REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 16479/2011

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE : NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE_____ _____

SIGNATURE

In the matter between:

GERHARDUS LODEWIKUS KRUGER Plaintiff

And

ROAD ACCIDENT FUND Defendant

JUDGMENT

HULLEY, AJ

Introduction

[1] The plaintiff is 52 years of age. On 23 August 2009, when he was 47 years old, he was a passenger in a motor vehicle which was involved in a collision with an unidentified vehicle.

[2] The plaintiff suffered serious bodily injuries for which he sued the defendant, the statutory third party insurer established for the purpose of compensating persons injured as a result of the negligent or other unlawful driving of a motor vehicle.

[3] At the commencement of the trial the plaintiff initially sought payment of the amount of R3 210,000.00 together with interest thereon at the rate of 15.5% per annum calculated from fourteen days from the date of judgment to the date of payment, together with costs of suit. At the conclusion, however, the plaintiff moved for an amendment in terms of which the capital sum claimed had risen to R4 240 595,00 to bring the claim into line with the evidence led. The amendment was not opposed and was granted.

Common cause facts

[4] At the commencement of the proceedings and by agreement a list

entitled *"Common Cause Facts"* was handed up.

[5] Given its importance in determining the issues in dispute I set out the common cause facts in detail:

"1. On 23 August 2009 Plaintiff was involved in a motor vehicle collision in terms of which he suffered certain injuries.

2. On 17 September 2014 the Defendant agreed to pay the Plaintiff 100% of his proven and/or agreed damages.

3. The Defendant shall provide Plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 ("the undertaking") for the costs of the Plaintiff's future accommodation in a hospital or nursing home or treatment of, or rendering of a service or supplying of goods to him arising out the injuries sustained by the Plaintiff in the motor vehicle collision that occurred on 23 August 2009 after such costs have been incurred and upon proof thereof.

4. The only issues to be determined by the Honourable Court are the following:

4.1 Estimated past loss of earnings;

4.2 Future loss of earnings and/or earning capacity;

4.3 General damages.

5. The parties are in agreement that the facts contained in the report and opinion expressed by Dr Read contained in the Plaintiff's expert bundle is true and correct.

6. The parties are also in agreement that the facts contained in the report and opinion expressed by Dr Volkersz is true and correct.

7. The parties are also in agreement that facts contained in the report and opinion expressed by Dr Scheepers in the Defendant's expert bundle is true and correct.

8. From the Orthopaedic Surgeon's reports, the parties are in agreement that the Plaintiff suffered the following injuries:

8.1 A head injury;

8.2 A fracture of the T12 vertebrae;

8.3 A fractured dislocation of the left shoulder;

8.4 a soft tissue injury to the vertical spine;

8.5 A soft tissue injury and deep laceration to the left side of the jaw;

8.6 that the injuries and *sequellae* suffered in the accident as described in the joint minute of Prof Scheepers and Dr Volkersz is true and correct.

9. The parties are in agreement that as a result of the Defendant's orthopaedic injuries:

9.1 The plaintiff could not return to his pre-accident occupation because the work is too strenuous and physically demanding;

9.2 The Plaintiff copes with his work, but with difficulty;

9.3 The Plaintiff has suffered a severe decline in earning capacity and earns a lot less than what he did pre-accident;

9.4 The Plaintiff has suffered a 41% whole person impairment and thus qualifies for general damages.

10. The parties are in agreement that the facts contained in the report and opinion expressed by Maria Georgiou read with the findings of Keshika Naidoo together with their joint minute is true and correct.

11. The parties are in agreement that the findings in the joint minute are that the Plaintiff was unable to return to his pre-accident employment and had to see alternative employment. He is currently a service manager at Combined Motor Holdings, his work in this area being considered to be sedentary with occasional aspects of a light nature.

12. Ms Naidoo does not comment on head injuries, but defers to the Neuropsychologist.

13. The parties are agreement that the facts contained in the report and the opinion expressed by Mr P Bruce White, a Plastic and

Reconstructive Surgeon, who found the following:

13.1 Well healed hypo-pigmented scars of the angle of the left side of the jaw extending down the left side of the next onto the chest.

13.2 Diminished movement of the left shoulder.

14. The parties are in agreement that the facts contained in the report and opinion expressed by Margie Gibson is true and correct, in particular that the Plaintiff sustained a brain injury of a moderate degree with behavioural and effective changes.

15. The parties are in agreement that the facts contained in the report and opinion expressed by Dr Ranchod is true and correct, in particular that the plaintiff sustained a left axillary nerve injury, resulting in weakness of abduction and external rotation of the left shoulder.

16. The parties are in agreement that the facts contained in the report and opinion expressed by Dr Leon Fine are true and correct and according to him, the Plaintiff suffered the following injuries:

16.1 A head injury with organic brain damages;

16.2 Cerebral impairment;

16.3 Accident-traffic-travel-related anxiety disorder; and

16.4 Depression.

17. The parties are in agreement that the facts contained in the report and opinion expressed by Dr H J Edeling, a Neurosurgeon are true and correct, in particular that the Plaintiff sustained the following serious injuries:

17.1 Dislocation of left shoulder and fracture of left clavicle;

17.2 Back injury with compression fracture of T12 vertebrae;

17.3 Lacerations of both hands;

17.4 Abrasions/lacerations over left side of neck, clavicle and

upper chest wall;

17.5 Head injury with left periorbital haematoma and bleeding from left ear;

17.6 Complicated traumatic brain injury of moderate degree.

18. The parties are in agreement that the facts contained in the report and opinion expressed by Dr Deon P Roussouw, an Ear, Nose and Throat Surgeon are true and correct.

19. The parties are in agreement that the facts contained in the report and opinion expressed by Dr Odette Guy are true and correct, which states as follows:

19.1 The Plaintiff presents with a speech, language and communication profile that is characterised by mild and intermittent distortions and misarticlations, with periods of rapid speech; adequate receptive language skills; expressive language skills characterised by low productivity and mild and intermittent planning and formulation difficulties.

19.2 The aforesaid profile is suggestive of injury to the frontal areas of the brain.

19.3 The Plaintiff's current speech, language and communication profile corresponds with the findings of the experts, Dr Edeling and Ms Gibson, namely that his deficits and executive functioning are suggestive of a brain injury.

19.4 Given the time that has passed since the accident, no further improvements can be expected and his problems will remain permanent.

20. The parties are in agreement that the facts contained in the report and opinion expressed by Dr A M Kellerman, Industrial Psychiatrist are true and correct, namely:

Pre-Accident

20.1 ….

Post-Accident

20.2 The Plaintiff is now employed as a workshop supervisor in a sympathetic employment environment, earning approximately R17 000.00 per month with a R3 000.00 incentive.

20.3 Both the incentives are not always reached 100%.

21. For purposes of calculation, the parties agree that the Plaintiff shall have to retire 7 ½ years earlier due to his injuries.

22. The parties are in agreement that the calculation of Algorithm is mathematically correct."

(I have omitted all references to the expert witnesses bundle which were contained in the list.)

[6] In addition, two sets of joint minutes were handed up, one in respect of a meeting between the occupational therapists, Ms K Naidoo and Ms Sarah-Kay Trollip, and another in respect of a meeting between the orthopaedic surgeons, Dr H Volkersz and Prof A Scheepers. I was informed that the parties accepted those aspects of the joint minutes upon which the experts were in agreement and neither had any intention of leading further evidence in respect of those aspects upon which the experts disagreed.

[7] At the outset of the trial I was informed that the parties had since compiling the list of common cause facts, managed to reach agreement on the amount to be awarded in respect of general damages. In this regard, I was requested to make an order in the sum of R800 000.00.

[8] Thus, the only issue upon which I was asked to make a determination concerned the plaintiff's past and future loss of earnings.

The evidence

[9] It is perhaps apposite, before dealing with the testimony of those witnesses who were called to provide testimony, to deal with the medico-legal reports which were not in dispute. I do not intend dealing with any of the reports in great detail, and do so only as a precursor to a consideration of the loss of earnings of the plaintiff.

[10] The plaintiff obtained a medico-legal report from Dr Edeling, a neurosurgeon. In his report Dr Edeling diagnosed the plaintiff with a head injury with left peri-orbital haematoma and bleeding from the left ear. He found that the plaintiff had suffered a complicated traumatic brain injury of a moderate degree and concluded that these injuries had resulted in post-traumatic neuro-psychological and neuro- behavioural disorders with recurrent cervicogenic headaches. According to Dr Edeling the organic neurological *sequelae* of the plaintiff's brain injury had stabilised and become permanent. He stated that the plaintiff's post-traumatic headaches had become chronic and were expected to persist in variable degree in the long term, although, so he said, they should be amenable to reasonable control with appropriate treatment.

[11] A report was also obtained from Dr Fine, a psychiatrist, who concluded that the plaintiff had sustained a head injury with organic brain damage. Dr Fine considered that the plaintiff's condition had become permanent and that it was irreversible functionally.

[12] According to Ms Gibson, an educational psychologist, who provided the plaintiff with a neuro-psychological assessment, the plaintiff presented with difficulties consistent with brain injury, particularly pertaining to areas such as attention, memory and executive difficulties. These problems, she opined, were consistent with a

brain injury of a moderate degree. She felt that his condition was permanent. Ms Gibson stated that the plaintiff would, given his injuries, present with *sequelae* consisting of irascibility, aggression and irritation, that he would lack empathy and understanding, was likely to over-react and lack motivation; his actions were likely to be less considered and he would be given to impulsivity; he was likely to be error-prone and to require increased supervision, with affective support in a structured non-stressful work environment; his relationships were likely to become increasingly strained.

[13] As previously noted a joint minute was completed by the orthopaedic surgeons, Dr Volkersz and Prof Scheepers. They were in agreement that the plaintiff had sustained a fracture-dislocation of his left shoulder which was reduced without surgery, ending up with severe damage to his rotator cuff and humeral axillary nerve palsy. The doctors were in agreement that the prognosis for his left arm was poor. According to them the plaintiff sustained an anterior ridge compression fracture of the T12 vertebra with approximately 70% loss of height, which has united with a resultant kyphosis. They noted that the plaintiff suffered a spontaneous fusion at the D11 onto D12 levels and has consequently ended up with a persistently painful thoraco-lumbar spine. They agreed that the plaintiff will in future require an arthrodesis of his left shoulder. Both doctors agreed that the plaintiff would be incapable of working in his original occupation given his orthopaedic injuries.

[14] The occupational therapists, Ms Naidoo and Ms Trollip, agreed that the work previously performed by the plaintiff was of a light to medium physical nature and that he was incapable of performing that type of work post-accident. They noted that the work which he was presently performing was considered to be sedentary with

occasional aspects of a light nature and that he was capable given his injuries of performing the criteria of his current job.

[15] I turn now to consider the testimony of those witnesses who testified. The plaintiff called three witnesses, Mr Sean Singleton, the plaintiff himself and Dr Anne-Marie Kellerman. The defendant closed its case without calling any witnesses.

[16] Mr Singleton is presently employed on the Executive Committee of Combined Motor Holdings and has been in the employ of that company for the past eleven years. Combined Motor Holdings is responsible for ten dealerships and franchises, among others General Motors, Honda, Kia and MG. The company's responsibility is to procure new and used vehicles for these dealerships and franchises and to sell them to the public. It also procures and supplies parts. In addition, some branches do panel-beating.

[17] According to Mr Singleton, he has held the position on the Exco for the past six months and has some four-hundred-and-fifty people reporting to him. He was previously been the Dealer Principal at General Motors where the plaintiff worked under him as the Workshop Manager.

[18] Mr Singleton testified that he considered the plaintiff to be extremely diligent, mentally dexterous and was capable of formulating solutions to most problems without the involvement of his seniors; he was exceptionally good with clients and had a strong client following.

[19] The plaintiff's work as Workshop Manager required him to work with clients, looking after the service providers, ensuring that the work was properly carried out be technicians, assisting them if they had a problem on the motor vehicle, liaising with their factories if there

were major hiccups and ensuring that the warranty was correctly allocated and paid for and that the job itself was properly dealt with under the warranty and that the client accurately paid for services conducted. Mr Singleton testified that this was a particularly responsible job as a substantial portion of it related to ensuring good customer relations. He testified that if clients did not return, it would impact on the sales of vehicles as well as the sale of car parts. According to Mr Singleton, the plaintiff provided a sterling performance which he rated as 10/10.

[20] Mr Singleton testified that in 2009 the plaintiff left the company as he wished to start his own business. He regarded it as a huge blow to him but made it clear to the plaintiff that "the door was always open" and he was welcome to return if his own business failed. The plaintiff apparently indicated that he would give himself 18 months to succeed, failing which he would return.

[21] Mr Singleton testified that the plaintiff earned approximately R30 000.00 at the time of his departure, but he was of the view that the plaintiff could earn significantly higher, in the region of approximately R40 000.00 basic with a further commission of approximately R25 000.00 if he secured employment as a workshop manager of a larger dealership. According to him the task of workshop manager at the bigger branches entailed greater responsibility with commensurately higher earnings.

[22] Mr Singleton considered that the plaintiff would have been promoted to workshop manager at one of the bigger workshops within a period of three years had he not left. He noted however that promotion to the larger branches was dependent upon the availability of posts.

[23] He testified that the position of workshop manager at the East Rand

branch had recently become available and that five people had occupied that post in short succession. Four had failed and the most recent incumbent had held the post for a short while only.

[24] In general, said Mr Singleton, the Group preferred to promote people into positions within the larger branches from within and then fill vacancies at smaller branches, if necessary, from outside. The structure within the workshops was rigid and required an understanding of the systems of the group, and it was always preferable to promote from within.

[25] Mr Singleton stated that the plaintiff returned to him in approximately May 2010, sometime after the accident had occurred. At the time, there were no vacancies for workshop manager positions and so he re-employed the plaintiff as a foreman at Pre-Delivery Inspections (PDI), where a vacancy did exist. His intention, so he said, was to find the plaintiff a position as a workshop manager once such a position became available.

[26] The plaintiff has remained a PDI Foreman since his return. Mr Singleton testified that the plaintiff's work ability had been severely curtailed. He is now much slower, lacks the dexterity he once had, struggled physically, is short-tempered with customers and sales staff and sometimes displays a 'don't-care attitude'. The plaintiff had also become forgetful and, as a result, had been placed in a position which he described as "extremely structured". The plaintiff is now incapable of performing the tasks of a workshop manager, and there is little prospect of promotion.

[27] The cross-examination of Mr Singleton focused on the fact that the plaintiff could not have been aware of the career progression suggested by Mr Singleton. It was indicated that the plaintiff had

resigned because he was frustrated and had reached his career ceiling. Mr Singleton rejected both propositions. He testified that the plaintiff would have been aware of the possibility of taking up employment with one of the bigger branches.

[28] He was cross-examined on a statement which he had apparently made to Dr Kellerman and recorded in Dr Kellerman's medico-legal report. The statement reads "Mr Singleton opined that Mr Kruger would have been able to move to a bigger branch within five years' time". He was asked from which date that was calculated. He testified that it would have been prior to the accident.

[29] In response to questions raised by me, Mr Singleton testified that the company performed assessments on a daily basis, that score cards were kept and bonuses paid based on those assessments. His assessment of 10/10 was based upon on actual rating of the plaintiff, but he was unable to produce the performance assessment as the company had since moved from its previous premises. He also testified that he had not expressly advised the plaintiff of his ambitions for him, but that it must have been clear to the plaintiff that he favoured him.

[30] The plaintiff testified that he was a Service Manager at Combined Motor Holdings until the end of 2008, earning a salary of approximately R34 000.00. He left the company in December 2008 in order to start up a business with his son in vehicle maintenance. He had given himself a deadline of approximately 12 to18 months to succeed after which, he would consider returning. He believed that he was capable of earning approximately R50 000.00 to R60 000.00 per month and that if he did not make that amount within the proposed time frames, he would return to Combined Motor Holdings.

When asked why he had set himself a target of approximately R50 000.00 to R60 000.00 per month, the plaintiff testified that that is what service managers in the bigger branches earned and unless he was capable of earning that amount of money, it would make no sense for him to continue in his own business.

[31] The plaintiff was quite confident that he would have earned approximately R50 000.00 to R60 000.00 per month had he remained with Combined Motor Holdings given his performance prior to his resignation and his relationship with Mr Singleton.

[32] The plaintiff testified that he earned approximately R20 000.00 per month at his own business. He did not have any paperwork to prove it because the business had since closed down and that he was not aware of what had become of the paperwork.

[33] After the business failed the plaintiff returned to take up Mr Singleton on his offer.

[34] The plaintiff was employed at East Rand General Motors working under a Ms Botha. She left the company towards the end of 2010/beginning of 2011. The plaintiff testified that he was struggling at present, was unable to cope in the position, had temper outbursts and was physically incapable of moving heavy parts.

[35] Under cross-examination the plaintiff testified that he had commenced employment, after his return from the accident, with Combined Motor Holdings as a foreman. He testified that he had not been promoted. On the contrary, he had been demoted from the position of Service Foreman to that of PDI Manager. The PDI Manager post, he said, was supervisory. He testified that he had not received any increases since taking up employment once again with

Combined Motor Holdings.

[36] Asked why he had resigned if he had the promising career prospects he testified that in his view and with his experience he was satisfied that he would be able to earn more in his own business. He was aware that a number of his clients would follow him and many of them in fact did. According to the plaintiff, he had set himself a target of one-and-a-half years in which to achieve R50 000.00 per month. He testified that prior to the accident, things were looking promising, but that the accident intervened and he was entirely incapable of performing the work which he had previously done.

[37] Dr Kellerman testified on her report. She confirmed its contents and its correctness subject to what she described as “typos”. Before considering her testimony, I propose considering the contents of her report.

[38] In her report Dr Kellerman set out the plaintiff’s educational and work history. According to her the plaintiff obtained a standard 8 certificate in 1978 at Ventersdorp High School. From 1979 to 2001 he was employed at Tommy Martin Motors. In 2001 he took up employment with Rand Delta, but the company closed down and he moved to Combined Motor Holdings in 2003 where he remained until 2008. He left to start his own business, Turbo Evolution. He returned to Combined Motor Holdings in May 2010 after the accident. Much of this information was not tendered by the plaintiff when he testified.

[39] Dr Kellerman testified that there was no possibility of the plaintiff progressing in his current position and that if he lost his present employment, which she regarded as sympathetic, it would be difficult if not impossible for him to find work elsewhere. She testified that in

his present position, the reason the plaintiff's salary was not reduced was because of the Labour Relations Act which prohibited employers from effecting reductions. She testified that Mr Singleton realised that the plaintiff was even slower than he had initially thought.

[40] Under cross-examination, Dr Kellerman was asked when an employee would normally reach his/her career ceiling. She testified that she did not believe in a career ceiling, that it could differ from person to person and in some instances could be well after retirement age. She testified that a person's ceiling would depend upon his/her performance, the type of position held and so forth.

[41] That, then, was the totality of evidence.

Assessment

[42] The task falls to me to determine the plaintiff's past and future loss of earnings.

[43] The fundamental principle of compensation in respect of claims based on the *lex Aquilia* is that the plaintiff must be placed, insofar as this can be achieved by the payment of a monetary sum, in the same position she would have been had the delict not been committed.[1]

[44] The *onus* is on the plaintiff to prove that he has suffered a loss and what that loss is. A court is bound to determine the extent of damages to the best of its ability on the evidence available to it. However, it is not bound to do so where the plaintiff fails to adduce

[1] *Hulley v. Cox* 1923 AD 234 at 244

evidence that was available to him.[2]

[45] The 'critical' question in each instance is whether the plaintiff has produced all the evidence she could reasonably be expected to have produced.[3] The reason for non-suiting a plaintiff who fails to adduce the best available evidence of the damages she has suffered has been fully set out by Van Winsen AJ:[4]

> 'Die rede vir so 'n voorbehoud is dan ook ooglopend. Word 'n hof onder 'n verpligting gestel om te poog om op die grondslag van onvolledige getuienis 'n berekening van skade te maak in die geval waar daar inderdaad afdoende of dan wel vollediger getuienis van skade beskikbaar is, kan dit *ex post facto* blyk dat die hof se berekenings nie met die werklikhede strook nie en 'n onreg kan maklik die een of die ander van die partye aangedoen word. Word die weerhouding van beskikbare getuienis ten opsigte van skade eenmaal deur die howe op dié wyse geoorloof kan dit maklik gebeur dat 'n party doelbewus getuienis weerhou in die hoop dat die hof se skadeberekening meer in sy guns sal uitval as wat die geval sou gewees het, indien hy die beskikbare getuienis wel voor die hof geplaas het. Die alreeds moeilike taak wat op 'n hof berus in verband met skadebepaling sou daardeur oneindig moeiliker gemaak kon word, en die faktore wat meewerk tot die skep van onsekerheid by sodanige bepaling sou vermenigvuldig word. Die omstandighede van die onderhawige saak dien juis as voorbeeld van die onsekerheid wat geskep word waar beskikbare getuienis nie aangevoer word nie. In hierdie saak staan dit vas dat groter skade as gevolg van die tweede as van die eerste botsing aan appellant se voertuig veroorsaak is en dat as gevolg van altwee botsings saam sy voertuig tans 'n wrak is en 'n waardevermindering van R550 ondergaan het. Uit die getuienis is dit onmoontlik om met enige mate van sekerheid te sê in watter verhouding die twee ongelukke tot die algehele skade bygedra het. Uit die getuienis is dit nie af te lei waaraan dit toe te skrywe is dat die voertuig vandag as 'n wrak beskou word nie. Dit mag daaraan toe te skrywe wees dat sy onderstel onherstelbaar beskadig is. Is dit wel die geval dan volg dit nie noodwendig dat die groter skade aan die bak, wat as

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[2] *Hersman v. Shapiro & Co.* 1926 TPD 367 at 379
[3] *Esso Standard SA (Pty) Ltd v. Katz* 1981 (1) SA 964 (A) at 970H
[4] *Mkwanazi v. Van der Merwe & Another* 1970 (1) SA 609 (A) at 632A-H

> gevolg van die tweede botsing veroorsaak is, verantwoordelik is vir die onherstelbare toestand van die voertuig nie. Die hof kom dan voor die probleem te staan dat hy hieraangaande moet raai terwyl uit die mond van appellant se prokureur verneem moet word dat hy in besit is van getuienis wat sal aandui 'presies van welke bedrag skade ongeveer deur welke botsing veroorsaak is'. Dit kan nie van 'n hof geverg word nie om hom met raaiwerk of bespiegelinge oor moontlikhede besig te hou wanneer daar tasbare en presiese getuienis aangaande die tersaaklike ondersoek inderdaad beskikbaar is. Ook hierdie betoog dus gaan myns insiens nie op nie.'

[46] To discharge the *onus* which is upon him the plaintiff must establish that the damages for which he contends is more probable than not.

[47] In determining what is probable a court must have regard to a number of factors. These include the inherent probabilities of the respective versions, the credibility of witnesses and their reliability.[5]

[48] Probability is determined from the perspective of the *judex facti*.[6] Where a particular assertion is inherently improbable, "belief is slow and difficult".[7] Interestingly, theories on the determination of probabilities are more commonly encountered in the field of philosophy[8] and statistics[9] than they are in law. Ultimately, however, our courts must borrow from these other fields if they are to retain any credibility.[10]

[49] The credibility of witnesses is determined having regard to factors such as general veracity or candour and demeanour in the witness

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[5] *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA); H C Nicholas, "Credibility of Witnesses" (1985) 102 *SALJ* 32
[6] Nicholas, *op cit*, p. 43
[7] Nicholas, *op cit*, p. 42
[8] D. H. Mellor, *Probability: A Philosophical Introduction* (Routledge, 2005)
[9] J. Y. Halpern, *Reasoning about Uncertainty* (Massuchusetts Institute of Technology Press, 2005)
[10] D. T. Zeffertt *et al*, *The South African Law of Evidence* (Lexis Nexis Butterworths, 2003), especially at Chapters 2 to 4

box, internal contradictions in a witness's own evidence, external contradictions with what was pleaded or was put on his behalf or with extracurial statements made by him, the probability or improbability of aspects of his version and the calibre and cogency of his performance relative to that of other witnesses, partiality or bias.[11]

[50] The reliability of witnesses is considered primarily having regard to the opportunities he had to experience or observe the event in question.[12]

[51] A trier of fact, having applied all the above factors, must ultimately come to a conclusion as to whether the version contended for by the party bearing the *onus* is more probable than not.

[52] With these basic principles in mind I turn to consider the facts of this case.

[53] The plaintiff presently has presented a salary slip which shows that he earns a salary of approximately R20 500.00 per month. This consists of a basic salary of R17 500.00 per month with commission of approximately R3 000.00 per month. Making allowance for fluctuations in the commission earned by him, I accept that the plaintiff's present earnings are R20 000.00 per month.

[54] During his first stint at Combined Motor Holdings, the plaintiff earned a salary of R30 424.00 per month made up of a basic salary of R18 900.00 per month, a bonus of R4 000.00 per month and a management commission of R7 524.00 per month.

[55] Given these facts, it is not difficult to conceive that the plaintiff, upon

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[11] *Stellenbosch Farmers' Winery v. Martell*, *supra*, at 14J – 15B
[12] *Stellenbosch Farmers' Winery v. Martell*, *supra*, at 15B – C

his return would have taken approximately 1½ years to reach the level of R35 000,00 per month. Upon his return to Combined Motor Holdings, the plaintiff was absorbed into the only available position, that of Service Foreman. He testified that he was subsequently demoted to the position of PDI Manager, without any financial impact. At the time that the plaintiff was re-employed, Mr Singleton was largely unaware of the plaintiff's injuries. He testified that the plaintiff had informed him that he had been involved in an accident, but he (Mr Singleton) did not appreciate the severity of the injuries. In these circumstances, I must accept that the plaintiff's injuries played no part in the salary offered to him in the new position.

[56] Mr Singleton indicated that he wished to return the plaintiff to his original post as Workshop Manager, provided the post became available. No evidence was led as to when that might be. For the purpose of determining the plaintiff's loss and having regard to the testimony regarding the availability of the post in the East Rand dealership, I have assumed that it would have taken the plaintiff approximately three years for such a post to become available.

[57] As things presently stand the plaintiff has not received any increases during his second stint with Combined Motor Holdings. In my view, but for the accident, he would, in all likelihood, have received increases in his post as Service Foreman for the period to date. The fact that he will not receive such increases is attributable entirely to the injuries sustained in the accident. The difficulty that I am faced with, however, is that I do not have information on how his salary would have increased during this period, but for his injuries. In the circumstances, I have accepted that there was a loss but that it has not been proved.

[58] I am satisfied that once the plaintiff was absorbed into the post of Workshop Foreman, on the same level that he occupied prior to leaving Combined Motor Holdings, his salary would have been no less than that which he earned prior to his departure. In all likelihood it would have been higher, but once again there was no evidence of what it would have been. Thereafter his salary would have increased in line with inflation.

[59] I have considered the evidence that was led to demonstrate that the plaintiff would, in fact, have earned substantially more in a position as Workshop Manager of a large dealership. What is clear is that for a period of 26 years the plaintiff managed to work his way up in the field of motor mechanics. Having obtained his standard 8 certificate, he took up employment with Tommy Martin Motors, apparently as an apprentice motor mechanic. He completed his trade examinations and then worked as a motor mechanic.

[60] Ultimately, he progressed to the level of Workshop Manager for a medium-size dealership with Combined Motor Holdings where he earned a salary of approximately R35 000.00 per month.

[61] The plaintiff seeks to persuade me that his salary would have increased to R65 000.00 per month within the space of three years of his return to Combined Motor Holdings had it not been for the accident or that his income would have increased to that level within three years had he not left to seek greener pastures elsewhere.

[62] The amount of R65 000.00 per month represents an increase of approximately 86% on the salary earned by the plaintiff at the time of his departure. The proposition is so startling that it requires particularly cogent and persuasive evidence. In my view, such proof was not presented.

[63] In any event, the proposition is dependent upon the plaintiff's success in the post of Workshop Manager for a large dealership. Elevation to that post may well have been a poisoned chalice for the plaintiff. Mr Singleton testified that where the managers did not perform, they were dismissed. (I assume that this would have been done in accordance with the Labour Relations Act.)

[64] In the present case it is clear from the evidence of Mr Singleton that a series of managers had passed through that position at East Rand Motors. When appointing these mangers the company must have been satisfied that they were up to the task. Yet they ultimately failed. The plaintiff may, likewise, have failed in that position. I am, for instance, completely oblivious as to how the plaintiff stacked up relative to the four other persons who had proved incapable of performing the functions of the Workshop Manager of a large dealership. Why would he have succeeded in circumstances where they had all failed? No answer was provided to this. In my view, the plaintiff failed to establish that he would have earned at the level of R65 000.00 per month.

[65] Having said that, it appears to my mind that irrespective of what income the plaintiff would have earned in his uninjured state, such income was in most instances at least greater than the loss imposed in terms of the capping under Section 17(4)(c) of the Road Accident Fund Act.

[66] Section 17 of the Road Accident Fund Act, 56 of 1996 provides, insofar as is relevant for present purposes:

> "(4) Where a claim for compensation under subsection (1) –
>
> (a) …

> (c) includes a claim for loss of income or support, the annual loss, irrespective of the actual loss, shall be proportionately calculated to an amount not exceeding …."

[67] The amounts referred to in sub-paragraph (c) are adjusted quarterly by the Fund by notice in the Government Gazette. This is to take account of inflation. The amount applicable to the plaintiff's claim is R160 000.00 per annum (or approximately R13 333.33 per month). Where the loss is greater than R13 333.33 per month, it would have no effect on the ultimate award.

[68] Against this background, I called for an actuarial report to be provided on the plaintiff's loss, having regard to certain assumptions.

[69] In so far as contingencies are concerned, I have accepted that contingency deductions of approximately 0.5% per annum should be applied for both past and future losses in respect of pre-morbidity. I have, however, accepted that a contingency deduction of 20% per annum should be applied to the post-morbidity future loss scenario. This is to take account of the fact that the plaintiff's present employment is sympathetic and should he lose it, he may be rendered unemployable. Because the date is so close to the agreed date of retirement (57 ½ years old), I have not applied a larger contingency deduction.

[70] In the circumstances, and based upon the actuarial calculations I have assessed the plaintiff's loss of earnings as follows:

70.1	Net past loss of earnings	R	315 027.00
70.2	Net future loss of earnings	R	1 996 277.00
70.3	Total net loss of earnings	R	2 311 304.00

[71] To this must be added the amount of R800 000.00 agreed upon by the parties in respect of general damages.

CONCLUSION

[72] Having regard to the aforesaid, I make the following order:

72.1 The defendant shall to pay the plaintiff the amount of R3 111 304.00.

72.2 Interest on the aforesaid amount at the rate of 15.5% per annum, calculated from fourteen days from the date of judgment to the date of payment.

72.3 The defendant shall pay the plaintiff's costs.

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G. I. HULLEY

Acting Judge

APPEARANCES:

PLAINTIFF:	D J Combrink
	Instructed by Renier Van Rensburg Inc.
RESPONDENTS:	T J Mosenyehi
	Instructed by Sishi Inc.
DATE OF HEARING:	22 September 2014
DATE OF JUDGMENT:	21 November 2014