

SOUTH AFRICA / JUDGMENT

Boshoff v Road Accident Fund (A106/2022) [2024] ZAGPPHC 204 (5 March 2024) [2024] ZAGPPHC 204

COURT

North Gauteng High Court, Pretoria

BEFORE

MKHABELA, MOLOPA-SETHOSA, COWEN

CASE / FILE NUMBER

A106/2022

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IN

THE HIGH COURT OF SOUTH AFRICA,
GAUTENG

DIVISION, PRETORIA

A106/2022

REPORTABLE

OF

INTEREST TO OTHER JUDGES

REVISED

DATE:05/03/2024

In

the matter between:

CHRISTA
BOSHOFFAppellantandROAD
ACCIDENT FUNDRespondent
CHRISTA
BOSHOFFAppellant
CHRISTA
BOSHOFF
Appellant
ROAD
ACCIDENT FUNDRespondent
ROAD
ACCIDENT FUND
Respondent

JUDGMENT

MKHABELA AJ (MOLOPA-SETHOSA J AND COWEN J CONCURRING)

Introduction

[1]This is an appeal against an award of damages to the appellant in respect of loss of earning capacity suffered as a result of a motor vehicle accident. The court (per Teffo J) awarded the appellant R1 951 485.80, but granted leave to appeal. The accident took place on 8 October

2004, nearly twenty years ago. The appellant was then a 21 year old student pursuing a degree in psychology planning to become a clinical psychologist. She sustained a range of injuries and claimed damages from the respondent, the Road Accident Fund (RAF).

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(per Teffo J) awarded the appellant R1 951 485.80, but granted leave to appeal. The accident took place on 8 October

2004, nearly twenty years ago. The appellant was then a 21 year old student pursuing a degree in psychology planning to become a clinical psychologist. She sustained a range of injuries and claimed damages from the respondent, the Road Accident Fund (RAF).

[2]The RAF conceded the merits of the appellant's claim in circumstances where she was a passenger. Her sister was driving

the vehicle and died at the scene. Her nephew was also in the vehicle and he too died at the scene. The appellant was

rendered immediately unconscious and remained disoriented and without recall ten days later.

The RAF conceded the merits of the appellant's claim in circumstances where she was a passenger. Her sister was driving

the vehicle and died at the scene. Her nephew was also in the vehicle and he too died at the scene. The appellant was

rendered immediately unconscious and remained disoriented and without recall ten days later.

[3]The only issue in this appeal is the amount awarded in respect of the appellant's loss of earning capacity. The parties reached a settlement in respect of the other heads of damages claimed, including general damages (R600 000) and future medical expenses, made an order of court on 9 June 2009. The respondent also made an interim payment towards loss of earnings, in the sum of R1 400 000 (one million and four hundred thousand rand).

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[4]In her amended particulars of claim, the appellant claimed, as compensation for loss of earning capacity, a future loss of income,

including loss of employment, in an amount of R26 million. In her notice of appeal, she pleads that the court ought to have awarded her an amount of R36 927 561 (thirty-six million nine hundred and twenty seven thousand five hundred and sixty one rands) alternatively an amount of R10 559 939.80 (ten million five hundred and fifty-nine thousand nine hundred and thirty nine rands and eighty cents).

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[5]The appellant is accordingly asking us to improve the award significantly.

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[6]The trial commenced only on 28 January 2020, in other words over fifteen years after the accident and at a point when there was already much known about the appellants' sequelae, and about how the appellant's post-morbid career trajectory is in fact playing out.

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, and about how the appellant's post-morbid career trajectory is in fact playing out.

[7]Furthermore, by the time the trial commenced, there was substantial agreement or at least no dispute between the parties and their experts on many issues. Joint minutes between the parties' neurosurgeons (respectively, Dr Bingle and Dr Ntimbani) and their occupational therapists (Ms Ledwaba and Ms Tom) reveal consensus on material matters and there were uncontested reports submitted by the appellant from a neuro-psychologist (Dr Shai Friedland), a psychologist (B van Zyl) and a psychiatrist (Dr Fine).

Furthermore, by the time the trial commenced, there was substantial agreement or at least no dispute between the parties and their experts on many issues. Joint minutes between the parties' neurosurgeons (respectively, Dr Bingle and Dr Ntimbani) and their occupational therapists (Ms Ledwaba and Ms Tom) reveal consensus on material matters and there were uncontested reports submitted by the appellant from a neuro-psychologist (Dr Shai Friedland), a psychologist (B van Zyl) and a psychiatrist (Dr Fine).

[8]The issues that remained in dispute between the parties were limited to the plaintiff's post-morbid potential, the quantum of her loss of earnings and the appropriate contingencies to be used. In the result, there were only four witnesses at trial. The appellant testified followed by Ms Pretorius, the appellant's industrial psychologist. The defendant's two witnesses were Professor Karl George Esterhyse (Prof Esterhyse) who is employed as the academic head of the Psychology Department at the University of the Free State (UOFS). Thereafter, Mr Ramusi testified, the defendant's industrial psychologist. The issues in dispute ultimately turn on an assessment of the impact of the appellant's psychological injuries on her abilities.

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The evidence

[9]The common cause or undisputed facts are helpfully summarised in a document entitled 'Common cause facts and issues for

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of the trial court', which – the court was informed at the commencement of the trial – was agreed between the parties' representatives (the parties' statement of facts). However, the RAF subsequently sought to distance itself from this document when it obtained new representation mid-trial.

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was informed at the commencement of the trial – was agreed between the parties' representatives (the parties' statement of facts). However, the RAF subsequently sought to distance itself from this document when it obtained new representation mid-trial.

[10]In these circumstances, and because it is trite that a court is not bound by or obliged to accept the evidence of an expert witness and must itself find facts and actively evaluate the evidence, [1]we have nevertheless had considered regard also to the source documents specifically the parties' experts' joint minutes and expert reports.

In these circumstances, and because it is trite that a court is not bound by or obliged to accept the evidence of an expert witness and must itself find facts and actively evaluate the evidence,[1]we have nevertheless had considered regard also to the source documents specifically the parties' experts' joint minutes and expert reports.

[11]When the appellant testified, she was 36 years old. Her evidence, in brief, was that she was 21 years old at the time of the accident and in her third year of her B Psych degree studies. Her intended programme was to complete the B Psych degree and then proceed to her Honours degree. She testified that she was one of the top students in her class, coped very well and was getting marks in the high 80s and 90s.

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[12]She aspired to be a clinical psychologist, which would have required her to be selected into a two-years' Master's Degree in Clinical Psychology, the first year of which is course-work and the second an internship.

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[13]She was unable to write her third year exams following the accident which took place in October 2004, close to the academic year end. She was given estimate marks for certain practical modules but had to write supplementary exams the following year which she passed, but received marks in the 60s. Under cross-examination, the appellant confirmed that after the accident she had recuperated at home for about four months before she wrote the

supplementary examination. She emphasised that it was very difficult for her to do this, she was experiencing headaches and it felt as though she was 'in the twilight zone'. She had a lot of help studying from her parents. It was put to her that her cognitive abilities were not however ultimately affected, but the appellant disagreed.

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[14]She proceeded to complete her Honours Degree in 2005, but again received lower marks than she had previously, and at times failed tests. Nevertheless, she still wished to pursue her intended career as a clinical psychologist.

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[15]The appellant testified that she applied three times to be accepted to the Master's degree in clinical psychology, initially at the UOFS. Applicants are required to write a life story. She testified that on the first occasion, in 2005, she did not proceed to the interview stage. The panel told her that the accident was too traumatic in her life story and she needed to first deal with the trauma. She was also told that she was visibly struggling to cope with the workload. She applied again at UOFS in 2006, when she proceeded to the interview stage, but was again told that she was too traumatised by what had happened and that she did not have the necessary concentration for the course. She applied a third and last time in 2007, to the University of Pretoria. She was interviewed but was not admitted to the programme: the programme co-ordinator called her and told her she was not selected for the programme due to her post-traumatic stress and depression. Under cross-examination, the appellant confirmed that the communications were verbal communications.

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interviewed but was not admitted to the programme: the programme co-ordinator called her and told her she was not selected for the programme due to her post-traumatic stress and depression. Under cross-examination, the appellant confirmed that the communications were verbal communications.

[16] In 2006, the appellant registered for a two year Master's Degree in Research, also in psychology, in part on the recommendation of her neurologist who emphasised it was a less stressful course. It was a part-time course that did not require selection and it allowed her to earn an income doing odd jobs, to pay the rent and buy food. She completed the Master's degree in 2007, being the normal time frame and with a second class pass, but explained that she had to take medication (Concerta) to help her to concentrate. Under cross-examination, the appellant emphasised that the degree was significantly less strenuous than a clinical degree, only required a fifty-page dissertation and did not require her to write tests or examinations. She also worked while experiencing severe headaches. Nevertheless, she accepted that she was able to do the research and complete the degree. The appellant then registered for her PHD in psychology in 2008 at North West University. She testified that the PHD was supposed to take her three years but she only completed it in 2014. She struggled with concentration and organising her thoughts. Under cross-examination, however, the appellant accepted that despite her head injury, she was ultimately able – without interruption, to continue with, and eventually complete, her studies. Her results were, however, notably lower than they were before. In cross-examination, she was questioned on whether she completed her PHD in 2013 (as reflected in certain documentation) or in 2014 as she had testified.

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[17]The appellant worked as a Facilitator (Life Skills) at the UOFS from 2011 until the end of 2014 / early 2015. This was while she was studying. The post entailed assisting students to understand course requirements based on a lecturers' lesson plan. Ms Pretorius, her industrial psychologist described this as a tutoring post. She was earning about R12 000 a month. The appellant testified that she struggled with the job when the time for marking came which required focus and concentration.

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[18]In February 2015, the appellant moved to Knysna in circumstances where she was not coping, was on the brink of burn-out and found it difficult to live in Bloemfontein, where she had resided with her sister and nephew. She got a position as a Grade RR Teacher at a pre-primary school earning R10 000 a month. The work was overwhelming and she did not cope, at times having uncontrollable emotional outbursts with the children. After thirteen months, the appellant got another job as a principal of a small private school, called the British Academy, earning R19 000 or R20 000 a month. Even in this role, which was largely administrative, the appellant says that she struggled. She continued to have uncontrolled emotional outbursts and suffered from ongoing depression. She was on an anti-depressant during this period. The appellant worked as a principal until June 2017 when she was retrenched. It is common cause that the owner of the school, a Ms Bester, reported that the appellant had initially presented with the necessary drive despite her circumstances, but later presented with an 'almost does not care attitude', and that her 'emotional wellbeing observably deteriorated.' The appellant accepted this was a fair expression of what transpired at the time.

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expression of what transpired at the time.

[19] Under cross-examination, the appellant explained that there were twenty-one or twenty-two children at the school and about ten staff members. The appellant explained further that she did try to get other employment after she was retrenched. She applied for jobs as a principal at schools in George and Plettenberg Bay and she sent her CV to other schools in the country but was not invited for interviews. She sent out her CV to Universities for any job that would be in the line of what she had studied. She believes that the reason she has not been offered other jobs is because it was known that the high school closed down due to her bad management, because her training and interests are directed towards psychology and because of her psychological challenges and regular headaches. Counsel for the RAF disputed that the school closed due to the appellant's bad management, referencing a glowing report from the school owner about her diligence and hard work and the fact that a fire in the area was a material contribution, which the appellant disputed. Under re-examination, the appellant clarified that she could not register with the Health Professions Council of South Africa (HPCSA) as a counsellor with her current qualifications and would need to do further training. She also pointed out that it was difficult for her to get academic jobs on her current qualifications.

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[20] After she was retrenched and the school shut down, the appellant started a private practice as a counsellor of children but was not registered with the HPCSA. The appellant continued to struggle, and in mid-2018, a psychiatrist, a Dr Fourie, hospitalised her for a week in circumstances where she was getting shocks in her spine and could not sleep. She was also suffering from severe and frequent headaches, often accompanied by nausea, which she had experienced since the accident. Her medication was then changed which somewhat alleviated the headaches. She returned to counselling, but is only able to see about fifteen patients a week. She struggles with focusing and concentration, she remains traumatised about the accident – which affects her ability to counsel others – and she is often unable to recall or confuses patients'

and their stories. The appellant accepts that she is probably struggling too much with the work she is wanting to do.

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[21]After the appellant's testimony in January 2020, the matter was postponed and only resumed the following year in March 2021. At that stage, the RAF was represented by new counsel, who sought to shift the RAF's approach to the litigation, specifically to put in issue the appellant's pre-morbid potential, which was recorded as common cause in the parties' statement of facts. In the result, when the trial resumed, the presiding Judge was requested by the appellants' counsel to rule on this issue.

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[22]After hearing the parties, the court delivered its ruling, the effect of which was to hold the RAF to be bound by concessions made by its counsel before the trial commenced regarding the appellant's pre-morbid potential, which could not, in the result be revisited.[2]It was nevertheless clarified that evidence could be led in respect of contingencies relevant to the pre-morbid scenario.

After hearing the parties, the court

delivered its ruling, the effect of which was to hold the RAF to be bound by concessions made by its counsel before the trial commenced regarding the appellant's pre-morbid potential, which could not, in the result be revisited.[2]It was nevertheless clarified that evidence could be led in respect of contingencies relevant to the pre-morbid scenario.

[23]The salient points of agreement are recorded in the joint minutes of the parties' industrial psychologists dated 17 January 2020 under the heading 'Probable career progression and remuneration scenario but for the accident', in the following terms:

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'3.1 We agree that but for the accident the client would probably have completed her Master's degree in clinical psychology and would probably by 2010/2011 have entered the labour market as qualified clinical psychologist, registered with the SA Health Professions Council or any other work in line with her qualification including in the academia. Given her preferred study in Educational Counselling, she would have as well worked in schools and in universities in counselling services and similar pastoral duties. She also would have worked as a Psychometrist (Independent Practice) had she opted as well to take up an internship (practicum) on completion of the B. Psych degree.

3.1 We agree that but for the accident the client would probably have completed her Master's degree in clinical psychology and would probably by 2010/2011 have entered the labour market as qualified clinical psychologist, registered with the SA Health Professions Council or any other work in line with her qualification including in the academia. Given her preferred study in Educational Counselling, she would have as well worked in schools and in universities in counselling services and similar pastoral duties. She also would have worked as a Psychometrist (Independent Practice) had she opted as well to take up an internship (practicum) on completion of the B. Psych degree.

We note that according to <https://www.healthman.co.za/Tariffs/Tariffs2011a> Psychologist could have charged R747.00 per hour in 2011. We agree that taking in consideration that she would at the beginning of her career not have worked all possible hours and would have had expenses for an office and administration. We thus agree that her personal profit from her practice should be estimated to equal D2/D3 of Paterson's scale in 2010/2011 when she would have stated her career. Similar earnings are as well applicable in other career fields in line with her qualification.

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3.3. MP: In the event that she had completed a PhD in Psychology, it would not necessarily have influenced her income in a clinical practice. KR notes that in the academic and other areas of employment, her further qualifications (PhD) would have been considered for determination of earnings. With publications in research journals in academic, she would have been able to progress even further to the level of Professor.

We note that according to <https://www.healthman.co.za/Tariffs/Tariffs2019> a psychologist can charge R1518.70 per hour in 2019. We agree that taking in consideration that by 2019 her practice would have been established but that she would still have had expenses. We thus agree that her personal profit from her practice should be estimated to equal E1 of Paterson's scale in 2019. These earnings and the scale indicated would also have been applicable in compensation for her level of education, PHD. Thus her earnings would have progressed until she ceilings at this level in line with her level of education. This would have occurred at about 40-45 years of age.

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We agree that she would have maintained this level of income until retirement' [agreed probably to be the age of 65]

[24]It is also significant to note that there was a joint minute between Ms Pretorius and the RAF's erstwhile industrial psychologist, Dr M Kgosana, who had since passed away before the commencement of the trial to the effect that both experts agreed that pre-accident the appellant aspired to become a clinical psychologist and that but for the accident the appellant would likely have completed her Master's degree in clinical psychology after which she would likely have earned and retired on at least a D2 Paterson Level within corporate and D3/D4 in private practice.

It is also significant to note that there was a joint minute between Ms Pretorius and the RAF's erstwhile industrial psychologist, Dr M Kgosana, who had since passed away before the commencement of the trial to the effect that both experts agreed that pre-accident the appellant aspired to become a clinical psychologist and that but for the accident the appellant would likely have completed her Master's degree in clinical psychology after which she would likely have earned and retired on at least a D2 Paterson Level within corporate and D3/D4 in private practice.

[25]After the ruling was given the appellant's industrial psychologist, Ms Pretorius, gave evidence whereafter the appellant closed her case. The RAF then led its two witnesses. The oral evidence must, of course, be understood against the background of the facts established by the experts who did not testify.

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[26]In her judgment, Teffo J detailed the evidence of all these experts and witnesses and no purpose would be served restating all of the evidence here. Brief remarks suffice.

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[27]Ms Pretorius testified that the appellant's most likely career progression was for her to continue doing what she was doing at the time – namely working as a counsellor[3]and earning minimally.

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[28]The respondent's first witness, Professor Esterhyse confirmed the appellant's version that she applied for the Master's

degree in clinical psychology but was not successful. He testified that she applied three times. He detailed the admissions process and that applicants are required to give very sensitive information about themselves including their life story (trauma). His evidence was that it was extremely difficult to be accepted into the program and that being a good student does not make one a suitable candidate. Only 10 of 112 students were admitted in 2005. He testified that it is not proper to inform a candidate of the reason for their non-admission. Under cross-examination he conceded that he was not part of the interviewing panel that interviewed the appellant.

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[29]The RAF's second witness, industrial psychologist Mr Ramusi ultimately testified that in his opinion, there was no real difference between the appellant's pre-morbid and post-morbid potentials and she would have graduated with a PhD pre-accident as she did post-accident. He testified that he was not aware that the plaintiff aspired to obtain a qualification in clinical psychology, which was not disclosed to him. Her prospective career, in his opinion, would have been similar if the accident had not happened. This entailed an academic focus, which in her

case was, initially a facilitator, and thereafter a teacher and school principal.

The RAF's second witness, industrial psychologist Mr Ramusi ultimately testified that in his opinion, there was no real difference between the appellant's pre-morbid and post-morbid potentials and she would have graduated with a PhD pre-accident as she did post-accident. He testified that he was not aware that the plaintiff aspired to obtain a qualification in clinical psychology, which was not disclosed to him. Her prospective career, in his opinion, would have been similar if the accident had not happened. This entailed an academic focus, which in her case was, initially a facilitator, and thereafter a teacher and school principal.

[30]The court rejected material features of the appellant's evidence as non-sensical and uncorroborated and rejected the evidence of the appellant's industrial psychologist Ms Pretorius in lacking in independence, realism and logic.

The court

rejected material features of the appellant's evidence as non-sensical and uncorroborated and rejected the evidence of the appellant's industrial psychologist Ms Pretorius in lacking in independence, realism and logic.

[31]Conversely, the court wholeheartedly accepted the expert evidence of Mr Ramusi, the respondent's industrial psychologist, about the appellant's

career progressions and found that his findings and opinions were realistic and consistent with the evidence.

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wholeheartedly accepted the expert evidence of Mr Ramusi, the respondent's industrial psychologist, about the appellant's

career progressions and found that his findings and opinions were realistic and consistent with the evidence.

[32]In the result, the court concluded that it was not guaranteed that the appellant would have practised as a clinical psychologist but for the accident. The court found that the appellant is employable, was able to complete all her studies up to the highest level in academia post-accident and that she would have achieved pre-accident what she has achieved post-accident. On the evidence, the court concluded that the appellant's neuropsychological and psychiatric sequelae are mild and they have not completely and severely cognitively impaired her intellectually to such an extent that after the accident she could not proceed with her studies. The court was of the view that the appellant's neuropsychological and psychiatric deficits would not preclude her from following a career in academia and have been exaggerated given how she progressed in her studies and career more than 10 years after the accident.

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concluded that it was not guaranteed that the appellant would have practised as a clinical psychologist but for the accident. The court found that the appellant is employable, was able to complete all her studies up to the highest level in academia post-accident and that she would have achieved pre-accident what she has achieved post-accident. On the evidence, the court concluded that the appellant's neuropsychological and psychiatric sequelae are mild and they have not completely and severely cognitively impaired her intellectually to such an extent that after the accident she could not proceed with her studies. The court

was of the view that the appellant's neuropsychological and psychiatric deficits would not preclude her from following a career in academia and have been exaggerated given how she progressed in her studies and career more than 10 years after the accident.

The test for loss of earnings and approach on appeal

[33]In the Appellate Division case of *President Insurance Co Ltd v Mathews*[4], Smalberger JA had the following to say:

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President Insurance Co Ltd v Mathews

[4], Smalberger JA had the following to say:

“The Plaintiff’s action is one for damages based on negligence. Under the lex Aquilia, as developed in our law, he is entitled to be compensated to the extent that his partrimony has been diminished in consequence of such negligence. This also takes into account future loss. His damages therefore include any loss of future earnings or future earning capacity he may have suffered[5]. A precise mathematical calculation of such a loss is seldom possible because of the large number of variable factors and imponderables

which come into play”.

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. A precise mathematical calculation of such a loss is seldom possible because of the large number of variable factors and imponderables

which come into play”.

[34]The approach of an appellate court when dealing with an appeal from a trial court in respect of awards of damages is aptly captured in the Appellate Division case of *Southern Insurance Association v Bailey NO*. [6]I can do no better than reproduce the whole quotation.

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Southern Insurance Association v Bailey NO.

[6]I can do no better than reproduce the whole quotation.

“It is well settled that this court does not interfere with awards of damages made by a trial Court unless there is ‘substantial

variation’ or ‘a striking disparity’ between the award of the trial court and what this Court considers ought to have been awarded; or the trial Court did not give due effect to all the factors which properly entered into the assessment; or the trial Court made an error in principle, or misdirected itself in a material respect.”

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variation’ or ‘a striking disparity’ between the award of the trial court and what this Court considers ought to have been awarded; or the trial Court did not give due effect to all the factors which properly entered into the assessment; or the trial Court made an error in principle, or misdirected itself in a material respect.”

[35]The following dictum in *Van der Plaats v South African Mutual Fire and General Insurance Co Limited* [7] must also be borne in mind, that: ‘a decision whether provision should be made for the deduction from the awarded amount of damages of a certain percentage in respect of contingency factors falls within the discretionary powers of the trial Judge and the exercise of such discretion will only be interfered with if it was improper’ by which it was suggested that the trial court should have regard to factors that are duly relevant thereto.

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Grounds of appeal and analysis

[36]The appellant’s grounds of appeal are numerous but in my view, the most crucial and decisive one is that the court is said to have erred in placing any relevance on whether the appellant would have, pre-accident, practised as a clinical psychologist or not, in circumstances where the issue of pre-morbid earning capacity was common cause and it had been agreed that the appellant need not prove that issue at trial.

The appellant's grounds of appeal are numerous but in my view, the most crucial and decisive one is that the court is said to have erred in placing any relevance on whether the appellant would have, pre-accident, practised as a clinical psychologist or not, in circumstances where the issue of pre-morbid earning capacity was common cause and it had been agreed that the appellant need not prove that issue at trial.

[37]Furthermore, it was contended on behalf of the appellant that it was common cause that pre-accident whatever the appellant's chosen career progression was (clinical psychologist or any other arena), her earnings would have been commensurate with what was postulated and agreed to by the industrial psychologists, being determined as the amount the appellant would have earned as a clinical psychologist.

Furthermore, it was contended on behalf of the appellant that it was common cause that pre-accident whatever the appellant's chosen career progression was (clinical psychologist or any other arena), her earnings would have been commensurate with what was postulated and agreed to by the industrial psychologists, being determined as the amount the appellant would have earned as a clinical psychologist.

[38]The trial court was aware of the agreement reached by the parties's respective industrial psychologists in respect of the appellant's career progression. That is clear from the record when the above mentioned ruling was made and it is also evident from paragraph 47 of the judgment which reads as follows:

The trial court was aware of the agreement reached by the parties's respective industrial psychologists in respect of the appellant's career progression. That is clear from the record when the above mentioned ruling was made and it is also evident from paragraph 47 of the judgment which reads as follows:

'On 23 March 2021, the parties argued a preliminary point relating to whether the pre accident career progression of the appellant was also an issue for determination by the court. This issue has been dealt with in the parties' industrial psychologists'

reports and at the commencement of the trial the parties agreed that the issue was not for determination considering the agreement by the industrial psychologists in their joint minutes. The court held that the parties were bound by the agreement between their respective industrial psychologists with regard to the plaintiff's career projections as contained in their joint minute dated 17 January 2020.'

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reports and at the commencement of the trial the parties agreed that the issue was not for determination considering the agreement by the industrial psychologists in their joint minutes. The court held that the parties were bound by the agreement between their respective industrial psychologists with regard to the plaintiff's career projections as contained in their joint minute dated 17 January 2020.'

[39]Notwithstanding such awareness the court determined the appellant's career progression by accepting the pre-morbid progression proposed by Mr Ramusi in his evidence which deviated from the joint minute. This can be gleaned inter alia from paragraph 159 of the judgment which reads as follows:

Notwithstanding such awareness the court

determined the appellant's career progression by accepting the pre-morbid progression proposed by Mr Ramusi in his evidence

which deviated from the joint minute. This can be gleaned

inter alia

from paragraph 159 of the judgment which reads as follows:

"Having said that I agree with the views of the defendant's industrial psychologist, Mr Ramusi as outlined in his report and find them realistic as they are consistent with the evidence on record. I find the career progressions proposed by him to be consistent with the evidence."

Having said that I agree with the views of the defendant's industrial psychologist, Mr Ramusi as outlined in his report and find them realistic as they are consistent with the evidence on record. I find the career progressions proposed by him to be consistent with the evidence."

[40]As I see it, the court committed a material misdirection as contemplated by the authorities quoted above when it considered an issue that had been

agreed upon and on which it had already pronounced when it considered what would constitute a fair and adequate compensation to the appellant and had already held that the parties were bound by their agreement as alluded to above.

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committed a material misdirection as contemplated by the authorities quoted above when it considered an issue that had been

agreed upon and on which it had already pronounced when it considered what would constitute a fair and adequate compensation to the appellant and had already held that the parties were bound by their agreement as alluded to above.

[41]It is significant that the trial court's acceptance of the appellant's career progression attributed by Mr Ramusi to the appellant pre-morbid was not in harmony with the pre-morbid career progression that Mr Ramusi had agreed to in his joint minute with Ms Pretorius. In my view, this is a material misdirection which renders an interference with the trial court's award inevitable on the facts before us. It is primarily the above misdirection that led the court to make an award which has a striking disparity between what the trial court considered and what this appellate court considers ought to have been awarded. Furthermore, the interference with the court's award is also warranted on the premise that there is no sound basis that existed for the award it made.[8]In addition, fairness dictated in this case, that the parties be held to their pre-trial agreement as to what was in dispute, as the court itself had ruled.

It is significant that the trial court's acceptance of the appellant's career progression attributed by Mr Ramusi to the appellant pre-morbid was not in harmony with the pre-morbid career progression that Mr Ramusi had agreed to in his joint minute with Ms Pretorius. In my view, this is a material misdirection which renders an interference with the trial court's award inevitable on the facts before us. It is primarily the above misdirection that led the court

to make an award which has a striking disparity between what the trial court considered and what this appellate court considers ought to have been awarded. Furthermore, the interference with the court

a quo's

award is also warranted on the premise that there is no sound basis that existed for the award it made.[8]In addition, fairness dictated in this case, that the parties be held to their pre-trial agreement as to what was in dispute, as the court itself had ruled.

[42]The departure from the agreed position was in any event not justified on the evidence. Mr Ramusi must have been aware that the appellant intended to pursue a career in clinical psychology as reflected in the joint minute. The suggestion that her pre-morbid and post-morbid career trajectory is aligned loses sight of the fact that the appellant resorted to being a pre-school teacher and principal because she was not able to pursue her aspirations to be a clinical psychologist or follow a similar equally remunerated path. Importantly, the appellant's own testimony, about why she was not accepted into the Master's degree in clinical psychology was not seriously disputed and aligns with the joint minute and should have been accepted by the trial court. Professor Esterhyse's evidence was not put to her and all the evidence points to the trauma following the accident being the reason she could not pursue that career. Professor Esterhyse's evidence, in any event, did not do further than positing that there was no guarantee that the appellant would have been accepted. Furthermore, even if she had not ultimately pursued the clinical psychology path, the experts agreed pre-trial that her earnings would in any event have been aligned. There is nothing to gainsay this.

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[43]The misdirection on these aspects was crucial. As I see it, the correct basis for determining fair and adequate compensation for the appellant's loss of earning capacity is to acknowledge that but for the accident the appellant would probably have been accepted into the Master's degree in clinical psychology and eventually qualified to practise as a clinical psychologist until she reached retirement at 65. Further, even if she had not been so accepted, her pre-morbid earnings would have been aligned with what she would have earned had she so qualified. In my view, and in the result, a fair and adequate compensation would be based on the premise that the appellant would have entered the labour market on completion of her studies at a Paterson C1/C2 with progression to her career ceiling at about 45 years of age earning a Paterson D5/E1.

The misdirection on these aspects was crucial. As I see it, the correct basis for determining fair and adequate compensation for the appellant's loss of earning capacity is to acknowledge that but for the accident the appellant would probably have been accepted into the Master's degree in clinical psychology and eventually qualified to practise as a clinical psychologist until she reached retirement at 65. Further, even if she had not been so accepted, her pre-morbid earnings would have been aligned with what she would have earned had she so qualified. In my view, and in the result, a fair and adequate compensation would be based on the premise that the appellant would have entered the labour market on completion of her studies at a Paterson C1/C2 with progression to her career ceiling at about 45 years of age earning a Paterson D5/E1.

[44]The question that remains is that since interference with the award made by the trial court is warranted, how then should this court deal with the appellant's post-morbid potential to arrive at fair and adequate compensation. The appellant made two alternative

submissions.

The question that remains is that since interference with the award made by the trial court is warranted, how then should this court deal with the appellant's post-morbid potential to arrive at fair and adequate compensation. The appellant made two alternative

submissions.

[45]The first is that the court should have calculated the appellant's post-morbid earning capacity as being limited to between an A1 /A2 on the Patterson scale resulting in a total award of R37 427 5631, less the interim payment. In doing so, the court ought to have had proper regard to the findings of the medical experts regarding her diagnosis, prognosis and the effect of her injuries on her ability to work.

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should have calculated the appellant's post-morbid earning capacity as being limited to between an A1 /A2 on the Patterson scale resulting in a total award of R37 427 5631, less the interim payment. In doing so, the court ought

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to have had proper regard to the findings of the medical experts regarding her diagnosis, prognosis and the effect of her injuries on her ability to work.

[46]Secondly, and in the alternative, the court should have calculated the loss of earning capacity having regard to a contingency differential of 30% having regard to her severely compromised capacity. That approach, it was contended, would only arise should the court conclude that the appellant can, as was found, earn post-accident what she could pre-accident.

Secondly, and in the alternative, the court

should have calculated the loss of earning capacity having regard to a contingency differential of 30% having regard to her severely compromised capacity. That approach, it was contended, would only arise should the court conclude that the appellant can, as was found, earn post-accident what she could pre-accident.

[47]In my view, the alternative approach is, broadly speaking, warranted. In this regard, I am unpersuaded that there are grounds to interfere with the factual findings of the court in its rejection of material features of the evidence of either the appellant or Ms Pretorius regarding the appellant's post-morbid trajectory. This approach, furthermore, gives due cognisance to the fact that the appellant's cognitive abilities are in important measure intact although she suffers from memory deficits and mood and behavioural changes. Furthermore, it gives due cognisance to the factual findings of the court to the effect that aspects of the appellant's actual career trajectory and circumstances are not wholly accident-related, but at times an incident of extraneous factors, choice and the appellant's own agency. On the other hand, the common cause or undisputed expert evidence from the neuro-psychologist, psychologist and psychiatrist about the impact of the appellant's psychological and psychiatric injuries on her, which is compelling, can, on the facts of this case, sensibly and fairly be taken into account when applying the proposed contingency differential. In this regard, it was undisputed that the appellant sustained a significant concussive brain injury with at least moderate cognitive and psychological sequelae, a fracture of the mandible and facial fractures, facial scarring and facial lacerations. While the

physical injuries were treated and have healed, the appellant was also diagnosed with depression and post-traumatic stress and anxiety. There is no serious dispute that this affects the appellant's ability to cope in the workplace: indeed the court found as much.

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in its rejection of material features of the evidence of either the appellant or Ms Pretorius regarding the appellant's post-morbid trajectory. This approach, furthermore, gives due cognisance to the fact that the appellant's cognitive abilities are in important measure intact although she suffers from memory deficits and mood and behavioural changes. Furthermore, it gives due cognisance to the factual findings of the court

to the effect that aspects of the appellant's actual career trajectory and circumstances are not wholly accident-related, but at times an incident of extraneous factors, choice and the appellant's own agency. On the other hand, the common cause or undisputed expert evidence from the neuro-psychologist, psychologist and psychiatrist about the impact of the appellant's psychological and psychiatric injuries on her, which is compelling, can, on the facts of this case, sensibly and fairly be taken into account when applying the proposed contingency differential. In this regard, it was undisputed that the appellant sustained a significant concussive brain injury with at least moderate cognitive and psychological

, a fracture of the mandible and facial fractures, facial scarring and facial lacerations. While the physical injuries were treated and have healed, the appellant was also diagnosed with depression and post-traumatic stress and anxiety. There is no serious dispute that this affects the appellant's ability to cope in the workplace: indeed the court

found as much.

[48]In my view, a 20% contingency differential is reasonable in all the circumstances as it both recognises the seriousness of the appellant's psychological and psychiatric sequelae, her vulnerability as an employee, her need for accommodation and that by the time that the trial commenced, she had reached her recovery ceiling. It would simultaneously acknowledge the agency that remains with the appellant and her ongoing access to treatment at the RAF's expense.

In my view, a 20% contingency differential is reasonable in all the circumstances as it both recognises the seriousness of the appellant's psychological and psychiatric sequelae, her vulnerability as an employee, her need for accommodation and that by the time that the trial commenced, she had reached her recovery ceiling. It would simultaneously acknowledge the agency that remains with the appellant and her ongoing access to treatment at the RAF's expense.

[49]Based on the above scenario and applying a 20% contingency differential, a fair and adequate compensation is R8 923 100,80 less R1 400 000.00 (being the interim payment) = R7 523 100.80.

Based on the above scenario and applying a 20% contingency differential, a fair and adequate compensation is R8 923 100,80 less R1 400 000.00 (being the interim payment) = R7 523 100.80.

[50]In the result I would uphold the appeal and substitute the court a quo's award accordingly. In respect of costs, nothing militates against the principle that costs should follow the result, either on appeal or at trial, in respect of which costs were reserved.

In the result I would uphold the appeal and substitute the court

award accordingly. In respect of costs, nothing militates against the principle that costs should follow the result, either on appeal or at trial, in respect of which costs were reserved.

[51]The following order is made:

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1.The appeal is allowed with costs including all the costs reserved by the trial court.

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2.Paragraph 1 of the order of the court a quo is replaced with the following:

Paragraph 1 of the order of the court

is replaced with the following:

“The respondent shall pay the appellant an amount of R7 523 100.80 into the appellant's bank account as provided in the court a quo's order.”

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The respondent shall pay the appellant an amount of

R7 523 100.80

into the appellant's bank account as provided in the court a quo's order.”

R B MKHABELA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

I concur

L M MOLOPA-SETHOSA J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

S J COWEN

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 5 March 2024.

COUNSEL FOR THE APPELLANT:

T Lipshitz

INSTRUCTED BY:

T Tiatz & Skikne Attorneys

COUNSEL FOR RESPONDENT: E Seima SC and M Kgomongwe

INSTRUCTED BY:

Sekati & Sekati Inc

DATE OF THE HEARING:

06 September 2023

DATE OF

JUDGMENT:

5 March 2024

[1]See egTwine and another v Naidoo and another[2017] ZAGPJHC 288;[2018] 1 All SA 297(GJ) at para 18 including specifically 18(k), (r) and (s).

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Twine and another v Naidoo and another

[2017] ZAGPJHC 288;[2018] 1 All SA 297(GJ) at para 18 including specifically 18(k), (r) and (s).

[2018] 1 All SA 297

[2]In doing so, the courta quorelied uponGlen Mark Bee v RAF2018(4) SA 366 at para 65 and 66:‘[65] Effective case management would be undermined if there were an unconstrained liberty to depart from agreements reached during the course of pre-trial procedures, including those reached by the litigants’ respective experts ...’[66] ‘Where, as here, the court has directed experts to meet and file joint minutes, and where the experts have done so, the joint minute will correctly be understood as limiting the isuses in which evidence is needed. If a litigant for any reason does not wish to be bound by the limitation, fair warning must be given. In the absence of repudiation that is a fair warning, the other litigant is entitled to run the case on the basis that the matters agreed between the experts are not in issue.’

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[66] ‘Where, as here, the court has directed experts to meet and file joint minutes, and where the experts have done so, the joint minute will correctly be understood as limiting the issues in which evidence is needed. If a litigant for any reason does not wish to be bound by the limitation, fair warning must be given. In the absence of repudiation that is a fair warning, the other litigant is entitled to run the case on the basis that the matters agreed between the experts are not in issue.’

[3]Although Ms Pretorius emphasized that what the appellant was doing was not conventional counselling, she was merely counselling students which did not qualify as counselling per se.

Although Ms Pretorius emphasized that what the appellant was doing was not conventional counselling, she was merely counselling students which did not qualify as counselling per se.

[4]1992

(1) SA 1at page 5C- E.

1992

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1992

(1) SA 1

[5]Santam Versekeringsmaatskappy Bpk v Byleveldt1973 (2) SA 146(A) at 150A-C.

Santam Versekeringsmaatskappy Bpk v Byleveldt1973 (2) SA 146(A) at 150A-C.

1973 (2) SA 146

[6]1984

- (1) SA 98(A) at page 109H. See too AA Mutual Insurance Association Ltd v Maqula 1978(1) SA 805 (A) at 809B-C: ‘It is settled law that a trial Court has a wide discretion to award what it in the particular circumstances considers to be a fair and adequate compensation to the injured party for his bodily injuries and their sequelae. It follows that this Court will not in the absence of any misdirection or irregularity, interfere with a trial Court’s award of damages unless there is a substantial variation or a striking disparity between the trial Court’s award and what this Court considers ought to have been awarded, or unless this Court thinks that no sound basis exists for the award made by the trial Court.’

1984

- (1) SA 98(A) at page 109H. See too

1984

- (1) SA 98

AA Mutual Insurance Association Ltd v Maqula

1978(1) SA 805 (A) at 809B-C

: ‘

It is settled law that a trial Court has a wide discretion to award what it in the particular circumstances considers to be a fair and adequate compensation to the injured party for his bodily injuries and their sequelae. It follows that this Court will not in the absence of any misdirection or irregularity, interfere with a trial Court’s award of damages unless there is a substantial variation or a striking disparity between the trial Court’s award and what this Court considers ought to have been awarded, or unless this Court thinks that no sound basis exists for the award made by the trial Court.’

[7] 1980(3) SA 105 (A) at 115 (Juta translation)

1980(3) SA 105 (A) at 115 (Juta translation)

[8] AA Mutual Insurance Association Ltd *supra*.

AA Mutual Insurance Association Ltd

supra.

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