre had already suggested that *'significantly higher than normal post-morbid contingencies be applied'.*

[74] In his testimony Shapiro agreed with the disability employment statistics provided by Nobre and added that in reality employment equity targets are not generally reached, even in government positions. While no empirical basis can be attributed to the notions of *higher* and *significantly higher* than normal, if pressed he would place *higher* at 30% and *significantly higher* at 50%.

[75] It was Shapiro's understanding that the agreement in the October 2016 joint minute on *'higher than normal'* already took into account the above factors, as

well as that the plaintiff had historically only been able to sustain employment 50% of the time. He explained:

> *'While you might currently see a gap of 50% you would expect it to equate to 30% over the passage of time, not only because of the injury but also the unemployment rate, and that people do often stay out of employment before they secure other employment and also switch jobs to build up experience.'*

[76] However Shapiro fairly conceded that subsequent to the joint minute he had not been requested to provide follow-up on the plaintiff's employment. He agreed that the minute was compiled on the basis of information available at the time, which thus self-evidently excluded what had transpired for the plaintiff subsequent to October 2016. He also fairly conceded that the situation had proved to be somewhat different from what was predicted in the joint minute.

[77] During argument it was contended on behalf of the defendant that notwithstanding the subsequent evidence of these experts, their joint minute was binding on the plaintiff. Relying on *Bee v RAF*,[8] it was submitted that the content of the joint minute was not timeously repudiated by the plaintiff. In my view this submission, in the particular circumstances of this matter, falls to be rejected. Had this indeed been the defendant's stance it should have objected to Nobre testifying on the areas of disagreement and asked the court to make a ruling in that regard. Not only did it not do so, it cross-examined Nobre, led Shapiro on the self-same areas of disagreement, and made submissions in

[8] 2018 (4) SA 366 (SCA).

argument as to why Shapiro's opinion should be preferred. This is clearly distinguishable from what occurred during the trial in *Bee* (*supra*).

[78] I found both Nobre and Shapiro to be objective in expressing their opinions to assist the court. Neither can be criticised for the manner in which they gave their evidence. It is also clear from their joint minute that both envisaged that in allowing *'higher than normal'* post-morbid contingencies, these would have to be negotiated. On the available information, it is my view that the fair and just manner in which to approach this issue is to take the average between the two, and allow for a post-morbid contingency of 40%. In addition, given that Nobre's revised opinion of a 2 year delay post-morbid career progression is based on historical fact, there is no reason why I should not accept it.

[79] During argument Mr McLachlan, who appeared for the plaintiff, proposed that pre-morbid contingency deductions should be applied of 5% on past loss of earnings (as per Robert J Koch – general contingencies) and 18.25% on future loss of earnings (calculated at 0.5% per annum to retirement at age 62.5 – sliding scale as per Robert J Koch). Ms Isaacs, who appeared for the defendant, proposed 8% and 20% respectively, on the basis that the plaintiff is on antiretroviral treatment and there was a possibility that she would not have had the financial resources to complete her studies in any event.

[80] However Ms Isaacs accepted that the two industrial psychologists had not considered either of these to be of any significance when plotting the plaintiff's pre-morbid career path. Moreover on the uncontested evidence the plaintiff has been asymptomatic since at least the date of the collision, and there was

no suggestion during the course of the trial that she would not, but for the collision, have completed her studies timeously. In these circumstances I see no reason why I should not accept what Mr McLachlan proposed.

[81] He also submitted that for purposes of actuarial calculation it should be assumed that, in the pre-morbid scenario, the plaintiff was earning R750 per month at the time of the collision from selling Avon products and would have continued to do so until 31 December 2014. In her first report Nobre stated that:

> *'Prior to the motor vehicle accident, she sold Avon products to assist paying for her studies, but due to the MVA and missing college the students did not pay her for products she had given them, she now owes Avon money. Ms Z earned between R500 to R1 000 per month selling Avon products, which she can no longer do. She only sold three products whilst she was a student…'*

[82] This information is self-evidently vague and the plaintiff was not asked about this during her testimony. I accordingly agree with Ms Isaacs that this income should be excluded from the calculation.

[83] Turning now to general damages. The parties limited their reliance on comparable awards to *Msiza v RAF*[9] and *Mazibukwana v RAF.*[10] In *Msiza* the plaintiff was a 62-year old crafter of mats, bracelets and necklaces. She sustained a left femur fracture and her leg subsequently had to be amputated above the knee. She also sustained a fracture of the right humerus and

[9] North Gauteng High Court, Pretoria: (case number 30118/2011): date of judgment 2014 (exact date not known).

[10] Gauteng Division, Pretoria: case number 41150/2013 dated 5 January 2016.

lacerations of the scalp. She was unable to walk because of the amputated limb and did not have a prosthesis because her stump was short. She used a walking frame to mobilise. She endured severe and acute pain for approximately 7 to 14 days after the collision, and quite severe pain for a long period due to the combination of fractures of the left femur and right humerus which made mobilisation very difficult. She had a prolonged period of sub-acute pain because of her osteomyelitis and re-operations. She had chronic pain in her right shoulder and post-traumatic headaches. Her facial scars and right upper arm were disfiguring. She found it difficult to comply fully with most of the demands of everyday activities which involved standing, walking as well as lifting and carrying light to medium objects. She had also lost the ability to perform any form of work. The award for general damages was R700 000.

[84] In *Mazibukwana* the plaintiff was a 21-year old female domestic worker/carer. She sustained a compound fracture of the left tibia and fibula; fracture of the left foot, and degloving of the left lower limb affecting the supply of blood to the leg. Her left leg was amputated through the knee 9 days after the collision. She had to endure pain through various procedures before the eventual amputation. She also sustained a fracture of the pubic rami on the right side of the pelvis. She was hospitalised from the date of the collision (4 September 2010) until July 2011. Her award for general damages was R743 000.

[85] Mr McLachlan submitted on the basis of these authorities that an award of R750 000 would be appropriate, whereas Ms Isaacs submitted that the amount should be R650 000. In the present matter the plaintiff is able to walk,

albeit due to the prosthesis. She has also not lost the ability to perform any form of work. The award proposed by Mr McLachlan is higher than either of those in *Msiza* or *Mazibukwana* but of course account must also be taken of inflation on those awards. In my view an award of R700 000 for general damages would be reasonable compensation in the circumstances.

[86] **In the result the following order is made:**

1. It is declared that the insured driver was the sole cause of the collision in which the plaintiff was injured and the defendant is thus liable to compensate the plaintiff for 100% of her proven damages;

2. The defendant shall accordingly compensate the plaintiff as follows:

2.1 Paying her past medical expenses in the agreed sum of R213 059.54;

2.2 Providing an undertaking in respect of future hospital and medical expenses in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996;

2.3 Payment of general damages in the sum of R700 000;

2.4 Payment of loss of past and future earnings to be actuarially calculated in accordance with the assumptions set out in Annexure "A" hereto, provided that, on receipt of the actuarial calculation, and should the parties be in agreement therewith, they shall approach the court in

chambers for an order to that effect, or failing agreement, for directions with a view to presenting oral argument;

2.5 Paying interest on the aforesaid sums at the prescribed rate of interest, calculated from 14 (fourteen) days after date of judgment until date of final payment; and

3. The defendant shall pay the plaintiff's party and party costs on the High Court scale, as taxed or agreed, such costs to include the costs of counsel as well as the qualifying fees and all reasonable and necessary fees and disbursements incurred in the procurement of medico-legal reports in respect of the following expert witnesses:

- **Dr Jason Sagor (orthopaedic surgeon)**
- **Ms Marion Fourie (occupational therapist)**
- **Ms Elspeth Burke (clinical psychologist)**
- **Dr Keith Cronwright (plastic and reconstructive surgeon)**
- **Mr Eugene Rossouw (orthotist and prosthetist)**
- **Ms Mary Cartwright (actuary)**

4. The defendant shall further be liable for interest *a tempore morae* on the costs as taxed or agreed, calculated from 14 (fourteen) days after date of *allocatur* or agreement, until date of final payment.

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J I CLOETE