REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH GAUTENG, JOHANNESBURG)

(1) REPORTABLE: YES	**CASE NO: 14465/2010**
(2) OF INTEREST TO OTHER JUDGES: YES	
..... DATE	..... SIGNATURE

In the matter between:

MOKWENA PHETOLE PETER **PLAINTIFF**

and

SOUTH AFRICAN RAIL COMMUTER CORPORATION **FIRST DEFENDANT**

METRORAIL **SECOND DEFENDANT**

J U D G M E N T

KUBUSHI, J

[1] The factual matrix of this case is that on 5 February 2008 the plaintiff sustained bodily injuries at Elandsfontein train station when he fell from a passenger train owned by the defendants and there and then operated by the employees of the defendants. The plaintiff boarded the train at Elandsfontein station *en route* to Limindlela station in Tembisa. When the train started moving people rushed into the train and because of the pressure exerted on the plaintiff by these people he was pushed to the opposite door of the train which was open and he fell off

the train onto the rail tracks. The plaintiff, a forty two year old man at the time of the incident, sustained serious bodily injuries as a result of the fall. He injured his right knee and lower back. He is therefore claiming damages for the injuries.

[2] I am informed that the merits have been settled. The defendants conceded 100% liability in respect of the proven or agreed damages. The matter is therefore before me for the determination of *quantum* of the alleged injuries.

[3] At the beginning of the trial the parties presented a bundle of documents, Bundle "E", which contained the reports of their respective expert witnesses. The reports in respect of each party contained in the said bundle pertain to:

a. the Industrial Psychologists;

b. the orthopaedic surgeons;

c. the occupational therapists; and

d. the actuaries.

[4] In addition to the said reports they also handed in Bundle "G" which contained the joint minutes in respect of the reports of:

a. the industrial psychologists;

b. the occupational therapists; and

c. the orthopaedic surgeons.

During the trial an addendum to the joint minutes of the industrial psychologists was handed in as exhibit "H". The actuaries for both parties did actuarial re-calculations based on this addendum. These re-calculations were handed in as exhibit "I" and "J" respectively. Due to the objections raised by the defendants' counsel at the trial the joint minutes presented lengthy debates between the two counsel. The defendant's counsel is of the opinion that the

joint minutes should not be accepted by the court without the calling of evidence to confirm the factual basis thereof. This is an issue which I shall deal with later in this judgment.

[5] At the pre-trial conference the parties agreed that the discovered documents are what they purport to be without admitting the truthfulness of the contents thereof. It was therefore the intention of the parties at the commencement of the trial to call all the expert witnesses to testify. However, during the trial and pursuant to the addendum to the joint minutes of the industrial psychologists and the actuarial re-calculations and as *per* agreement, the parties decided not to call any further witnesses. At the time of the actuarial re-calculations, the plaintiff had already given evidence and had led the evidence of the occupational therapist, the actuary and the industrial psychologist but did not call the orthopaedic surgeon to give evidence. The defendants closed their case without leading any evidence.

THE ISSUES

[6] The parties' counsel informed me at the start of the trial that the injuries suffered by the plaintiff and their *sequelae* were common cause. What required to be determined by this court was only the amount of *quantum* in respect of the various heads of damages claimed by the plaintiff. In particular, the defendants' counsel put the following in dispute:

a. The past medical expenses. This head of damages was subsequently abandoned by the plaintiff due to lack of documentary proof of such damages.

b. In regard to the loss of earnings –

i. <u>whether the plaintiff would have ended his career as an unskilled labourer or a semi-skilled labourer:</u> This dispute was however resolved by the industrial psychologists in their addendum to their joint minute where eventually they agreed that the plaintiff worked in an unskilled occupational group. I agree. Taking all the plaintiff's circumstances, he will, in my view, have ended his career as an unskilled labourer. There is nothing factually presented before me which indicates that he would have progressed to a level in the semi-skilled occupation. I accept the experts' opinion that his educational level, experience and age would not have enabled him to progress to an occupation in the semi-skilled level.

ii. <u>the retirement age of the plaintiff:</u> This dispute was also resolved by the industrial psychologists in the addendum to their joint minute where it was

agreed that the plaintiff's retirement age should be 62 ½ years. I accept the opinion. My view is that if it is accepted that the plaintiff would not have progressed to the occupation level of the semi-skilled he would have in most probabilities opted for the government pension which becomes available at the age of 60 years; and if he would have continued perhaps with his carpentry work, probabilities are that he would have retired at the age of 65 years. The pensionable age of 62 ½ is thus a compromise between the two ages and I am prepared to accept it.

iii. whether the plaintiff still retains the residual capacity to work: According to the industrial psychologists of both parties, the plaintiff does not retain any residual capacity to work. In the addendum to their joint minute, they agree that the plaintiff would not be able to return to his pre-accident work and that even though he is suited for sedentary work, but due to his age, level of education and experience he stands no chance in securing employment of a sedentary nature. Due to the injuries suffered by the plaintiff it is my view that the experts are correct that the possibility of the plaintiff being employable in the open market has been completely ruled out.

The industrial psychologists in the addendum of their joint minute support the assertion by the defendants' counsel that the plaintiff is still employable. They express a view that the plaintiff will be able to continue to assist his wife on a voluntary basis in her vegetable vendor business. I however, disagree with this assertion as well as with the opinion by the industrial psychologists on this issue. The evidence proffered is that the plaintiff is unable to sit and/or stand for long hours without experiencing any pain. There is no evidence to show that with the intended occupational therapy (rehabilitation interventions) and surgical procedures (for the knee and the hip) he will be able to sit and/or stand for long hours. To my mind, the effect of the injuries is such that the plaintiff would not be able to perform this kind of work. The contention by the defendants' counsel during argument that the plaintiff can also be able to carry on with the carpentry business is in my view unfortunate and misplaced. It is quite evident that the plaintiff cannot do this type of work. He has been rendered incapable to perform any heavy physical work which requires the shifting of heavy furniture or heavy household repairs. Any tasks requiring extensive standing, walking, good balance, lifting or carrying heavy objects and low work postures such as kneeling, stooping and crouching are not possible for the plaintiff. These are all postures that are required of a person doing carpentry work. The opinion of the defendants' occupational therapist that the plaintiff should open a carpentry business and employ staff to do the

physically demanding work and that he operate the business at a supervisory and/or office based role, does not take into account that the plaintiff has not been trained for such a job and that he does not have the required capital to start the business. With his level of education chances of having him so trained are non-existent.

iv. the contingency calculations: In the light of the addendum to the joint minute, of the industrial psychologists the disputes in regard to the loss of earnings claim ultimately became narrowed to contingencies.

THE INJURIES AND THE *SEQUELAE*

[7] The nature and extent of the injuries sustained by the plaintiff as well as the *sequelae* thereof are common cause between the parties. The plaintiff's testimony is that he injured his right knee and the right side of his lower back when he fell. According to the report of the orthopaedic surgeon who consulted him, he sustained injuries to his person being the proximal tibial fracture, fractured hip (right hip), fractured right knee and fracture of the right tibial plateau.

[8] He is no longer able to walk a distance of about 500m without getting pain. He also has a limp which is very pronounced when he walks. When he sits for a long time he suffers pain. He must change posture after every 20 to 30 minutes. Before the incident he was able to walk for distances, sit for a long time and play soccer. He is no longer able to do so. The injuries have also affected his marriage life. He experiences severe pain in the back whenever he has sexual intercourse. It takes him two to three days to recover from such pain before he can engage in sexual intercourse again. Previously he used to have sexual intercourse with his wife two to three times in one night.

[9] He experienced severe pains when he fell from the train and hit the rail tracks. The pain was on the knee and the right side of the lower back due to the fracture he sustained on the knee and the lower back. He experienced excruciating pain when he was picked up from the rails and placed on the platform. He was carried into the train where he was made to lie on the train seat. At the Limindlela train station he was helped to walk from the train to a motor vehicle which took him to the hospital. He could not be carried because of the excruciating pain he felt and had to be supported on both sides by the armpit.

[10] He was admitted at the Tembisa Hospital where he spent three weeks. At the hospital he was attended to immediately by the doctors. His right foot was put in traction. After a week the traction was taken off and the knee was operated on. A week after the operation he went for another operation of the lower back and was discharged from hospital a few days after the second operation. During the operation metal plates were inserted in his lower legs. As a result of the operation he has a 28cm scar on the right outside part of the thigh which runs up to his lower back. He also has scars on his right leg which are made by six deep holes two on the knee and four on the lower part of the leg. After he was discharged he went to the hospital for check-ups as an out-patient. He does not remember the number of times he went for such check-ups but he says it was many times. He was given tablets for the pain and medicine to clean the wounds. He used the hospital treatment for about five months after he was discharged from hospital.

[11] He married his wife in 1987. They have five children three of which are still dependent on them. The youngest is nine years old. His wife is presently unemployed and was not employed at the time of the incident. She was once employed at a restaurant at the airport – he does not remember when. The wife started selling fruits and vegetables when he was still in hospital. He normally sits with her outside where she sells whenever he is bored of being in the house. He can however not do this regularly because of the pain he experiences when he sits for a long time.

EMPLOYMENT

[12] The plaintiff gave evidence of the history of his employment prior to the incident. He was initially employed as a carpenter assistant at Rail Wood Furniture where he worked for three years and was trained to do carpentry work. He is able to make furniture. He earned a salary of R27 *per* week. He was retrenched from this job. Immediately before the incident he used to do carpentry work for a fee during the weekend when asked to do so by customers. He was employed in other various jobs but at the time of the injuries, he was employed in Boksburg by a company known as Oil Works Management. He had been employed for only three weeks prior to the incident. He earned a weekly wage of R400. His duties entailed stripping broken motor vehicle engines. The company he worked for collected used oil, oil filters and broken engines from garages like Hundai. The engines were brought to the company on a truck and offloaded next to the table where he worked. With the help of someone, he would then hoist the engine and place it on the table where he will be able to work on it. His job entailed stripping the engine and taking out the sump from where he will drain the oil. The oil was drained into 5 litre containers and then poured into 200 litre drums. The drums were taken by cranes and loaded on trucks for delivery to other companies where it was refined for re-use. Since the incident he has not been able to work at all. He cannot lift

heavy objects and as such he cannot lift the engine or the equipment required to make furniture. When he carries heavy objects he feels pain in the right side of his back.

THE JOINT MINUTE OF THE ORTHOPAEDIC SURGEONS (DR G READ FOR THE PLAINTIFF AND DR E D GANTZ FOR THE DEFENDANTS)

[13] Both doctors agree:

a. on the injuries sustained and treatment received;

b. that there has been progression of symptoms and clinical findings since the examination by Dr Read – the plaintiff's right hip and knee symptoms has worsened and early post-traumatic osteoarthritis ensued in both joints;

c. that he requires conservative treatment as outlined in their respective reports and will require surgical treatment in the form of total hip replacement, arthroscopic debridement of the knee joint and total knee replacement. The internal fixation may be removed from the right acetabulum. Provision should be made for revision surgery of the hip and knee should such need arise.

d. that the patient is only fit to work that does not require prolonged walking and standing or strenuous physical effort;

e. that his injuries caused long term serious impairment or loss of body function;

f. that his life amenities were affected; and

g. that his life expectancy was not affected, significantly by the accident.

JOINT MINUTE BETWEEN THE OCCUPATIONAL THERAPISTS (T M R NAPE FOR THE PLAINTIFF AND I H SHIBAMBO FOR THE DEFENDANTS)

[14] Both occupational therapists in their joint minute deferred to the orthopaedic surgeons in regard to the *sequelae* of the injuries and the recommended treatment.

The experts were also agreed in respect of the following:

a. OCCUPATIONAL THERAPY: that the plaintiff would benefit from 8 to 10 hours of occupational therapy inclusive of home visits;

b. that the plaintiff would benefit from other rehabilitation intervention such as physiotherapy and biokinetics for pain management and physical rehabilitation;

c. SPECIAL AND ADAPTED EQUIPMENT: that plaintiff would benefit from making use of the assistive devices in order to optimise his level of functioning when performing his daily activities.

d. ASSISTANCE: that the plaintiff will remain permanently incapable of heavy physical chores such as shifting heavy furniture or heavy household repairs and that he should as a result be compensated for his physical limitations and pain experience. His occupational therapist went further to recommend that he will require the assistance of: a handyman/gardener for four hours a month, a domestic worker for one hour *per* day for seven days *per* week should he live without his family support, additional personal care and domestic assistance for eight hours *per* day six days *per* week after undergoing any further surgical procedures relating to the injuries sustained. The defendants' occupational therapists recommended the assistance of a handyman for one half day *per* fortnight and about 2 – 4 hours *per* day of care/support post hospital-discharge.

e. ACCOMMODATION: that as regards accommodation, no structural adjustments are required at present. However, in future, his accommodation should consist of a single storey house with limited steps, floor covering to be continuous and non-slip without loose rugs to ensure safety in mobility around the house. He should also have access to running hot and cold water to a bath/shower in his permanent home.

f. TRANSPORT: that the cost of transport to and from all past, present and future appointments related to the incident be allowed at taxi fares or AA rates. The experts recommended the use of an automatic motor vehicle with a left hand side accelerator conversion.

g. EMPLOYMENT: that the plaintiff is no longer a candidate for medium, heavy or very heavy work due to his impaired mobility. Any tasks requiring extensive standing or walking, good balance, lifting or carrying heavy objects and low work postures such as kneeling, stooping and crouching are no longer possible. He should also avoid working at heights, uneven surfaces, cluttered or slippery/oily floors. He is no longer suited to employment as a carpenter, general worker or truck driver. The plaintiff's occupational therapist is of the opinion that due to the plaintiff's limitations, age, work

history and level of education he will not successfully compete in the open labour market for any sedentary type of work. The defendants' occupational therapist is of the opinion that if the plaintiff were to open a carpentry business, he will have to employ staff for physically demanding work and have a supervisory/workshop/office based role. He may also be able to carry on helping his wife with her vegetable vending business, but the income will be limited unless the business is expanded.

THE JOINT MINUTE OF THE INDUSTRIAL PSYCHOLOGISTS (DR M MALAKA FOR THE PLAINTIFF AND DR L MARAIS FOR THE DEFENDANTS)

[15] a. Pre-accident Prospects:

The industrial psychologists are both agreed that with his background, the actual level of education of Grade 9, the plaintiff could have been eligible for employment in the unskilled job level through to the low semi-skilled level. His record indicates that he functioned at that level. He has had spells of unemployment and at the time of the incident he was a casual/temporary worker. It is likely that over time he could have worked until he reached normal retirement, at the age of 60 to 65 years. According to the defendants' industrial psychologist if he was unemployed or worked in the informal sector at the time of retirement he would opt for a government pension when he qualified at the age of 60 years.

b. Post-accident Employment Prospects:

The experts deferred to the opinion of the occupational therapists with regard to the plaintiff's physical ability following the collision. They are however agreed that he is no longer suited for physically demanding work. Although in theory he retains some capacity for sedentary to light work, however, his relatively poor educational background precludes him from such employment. According to his industrial psychologist at best, he is a candidate for sympathetic employment. Thus he has sustained a total and permanent loss of capacity to earn. The defendants' industrial psychologist is of the opinion that since he is assisting his wife in the business venture and works as a vendor, he should be able to continue working in this capacity for as long as his health permits.

ADDENDUM TO THE JOINT MINUTE OF THE INDUSTRIAL PSYCHOLOGISTS (DR M MALAKA FOR THE PLAINTIFF AND DR L MARAIS FOR THE DEFENDANTS)

[16] a. The doctors are agreed that pre-accident:

i. the plaintiff worked in an unskilled occupational group;

ii. he experienced period of unemployment;

iii. his earning at the time of the collision was R20 800 *per annum* and the amount should be used for calculation purposes;

iv. he will receive inflationary increases until retirement age;

v. retirement age should be 62 ½ years.

c. The doctors were agreed that post-accident:

i. the plaintiff would not return to his pre-accident work that was of a physical demanding nature;

ii. he is suited for sedentary work but due to his age, level of education and experience he would not be able to secure employment of a sedentary nature;

iii. he will continue to assist his wife on a voluntary basis; and

iv. contingencies remain the prerogative of the court.

ANALYSIS OF EVIDENCE

[17] In his particulars of claim, the plaintiff sued the defendants for: future medical expenses; past loss of earnings; future loss of earning/earning capacity; general damages and costs of a personal attendant including a driver. However, at the end of the trial only awards for the heads of damages for loss of earnings, future medical expenses and general damages stood to be determined.

LOSS OF EARNINGS

[18] It became apparent during the course of the trial that, though the expert witnesses had entered into joint minutes, there were still pertinent issues on which they were not agreed. This resulted in different actuarial calculations. In trying to bring the parties closer in their calculations the industrial psychologists compiled an addendum to their joint minute which occasioned a re-calculation by the actuaries. Despite the re-calculation the actuaries could still not come with a common amount. The actuaries' calculation is based on the amount of

R20 800 *per annum*, as agreed to between the industrial psychologists. This is the amount on which they did their calculations. The actuaries' final calculations differ because the defendants' actuary did not allow for any salary progression. I am however of the view that the increment in line with the Consumer Price Index, as allowed by Jacobson, should have been allowed and must be allowed. The appropriate amount for calculation should therefore be that provided by Jacobson in his report (Exhibit "I"). In the light of the addendum to the joint minute of the industrial psychologists (Exhibit "H") this head of damages ultimately became narrowed to contingencies.

[19] As is trite, the contingency deductions are within the discretion of the court and depend upon the judge's impression of the case. The industrial psychologists have, correctly so, accepted as much. Normal contingencies are 5% for past loss and 15% for future loss. *Southern Insurance Association v Bailey NO* 1984(1) SA 98 (AD) at 116H.

[20] Jacobson in his report (Exhibit "I") and in evidence allowed for a 5% contingency deduction for pre-accident loss and a 15% post-accident loss. His contention is that the amount of the deductions is essentially subjective and should be a decision of the court. In applying the said deductions he took into account the unforeseen contingencies such as sickness, unemployment, errors in the estimation of future earnings and life expectancy, earlier retirement and general hazards of life. The plaintiff's counsel applying the approach in *Venter v Federated Employers Association Maatskappy BPK 1978 (2) QOD 756 (T)* argues for the retention of the contingencies suggested by Jacobson or that no contingencies be applied by the court or at least that 5% be deducted in respect of both pre- and post-accident loss. The court in that judgment taking into account that the plaintiff's life expectancy had been reduced applied a 10% deduction. In this instance, it is common cause that the plaintiff's life expectancy has not been reduced.

[21] The defendants' actuary in his report (Exhibit "J") did not allow for any contingency deductions. This is so because according to the opinion of the experts, the plaintiff experienced periods of unemployment. The defendants' counsel suggests two approaches that may be taken to come to an appropriate award in respect of the pre-accident loss. The first approach is to take the median of the two amounts for the plaintiff and the defendant. The second is to take the amount in exhibit "I" and apply a higher contingency. She suggested a contingency deduction of 10% instead of 5%.

[22] As regards the post-accident loss, the defendants' counsel submits that an appropriate deduction is 20%. She bases her submission on the ground that since the plaintiff has been cleared to be capable to perform sedentary work with an improved financial situation he might be able to return to the carpentry business.

I have already ruled out the possibility of the plaintiff ever going back to work.

[23] I am in alignment with the view expressed in *Venter v Federated Employers Association Maatskappy BPK* above whereat the court took the reduced life expectancy of the plaintiff into consideration. Since in this instance the plaintiff's life expectancy is not affected, there should in my view be no contingency deductions in respect of both pre- and post-accident loss.

[24] The calculations will thus be as follows:

Earnings pre morbid R 140 467

Earnings post morbid R 298 190

TOTAL NET LOSS R 438 657

GENERAL DAMAGES

[25] The plaintiff in his particulars of claim claimed a global amount for general damages in respect of pain and suffering, loss of amenities of life and disfigurement in the amount of R400 000.

[26] The plaintiff's counsel contends that the R400 000 claimed by the plaintiff is fair and reasonable. He based his argument on the judgment in *RAF v Marunga* [2003] 2 All SA 148 (SCA) at para [27] wherein the court adopted a liberal approach to the awarding of damages. He compared the current case to various other judgments where according to him the plaintiffs therein had suffered similar injuries to that of the plaintiff in this instance. He referred in particular to the judgments in *Vukubi v RAF* 2007 (5) J2 QOD 188 (E) and *Boshoff v Motor*

Insurers Association of Southern Africa 1969 (2) QOD 105 (AD).

[27] The plaintiff in the *Vukubi* – judgment suffered severe injuries to the knee comprising open dislocation of the knee joint and tears to the patellar tendon and cruciate ligaments, closed fracture of the *humerus* and closed fractures of the *radius* and *ulna*. He received treatment to the knee comprising debridement reduction of the knee joint and an internal fixation. He experienced pain and discomfort in the knee when engaged in physical activities and it was expected that future osteoarthritis would develop requiring conservative treatment with an 80% chance of knee replacement surgery and 60% chance of revision procedure. He experienced degenerative changes to the elbow joint and radio-ulna joint with possibility of pain and discomfort in the future. The plaintiff walked with a slight antalgic gait, was unable to bend the knee or walk long distances and could thus not participate in some sporting activities. The court awarded him general damages in the amount of R300 000 with current value of R437 000.

[28] In the *Boshoff* – judgment, the plaintiff, a 26 year old accountant sustained a dislocation and fracture of the left hip joint, concussion, a fractured rib and various cuts and bruises. The hip was reduced and placed in a plaster cast, where after he was taken from hospital to friends where he remained in bed for six weeks. After the splints were removed he used crutches to walk. After 18 months he still had pain in the hip and was continually taking pills for it. He had an early onset of osteo-arthritis and advised to have arthrodesis of the hip joint as soon as possible. He was awarded general damages in the amount of R9 000 for pain, suffering and loss of amenities with a current value of R509 000.

[29] The defendants' counsel is also in agreement with the approach adopted in *Marunga* but contends that an amount of R250 000 should be awarded to the plaintiff. She based her contention on the fact that the amount of R400 000 is not commensurate to the damages proven by the plaintiff. According to her, the plaintiff in his particulars of claim claimed an amount of R400 000 which included other injuries which he was not able to prove at the trial and as such the amount should be reduced.

[30] There is no hard and fast rule of general application requiring a trial court or a court of appeal to consider past awards. This is so because it would be difficult to find a case on all fours with the one being heard. Awards in decided cases might be of some use only for guidance. A court may also derive assistance from the general pattern of awards. See *RAF v Marunga* above at paras [24] and [25].

[31] As is the case in this instance, the judgments I have been referred to are not on all fours with the case before me. The injuries sustained by the plaintiffs in those judgments, the treatment administered and the consequences of such injuries are not similar to those in the present case and as such the amount of compensation would not necessarily be the same. I am also mindful of the fact that the injuries sustained by the plaintiffs in those cases are more severe than in the current case. I am however satisfied that the general patterns in those cases are indicative of what courts would normally award in such circumstances.

[32] As it has been said the award of general damages is by no means an easy task. There is no basic formula for the assessment of this kind of damages. To arrive at a fair and just amount all relevant factors and circumstances should be taken into account. I am in respectful agreement with the approach adopted in the *Marunga* – judgment. The courts should endeavour to determine compensation that reflects the changes in society, the prevailing money values, the state of economic development and should be fair in the eyes of a society.

[33] The Supreme Court of Appeal has repeatedly stated that in cases in which the question of general damages comprising pain and suffering, disfigurement, permanent disability and loss of amenities of life arises a trial court in considering all the facts and circumstances of a case has a wide discretion to award what it considers to be fair and adequate compensation to the injured party. See *Protea Insurance Company v Lamb* 1971 (1) SA 530 (A) at 534H 535A.

[34] It is common cause in this instance that the plaintiff sustained serious injuries to his right knee and the right side of his lower back when he fell. He spent three weeks in hospital where he underwent three operations to his right knee and lower back. It is thus not in dispute that he suffered pain at the time he fell. In his own words he testified that he experienced excruciating pains when he hit the rail tracks. The pain was on the knee and the right side of the lower back. He experienced the pain when he was picked up from the rails and placed

onto the platform. He was carried into the train where he was made to lie on the train seat. At the Limindlela train station he was helped to walk from the train to a motor vehicle which took him to the hospital. And all this time he experienced excruciating pain. He continued to suffer pain during and after the operations he underwent. His leg was in traction for the whole week and he was on crutches for eight months after being discharged from hospital. He continues to suffer pain even today. He is no longer able to walk a distance of about 500m without getting pain. He can no longer sit for an extended period of time without suffering pain and has to change his sitting posture many times to alleviate the pain. He cannot even stand for a long time. This was evident even in court whilst he was in the witness box. He could not sit down and had to give evidence standing. Because he cannot stand for a long time, he had to be given time to walk around the court room to alleviate the pain. He walked slowly and negotiated the steps in the court room with great difficulty. At times he had to support himself by holding onto the court benches whilst walking. It is also not in dispute that he has as a result of the injuries been disfigured. He has a 28cm scar on the right outside part of the thigh which moves up to his lower back. He also has scars on his right leg which are made of six deep holes two on the knee and four on the lower part of the leg. He also has a pronounced limp when he walks.

[35] It is common cause that he suffered and continues to suffer loss of amenities of life. He is a person who used to enjoy sexual intercourse with his wife. According to his undisputed evidence he would have sexual intercourse three or four times in one night. He is no longer able to do so. He experiences pain during sexual intercourse which requires him to rest for a day or two before he can have sex again. He is a person who also liked to play soccer and to exercise but he can no longer do that. He can hardly walk for a distance of 500m without experiencing pain.

[36] My view is that, when considering the injuries sustained by the plaintiff and the general trend followed by courts in awarding damages, the amount of R400 000 claimed by the plaintiff for general damages is not excessive and should be granted.

FUTURE MEDICAL EXPENSES

[37] The expenses claimed in respect of this head of damages are: allowance for handyman/gardener; domestic assistance; additional domestic assistance; post-surgery assistance; allowance for automatic motor vehicle; allowance for future adjustment of permanent residence and other future medical expenses.

[38] In proving this head of damages the plaintiff proffered his evidence and that of his three witnesses. The other evidence which is available to enable me to adjudicate this issue is the joint minutes of: the occupational therapists; the industrial psychologists; orthopaedic surgeons and the addendum to the joint minute of the industrial psychologists as well as the actuarial re-calculations of the actuaries for both parties. As such the only available evidence at the end of the case was that of the plaintiff and his three witnesses together with the reports as stated in this paragraph.

[39] It was argued on behalf of the defendants that on the evidence that is before me, I cannot make a finding of fact that the plaintiff suffered future medical expenses and that his claim should be rejected due to his failure to prove on a balance of probabilities that he suffered such loss. The argument is based on the following grounds:

a. the reliance by the plaintiff on the joint minutes done by the various experts without calling the said expert witnesses to testify.

b. the reliance by the plaintiff on the actuarial report that was compiled by Mr Pretorius who is not a qualified actuary.

c. the plaintiff's failure to call a mobility expert in respect of the requirement of an automated vehicle.

d. the failure by the plaintiff to adduce the evidence of an orthopaedic surgeon in respect of the requirement for future surgery.

[40] The crisp question in respect of this head of damages is whether the plaintiff on the basis of the evidence before me succeeded on a balance of probabilities to prove the damages claimed. Such *onus* can ordinarily only be discharged by adducing credible evidence to support the plaintiff's case.

[41] I shall therefore address the issues raised by the defendants' counsel as follows:

a. Reliance on the Joint Minutes

[42] The parties' counsel were at odds as to whether or not the joint minutes of their respective expert witnesses and the agreements entered into by the parties were binding between the parties. Secondly, the counsel having agreed not to lead any further evidence after the addendum and the actuarial re-calculations were handed in wanted to argue that I should make a negative inference against the party who has not tendered the evidence that was not led. For instance, the plaintiff did not lead the evidence of the orthopaedic surgeon and on the other hand, the defendants did not lead any evidence. After a lengthy debate by counsel I gave instruction that the issue be addressed by counsel in their respective heads of argument.

[43] On this point, the argument by the defendants' counsel is that the objective of the joint minutes and the agreements between the parties is to curtail the issues in order to limit the duration of the trial and that the opinion contained in such reports should not be elevated into evidence. The duty is ultimately upon the court to decide whether such opinion is to be relied on or not and to determine the weight if any, that has to be afforded that opinion. The contention by the plaintiff's counsel is that even though such minutes and agreements are intended to curtail the issues and limit the duration of the trial, the joint minutes and agreements are binding on the parties.

[44] The principles which pertains to the weight and/or value to be placed on the joint minutes of the expert witnesses or agreements entered into by the parties are enunciated as follows in *Thomas v BD Sarens (Pty) Ltd* (2007/6636) [2012] ZAGPJHC 161 (12 September 2012 para [10] – [15]:

i. Where the experts called by opposing litigants meet and reach agreements about facts or about opinions, those agreements bind both litigants to the extent of such agreements. No litigant may repudiate an agreement to which its expert is a party, unless it does so clearly and, at the very latest, at the outset of the trial. It is self-evident that to do so at so late a stage is undesirable because it may provoke delay, but that is a practical aspect not touching on any principle. It is conceivable that very exceptional circumstances might exist that allow a litigant to repudiate an opinion later than this moment, such as fraudulent collusion, or some other act of gross misconduct by the expert.

ii. Where experts are asked or are required to supply facts, either from their own investigations, or from their own researches, and an agreement is reached with the other party's experts about such facts, such an agreement on the facts enjoys the same *de facto* status as facts that are expressly common cause on the pleadings or facts agreed in a pre-trial conference or in an exchange of admissions.

iii. Where two or more experts meet and agree on an opinion, although the parties are not at liberty to repudiate such an agreement placed before the court, it does not follow that a court is bound to defer to the agreed opinion. In practice, doubtlessly rare, a court may reject an agreed opinion on any of a number of grounds all amounting to the same thing; ie the proffered opinion was unconvincing. (Menday v Protea Assurance Co Ltd **1976 (1) SA 565** (E) at 669B-E.) The rationale for not affording a litigant the same free hand derives purely from the imperative of orderly litigation and the fairness due to every litigant to know, from the beginning of a trial, what the case is that has to be met.

iv. The upshot of these principles is that it is illegitimate to cross-examine an opponent's witness to undermine an agreed position on fact or on opinion unless, before the trial begins, the opinion of a party's own expert has been formally repudiated. No litigant shall be required to endure the risk of preparing for trial on a premise that an issue is resolved only to find it is challenged.

v. Furthermore, an opinion may only be admitted into evidence on two bases. The first is that there is an agreement that it may be so admitted. The second is that the rules of court, especially Rule 35, have been complied with or compliance therewith has been excused by the adversary. It is therefore not permissible to refer to a letter or a report of a medical practitioner for the purpose of invoking and relying on an opinion expressed therein, if it was not the subject of proper notice in terms of the Rules. However, it may sometimes be permissible to refer to a fact recorded in such a document and any controversy about so doing falls to be decided in accordance with the rules of evidence as to the reliability of such evidence to establish the particular fact.

[45] I am in respectful alignment with the abovementioned principles and I find them apposite in this instance. To my mind the parties were common cause as to the agreement entered into by their expert witnesses in respect of the opinions expressed in the joint minutes. The defendants' counsel did not at the outset of the proceedings repudiate the joint minutes to

which the defendants' expert witnesses were party to. In fact she at the beginning of the trial confirmed that the joint minutes were not contested and should be handed in as part of the record. The reports were challenged only during cross examination and/or when addressing me at the end of the trial without raising any exceptional or any circumstances at all for doing so. And as already stated no litigant should endure the risk of preparing for trial on a premise that an issue is resolved only to find it is challenged. Similarly in this instance it is wrong for the defendants' counsel to challenge issues which were at the outset of the trial common cause between the parties. Even though, as suggested by the defendants' counsel, it remains the duty of the court not merely to accept the opinion of an expert witness without satisfying itself that such witness is correct, the joint minutes and the agreements remain binding between the parties. The court must weigh the opinion, along with all the other evidence in deciding the case but should as well take into account the facts and/or data which is common cause between the parties and the expert witnesses. Such facts and any agreement on the facts enjoys the same *de facto* status as facts that are expressly common cause on the pleadings or facts agreed in a pre-trial conference or in an exchange of admissions. My view is that this challenge by the defendants' counsel is misplaced and should be rejected.

My above ruling covers the issue raised on the failure by the plaintiff to call the orthopaedic surgeon to give evidence on the requirement for future surgery by the plaintiff. The two orthopaedic surgeons are agreed in their joint minute that the provision should be made for revision surgery of the hip and knee should such need arise. There was thus no reason for the plaintiff call the orthopaedic surgeon to come and regurgitate this evidence.

It is also per agreement between the occupational therapists in their joint minute to allow the use of a motor vehicle. The calculations by Jacobson are sufficient for this purpose. The undisputed evidence before me is that Jacobson is experienced in such things. I am thus satisfied that this expense should be allowed.

b. Reliance on the Actuarial Report

[46] The actuarial report on which the plaintiff relied on for his calculations is from a firm of consulting actuaries Gerard Jacobson. When tendering evidence on the calculation of *quantum* in respect of loss of income and future medical expenses the plaintiff called two witnesses, namely, Mr Maon Saul Jacobson (Jacobson) and Mr Morne Pretorius (Pretorius) to testify in support of the actuarial report. Jacobson, a qualified actuary and a fellow of the Institute of Actuaries, is a partner in that firm and Pretorius is a professional assistant. Jacobson is in partnership with his father Gerard Jacobson. The report in question is

compiled by Pretorius under the supervision of Jacobson and on behalf of Gerard Jacobson Consulting Actuaries..

[47] The defendants' counsel objected to the admission of the evidence of Jacobson on the basis that firstly the plaintiff's uniform rule 36 (9) notice in respect of the actuarial report referred to Gerard Jacobson as the person who will give evidence on behalf of the plaintiff and therefore Jacobson was not legible to testify in regard to that report; and secondly, the report was made by a person who is not a qualified actuary.

[48] The uniform rule 36 (9) (a) notice filed by the plaintiff in respect of the evidence of an actuary reads as follows:

> "**BE PLEASED TAKE** [sic!] **NOTICE THAT** the Plaintiff intends calling the following person to give expert evidence on his behalf at the trial of this matter:-
>
> **GERARD JACOBSON** (Consulting Actuaries)"

[49] The contention by the defendants' counsel is that she expected Gerard Jacobson, who is a partner in the firm to testify and not Jacobson. The defendants' counsel is clearly wrong, there is nowhere in the notice where it is indicated that Gerard Jacobson will give evidence on behalf of the plaintiff. The name Gerard Jacobson Consulting Actuaries as appears in the notice is not a name of a particular person but that of a firm of consulting actuaries. Jacobson is thus in my view professionally qualified to give evidence on behalf of the plaintiff. It is indeed so that the report was compiled by Pretorius who is not a qualified actuary but a professional assistant. The evidence, which is uncontroverted, is that Pretorius compiled the report under the supervision of Jacobson. My ruling therefore is that the report and the evidence of Jacobson are admissible.

DAMAGES

[50] It is not in dispute, the experts are agreed, that the plaintiff requires future medical treatment, including surgical operations for total hip replacement, arthroscopic debridement of the knee joint and total knee joint replacement. He will also require occupational therapy and other rehabilitation intervention such as physiotherapy and biokinetics for pain management and physical rehabilitation as well as special and adapted equipment and domestic assistance. All these issues were agreed to by the various experts. However, it was argued on behalf of the defendant that the court should not be bound by the joint minutes of the experts and should

exercise its discretion whether to allow the damages or not. I have already ruled on this issue raised by the defendant's counsel and made a finding that the parties are bound by what was agreed. I am prepared thus to make a ruling based on what has already been agreed. There are no special circumstances which were presented to me in order to persuade me to rule otherwise.

[51] It should be remembered that the elementary principle is that the purpose of awarding damages is to place an injured party in the same position, perhaps as nearly as possible, as he or she was before the incident which caused the injuries. The plaintiff in this instance should therefore be placed in that position.

[52] It was argued on behalf of the defendants that by awarding damages for the automatic motor vehicle would not be putting the plaintiff in the same position since he did not own a motor vehicle before he was injured. Logic dictates that now that the plaintiff is unable to walk for a long distance he can no longer walk himself to the bus stop or taxi rank where he will catch either a bus or a taxi which will take him to wherever he wants to go. This means he will have to depend on hiring either someone else's motor vehicle or calling a taxi to transport him around. If he does not have the money to do so he will end up being at the mercy of other people, or he will be home bound and this was not the situation before.

[53] I state also that the damages for accommodation should be awarded now even though the experts are of the view that they will be required in future when he has a permanent home. This may be his last home. He requires assistance now not in the future. The submission that at the moment he does not stay in a permanent home does not detract from the fact that he should now as we speak stay in a single storey house with limited steps, floor covering to be continuous and non-slip without loose rugs to ensure safety in mobility around the house. He also is in need of running hot and cold water to a bath/shower now not in the future when he has a permanent home.

[54] I have weighed the opinions of the various experts and I am satisfied that, except for a gardener – the plaintiff does not have a garden - and the additional personal care giver the plaintiff is entitled to all the future medical damages agreed to and recommended by the various experts.

[55] To the extent that no figures were provided by the experts in respect of the expenses they recommended and also taking into account the possibility of some of the aspects not being a certainty, I still have the discretion to include a contingency in the damages as a figure representing a percentage of that which would have been included if the possibility had been a certainty. Jacobson calculated the amounts which should be granted in respect of each of the expenses. The calculations and/or amounts are unchallenged and I have no reason whatsoever not to award them to the plaintiff. I am thus satisfied that these are the amounts which should be awarded.

[56] All the future medical expenses, excluding those I stated in paragraph [51] above and which were agreed to between the parties' experts should therefore be granted as *per* the calculations done by Jacobson. In my view the following damages should be granted:

a. contingency allowance for any structural adjustment to the plaintiff's house to ensure safety in mobility around his house, as well as the installation of mechanisms to bring about access to running cold and hot water to a bath or shower in the plaintiff's home in the amount of R500 000;

b. domestic assistance in the amount of R42 641;

c. post-surgery assistance in the amount of R7 893;

d. handyman in the amount of R7 873;

e. provision for an automatic motor vehicle including a contingency amount for the running costs thereof in the amount of R500 000; and

f. other future medical expenses in the amount of R649 148.

COSTS

[57] The plaintiff's counsel argued for a costs order on an attorney and client scale in case the matter is decided in the plaintiff's favour. The plaintiff is the successful party and is therefore entitled to his costs of suit which shall include the costs of all the plaintiff's expert witnesses and fees of the plaintiff's expert witnesses who testified in the trial. There are no special circumstances in this instance which call for a punitive cost order as argued by the plaintiff's counsel.

[58] Consequently I make the following order:

a. General damages are awarded to the plaintiff in the amount of R400 000;

b. Loss of income damages are awarded to the plaintiff in the amount of R438 657;

c. Future medical expenses are awarded to the plaintiff in the amount of R1 707 555;

e. The defendant is ordered to pay interest on the amounts awarded at the prescribed interest rate, from a date fourteen days after the date of this judgment to date of payment;

f. The defendant is ordered to pay the plaintiff the costs of this suit, including the costs of all of the plaintiff's expert fees and of the plaintiff's experts who testified in the trial, namely:

(i) Ms Thandi Nape (occupational therapist);

(ii) Dr M Malaka (industrial psychologist);

(iii) Mr Maon Saul Jacobson (actuary); and

(iv) Mr Morne Pretorius (professional assistant to Jacobson)

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KUBUSHI J

JUDGE OF THE SOUTH GAUTENG HIGH COURT

APPEARANCES

HEARD ON THE	**: 14 OCTOBER 2013**
DATE OF JUDGMENT	**: 26 FEBRUARY 2014**
PLAINTIFF'S COUNSEL	**: ADV G. SHAKOANE**
PLAINTIFF'S ATTORNEY	**: DENGA INCORPORATED**
RESPONDENT'S COUNSEL	**: ADV N. MAKOPO**
ESPONDENT'S ATTORNEY	**: JERRY NKELI & ASSOCIATES INC**