IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED

DATE **SIGNATURE**

CASE NO: A913/2014

COURT *A QUO* NO: 456/2013

DATE: 30/6/2016

IN THE MATTER BETWEEN

D K APPELLANT/PLAINTIFF *A QUO*

AND

THE ROAD ACCIDENT FUND RESPONDENT/DEFENDANT *A QUO*

JUDGMENT

PRINSLOO, J

[1] This is a typical claim for compensation for damages flowing from injuries sustained in a motor collision which, in this case, occurred on 23 July 2011.

Brief introduction

[2] From the record, it appears that the trial came before our brother Mavundla on 3 June 2014.

On that occasion, the question of liability was settled (100% in favour of the appellant) and all the heads of damages normally to be found in claims of this nature were also settled with the exception of the claim for loss of earnings.

[3] The trial involving determination of the sole issue of what award, if any, should be made to the appellant, as plaintiff, for loss of earnings, came before our sister Kubushi (the learned Judge *a quo* for present purposes) on 18 August 2014.

[4] On 23 September 2014 the learned Judge handed down the written judgment in which she ruled that no award should be granted in respect of loss of earnings and the claim for that alleged loss was dismissed with costs.

[5] On 19 November 2014, the learned Judge granted leave to appeal to the Full Court of this Division. This appeal came before us on 15 June 2016.

Brief remarks about the curtailment of proceedings, admissions made and evidence considered during the trial

[6] During a pre-trial conference held on 28 May 2014, the following was minuted:

"5.1.2 The defendant's attorney has delivered no expert reports on behalf of the defendant to date hereof.

5.1.3 The defendant was requested to admit the contents of the reports of the plaintiff's experts in the fields of expertise where the defendant has not delivered reports of opposing experts.

ANSWER: The defendant's attorney indicated that the defendant admits the contents of the reports of the plaintiff's experts."

[7] As a result of these admissions, the medico-legal reports of the following experts, engaged by the appellant (as plaintiff) were presented to the court and considered for purposes of the judgment:

Dr Birrell (orthopaedic surgeon)

Dr Truter (clinical psychologist)

Dr Botha (specialist physician)

Ms Heyns (occupational therapist)

Ms E Noble (industrial psychologist)

Dr Van Heerden (urologist)

Mr G Whittaker (actuary).

[8] No *viva voce* evidence was presented to the court and the learned Judge was addressed at length by the two opposing counsel, Mr Grobler and Mr Hattingh.

[9] On behalf of the respondent submissions were made about purported contradictory observations made by the experts in their medico-legal reports. On a general reading of the reports, I could find no material observations by the experts which could be

described as being of such a contradictory nature that it may redound to the prejudice of the appellant in the presentation of his case. In the main, the "contradictions" which I detected, had to do with issues such a sick leave, paid and unpaid, dates when the appellant returned to work after lengthy periods of absence and related issues. These "contradictions" such as they may have been, were, in my view, adequately investigated and addressed by Ms Noble, the industrial psychologist, who, by the nature of her report, had to consider all the medico-legal reports, identify any "contradictions" and clarify the material uncertainties by telephonic consultations with the erstwhile employers of the appellant.

[10] In this regard, the learned Judge said the following in her judgment:

> "[13] According to the defendant's counsel, the plaintiff failed to discharge the burden of proof, on a balance of probabilities, of the manifestation of any loss and the quantification thereof, due to the vastly contradictory nature of the collateral information so admitted and as contained in the various reports. Counsel's submission is that the plaintiff should have presented *viva voce* evidence to cure the discrepancies and without doing so, counsel's contention is that plaintiff failed to prove his past and future loss of income. In particular, the evidence in respect of the actuarial report, which the defendant did not admit, remains not proved without the oral evidence of the actuary. It was therefore, according to counsel, imperative for the actuary to come and prove his calculations for the quantification of the loss.
>
> [14] The submission by the plaintiff's counsel that the defendant's admission of the reports limits the issues which a court is required to consider, is

correct. As such, where a court is not required to consider and decide a particular issue it means that it is not necessary for either party to present any further evidence on that particular issue. Consequently, I rule that, except for the actuarial there was no need for the plaintiff to have led any *viva voce* evidence either on his own or that of the experts who compiled the reports."

[11] As to the presentation of the report of the actuary, Mr Whittaker, the following was recorded in the pre-trial minute:

"5.1.4 The defendant was requested to admit the actuarial principles utilised in the actuarial calculations of Mr Whittaker and to confirm that it would not be necessary to call Mr Whittaker during the trial to give *viva voce* evidence in substantiation of his calculations?

ANSWER: The defendant's attorney undertook to revert before 16:30 on 30 May 2014."

[12] It is common cause that the defendant's attorney never "reverted". It appears from submissions made by counsel on behalf of the appellant, during the trial, that there was never any indication by the respondent/defendant that the methods employed by the actuary, and the correctness of his calculations would be challenged. As I mentioned, the respondent did not consult an actuary and, on my reading of the record, there was no rebuttal of the actuarial methods adopted by Mr Whittaker neither were the correctness of his calculations challenged in any way. It is, in my view, a common experience that the assumptions made by an actuary may be challenged. These are the assumptions on which the calculations are based. In the present case, the assumptions

flow from the uncontested evidence of Ms Noble who also incorporated the uncontested evidence of the other experts in her report.

[13] Against this background, I see no reason why, in the event of a finding that the appellant did suffer a loss of income or a loss of earning capacity as a result of the *sequelae* of the injuries sustained in the collision, the calculations of actuary Whittaker cannot be taken into account in order to determine a just and reasonable and realistic amount to represent an award for those damages.

[14] This subject received some attention in the well-known case of *Southern Insurance Association v Bailey NO* 1984 1 SA 98. It is convenient to quote the following passage which appears at 113F-114E:

> "The second attack on the judgment of the trial court was that an actuarial computation was inappropriate in the present case for the reason that it was based on assumptions and hypotheses so speculative, so conjectural, that it did not afford any sound guide to the damages which should be awarded.
>
> Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.
>
> It has open to it two possible approaches.

One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guess-work, a blind plunge into the unknown.

The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

It is manifest that either approach involves guess-work to a greater or lesser extent. But the Court cannot for this reason adopt a *non possumus* attitude and make no award. See *Hersman v Shapiro and Company* 1926 TPD 367 at 379 per Stratford J:

'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages.'

And in *Anthony and Another v Cape Town Municipality* 1967 4 SA 445 (A) Holmes JA is reported as saying at 451B-C:

'I therefore turn to the assessment of damages. When it comes to scanning the uncertain future, the Court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not

> inappropriately be described as an informed guess, for no better system has yet been devised for assessing general damages for future loss ...'
>
> In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an 'informed guess', it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's 'gut feeling' (to use the words of appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess ..."

It should be added that in *Bailey*, where the court opted for an actuarial calculation in order to determine the loss, subject, of course, to some modifications, the injured child, who rejoiced in the name of Danderine, was only 2 years old when the collision occurred.

In the present matter, of course, the facts and details, on the uncontested evidence, on the strength of which the actuarial assumptions could be made, are far more settled than was the case with Danderine: the appellant was already 43 years old when the collision occurred, and his career path and other particulars were determinable with relative ease, subject to some areas of uncertainty. Consequently, this is, in my view, a clear case where the actuarial calculations can be applied in order to determine an award, if it were to be found that the appellant did, indeed, suffer a loss of income or a loss of earning capacity.

Brief remarks about the medico-legal evidence, with emphasis on the evidence of Ms Esmé Noble, industrial psychologist, who incorporated all the medico-legal reports for purposes of her own assessment

[15] I turn to a brief summary of the medico-legal evidence, and my remarks will be confined to what appears to me to be of direct relevance for purposes of assessing the loss of earnings or earning capacity.

(i) **Dr D A (Tony) Birrell, orthopaedic surgeon.**

[16] Dr Birrell confirmed the fracture of the right acetabulum, which was sustained in the collision. The acetabulum is the socket of the hip-bone, with which the head of the femur articulates. There was also a fracture of the inferior pubic ramus. On 29 July 2011, some six days after the collision, an open reduction and internal fixation of the right acetabulum fracture was performed. A soft tissue injury of the left hand was also placed in a splint. The appellant was immobilised with two crutches for six months. The appellant also complained of lower back pain.

At the time of the injury, the appellant had been a bus driver in the employ of the Pretoria municipality for about thirteen years. He also ran a concomitant panel-beating and spray-painting business on the side. This he started before he became employed as a bus driver. He was in permanent employment in that capacity.

As to his past medical history, he had been treated for hypertension and he suffered from ischaemic heart disease. Prior to the collision, in December 2010, he had received a coronary by-pass graft operation.

After the collision he experienced erectile dysfunction and in general, his level of activity became much reduced. There was a significant change to his normal lifestyle.

It appeared that the back ache experienced by the appellant had to do with the fact that he was walking with a limp and it was also related to the fractured hip.

As to the appellant's work capacity, he told Dr Birrell that before the injury, he attended to his panel-beating work from 05:00 to 08:00 and he used to do the shift as a bus driver from 14:00 to 18:00, excluding Saturdays and Sundays.

When he saw the doctor in January 2013, some 18 months after the collision, he said that he was no longer able to do the physical work of a panel-beater but attended to some administrative work in that business and also at the Pretoria municipality because he had not yet, by then, returned to bus driving. He also lost his allowances, so that his remuneration was at a lower level. He told the doctor that he was unable to drive a bus.

[17] The following passage from Dr Birrell's report, when he deals with the X-ray findings, is, in my view, of particular importance for present purposes:

> "I remain with my view that the patient has sustained a serious injury as a result of the accident, ie he qualifies under the Narrative Test as a serious injury. Whilst he only reaches 11% because of his acetabular fracture and the soft tissue injury to the lumbar spine, noting that 90%, at least, of pelvic fractured patients have concomitant lumber symptoms, this right acetabular

> injury still represents a serious problem for this patient. He has considerable loss of movement in the right hip. The fact that his right hip has diminished movement and pain means he can no longer work as a bus driver and this also hinders his work to some extent, as I will discuss shortly, relating to his panel-beating business." (Emphasis added.)

The fact that the injuries sustained in the collision rendered the appellant incapable of continuing with his work as a bus driver which was his primary profession, apart from the part-time panel-beating business, must, in my view, point to a clear loss of earning capacity sustained by the appellant. I add that he appears to have been working as a bus driver for most of his career, because, according to his work history analysed by Ms Noble, he also worked for the Johannesburg metro bus company as a bus driver for 15 years between April 1989 and April 1995 (the dates could be wrong as the period does not come to fifteen years).

I add the following passage from Dr Birrell's report:

> "In his work as a bus driver he is 100% disabled and this is permanent. In his panel-beating work I would estimate again that a period of six months of sick leave would have been ample and, indeed, this is fairly liberal. Here I would estimate that in an administrative type position, ie doing quotes, he has a loss of work capacity at present of 10%. He is a good candidate for a total hip replacement and this would push his loss of work capacity up 15%."

I add that Dr Birrell was asked to furnish an addendum to his earlier report dealing with the appellant's retirement age/loss of work capacity. The addendum is dated

13 February 2014 about a year after the appellant resigned from the City Council which resignation came after Dr Birrell's first report.

The following remarks are made by Dr Birrell:

> "Concerning this patient's retirement, in fact, he took a so-called package and not a pension. I cannot support his resignation at the City Council of Tshwane in February 2013 due to the accident! He was already on light duty. He had the benefit of a medical aid and he should have sought orthopaedic advice as to the possible removal of the internal fixation from the acetabulum or even the possibility of a total hip replacement or receiving more intense conservative therapy.
>
> I find no reason at all to support medically this patient's resignation.
>
> I have already stated previously that his overweight status and poor cardiac history will force him into early retirement before any *sequelae* of the accident."

As to the retirement from the panel-beating business the doctor said:

> "I cannot find that this patient is justified in 'retiring' because of the accident. He stated that he only occasionally supervises. I understand his son and daughter are running the business, so possibly his services are not required, but I gather he is available to supervise when needed.

> There is no loss of note that he sustained as a supervisor because of the accident."

(ii) **Dr Izak J van Heerden, urologist**.

[18] The doctor dealt, *inter alia*, with the erectile dysfunction which he pointed out was an early sign of cardio-vascular disease. There were no other urological implications to the injury, and from a urological view point his life expectancy "should be normal".

(iii) **Dr Kobus Truter, clinical psychologist**.

[19] Referring to the July 2011 collision and the injuries sustained, the doctor concluded that the appellant suffers from an anxiety disorder. He ought to benefit from certain proposed psychological treatment.

> "He presents minor symptoms of a depressed mood, which are unfortunately partially entwined with his anxiety as well as his pain and limitations. Some of these symptoms may therefore prove to be resistant to change."

(iv) **Dr A P J Botha, specialist physician.**

[20] The doctor dealt with the medical history of the appellant, including certain "positive prognostic factors" such as the fact that he had successful by-pass surgery, stopped smoking and was on treatment for ischaemic heart disease. Certain "negative factors" include that he is significantly overweight bordering on morbid obesity, there could be underlying glucose intolerance or diabetes, he is not on cholesterol-lowering therapy and has a low-normal left ventricular ejection fraction.

Against this background, and according to certain guide-lines consulted by the doctor, he came to the conclusion that "based on the current clinical findings and risk profile, he would most likely not have been considered fit to work as a bus driver beyond the age of 55". I add that this was taken into account by Actuary Whittaker when preparing his calculations.

[21] As to the panel-beating work, the doctor said the following:

> "When one considers the inevitable progression of the atherosclerosis and worsening obesity, I estimate that he would not have been physically capable of doing administrative work and performing the other duties required of panel-beating work such as doing quotes after the age of about 60 years."

Again, I add that the actuary was instructed to work on a pre-trauma scenario of an overall employment career (bus driver and panel-beater) which would end at age 55.

[22] The doctor also indicated that in the context of early retirement, the life expectancy of the appellant also had to be considered "as these two aspects are usually proportionally truncated". The doctor felt that there was a 10 year shorter life expectancy.

(v) **Nicola Heyns, occupational therapist.**

[23] The following passage from the report of Ms Heyns appears to me to be of relevance for present purposes:

> "Mr K thus does not meet the frequent sitting demands of his job as bus driver nor the frequent standing and stooping and the occasional low work demands of his job as spray-painter at the Jay Dean Auto Body (family owned) due to

accident-related *sequelae*. This justifies his resignation as bus driver after the accident and that he has been unable to work as a spray-painter due to injuries sustained in the accident. Mr K'Ss son has since taken over the managerial responsibilities at Jay Dean Auto Body, while Mr K has been accommodated in a flexible administrative/driver/supervisor position in this sympathetic work environment."

[24] Ms Heyns also remarks that the appellant would be able to continue to assist in an administrative, supervising and/or managerial capacity if accommodated in his job within his residual work capacity on an ongoing basis even after a total right hip replacement. She felt that the psychological *sequelae* reported on by Dr Truter, should the depression worsen, could contribute to fluctuation in performance within a work place, contributing to his vulnerability as employee.

[25] She expressed the view that having regard to his pre-existing medical conditions, the appellant is now a vulnerable employee in the open labour market and his job options and occupational potential have been curtailed because of injuries sustained in the accident. She expressed the view that the appellant has sustained long term functional impairment as a result of the accident which "impacts significantly on his occupational performance".

[26] Against this background, I repeat my earlier conclusion that, on the probabilities, the appellant has suffered a loss of earning capacity/future loss of earnings due to the *sequelae* of the injuries sustained in the collision.

(vi) **Ms Esmé Noble, industrial psychologist.**

[27] Ms Noble prepared a very comprehensive report, dealing with the work history of the appellant, his personal history, including details of his immediate family, academical background and so on. In the latter regard, I have to add that he only went to school up to Grade 11 (which he failed) and has no other formal qualifications. He is also not a qualified panel-beater.

[28] Importantly, details of the appellant's salary which he earned as a bus driver including the 13th cheque and other allowances as well as overtime payments and a housing allowance, medical plan and pension fund were properly investigated by Ms Noble and recorded by her after telephonic discussions with the Human Resources officer of the Tshwane municipality, Mr Stefan Roos. She also had a discussion with the driver's supervisor, Mr J Ramalepa. All this information was properly conveyed to Actuary Whittaker.

[29] As I already indicated, Ms Noble dealt comprehensively with the undisputed medical evidence. Where I have already attempted to perform a similar exercise, I find it unnecessary to embark upon unnecessary repetition.

[30] True to her mandate as an industrial psychologist, Ms Noble then offered certain guidelines as to the projected career paths of the appellant into the future, both but for the injuries sustained in the collision and, secondly, in view thereof:

- **Projected career path but for the collision.**

  Ms Noble dealt with the opinion of Dr Botha, to which I have referred, and concluded that the appellant would in any event, on the probabilities, not have

worked for the City of Tshwane as a bus driver beyond the age of 55 whereafter he would have been forced to go on early retirement without penalty ("vervroegde aftrede sonder penalisasie"). These details she cleared with Mr Roos, the Human Resources Manager. She obtained the exact salary figures, as I have indicated, for the year 2010/2011 which she postulated would have to be adjusted in accordance with the Consumer Price Index for purposes of this calculation. She obtained collateral information in the form of a salary advice and, in consultation with Mr Roos, recorded all the salary details including allowances and so on to which I have referred.

Ms Noble then postulated that after the early retirement the appellant would have continued with his involvement with the family panel-beating business and, on the probabilities, the son would have taken over the business in due course. The appellant would then have carried on with his administrative contributions up to the age of 60 years as recommended by Dr Botha. As I indicated earlier, the actuary was instructed to base his calculations on a retirement age of 55.

It should be added, that Ms Noble advised that the projected earnings of the appellant from this family business could be determined by a forensic auditor. It appears from an addendum report of Ms Noble, dated 19 May 2014, that the forensic auditor consulted by the appellant's legal representatives found that, on the available information, he was unable to determine the required details of the projected earnings. As an alternative approach, Ms Noble advised that the loss may be equated to the expense which the appellant would have to incur by

employing another person to do the work which the appellant would have been able to do, up to age 55, but for the injuries sustained. Ms Noble puts it as follows:

> "Soos in die skrywer se eerste verslag genoem is sy enigste kans op 'n inkomste uit self-emplojering en sou hy iemand moes aanstel om die spuitverfwerk te verrig wat klaarblyklik voorheen deur hom verrig is. Sy voorafbestaande obesiteit en mediese kondisie in ag genome is die skrywer van mening dat 'n jonger persoon meer produktief sou/sal wees as wat vir hom moontlik sou/sal wees en sal die koste aan 'n ongekwalifiseerde spuitverwer verdeel moet word na gelang van die persentasie toegeken om sy inset te vervang, en wat die persoon addisioneel sal kan uitsit.
>
> Aangesien mnr K self nie 'n gekwalifiseerde spuitverwer is nie maar oor die nodige vaardighede en ondervinding beskik om die werk te kan verrig, word markverwante basiese salarisse vir geskoolde operateurs (nie-gekwalifiseerde ambagsman) vir kwantifiserings- doeleindes aanbeveel synde die botsing tot gevolg gehad het dat hy nie meer as spuitverwer kan werk nie. Aangesien dit 'n klein werkswinkel is maar hy 'n mededingende salaris sal moet betaal om 'n goeie standaard aanstelling te maak, en die persoon te behou, word die onderste kwartiel basiese salaris vir kwantifiseringsdoeleindes aanbeveel."

In this regard, the salary for such a replacement unqualified panel-beater was then fixed by Ms Noble at the Paterson B3 level on the lowest quartile. This

information was then conveyed to Actuary Whittaker who said the following in his report:

> "On the basis of an addendum report by Ms Noble dated 19 May 2014, we have determined Mr K'Ss loss from the Auto Body business as being equal to the cost of an assistant."

I add that it is trite that there is no reason in principle why, in an appropriate case, the cost of employing a substitute should not form the basis of a claim for damages arising from a plaintiff's inability to carry on his pre-collision trade or profession – see *Terblanche v Minister of Safety and Security* 2016 2 SA 109 at 113E-H and the case there mentioned, notably *President Insurance Co Ltd v Mathews* 1992 1 SA 1 (A) at 5E-G.

- **Projected career path having regard to the accident**

  Based on all the salary details and allowances applicable to the appellant's earnings as a bus driver, the actuary then calculated the loss of earnings from the date that the appellant resigned, namely 6 August 2012 until age 55. From 1 July 2014, provision was made for inflationary increases, concisely described in paragraph 3.2.1 of the actuarial report, until retirement age at 55.

[31] As to the loss of earnings from the Auto Body business, this was determined from the date of the accident until age 55 on the basis as I have indicated, that the loss from the Auto Body business would be equal to the cost of the assistant, employed at the relevant Paterson level as advised by Ms Noble. Of course, Ms Noble's evidence is not in dispute.

(vii) **Mr Gregory Whittaker, consulting actuary**.

[32] I have dealt with most of the relevant aspects of the actuary's report.

[33] In addition, it can be stated that income tax was taken into account at a maximum marginal rate of 40% and further assumptions with regard to inflation, net discount rate and taxation appear from the report.

[34] As to the necessary contingency deductions, the actuary was instructed to make certain general contingency deductions which would make allowance for items such as loss of earnings due to illness, savings in relation to travel to and from work and risk of future retrenchment and resultant unemployment. Mr Whittaker was instructed to reduce his calculations of the loss of earnings on the basis of 10% for past loss of earnings (bearing in mind that the calculation date employed was 1 July 2014, almost three years after the accident) and 20% for future loss of earnings.

Bearing in mind the relatively short period anticipated to elapse between the calculation date (when the appellant would have been 46 years of age) and the expected retirement age of 55, some nine years later, it seems to me that these contingency deductions with regard to the income as a bus driver are generous and, if anything, redound to the advantage of the respondent. The same applies to the truncated retirement age of 55 from the panel-beating business despite Dr Botha's projection of age 60, except that the contingency deductions in respect of the loss flowing from the spray-painting career appears to me to be too generous, for reasons mentioned hereunder.

[35] In his very comprehensive report, Actuary Whittaker also took into account the effect of the loss limits imposed in terms of section 17(4)(c) of the Road Accident Fund Amendment Act 19 of 2005 ("the Amendment Act") which has a bearing on accidents occurring after 1 August 2008. The actuary pointed out that in terms of section 17(4A)(a) of the Amendment Act, the loss limit of R160 000,00 per year is adjusted quarterly. The loss limit in place at the date of the accident was taken as R185,289 per annum.

In the summary of the results presented by the actuary, the losses have been shown before the application of the Amendment Act and after the application of the Amendment Act.

Summary of the results

[36] Losses before the application of the Amendment Act.

Past loss	
Gross past loss	R645,672
Less contingency deduction: 10%	R64,567
Net past loss:	R581,105
Future loss	
Gross future loss	R2,405,593
Less contingency deduction: 20%	R481,119
Net future loss	R1,924,474
Total net loss	**R2,505,579**
Losses after the application of the Amendment Act	
Net past loss	R416,491
Net future loss	R1,633,141
Total net loss	**R2,049,633**

[37] The actuary prepared an addendum report dated 19 August 2014, three months after the first report of 19 May 2014.

In the addendum, the details and assumptions as well as the final figure remain the same. The calculation date also remains at 1 July 2014 and the losses are also deducted after the application of the Amendment Act.

As I mentioned earlier, the actuary also deducted a maximum marginal rate of tax of 40% from the cost of employing the replacement unqualified spray-painter.

The contingency deductions (10% for past loss and 20% for future loss, both as regards the bus driver salary and the auto business salary) also remain the same.

[38] What is convenient about the addendum, is that the actuary gave a break-down, distinguishing between the loss with regard to the bus driver salary and the loss with regard to the auto business salary.

It is convenient then, to tabulate the projected loss in respect of the two fields of endeavour:

Net past loss (bus driver)	R330,133
Net past loss (auto business)	R86,359
Net future loss (bus driver)	R1,226,088
Net future loss (auto business)	R407,053
Total net loss	**R2,049,633**

The judgment refusing any award for loss of earnings or loss of earning capacity: Is there room for this Court of Appeal to interfere?

[39] In *Prinsloo v Road Accident Fund* 2009 5 SA 406 (SECLD) the learned Judge, at 409C, observed that the legal position relating to a claim for diminished earning capacity is trite. At 409C-410A, the learned Judge quoted extracts from the leading judgments on the subject. For the sake of convenience, I repeat passages from those judgments:

- In *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 2 SA 146 (A) the following was said at 150B-D:

> "In 'n saak soos die onderhawige word daar namens die benadeelde skadevergoeding geëis en skade beteken die verskil tussen die vermoënsposisie van die benadeelde vóór die onregmatige daad en daarna. Kyk, bv, *Union Government v Warneke* 1911 AD 657 op bl 665 ... Skade is die ongunstige verskil wat deur die onregmatige daad ontstaan het. Die vermoënsvermindering moet wees ten opsigte van iets wat op geld waardeerbaar is en sou insluit die vermindering veroorsaak deur 'n besering as gevolg waarvan die benadeelde nie meer enige inkomste kan verdien nie of alleen maar 'n laer inkomste verdien."

- In *Dippenaar v Shield Insurance Co Ltd* 1979 2 SA 904 (A) the same learned Judge of Appeal (by now the Chief Justice) said the following at 917B-D:

> "In our law, under the *lex Aquilia*, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the *delict* and the value it would have had if the *delict* had not been committed. The capacity to earn money is considered to

> be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate."

[40] In view of the aforegoing, it therefore seems that the principle to be applied for present purposes is to recognise, as held by the learned Chief Justice in *Dippenaar*, that the capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate.

[41] In dismissing the claim for loss of earnings, the learned Judge *a quo*, in the present matter, said the following:

> "Although the plaintiff has proved disabilities which, potentially, could give rise to a reduction in his earning capacity, he has, however, failed to prove that this has resulted in patrimonial loss. He has failed to discharge the *onus* of proving that he suffered a loss or reduction of earning capacity as his post-accident has improved.
>
> Consequently, I have to rule that no award should be granted on this specific head of damages. The plaintiff's claim for loss of earnings is dismissed with costs."

[42] In deciding whether or not to interfere with this judgment, one has to bear in mind the trite principle, as I do, that when dealing with a so-called "appeal on fact" which is, by and large, the situation in the present matter, a Court of Appeal will be slow to interfere with the findings of fact of the trial Judge.

The well-known principles were tabulated (and endorsed with approval in many cases thereafter) in *Rex v Dhlumayo and another* 1948 2 SA 677 (AD) at 705-706.

One of these well-recognised principles is:

> "3. The trial Judge has advantages – which the Appellate Court cannot have – in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked."

In the present case, there was no *viva voce* evidence. All the evidence, produced by the experts, was admitted as being correct. For obvious reasons, there could be no adverse credibility findings from the point of view of the appellant.

As held in *Dhlumayo*, the Court of Appeal may interfere where there was a misdirection on the part of the trial Judge. The learned Judge of Appeal puts it as follows at 706:

> "10. There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.
>
> 11. The Appellate Court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the

> nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter."

It is also trite that "subject to the difference as to *onus*, the same general principles will guide an Appellate Court both in civil and criminal cases" – *Dhlumayo* at 706. See also *State v Francis* 1991(1) SACR 198 (A) at 204c-e.

[43] The learned Judge, correctly in my view, made a number of findings of fact on crucial aspects by endorsing the undisputed evidence of the experts:

- The weight of the evidence, as also endorsed by the learned Judge, is that after the appellant returned to work following the collision, he was accommodated in an administrative position but later, in early August 2012, asked to resume his job as a bus driver. He could not cope in that capacity and decided to resign.

  Occupational therapist Heyns puts it as follows:

  > "He returned to work as a bus driver in July 2012 (one year after the accident) during which time he received full salary. He reported that after having been accommodated in an administrative position, he was reportedly asked to resume his job as bus driver in early August 2012. He could barely complete the morning shift (05:00 to 08:00) due to lower back and right hip pain and subsequently was unable to return for the afternoon shift. He reportedly decided to resign and remained absent from work as he did not consider going back to the administrative position. His work contract was formally terminated in February 2013."

The learned Judge recognised the inability of the appellant to return to work as a bus driver and held as follows:

> "On 2 August 2012, an Occupational Health Panel (OHP) found him fit to commence work as a bus driver and he was ordered to leave the administrative work and go back to his old job. It only transpired much later after an explanation from Mr Ramalepa, the plaintiff's supervisor, that a report of the OHP did not take the plaintiff's collision injuries into account and pertained to his condition after the heart surgery. By that time and on 6 August 2012 he had applied for leave and thereafter absconded (on the evidence, this may be putting it too strongly). In February 2013 he was asked to come back to work but because of the hip pain he could not cope to do work as a bus driver and opted to resign. The city accommodated him by back-dating his resignation by six months to 6 August 2012 because of the huge debt he owed them."

I already pointed out that Dr Birrell declared that the appellant was 100% unfit, because of the *sequelae* of the injuries sustained, to work as a bus driver and that this condition was permanent.

- The learned Judge, correctly, found, based on the undisputed expert evidence, that the appellant was not suitable anymore to work as a bus driver or a spray-painter "or to any physically demanding work due to the accident".

- In this regard, it is useful to revisit the remarks of Dr Birrell that -

> "... I remain with my view that the patient has sustained a serious injury as a result of the accident, ie he qualifies under the Narrative Test as a serious injury. Whilst he only reaches 11% because of his acetabular fracture and his soft tissue injury to the lumbar spine, noting that 90%, at least, of pelvic fractured patients have concomitant lumbar symptoms, this right acetabular injury still represents a serious problem for this patient. He has considerable loss of movement in the right hip. The fact that his right hip has diminished movement and pain means he can no longer work as a bus driver and this also hinders his work to some extent, as I will discuss shortly, relating to his panel-beating business."

[44] I have already pointed out that the plaintiff worked for the City Council of Tshwane as a bus driver for about thirteen years before his resignation following the accident and he also worked for the Johannesburg metro bus company as a bus driver for about fifteen years between April 1989 and April 1995. (I mentioned earlier that the dates may be wrong.) When the collision occurred, when he was about 43 years old, he had, therefore, worked as a bus driver for most of his adult life namely a period of some twenty eight years. This was obviously his main occupation. It is common cause that, because of serious physical impairment, following the injuries sustained, he can no longer pursue this occupation. It also appears from the actuarial calculations that the postulated loss of earnings due to his inability to continue as a bus driver, constitutes the bulk of his claim as actuarially calculated: some R1,55 million compared to some

R493 000,00 in respect of the predicted future loss flowing from the inability to work as a spray-painter.

[45] Against this background, it seems to me, with respect, that the learned Judge misdirected herself by finding that the appellant had failed to prove a loss of earnings/earning capacity following his inability to continue working as a bus driver. It seems to me, in the words of the learned Chief Justice in *Dippenaar*, that the capacity which the appellant had to earn money as a bus driver is now no longer available to him, and this lost capacity, considered in law to be part of the appellant's estate, must be seen as a loss diminishing his estate in view of the authorities quoted.

Moreover, in the spirit of *Bailey, supra*, there appears to be no reason to reject the meticulous actuarial calculations establishing the monetary value of this loss and details of which I have remarked upon. I repeat my earlier remarks that the loss, as calculated, was also properly mitigated, in my opinion, by reducing the retirement age to only 55, applying a 20% contingency deduction to future loss and applying the 40% maximum marginal rate of tax deduction.

[46] For these reasons, I have come to the conclusion that the learned Judge erred in not allowing an award in respect of loss of earnings or loss of earning capacity flowing from the truncation of the appellant's career as a bus driver.

[47] I turn to the claim for loss of earnings flowing from the appellant's inability to continue working as a spray-painter:

- It is common cause that the plaintiff worked as a spray-painter before the collision and that, as a result of the *sequelae* of the injuries sustained, he can no longer work as such. This was, correctly, held by the learned Judge to be the case.

- As I indicated earlier, there was insufficient information available for the forensic auditor to calculate the appellant's income from the family panel-beating business. The resultant advice from Ms Noble was to equate the loss to the costs of employing a replacement spray-painter. I have dealt fully with this subject and also with the fact that the actuary made his calculations on this basis and reduced the projected costs of such employment of a replacement by the maximum marginal rate of tax of 40%. The best available evidence, in the absence of calculations by a forensic auditor, which calculations could not be made through a lack of information, was employed to obtain a well informed actuarial calculation. As I indicated earlier, the technique of calculating a loss of income by providing for the employment of a substitute is also well recognised in our law. Moreover, the evidence of Ms Noble about the projected salary for an unqualified artisan at the Paterson B3 level was also admitted by the respondent as correct. In the circumstances, I, respectfully, consider the rejection by the learned Judge of the proposition by Ms Noble to conduct the calculation as explained, to be a misdirection.

- The learned Judge also found that there was no evidence that the appellant earned any income from the panel-beating business pre-trauma. I consider this to be a misdirection: on the overwhelming probabilities he must have earned

an income from his panel-beating activities. He told Dr Birrell that he ran the concomitant panel-beating and spray-painting business while working as a bus driver. He walked to work, the bus depot being approximately 2 minutes walk from his home. He started the panel-beating and spray-painting business before he was employed as a bus driver. It must be inherently improbable that he did not earn an income from this business. In any event, the loss of income, as claimed, is not based on previous income as a panel-beater but, as explained, on the cost of employing a substitute. The learned Judge, correctly, also found that –

> "It is common cause that at the moment he is employed and continues to be employed in the family business. He does no longer do the spray-painting job because of his injuries but has been sympathetically accommodated in a flexible administrative/driver/supervisor position in a sympathetic work environment."

The learned Judge emphasised the fact that the appellant told Ms Noble that he does not receive a fixed salary from the panel-beating business but he receives 10% of the profits which, at an average, comes to some R20 000,00 per month. Compared to the R13 000,00 per month earned as a bus driver, the learned Judge held that the appellant was now better off than what he was pre-accident so that he failed to prove a claim for loss of earnings flowing from his inability to continue working as a panel-beater. I am of the respectful view that this approach represents a misdirection: there was no evidence to the effect that the appellant earned less than R20 000,00 per month from the panel-beating business while he could still do spray-painting himself. This also ignores the

fact that, in addition, he earned some R13 000,00 per month as a bus driver. Indeed, Ms Noble's research, after consultation with the Tshwane officials, revealed that he was earning some R15 000,00 per month gross together with certain allowances and a 13th cheque prior to the injury.

- In my view, the common cause fact that the appellant was rendered unfit to continue with his occupation as a spray-painter as a result of the injuries sustained in the collision, and rendered unfit to do so at least until the age of 55, must, on the probabilities, represent a loss of earnings or loss of earning capacity.

  Where the best evidence available was employed to prepare a proper actuarial calculation with reasonable mitigating features, and where a method was employed, namely calculating the cost of engaging the services of a substitute, which is well recognised in our law, I consider that the learned Judge misdirected herself by disallowing a claim for loss of earnings as a spray-painter *in toto*.

- During the proceedings before us, Ms Bezuidenhout, for the appellant, with some emphasis, invited our attention to what the appellant told Ms Noble about his future plans, with particular reference to the panel-beating business. It is convenient to quote from Ms Noble's report:

  > "... Mr K reported that his wife plans to start a catering business in June/July 2014 on a part-time basis in the local area and he will be assisting her as a driver ('ek gaan haar rondry').

> Hy wil 'nie rêrig' dit doen tot aftrede. 'As al my goete oraait is gaan ek Katu toe trek. Ek soek daai rustigheid weer. 'n Klein winkel oopmaak, iets klein. Dat jy verkoop, iemand betaal en hy is weg.' Hy bedoel hy sal wil trek as sy kinders klaar gekwalifiseer is 'dan gaan ek in die Noord-Kaap want ek wil nie rêrig oud word, panel-beating te doen nie.' Sy huidige werk is groot en veeleisend."

Against this background, it appears that there is a realistic possibility (I cannot put it stronger than that, because of the inevitable degree of speculation involved) that the appellant will terminate his involvement with the panel-beating business in the foreseeable future, and perhaps well before he reaches the age of 55, some seven years from now. The shop he plans to open in Katu does not appear to have the remotest connection with panel-beating activities. On that scenario, it may happen that the employment of a replacement panel-beater, provided for by Actuary Whittaker, and Ms Noble, will never become a reality.

Bearing in mind that Ms Noble's report is dated 3 April 2014, no evidence was presented as to whether or not the appellant's wife's planned catering business due to start in June/July 2014, ever became a reality. On the other hand, provision must be made for the contingency that it may become a reality (if this has not happened yet) in which event there may also be a scaling down of the appellant's panel-beating activities.

Where Mr Whittaker's calculation date already goes back to 1 July 2014, it seems to me to be reasonable to reduce the projected loss of income from the panel-beating business as follows:

in respect of the past loss a reduction by 50%; and

in respect of the future loss a reduction by 70%.

According to my calculations, these awards should be reduced as follows because of the greater contingency deduction:

past loss to R47,498 (from the existing R86,359); and

in respect of the future loss, R146,539 (reduced from the present amount of R407,053).

In the result, the award, reduced from Actuary Whittaker's tabulation, should be as follows:

net past loss (bus driver)	R330,133
net past loss (auto business)	R47,498
net future loss (bus driver)	R1,226,088
net future loss (auto business)	R146,539
Total net loss	**R1,750,258**

- In all the circumstances, it seems to me that it would not be inappropriate to allow the claim for loss of earnings as calculated by the actuary, but reduced by increasing the percentage deduction for contingencies in respect of the panel-beating pursuits.

Conclusion

[48] In the result, I have come to the conclusion that the appeal ought to be upheld and an award falls to be made along the lines as calculated by the actuary, subject to the reductions applied in regard to the spray-painter income.

Costs

[49] There appears to be no reason why the costs should not follow the result.

The order

[50] The rather lengthy order which follows, is based on a draft submitted by the appellant's counsel during the trial containing the relevant provisions generally found in orders of this nature. I decided to omit a few small items which I consider to be in the province of the taxing master and I do not wish to usurp the functions of that official.

[51] I make the following order:

1. The appeal is upheld with costs.
2. The order of the learned Judge *a quo* is set aside and replaced with what follows hereunder:
    2.1 The defendant is ordered to pay the sum of R1,750,258 to the plaintiff's attorneys, Adams & Adams, in settlement of the plaintiff's claim for past and future loss of earnings, which amount shall be payable by direct transfer into their trust account, details of which are as follows:

Nedbank
Account no: […]
Branch no: 198765
Pretoria
Reference: NK/KR/P333

2.2 The capital amount referred to in 2.1 above will not bear interest unless the defendant fails to effect payment thereof within fourteen calendar days of the date of this order, in which event the capital amount will bear interest at the rate of 10.25% per annum (or the applicable *mora* rate) calculated from and including the 15th calendar day after the date of this order to and including the date of payment thereof.

2.3 The defendant must make payment of the plaintiff's taxed or agreed party and party costs on the High Court scale which costs shall include the following:

2.3.1 all the fees of senior/junior counsel, inclusive of:

2.3.1.1 his full day fees for 18 and 19 August 2014;

2.3.1.2 his fees for preparation of heads of argument and preparing a reply to the defendant's heads of argument, as directed by the Court;

2.3.2 the reasonable taxable preparation and reservation fees, if any, of the following experts of whom notice had been given, being:

2.3.2.1 Dr Birrell (orthopaedic surgeon);
2.3.2.2 Dr Truter (clinical psychologist);
2.3.2.3 Dr Botha (specialist physician);
2.3.2.4 Ms Heyns (occupational therapist);
2.3.2.5 Ms E Noble (industrial psychologist);
2.3.2.6 Dr Van Heerden (urologist);
2.3.2.7 Mr G Whittaker (actuary).

There shall be no duplication of any costs already allowed in the order of 3 June 2014.

2.3.3 The above costs will also be paid into the aforementioned trust account.

2.4 The following provisions will apply with regard to the determination of the aforementioned taxed or agreed costs:

2.4.1 the plaintiff's attorney shall serve the notice of taxation on the defendant's attorney of record;

2.4.2 the plaintiff shall allow the defendant 7 (seven) court days to make payment of the taxed costs from date of settlement or taxation thereof;

2.4.3 should payment not be effected timeously, the plaintiff will be entitled to recover interest at the rate of 10.25% (alternatively the applicable *mora* rate) on the taxed or agreed costs from date of *allocatur* to date of final payment.

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

A913/2014

I agree

H J FABRICIUS
JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree

N V KHUMALO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 15 JUNE 2016
FOR THE APPELLANT: J F GROBLER
INSTRUCTED BY: ADAMS & ADAMS
FOR THE RESPONDENT: Ms F BEZUIDENHOUT
INSTRUCTED BY: MATHIPANE TSEBANE ATTORNEYS