

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

Case Number : 09/49084

In the matter between:

CAROLINE NOMATHAMSANQA LOUW

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DELETE WHICH IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

Date

Signature

JUDGMENT

BEKKER AJ:

[1] The Plaintiff in this matter is a 52 year old woman, who was employed as a domestic worker at the time that she was involved in the motor vehicle accident from which her claim arises. On 31 December 2008, the Plaintiff sustained bodily and other injuries when a mini-bus taxi in which she and her minor son were travelling collided with another vehicle on a public road outside Sasolburg. The Plaintiff's son, a student, died on the scene of the accident.

[2] The accident having occurred after 1 August 2008, the Plaintiff instituted action in this Court against the Defendant in terms of the provisions of the Road Accident Fund Act, no. 56 of 1996 (*"the Act"*) and the Regulations promulgated thereunder. She alleged in the particulars of claim that either or both of the drivers of the two vehicles involved in the collision was or were negligent, and claimed the following by way of damages:

[2.1] future medical expenses:	An undertaking in terms of Section 17(4)(a) of the Act
[2.2] funeral expenses:	R8 580,00
[2.3] future loss of earning capacity:	R171 000,00
[2.4] general damages:	R100 000,00

	R279 580,00

[3] At the trial roll call on Tuesday 1 March 2011, being the day prior to the trial hearing commencing, the Defendant's legal representatives conceded 100% liability (merits) in favour of the Plaintiff. The parties jointly sought, and was granted, an order in terms of Rule 33(4), separating the issues relating to liability from the issues relating to *quantum*. In terms of the separation order, the Defendant undertook liability for the Plaintiff's proven damages, the latter being the issue serving before me for determination.

[4] In addition to the *quantum* issue, I am also required to deal with the Defendant's special plea of the Plaintiff's alleged non-compliance with the provisions of the Act. At the commencement of the trial hearing and after hearing brief argument during opening address thereon, I ruled that the special plea be argued only after all the evidence has been led.

- [5] During his opening address, the Plaintiff's counsel informed me that he intended calling four witnesses, being the Plaintiff, an industrial psychologist, an orthopaedic surgeon and an occupational therapist. He stated that the reason for these three expert medical witnesses to be called was due to the Defendant's unjustified refusal to admit their evidence; despite the Plaintiff's orthopaedic surgeon and occupational therapist not having counterparts, and a joint minute having been drawn between the parties' respective industrial psychologists. There was consequently no identifiable dispute between any of the medical experts. The Plaintiff's counsel specifically placed on record that the Plaintiff intended asking for a special costs order in light of the Defendant's approach.
- [6] In his opening address the Defendant's counsel, in addition to requesting me to deal with the special plea first, mentioned that the Defendant required certain further documents from the Plaintiff regarding the Plaintiff's minor son's funeral expenses, and relating to the Plaintiff's employment. In answer thereto, the Plaintiff's counsel replied that (apart from what is contained in the trial bundle) no such documentation existed. He also pointed out that the Defendant could have asked for further particulars and could have sought such documents earlier through the discovery procedure.
- [7] My attention was further drawn by the Plaintiff's counsel to the contents of the minute of the pre-trial conference which was held on 13 January 2011. It is apparent from a consideration of the pre-trial minute that the Defendant failed to reply to the Plaintiff's questions and the requests for admissions as contained therein, and responded to almost every question by simply noting that "*The Defendant will revert by 31 January 2011*". The Defendant however never reverted to any of these questions or requests of the Plaintiff

and in the process effectively negated the whole pre-trial conference procedure, as provided by Rule 37 of the Rules.

- [8] The Defendant's counsel thereupon did not persist with his request, and no postponement or other ruling or order was sought to procure the discovery or production of the documents which the Defendant's counsel may have had in mind.

PLAINTIFF'S EVIDENCE

- [9] The first witness called was the Plaintiff, Mrs Caroline Louw. She testified that she was born on 4 July 1958, being 52 years of age. On 31 December 2008 at about 19h00 she and her minor son were passengers in a mini-bus taxi travelling from Sterkspruit in the Eastern Cape. There were also other persons in the taxi. Near Heilbron the taxi was involved in an accident, although the Plaintiff was unable to testify as to how it happened. This aspect is however irrelevant, as the manner in which the accident happened relates to the merits of this matter, which have been conceded.
- [10] The Plaintiff testified that she "*woke up*" (presumably from a state of unconsciousness) outside the taxi, whilst lying in grass in an open field. As she got up, she remembered her son's name and called it out, but received no reply. She then saw her son lying still on the ground. She called out his name, went to him and tried to shake him. She saw blood coming out of his mouth and nostrils, and she cried.
- [11] An unknown man then came to the Plaintiff and started praying for her. The Plaintiff then asked a woman who had also arrived on the scene for help. This woman approached where the Plaintiff's son was lying, and announced

that he was dead, but the Plaintiff refused to accept this. Throughout this part of her evidence, the Plaintiff was visibly emotional and tearful, and it was apparent that she was only just managing to hold back her tears.

[12] She testified that her son's name was Sipiwe Louw, and that he was born on 27 February 1985. She did not have his birth certificate, but she did have his death certificate. She was referred to the invoice dated 6 January 2009 from Martin's Funerals for her son's burial in the amount of R8 580. 00 (which was included in the trial bundle), which amount she had paid.

[13] The Plaintiff further testified regarding the following injuries which she sustained in the accident, namely:

[13.1] an injury on her right shoulder, which results in her no longer being able to lift objects;

[13.2] an injury on her left leg;

[13.3] an injury to her back.

[14] She testified that, from the scene of the accident, she was transported in a police patrol vehicle to Sasolburg Hospital, from where she phoned her other son to come and fetch her, as she required to be transferred to Natspruit Hospital. She was first x-rayed a day after the accident, on 1 January 2009. She was later released from Natspruit hospital for her son's burial, after which she went back to hospital. She was hospitalised for three or four days. She had an operation on her left leg, as it was swollen and the fluid had to be drained therefrom.

- [15] Upon being asked whether she felt pain at the scene of the accident, she testified that she was unable to say, as she was so concerned about her son. However at hospital she experienced pain, and she testified that she has been suffering pain ever since. The pain occurs on her shoulder and on her hip, going into her left thigh and spreading to the rest of her left leg.
- [16] Regarding her employment record the Plaintiff testified that her highest academic qualification is a standard 6 (grade 8) certificate, which she had obtained at Thaba Lesoba, Sterkspruit. She was previously employed at various places as a factory worker, and on occasion also worked as a hawker and as a tea maker. She was unemployed during 1992 or 1993. During 2007, she started working for a woman named Kate Motaung, and in 2008 she also started working for a woman named Lorraine (whose surname the Plaintiff was unable to recall), which situation endured until the accident happened.
- [17] She said that she worked three days of the week at one place, and other days at another. She elaborated that she worked for two employers, one named Kate Motaung and one named Lorraine. For Lorraine, who lived in Ellispark, she worked on Mondays, Wednesdays and Fridays at her house, doing cleaning, at a remuneration of R850 per month. She worked for Kate Motaung as a domestic worker on Tuesdays and Thursdays, for which she received R400 per month. Accordingly, the Plaintiff, on her evidence, worked for five days of the week, for which she earned R1 250 per month.
- [18] The Plaintiff was however unable to furnish any documentary proof to reflect the fact of her employment, nor any payments that she may have received therefrom. She explained that she simply received her money, without any of these payments being accompanied by any documentation. Considering

that the Plaintiff is employed as a part-time domestic worker, working for private persons, I do not find this explanation improbable.

[19] After the accident she did not return to work. She testified that she cannot work, as a result of her injuries. With reference to her age, she testified that, were it not for the accident, she would have carried on working for as long as her strength and energy would allow. She had not thought of the age at which she would retire. According to the Plaintiff, she cannot even do washing as a result of her injuries.

[20] The Plaintiff was then cross-examined by the Defendant's counsel. Upon being questioned about the accident, she repeated that she did not know what had happened to her, and that she just remembered waking up whilst lying outside the vehicle in the grass. She did not know for how long she had been lying there. After further questioning regarding the events at the accident scene, the Plaintiff broke down completely. She started sobbing and shaking uncontrollably, and it was evident that she was extremely upset and traumatised by having to recount the events of the day. I then addressed the Plaintiff and calmed her down to such an extent that she could resume her cross-examination.

[21] In further cross-examination, she was again asked, in more detail, regarding the events on the scene. She testified that when she woke up, she immediately thought of her son, and that many vehicles had stopped at the scene, although she was not sure when they arrived. She also answered questions about the man and woman on the scene, who were passers-by, and related how the paramedics arrived and that the woman told her that her son was dead.

[22] Upon being asked what exactly the woman did (presumably in order to ascertain if the son was dead), the Plaintiff testified that she could not see for herself, but that this woman reported that her son was dead. She only saw the paramedics arriving, and when she asked about her son from one of the paramedics, he told her that her son was no longer breathing. In response to further questioning regarding her son, she testified that he was loaded into a vehicle used to transport bodies. The Plaintiff was then taken in a police vehicle to hospital.

[23] It was clear to me that the Plaintiff found it very difficult and hurtful to recall these events. The Plaintiff was however subjected to further persistent cross-examination regarding the *post mortem* examination which was conducted on her son's body, and particularly about the fact that she did not have a copy of the report. In reply to being asked for her son's death certificate, which was previously not available, she produced it and handed in as an exhibit, together with an extract of the death register, recording her son's death as a result of skull fracture sustained in the accident on 31 December 2008, and a copy of the burial order.

[24] Regarding her employment, the Plaintiff confirmed in cross-examination that she worked as a domestic worker for Kate and Lorraine. Upon being pressed on the fact that she did not go back to work after the accident, she responded that she hoped that the Defendant's counsel would realise what her problem was. She explained that she stayed far from her places of work, being the homes of Kate and Lorraine, and that she used to travel to her workplaces by taxi. Upon being asked for their contact details, the Plaintiff testified that she had their contact details stored in her cell phone, which was lost in the accident. This evidence could in my view also not be rejected as improbable.

[25] She further explained in cross-examination that she stayed with two children of whom one was hers, and conceded that she could have sent them to contact Kate or Lorraine, but said that she had not given thought thereto. The Plaintiff further testified in cross-examination that if Kate or Lorraine had been informed of the trial, they would have come to Court to confirm her employment. She reiterated that she was injured, and that she was still unable to walk properly. She testified that if she had a choice, she would never travel in a vehicle again.

[26] In response to a question whether the Plaintiff was ever taken to medical doctors for assessment, she testified that she was presently receiving treatment from Dr Sekiti, being a private doctor who is not based at any hospital. Apart from Dr Sekiti who treats her injuries, there have been many other doctors, although she did not know their names. She remembered one doctor who examined her leg, but was unable to furnish any specific detail thereof.

EXPERT EVIDENCE

(a) **Ms van Zyl, IP**

[27] The first expert witness called on behalf of the Plaintiff was Ms Jeannie van Zyl, an industrial psychologist, who assessed the Plaintiff's employability pre and post-accident. She had prepared a joint report with the Defendant's industrial psychologist. In this report, they *inter alia* agreed that the Plaintiff:

[27.1] was employed as a domestic worker at the time of the accident;

[27.2] would probably have continued with her employment as domestic worker in line with her aspirations and skills set;

[27.3] would probably have worked until a retirement age, which Ms van Zyl put at 65, and Ms Moses at 60 years of age;

[27.4] was rendered unemployable in the formal and informal sectors due to the *sequelae* of her injuries.

[28] Ms van Zyl's evidence, in the form of her expert report, was admitted by the Defendant's legal representatives at such a late stage that she had already arrived at court. More to use up court time (whilst awaiting the arrival of the Plaintiff's next expert) than for any other reason, Ms van Zyl was called into the witness box to confirm the contents of her medico-legal report. The report is included in the trial bundle and it is not necessary to repeat the contents thereof. Ms van Zyl confirmed that the Plaintiff was unable to provide her with the contact details of her two previous employers, but testified that on the information given to her by the Plaintiff, it appeared that the Plaintiff was employed full time for the past sixteen years.

[29] Ms van Zyl testified that, but for the accident, which rendered the Plaintiff unemployable, the Plaintiff would probably have continued with her employment as domestic worker until retirement age. Having regard to the fact that the Plaintiff was healthy, Ms van Zyl opined that it is probable that she would have worked until retiring at the age of 65, but appeared prepared to concede a retirement age of 60, when the Plaintiff would start receiving her state pension. Her evidence falls to be compared to the Plaintiff's own evidence, in which she stated that she had not given the matter any thought.

[30] Ms van Zyl therefore testified with reference to her report that the Plaintiff suffered a loss of earnings equal to a monthly income of R1 250 per month, with effect from 1 January 2009. Ms van Zyl was not cross-examined.

(b) **Ms Marks, OT**

[31] The second expert witness called on behalf of the Plaintiff was Ms Romy Marks, an occupational therapist, whose expert report is also contained in the trial bundle. She testified that an occupational therapist would assess a patient's functional activities in the workplace, in his or her home or other environment.

[32] Ms Marks confirmed the contents of her report, and elaborated during her evidence in chief that (with reference to paragraph 9.2 of her report) the Plaintiff told her that at the time of the accident she was doing domestic work for three days per week. The Plaintiff also told her that she was unable to return to work until she had fully recuperated, but by then her job was no longer available, and that she would in any event not have been able to function in her work as before.

[33] She further testified in chief (with reference to paragraph 13.6 of her report) that during the examination the Plaintiff only managed to walk about 50 metres without crutches. Further according to the report, the Plaintiff's breathing was laboured and her walking was extremely slow. She testified that the Plaintiff experienced pain, estimated to amount to level 4 on the pain scale on the date of the assessment, which is defined as "*somewhat strong*". Over a period of three months, the Plaintiff's pain was, at best, moderate (being level 3) and, at worst, strong (being level 5).

- [34] Ms Marks gave evidence regarding the *Valpar* component work sample series, which entails a physical test. The result of the *Valpar* assessment was set out in paragraph 17 of her report, which reflects that the Plaintiff was unable to do either a horizontal or a vertical press. Ms Marks concluded that the Plaintiff was suited to sedentary work only, and that she was in obvious pain.
- [35] Ms Marks also testified regarding the Plaintiff's mobility and her clinical depression, with reference to paragraph 19 of her report. She testified that the Plaintiff scored 26 on the *Beck's Depression Inventory*, which is indicative of a self-reported moderate depression. She also testified that the Plaintiff experienced anxiety related to the accident, as elaborated upon in paragraph 20 of her report. She also testified that the Plaintiff experienced pain and discomfort, as set out in paragraph 25.3 of her report. Given her age, lack of experience and physical problems, it was unlikely that the Plaintiff would return to her previous job or be gainfully employed (with reference to paragraph 29.3 of her report).
- [36] Under cross-examination, Ms Marks was questioned regarding her expertise and experience, to which she responded that she has been an occupational therapist for twelve years, and that she worked at the Garankuwa Hospital. She gave some background of her experience, which included being in private practice. She was also asked regarding the source of her information, which Ms Marks admitted she had obtained from the Plaintiff. She reiterated that the Plaintiff can only do sedentary work and estimated that, in an eight hour day, the Plaintiff could do 80% to 90% of seated and clerical work.

[37] Upon being questioned regarding the Plaintiff's evidence of her previous employment, Ms Marks replied that the Plaintiff told her that she was unemployed at the time, and that she was unable to return to work until she had fully recuperated. She added that the Plaintiff told her that her original job was no longer available. Her own conclusion, taking into consideration what she learnt from the Plaintiff, was that the Plaintiff would not be able to function with the injuries as she did before, as stated in paragraph 9 of her report.

[38] With reference to paragraph 13 of her report, Ms Marks testified that the Plaintiff walks without a limp, but very slowly. She further confirmed the contents of paragraph 15.7 of her report, to the effect that the Plaintiff felt less pain during sedentary tasks, and that she could only do sedentary tasks by virtue of a combination of the injuries sustained in the accident and the fact that she was not well educated.

[39] Ms Marks was then cross-examined regarding the contents of paragraph 25.5 of her report, in which the following appears: *"Ms Dhludlu used to do gym. It is unlikely she will return to do gym."* This statement, which evidently does not pertain to the Plaintiff, was sought to be explained by Ms Marks by stating that *"gym"* in reality means walking, to which she referred in paragraph 7.2 of her report. She also made some reference to an interpreter sometimes being used.

[40] I was, however, not impressed by this evidence of Ms Marks, as I formed the distinct impression that the contents of paragraph 25.5 were patently a mistake, in that it simply does not relate to the Plaintiff. I would venture to suggest that the offending paragraph may well be the inadvertent remnant of another report, relating to a different patient, which may have served as a

precedent or *pro forma* for this report. Ms Marks testified that she was not aware of this mistake. She conceded that an industrial psychologist should establish or verify a patient's work history. With regard to the examination conducted on the Plaintiff, Ms Marks testified that this could have lasted four to six hours, during which the Plaintiff had explained everything to her. There was no re-examination of Ms Marks' evidence.

[41] Suffice it to state that the cross-examination of Ms Marks failed to contribute in any significant manner to the case. Apart from establishing that the Plaintiff had mentioned to Ms Marks that she only worked three days per week, the remainder of Ms Marks' cross-examination served no purpose. There was furthermore no factual or expert evidence put to Ms Marks in order to contradict her evidence; the Defendant having failed to engage the services of an occupational therapist of its own.

(c) **Dr Barlin, OS**

[42] On day two of the trial, namely 3 March 2011, the Plaintiff called its next expert, Dr Colin Barlin, an orthopaedic surgeon, who has practiced as such since 1987, and who is presently based at Rosebank Clinic. In his examination in chief, Dr Barlin testified that the Plaintiff sustained the following injuries in the accident:

[42.1] a head injury with a short loss of consciousness;

[42.2] a contusion of the right shoulder;

[42.3] a severe contusion with a large haematoma over the left chin.

- [43] Regarding the Plaintiff's current symptoms, he testified that she experiences recurrent pain in the right shoulder on elevation of the arm, lifting and carrying objects with her right arm and lying on that side. With reference to the contents of paragraph 111 of his report, Dr Barlin testified that all of the Plaintiff's symptoms are worse in inclement weather, and that she takes analgesics two or three times a week. He also confirmed that she experiences left shin pain on standing for long periods and walking long distances, which is likewise worse in inclement weather.
- [44] He also testified regarding the limitation of the movements of the Plaintiff's right shoulder, to the effect that she has a 160° flexion, which was decreased and painful, and a 60° extension, which was normal, but painful. The Plaintiff's 160° abduction was decreased and painful, and she had an 80° external rotation, which was normal but painful. The internal rotation of her right shoulder was 40°, which was slightly decreased and painful. He also noted a 13 cm long longitudinal surgical scar over the interior aspect of the Plaintiff's left shin, and estimated that the effect of the operation would also have been painful.
- [45] Dr Barlin testified that he would not recommend further surgical intervention, for which he gave certain reasons, notably that there was a low success rate therewith. He recommended that an amount of R15 000 be set aside for physiotherapy, and a similar amount for the purchase of analgesics and anti-inflammatories, as was proposed in his report on page 113. Neither of these amounts was claimed separately in the particulars of claim. Dr Barlin concluded that the Plaintiff would have difficulty working as a domestic worker, and said that he personally would be reluctant to employ her.

[46] Under cross-examination, Dr Barlin elaborated on this aspect by testifying that he would prefer to employ someone else, but conceded that there was a possibility that the Plaintiff may still find a job as a domestic worker, despite her being partially disabled. He testified that this would, however, depend on the employer, and that he was not aware of what an employer's requirements might be.

[47] In further cross-examination, Dr Barlin agreed that the tone adopted in the summary of his report, namely that in his opinion the Plaintiff's condition has rendered her unemployable in her previous occupation, was too adamant, but added that it was unlikely that the Plaintiff may find employment.

[48] Dr Barlin thereupon was asked regarding the aforementioned projected costs, and added that the Plaintiff was probably not a suitable candidate for an operation. He confirmed in cross-examination, as mentioned in his report on page 110, that the Plaintiff had told him that she was employed as part-time domestic servant, working for two employers five days a week. This was consistent with the Plaintiff's evidence in Court.

[49] Dr Barlin also testified that he believes that his knowledge of the injuries to which he referred in his report was obtained from the clinical notes. In this regard, he referred to the large haematoma seen on the Plaintiff's leg, as well as x-rays of the Plaintiff's right shoulder to which he referred in his report. He testified that the Plaintiff had told him of her short loss of consciousness, and that the Plaintiff's soft tissue injuries would not show up on the x-rays which were taken. There was no re-examination of Dr Barlin's evidence.

(d) **Mr Minnaar** (Actuary)

[50] The last expert called by the Plaintiff was Mr Isak Josua Minnaar, a consulting actuary who has been employed by Clemens, Murfin & Roland since 1984. Mr Minnaar prepared the actuarial assessment appearing on pages 153 to 156 of the bundle. In his examination in chief, he explained that he worked on an annual income for the Plaintiff of R16 250, calculated at R1 250 per month plus a thirteenth cheque, and that the Plaintiff's income would have increased in the future until her retiral age of 65.

[51] He explained that the calculations performed by him were standard arithmetical assumptions which were used in the industry, and that they were based on the latest mortality rates, being standard practice. He also testified that he applied no contingencies to his calculation, and confirmed the contents of the table appearing on page 156 of his report.

[52] These were to the effect that the Plaintiff's accrued loss to the time of his report amounted to R36 925 and that her prospective loss amounted to R166 119, calculated at a retirement age of 65. From the calculation referred to it appears to me that if the last five years of the calculation, representing the five year period between ages 60 and 65 years be disregarded, the Plaintiff's prospective loss would amount to R108 186. Such prospective loss and the accrued loss would therefore jointly amount to R 145 111.

[53] Under cross-examination, Mr Minnaar was questioned regarding where he received his instructions from, and he agreed that his testimony was based upon instructions received by him. He was asked about having worked on a retirement age of 65 and why he assumed that the Plaintiff's income would

remain constant, to which he replied that these were his instructions. He conceded that, in principle, the retirement age may have been taken at 60.

[54] Upon being questioned about the rate of interest of 8,65% per *annum* compound which he utilised to capitalise the compensation (discussed on page 154 of his report) Mr Minnaar testified that this rate of interest was used in conjunction with an inflation rate of 6%, giving a net capitalisation rate of interest of 2,5% per *annum* compound. He conceded that no provision was made for the Plaintiff's mortality contingency, as the Plaintiff had survived the accident. Mr Minnaar repeated (with reference to the contents of page 155 of his report) that he did not apply a contingency because he was instructed not to do so.

[55] He was further questioned regarding the calculation of the Plaintiff's earnings, which he testified was based on the Plaintiff continuing to work in the same capacity, and in the same industry. There was no re-examination of the evidence of Mr Minnaar.

[56] The Plaintiff's case was then closed, upon which the Defendant also closed its case without adducing any evidence.

THE PLAINTIFF'S CLAIMS

[57] The damages which the Plaintiff claims is dealt with hereinbelow in accordance with the items of damages as set out in the Particulars of Claim. The Plaintiff's first claim is for future medical expenses, in respect of which an undertaking was sought from the Defendant in terms of Section 17(4)(a) of the Act.

[58] The Plaintiff's second claim is for funeral expenses in the amount of R8 580, being the funeral expenses incurred by the Plaintiff in burying her minor son. There is no doubt that the Plaintiff's minor son died on the scene and that the Plaintiff buried him. The invoice for the burial in the sum of R8 580, which the Plaintiff testified she paid, was introduced in evidence. Her evidence that she paid this amount to the undertakers was uncontested, nor was it put to her that the amount was inflated or otherwise not reasonable. I therefore find that the *quantum* of this claim has been proved.

[59] The third item of damages claimed by the Plaintiff is the amount of R171 000 in respect of her future loss of earning capacity. There is no separate claim for past loss of earnings in the particulars of claim, but having regard to the actuarial report in which both accrued loss and prospective loss were calculated, and the evidence of Mr Minnaar, I consider the reference to a future loss of earnings to be a reference to the Plaintiff's total loss of earnings as calculated from the date of her incapacity, and not from the time of issuing the particulars of claim, or from the date of the actuarial report.

[60] I am inclined to believe that the Plaintiff probably generally did work for five days a week. This despite her inability to produce any documentation in support thereof, and whilst being mindful of the fact that she had previously reported that she worked only three days per week. It may well be that the Plaintiff did not always, over the years, work the same number of days per week for her different employers, and I do not regard this discrepancy to be fatal to her claim.

[61] There was no evidence to contradict the Plaintiff's version, and one has but her word therefore. However, the Plaintiff made a very good impression on me as a witness. She came across as being decent, soft-spoken, honest and credible, and she did not contradict herself in any material respect.

[62] The Plaintiff's evidence regarding her future loss of earning capacity was consistent with the records in the joint minute drawn by the industrial psychologists. In light of the joint minute, I find it difficult to understand the rationale behind the cross-examination by the Defendant's counsel. The only issue worth canvassing with the Plaintiff arising from the joint minute was whether she would have probably retired at the age of 60, or 65 years. As aforementioned, the Plaintiff herself did not say, and Ms van Zyl already indicated that a retirement age of 60 years might be appropriate.

[63] In light of the fact that pensionable age is present 60 years of age, I am inclined to believe that the Plaintiff would probably have worked to age 60, at which age she would qualify for a state pension, which presently amounts to approximately two thirds of what the Plaintiff earned per month prior to the accident occurring. Should the Plaintiff's actuarial calculation be reduced by omitting the income earned between ages 60 and 65, and taking into account the contingencies, I find the Plaintiff's loss of earnings capacity to be in the sum of R 145 111 .

[64] The Plaintiff's fourth claim is for general damages in the sum of R100 000, which is alleged in the particulars to be inclusive of pain and suffering, shock and loss of amenities of life.

[65] I reiterate that the Plaintiff was very emotional and tearful whilst giving evidence, and that I, on more than one occasion, felt obliged to calm her

down and her give her time to recover. I observed her in the witness box visibly shaking at the memory of the accident and particularly her son's death. The Plaintiff pleaded with the Defendant's counsel, more than once, not to be asked further questions about her son's death. She was obviously heartbroken about the loss of her son, who was a student and who would have looked after her.

[66] Despite these emotional scenes playing off, the Defendant's counsel somehow considered it necessary to address rather pointless, yet evidently hurtful, questions to the Plaintiff about her son's injuries and his death at the scene. For some reason, the Defendant's counsel kept confronting the Plaintiff about the fact that she was not possessed of the *post mortem* report. This in spite of the Plaintiff's uncontradicted evidence that her son died on the scene of the accident. The Plaintiff's counsel described this questioning as "*cruef*" in his closing address.

[67] I have also given consideration to the pain and discomfort suffered by the Plaintiff, which is on-going, as well as the restrictions on her walking ability and her range of movements. The Plaintiff's evidence was that she was hospitalised for three to four days after the accident, which included an operation on her leg. I am further mindful of her evidence that, post-accident, she could not work again due to her injuries. Her testimony that she still suffers pain, particularly on her shoulder and hip, is uncontested.

[68] Having taken all of the relevant evidence into account regarding the injuries suffered by the Plaintiff in the accident, her pain and suffering, her shock and her loss of amenities of life, I am of the view that sufficient evidence

exists (subject to what follows below) to award the Plaintiff R100 000 in respect of general damages.

[69] I was referred during argument by the Plaintiff's counsel to the matter of **Ngcobo v KwaZulu Transport (Pty) Ltd**, case number 3102/97 (NPD), reported in CORBETT & HONEY : "*The Quantum of Damages*" in segment D3-1. In that matter, the plaintiff had suffered a dislocation of his shoulder, with permanent damage to the muscles and surrounding nerves, resulting in restricted abduction. That plaintiff resumed his employment post-accident, but took an early retirement package. According to the table provided, the R60 000 which the plaintiff received in that matter would, by applying a factor of 1,513 have resulted in an amount of some R90 780 as at 2007. This having been four years ago, the award in the **Ngcobo** matter would probably equate to at least R100 000 in today's monetary terms.

[70] I was also referred by Plaintiff's counsel to the decision in **Majiet v Santam Ltd**, case number 9558/95 (CPD), similarly reported in CORBETT & HONEY in segment K, at K3-1. In that matter, a Plaintiff whose son was killed by a motor vehicle was awarded R35 000 for the emotional shock suffered. Applying a factor of 1.75, this award would be worth R61 250 during 2007.

SPECIAL PLEA: REGULATION 3

[71] The Defendant's special plea now requires to be dealt with. In its special plea, the Defendant merely alleged that the Plaintiff failed or neglected to comply with Regulation 3, without furnishing any reasons or grounds in

support thereof. A consideration of the applicable principles, as contained in the Act and the Regulations is therefore required.

- [72] For the Plaintiff to be able to claim compensation for general damages (non-pecuniary loss), her injuries have to be regarded as “*a serious injury*”, within the contemplation of Section 17(1) of the Act. For the Plaintiff to be compensated therefore, Section 17(1)(1A)(a) and (b) of the Act requires of a party to submit to a process of medical assessment of her injury, the method of such assessment further being prescribed by the Regulations promulgated under 26 of the Act. These Regulations were promulgated in the Government Gazette dated 21 July 2008, and came into operation on 1 August 2008.
- [73] Regulation 3(1) provides for the method of assessment of the injury. Regulation 3(3)(a) requires of a party whose injury has been assessed, to obtain from the medical practitioner concerned a serious injury assessment report, known as an RAF4 report. Regulation 3(1)(b)(ii) provides that if the injury resulted in 30 per cent or more impairment of the “Whole Person”, as provided in the AMA Guides, the injury shall be assessed as serious.
- [74] An injury which does not result in 30 per cent or more impairment of the “Whole Person” may only be assessed as serious only if that injury is classified as one of the four categories of injuries specified in Regulation 3(1)(b)(iii)(aa) to (dd), which includes if the injury resulted in a serious long-term impairment or loss of a body function, or a severe long-term mental or a severe long-term behavioural disturbance or disorder (as provided in Regulations 3(1)(b)(iii)(aa) and (cc)).

[75] The method of assessment of a person's impairment is provided for in Regulation 3(1), and entails two criteria. The first criterion is whether the injuries concerned have resulted in a 30% whole person impairment, based upon a method of assessment as set out in the American Medical Association Guidelines for the assessment of disability. The second criterion applies if the injury is not on the list of non-serious injuries and if it did not result in a 30 per cent "whole person impairment". In such event, the "*narrative test*" referred to in section 5 of the RAF4 form would find application.

[76] On her RAF4 form, the Plaintiff's injury was assessed as having resulted in the consequences specified in two of the four categories of injuries which qualifies, namely:

[76.1] a serious long-term impairment or loss of a body function; and

[76.2] severe long-term mental or severe long-term behavioural disturbance or disorder.

[77] If the Road Accident Fund or an agent ("*the Fund*") is not satisfied that the injury has been correctly assessed, it must either reject the RAF4 report and furnish the party with reasons, or it must direct that the party submits himself or herself to a further assessment to ascertain whether the injury is serious, as provided for more fully in Regulation 3(3)(d)(i) and (ii). No specific time period is however provided in the Regulations within which the Fund is entitled or required take these steps.

[78] The Plaintiff duly submitted herself to an assessment and obtained an RAF4 report, which was, together her claim for compensation, furnished timeously to the Defendant on 29 September 2010. The Defendant then had 60 days, in terms of Section 24(5) of the Act, to object to the validity of the claim, failing which "*the claim is deemed to be valid in law in all respects*".

[79] The Defendant in fact failed to object to the validity of the claim within the 60 day period, or at all. It also failed to reject the RAF4 report or to direct that the Plaintiff should submit herself to a further assessment to ascertain whether the injury is serious. The Plaintiff's counsel contended that the Plaintiff's claim is therefore deemed to be valid in law in all respects.

[80] The Defendant's counsel however argued that because the Fund had not yet responded to the Plaintiff's RAF4 form, and because there is no time limit set within which the Fund had to take any of the aforementioned steps, that the Plaintiff was precluded from claiming any general damages. He did not indicate any other date, time period or event which might place a limitation on what might otherwise amount to an indeterminate time period, prior to the lapse of which a plaintiff would be precluded from suing.

[81] The Plaintiff's counsel argued that the 60 day period referred to in Section 24(5) applies not only to the filing of the RAF1 claim form, but that it should equally by implication apply to the filing of the RAF4 report. He contended that if both forms were delivered on the same day, the period would coincide and run concurrently. He also argued that a reasonable time in the circumstances, for the Fund to take either of the aforementioned steps, would be 60 days from the submission of the RAF4 form.

- [82] I accept the argument of the Plaintiff's counsel, as this appears to accord with a purposive construction being placed on the relevant statutory provisions. I had no difficulty in rejecting the argument of the Defendant's counsel as without substance, bearing in mind that, should such an interpretation prevail, the Fund can avoid and frustrate every claim against it indefinitely by simply not taking either of the said steps.
- [83] I am further satisfied from the expert medical evidence led that the injuries which the Plaintiff suffered have in fact reached maximal medical improvement ("MMI"). This conclusion, which appears *inter alia* from the medico-legal report of Dr Barlin under the heading "*Projected Future Medical Management*", was never challenged by the Defendant.
- [84] In my view, the aforementioned injuries to the Plaintiff do constitute a serious long term impairment and a loss of some of her body functions, namely her ability to walk or use her right shoulder properly, and that they resulted in her *de facto* unemployability. The tragic loss of her son and her *angst* of travelling in vehicles constitute, in my view, a severe long-term mental or behavioural disturbance or disorder. This also appears to be the viewpoint of Ms Marks and Dr Barlin. Accordingly, the Plaintiff would in my view qualify for the award of general damages.
- [85] In the result, and having considered all the available evidence, I am of the view that the Plaintiff also succeeded in proving her legal entitlement to claim for general damages. I have already quantified this claim in the amount of R100 000. Accordingly, the total monetary compensation which is awarded to the Plaintiff amounts to R253 691.

COSTS

- [86] As indicated above, the Plaintiff's counsel placed on record during his opening address that the Plaintiff would seek a punitive costs order against the Defendant. This was based on the Defendant's legal representatives having failed to respond to any of the questions put by the Plaintiff at the pre-trial conference, the Defendant's concession of 100% liability on the merits only at the trial roll call, and the Defendant's insistence on proceeding to challenge the Plaintiff's expert evidence in the absence of any conflicting expert medical evidence. The Plaintiff's said request was repeated in her counsel's closing argument on the second day of trial.
- [87] As aforementioned, the industrial psychologists, in their joint report, differed only on the question whether the Plaintiff would probably have retired at the age of 60 or 65 years. I reiterate that the Plaintiff herself conceded that she had not given her retirement age any thought, and there was consequently in my view no support for Ms van Zyl's suggestion that the Plaintiff would have retired at age 65. This was however not an aspect which was only solicited under cross-examination by the Defendant's counsel.
- [88] The cross-examination conducted of the Plaintiff's expert medical witnesses and its actuary failed to contribute anything of value to the matter. The Defendant's legal representatives refused to admit the evidence of Ms Marks, Dr Barlin or Mr Minnaar and thus compelled the Plaintiff to call them as witnesses, only be subjected to aimless and sometimes embarrassing cross-examination. They admitted Ms van Zyl's evidence only after she had already arrived to testify at Court.

- [89] Subsequent to the closing argument of the Plaintiff's counsel during the afternoon of the second day of the trial, and having also formed the view that the trial was being unnecessarily prolonged, I informed the Defendant's counsel that I was considering making a punitive costs order, and asked him to request the relevant claims manager of the Fund to attend Court the following morning (the Defendant's attorney having been present in Court). I also drew the attention of the Defendant's counsel to the right and entitlement, in such situations, to appoint separate legal representation.
- [90] On the third day of trial (4 April 2011) the said claims manager attended at Court, accompanied by a legal representative, Mr Weideman, to listen to the closing argument of the Defendant's counsel on the Plaintiff's *quantum*.
- [91] Whilst the Defendant's counsel was addressing me on the Plaintiff's claim for future medical expenses, he stated that the Defendant had made an offer to the Plaintiff, which was communicated to the Plaintiff's attorney at the roll call on the first day of trial. No further details or particularity was given regarding the alleged offer at this stage.
- [92] To justify his cross-examination of the Plaintiff regarding the funeral expenses, the death certificate and the *post mortem* report, the Defendant's counsel stated that, whilst the Plaintiff testified that her son died at the scene, this was not proved, as there was nothing to indicate that he died as a result of injuries sustained in the accident. This submission is in my view ludicrous, having regard to the evidence delivered.
- [93] With regard to the Plaintiff's loss of earning capacity, and whilst not disputing that the Plaintiff was rendered unemployed and unemployable by the accident, the Defendant's counsel was critical of her evidence to the

effect that she has not been back to her former work places, despite knowing where her previous employers lived. In relation to the Plaintiff's claim for general damages, the Defendant's counsel contended that "*general contingencies*" should apply, having regard to the age of the Plaintiff, the fact of her unemployment and the applicable mortality rate. However, no specific factors were referred to which might have necessitated the application of any such contingencies.

[94] To my question to the Defendant's counsel regarding what evidence the Defendant had available when the Plea was drawn, he was unable to state what these instructions comprised, save that the particulars contained in the Plea was obtained orally from "*someone*" at the Fund. He mentioned that he received his brief in the matter only on the previous Friday (two Court days before the set down date) and that he was therefore briefed at a very late stage. He sought to explain the Defendant's failure to reply to the Plaintiff's pre-trial conference questions by stating that he had not received any instructions from the Defendant's attorneys thereabout, and added that the Defendant's attorney was not personally present at the pre-trial conference.

[95] In response to a question why the replies were then not furnished later, the Defendant's counsel stated that the Defendant's attorney never received instructions from the Fund regarding the issues arising from the pre-trial conference, and the said attorney is unable to remember whether he in fact made any queries with the Fund, in order to obtain instructions thereon. He further made some reference to the morning of the trial roll call on 1 March 2011, at 09h30, when he told the Defendant's counsel he wanted to speak to him, and during the ensuing conversation he conceded the merits.

- [96] He then mentioned, in a rather vague and tentative manner, that he tried to have a discussion with the Plaintiff's counsel about the matter, without furnishing any specifics thereon. He conceded that the only issue really raised with Ms Marks was the one mistake contained in her report, and conceded that it was not actually necessary for Mr Minnaar to be called, but stated that there was an agreement with the Plaintiff's counsel that Mr Minnaar would not be called (which was denied by the Plaintiff's counsel).
- [97] Rather than attempt to justify the reason for the Plaintiff having been put to prove its whole case, the Defendant's counsel adopted the attitude that the Plaintiff's legal representatives were really at fault, as they could have asked for further particulars, or excepted against the Plea. The Defendant's counsel then requested that the amount claimed by the Plaintiff should be reduced by taking into account certain contingencies, that the general damages be referred to an appeal tribunal (presumably as contemplated in Regulation 3(8)) and that the cost of the actuary should not be awarded against the Defendant.
- [98] He asked me to apportion some blame to the Plaintiff and requested that costs be awarded on the ordinary scale. He further contended that the Plaintiff's aim was not to waste time, and if mistakes were made, these should not be punished by a special costs order. He contended that it was not necessary for a costs order to be awarded *de bonis propriis*, as a reprimand of the attorney (who was throughout present in Court) would suffice.

- [99] I then gave Mr Weideman, who appeared for the Fund, the opportunity of addressing me. Mr Weideman, who accompanied the Fund's claims manager, stated that he was shocked to hear what was going on in Court, and that hearing the address by the Defendant's counsel was an "eye opener". He explained the personnel and seniority structures existing at the Fund, and stated that the senior officials do not have any direct contact with the handling of specific matters, but that they evaluate claims on paper, corroborated by available documents.
- [100] He informed me that certain officials of the Fund were approached on 1 March 2011 (being the set down day), and that some medico-legal reports were faxed (for the first time) to the Fund only then. Instructions were given by the Fund to its attorneys to make an offer of settlement to the Plaintiff, on the basis that if such offer was not accepted, then documents regarding the death of the minor child and any contingencies relating to the Plaintiff's loss of income should be obtained; this in light thereof that no documentary proof existed that the Plaintiff was employed at the time.
- [101] Mr Weideman made it clear that the instructions given by the Fund to its attorneys comprised that an offer had to be made to the Plaintiff, and if the offer was not accepted, then only these two issues should be attended to. He added that, until the previous afternoon (3 April 2011, being the second day of the trial), there were no were no communications whatsoever in relation to this matter between the Fund and its attorneys. He stated that normally, if the Fund does not hear anything, it means that the offer has been accepted.

- [102] Mr Weideman added that, according to his instructions, the claims manager of the Fund had not seen the expert reports, or the joint minutes, or even the pre-trial minutes. In fact, they were totally unaware that the trial was proceeding, and had no knowledge regarding what was happening in this Court during the previous two days. Having listened to the closing address of the Defendant's counsel, he agreed that cross-examination of these witnesses was not necessary (save perhaps regarding the aforementioned two issues).
- [103] The Defendant's counsel thereupon confirmed Mr Weideman's address regarding the instructions given by the Fund to its attorneys. He then stated that the Defendant's attorneys had in fact made the offer to the Plaintiff, by faxing it to the Plaintiff's attorneys on 1 March 2011. He further stated that the offer was rejected by the Plaintiff's legal representatives in a manner which was "*not collegial*", and because no counter-offer was received from the Plaintiff, the Defendant did not increase its offer.
- [104] I then requested the Defendant's counsel for a copy of the offer, which was produced hesitatingly from the Defendant's attorney's file, and handed up to me. (Exhibit "C") This document, headed "*Notice of Offer of Settlement*" contains a without prejudice offer in full and final settlement of the Plaintiff's claim. The amounts offered are R83 059 (after a 50% contingency deduction) in respect of the Plaintiff's claim for future loss of earnings, and the amount of R18 462 (after a 50% contingency deduction) for the Plaintiff's accrued loss of earnings. In addition thereto, it offered an undertaking in respect of future medical costs, and the taxed or agreed party and party costs of the action on the High Court scale up to the date of the offer.

- [105] The document which I received appears to be the original thereof, containing the signature of the Defendant's attorneys. Despite a space being provided therefor, there was no acknowledgement of receipt of the offer on the part of the Plaintiff. No fax transmission report for the offer was either mentioned or produced by the Defendant's counsel.
- [106] In reply, the Plaintiff's counsel denied, in very strong and persuasive terms, that a formal offer was ever received by the Plaintiff's legal representatives, and effectively described this allegation as an untruth. He was also critical of the alleged non-collegiality, and submitted that, even if this had been the case, the Defendant could always have made an offer subsequently during the course of the trial hearing.
- [107] Whilst I specifically refrain from making a credibility finding in respect of anyone, I do believe and accept that the written offer was not communicated to the Plaintiff's legal representatives.
- [108] The Plaintiff's counsel specifically asked for an order to be made *de bonis propriis* against the Defendant's attorneys, having regard to Mr Weideman's address. He further contended that the entire running of the trial consequently occurred without the Fund's instruction, and that it is notable that its legal representatives had not even reverted to their client despite this already being the third day of trial.
- [109] In his written heads of argument, the Plaintiff's counsel drew my attention to the decision in **Rauff v Standard Bank Properties (a division of Standard Bank of SA Ltd) and Another** 2002 (6) SA 693 (W). In that case FLEMMING DJP addressed the question whether a lawyer has a duty to handle litigation in any particular manner, and found that an officer of Court

should practice in such a way that the client, the opponent and the Court all have the benefit of bringing the case before Court in the most effective and most cost-effective way. He also held that it was an attorney's duty to properly use the tools provided by the Rules to advance the expeditious and cheapest development and finalisation of a dispute.

[110] The Plaintiff's counsel further quoted extensively in his heads from the decision in **Mlatsheni v Road Accident Fund** 2009 (2) SA 401 (E), in which the Court was extremely critical of a type of approach followed by attorneys acting for the Fund, which *"has become common practice in this jurisdiction: typically, when a trial commences, the plaintiff and his or her witnesses are ritualistically required to jump through a few hoops by the defendant, who leads no evidence to advance its case and has not so much as an expert's report to counter the expert witnesses of the plaintiff, but still persists in its opposition in circumstances in which the matter should have been settled at an early stage"* (paragraph [12], p. 405).

[111] Having considered all of the foregoing, I would estimate that one day, at most, should have been sufficient in the circumstances for the Defendant to either settle the matter, or enquire into, and obtain certainty on, the two issues which the Fund had identified. The trial could and should have finished in one day. The fact that the trial continued for a second and third day appears to be solely attributable to the approach and style followed by the Defendant's attorneys, who appear to have proceeded with this litigation in the absence of instructions of their client. They failed to communicate altogether with the claims manager, who was blissfully unaware of the fact that there was a trial running, in which it featured as a litigant.

[112] In my view, the conduct of the Defendant's attorneys was unauthorised, improper and indeed reprehensible. It accords with the type of professional misconduct described in the Mlatsheni matter *supra*. The nature and degree thereof indicate, in my view, not only that a higher scale of costs should be awarded, but also that it is not fair or proper to award such costs against the Defendant, being a public fund. Instead, I am of the view that it would be just in the circumstances to order that the costs of the second and third days of trial be borne by the Defendant's attorneys *de bonis propriis*.

[113] In the result, I make the following order:

1. *The Defendant is ordered to:*
 - 1.1 *pay the sum of R145 111 to the Plaintiff;*
 - 1.2 *furnish an undertaking in terms of Section 17(4)(a) of Act 56 of 1996 to the Plaintiff;*
 - 1.3 *pay interest on the amount of R145 111 at the rate of 15,5% per annum, calculated as from fourteen days after date of this order;*
 - 1.4 *pay the costs of the action on the party and party scale, including the first day of the trial hearing on 2 March 2011;*
 - 1.5 *pay the qualifying fees of the experts Ms van Zyl, Ms Marks, Dr Barlin and Mr Minnaar, save for the portion thereof which is attributable to their appearances at the hearing on 2 March 2011 or 3 March 2011;*
2. *No order is made in relation to the costs of 1 March 2011;*
3. *The Defendant's attorneys of record are ordered to pay:*

- 3.1 *the Plaintiff's costs of the second and third days of the trial, being 2 and 3 March 2011, on the scale as between attorney and client **de bonis propriis**;*
- 3.2 *the qualifying fees of the experts Ms van Zyl, Ms Marks, Dr Barlin and Mr Minnaar which is attributable to their appearances at the hearing on 2 March 2011 or 3 March 2011, on the scale as between attorney and client **de bonis propriis**;*
4. *The Registrar is directed to serve, by registered post, a copy of this judgment on the chairperson of the board of the Road Accident Fund, and on the president of the Law Society of the Northern Provinces.*

S.J. BEKKER

Acting Judge

HIGH COURT

JOHANNESBURG

12 August 2011

Plaintiff's Attorneys:

Norman Berger & Partners Inc.

Defendant's Attorneys:

Kekana Hlatshwayo Radebe Inc.