REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 19585/2013

15/6/2016

Reportable: No

Of interest to other judges: No

Revised.

In the matter between:

S. N. H. Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

MOLOPA-SETHOSA J

[1] The Plaintiff has instituted an action against the defendant for damages as a result of bodily injuries he sustained due to an accident that occurred on 16 June 2012, when he, as a pedestrian, was hit by an unknown motor vehicle.

[2] It is common cause that the plaintiff sustained the following injuries:

[2.1.] Soft tissue injury to his right shoulder;

[2.2.] Left ankle fracture.

And as a result of the sequelae thereof he received medical and hospital treatment, and will in future still require medical and hospital treatment for his injuries.

[3] The issue of liability has been resolved. The parties have agreed that the defendant will pay 90% of the plaintiff s proven damages. The liability of the defendant for past hospital and medical expenses has also been agreed to be 90% of what plaintiff will prove.

[4] It was agreed that the defendant is to pay the plaintiff a sum of R300 000.00 in respect of general damages, and would furnish to the plaintiff an undertaking in respect of future accommodation and hospital and medical expenses in terms of section l 7(4)(a) of the Road Accident Fund Act 56 of 1996. Consequently, the only issue for determination in this trial was the plaintiff s damages for past and future loss of earnings and earning capacity.

[5] It was common cause that at the time of the collision the plaintiff, who possessed no significant or specific skills, was unemployed. He was about 50 years old.

[6] The plaintiff called three expert witnesses and the defendant called one. The plaintiff himself did not testify.

[7] The plaintiff led the evidence of Ramaisela Adelaide Phasha. She testified that she is an Occupational therapist, and that she practices at Constantia Park, Pretoria East. Her qualifications and expertise are not in dispute.

[8] She confirmed the contents of her medico legal report. She testified that the purpose of compiling a report was to assess the functional capacity of the plaintiff in relation to the injuries he sustained as a result of the accident under discussion.

[9] She testified that she consulted with the plaintiff on 02 October 2013. That she used various tests that are age and injury related to assess the plaintiff. Further that she looked at the plaintiff s previous work history. That she had regard to the plaintiff s injuries as noted in the medico legal report of Dr Khan, an orthopaedic surgeon, which injuries are: - the left ankle fracture which has

developed osteoarthritis; and that there is a So/o chance that the plaintiff will develop the full right shoulder impingement syndrome, as well as that the left talo-navicular joint is also developing osteoarthritis.

[10] She testified that other information made available to her when she consulted with the plaintiff was the RAF 1 form compiled by Dr Ephraim Appal dated 2 November 2012, as well as medical records from Mamelodi Hospital.

[11] After interviewing the plaintiff and doing certain tests set out in her medico legal report Ms Phasha concluded:

> *"From a physical point of view though he demonstrated the capacity to perform work within the medium category, he* is *best suited for sedentary and light occupations given the unfavourable prognosis as indicated by Dr Khan. It* is *noted that the client has already developed osteoarthritis of the left ankle due to the fracture sustained and it will reportedly get worse in future. The left talo-navicular joint* is *also developing osteoarthritis. He will thus be advised to refrain from performing medium, heavy and very heavy work so as to facilitate joint hygiene and preserve the affected joints. Furthermore he is expected to experience limitations with tasks requiring working at level above head, prolonged walking, maintaining a crouching and squatting positions as this aggravated pain to his left ankle and right shoulder.*
>
> *Though he was employed at the time of the accident, note* is *taken that the client has always relied on his physical capacity to work. With this compromised and with disease progression, he will not be suited for most work that his skills qualifies him for, that* is *work requiring manual labour /physical demanding as well as good mobility and agility skills including his previous jobs as a general assistant and petrol attendant. Furthermore that he undergoes recommended surgery; his physical capacity will further be reduced. Even with recommended procedure and rehabilitation, he* is *not expected to regain his pre-morbid status: His employment options have thus been significantly reduced and given his previous work experience he would most probably remain unemployed for most of his life. This can be attributed to the accident under discussion.* "

[12] Her evidence is to the effect that the plaintiff, who worked most of his working period as a

petrol attendant, is more suited for light to sedentary category of work. That although petrol attendant can be regarded as light category it requires prolonged standing and it requires strong positional tolerance and mobility skills and her opinion is that the plaintiff is unsuited for this work as it will be contrary to joint savings principles given that the plaintiff has already developed osteoarthritis.

[13] She testified that due to the injuries sustained by the plaintiff during the accident, the plaintiff cannot /is no longer suited to perform the work as a shelf packer nor as a dry clean general assistant. That she and the defendant's occupational therapist both agree in this regard as these jobs are regarded as medium to heavy category of work. Further that both occupational therapists agree that the plaintiff is unsuited for medium, heavy and very heavy category of work.

[14] She further testified that the plaintiff does not have an experience in sedentary jobs such as office work, where one works in seated position; and that plaintiff does not have the experience to can run a spaza shop, and that if he were to decide to run a spaza shop he would encounter problems as he would be required to buy stock and pack same. That running a spaza shop is actually not a light category, but is medium to heavy category.

[15] She testified that the plaintiff can neither be a general worker in construction industry, that that cannot even be considered because it falls under heavy category.

[16] Under cross-examination, she stated that she did not verify any collateral information with the plaintiff's previous employers because, as an occupational therapist, her main role is to determine the functional capacity of the plaintiff, which she did, without having to obtain or confirm plaintiff s employment history.

[17] Further that at the time of accident plaintiff was not employed, therefore, she did not verify to check his collateral information. That the reason she would call the employer for collateral information is to determine the functional capacity of a client prior to the accident and post the accident, and how did the accident actually impact on client's (plaintiff’s) functioning. She stated that as the plaintiff was unemployed at the time of the accident there would be nothing to compare to post accident because he has not obtained any employment subsequent to the accident.

[18] She further stated that she does not need an employer's certificate to determine the client's physical capacity. She stated that it was the role of an industrial psychologist to verify that the plaintiff was indeed a petrol attendant, not that of an occupational therapist.

[19] She stated that during evaluation, the plaintiff mentioned that he had discomfort to both his knees and that he/plaintiff mentioned that that was from a previous injury. That she could not comment on what the plaintiff had told other experts, e.g. Dr Khan, Dr Pretorius, Ms Zondo.

[20] She stated that notwithstanding the previous knee injury, overall that knee injury did not have any impact on plaintiff's functioning; that Dr Pretorius, the industrial psychologist, has to do with earning capacity and not with functional implications of the knee injury, which, she stated, is purely the role of an occupational therapist.

[21] She stated that both she and the defendant's occupational therapist have agreed that the plaintiff's functional capacity is reduced purely due to the injuries he sustained in the accident under discussion. That the previous knee injury does not have any effect on plaintiff's functional capacity. That the knee did not impede on plaintiff's mobility.

[22] She confirmed that there were discrepancies in the employment history that plaintiff gave to the various experts, including herself. Further that the plaintiff was not forthcoming with information why he was dismissed at two previous employments at Engen and Sasol respectively. That however, regardless of the dismissal at Engen, the plaintiff was still able to obtain an alternative job somewhere else, as a petrol attendant.

[23] She reiterated that the main reason of conducting a medico legal is to determine the functional capacity of an individual and in doing that one needs to obtain a work history to determine what job category was the person doing previously, and that she was able to do that successfully. She stated that despite the plaintiff having informed Dr Pretorius (industrial psychologist) of previous injury at Zenex in 2000 where after he was allegedly accommodated by the employer and worked as a cashier, that most probably his knee injury had healed. That both she and Ms Zondo did an evaluation on both plaintiff s lower limbs and it was found that he has got normal range/motion, with no pain whatsoever except discomfort that he reported on during crawling.

[24] She stated that to work as a cashier at a petrol station is regarded as light category of work, not sedentary because at the petrol station normally they do not have chairs, and counters are high up; that the plaintiff would be required to stand for long periods, and to frequently move between the tills and to attend to customers in the petrol station shop as well as petrol attendants on the window. That in that regard he is still unsuited for that because he will be required to stand for prolonged period of time and actually walk for prolonged period of time.

[25] Under re-examination she reiterated that she would normally conduct collateral information to compare pre and past work performance of a client/plaintiff, that in this case the plaintiff was not employed, therefore she did not get collateral information as there was nothing to compare work performance pre and post the accident, i.e. to check whether the injuries sustained during the accident have an impact on the client's functioning. She stated that it is not the role of the occupational therapist to prove whether a client/plaintiff was indeed employed at a specific place at a particular time.

[26] She stated that the discomfort on the knee mentioned pertains to crawling, which, she says, is not required as petrol attendant; that on both occupational therapist's assessments the impending factor was the left ankle and the right shoulder injuries.

[27] That also on reading the defendant's orthopaedic surgeon's report it is indicated, and she confirms, that both plaintiff's knees do not have any impact on plaintiff's current and future functional capacity. That the defendant's orthopaedic surgeon and the plaintiff's orthopaedic surgeon, as well as both occupational therapists did not pick up any problems/impediment with plaintiff's knees.

[28] She confirmed that from Dr Khan's report it is stated that Dr Khan, despite having stated in his report that "Future treatment can improve his condition and he has 70% possibility to continue working in his previous job" he (Dr Khan) deferred to the occupational therapist's opinion to assess plaintiff s work ability.

[29] It will be noted that I dealt with the evidence of Ms Phasha comprehensively, and this is because, of all the witnesses that testified she is the one that was mostly taken to task by defendant's counsel, and as an occupational therapist it is within her competence, of all the

experts that testified on behalf of the plaintiff, to assess plaintiff s functional capacity. Also, of all the experts, it is the occupational therapists that have some differences/disagreement on whether the plaintiff in his injured state, is still suited for the position of petrol attendant; with Ms Phasha saying no plaintiff is no longer suited, and Ms Zondo, the defendant's occupational therapist, saying yes with recommended intervention and appropriate treatment plaintiff is still suited, that the plaintiff will have do weight shifting and would have to carry a foot stool to work, so that he can frequently/occasionally rest his ankle during rest breaks, to preserve ankle hygiene. The other experts, as shall appear on the extract of the joint minutes below, are almost l00% in agreement with each other on the prognosis, effect and sequelae of plaintiff's ankle injury.

[30] The next witness to testify for the plaintiff is Dr Willem Lamprecht Pretorius, an Industrial psychologist. His expertise and qualifications were not in dispute. He confirmed the contents of his medico legal report which he compiled together with his associate, Ms L Coetzer.

[31] He testified that he assessed the plaintiff who was 52 years old at the time. That the purpose of his report was to assess the claimant and to assess the imputs of the experts in relation to work/tasks that the plaintiff performed, as well as the as well as capacity and assess plaintiff s loss of earnings and if possible promotional positions available.

[32] He testified that from reading DR Khan's report, it shows that Dr Khan did not pick up any abnormalities on plaintiff s knees; and that he can confirm that both knees (left and right) do not have an impact on plaintiff s current and future functional capacity.p58/59

[33] He testified that he interviewed the plaintiff, and that when he interviewed the plaintiff, the expert opinions and reports that were available to him were Dr Khan, the orthopaedic surgeon, and Ms Phasha, the occupational therapist's reports.

[34] He testified that when they were finalising his report they (him and Ms Coetzer) could not confirm collateral information because they tried to contact previous employers of the plaintiff, but initially they could not reach or were not able to get hold of any employers.

[35] That at the stage they compiled the joint minutes together with his counterpart/the defendant's industrial psychologist, Ms Grove, his counterpart/ Ms Grove had managed to get

collateral information from the plaintiff s last employer and that he/Dr Pretorius also took the telephone no. from Ms Grove and he phoned the plaintiff s last employer in the presence of Ms Grove. That they (the industrial psychologists) spoke to one Ms Wessels, an accountant/supervisor at Sasol Service Station, Kilnerpark ("Sasol"), the last employee of the plaintiff. That Ms Wessels confirmed that the plaintiff was previously employed at Sasol and was dismissed due to intoxication at work, in April 2012 (two months prior to the accident in question herein.

[36] He further testified that he and Ms Grove, defendant's industrial psychologist compiled joint minutes. He confirmed the contents of the joint minutes dated 07 August 2015. That they both agree that plaintiff is likely to work as an accommodated cashier or even sympathetically employed. That the plaintiff if he were to work as a petrol attendant, he will need a sympathetic employer who will accommodate him because he will struggle with other activities like standing, walking, crouching; so the employer will have to allow him to sit, i.e. the employer will need to accommodate him/allow him lee-away, because Ms Wessels informed them [the industrial psychologist] that normally petrol attendants are not allowed to sit during their shift.

[37] He testified that Wessels was not able to give him the exact date when the plaintiff started working at Sasol. That she informed him that although plaintiff s performance as a petrol attendant was satisfactory, he/plaintiff had a problem with alcohol so he was dismissed on 12 April 2012, about two (2) months before the accident.

[38] That she further informed him that plaintiff worked a minimum of 45 hours per week, and that if he worked more than 45 hours he'd be paid overtime. Further that Wessels was not sure how much they earned at the time (2012) but guessed that it could have been around R2000 bi-weekly/per fortnight. Wessels was not sure if petrol attendants received tips.

[39] He testified that Wessels informed him that the current (2015) rate paid to petrol attendants was R20. 87 per hour for a petrol attendant, and R22. 90 per hour for a cashier. That monthly the salary was R3 756 per month and R4 465.16 per month respectively. That he and Ms Grove agree that plaintiff s likely earnings would have been somewhere between these annual earnings of R45 079.20 and R53 581.92 (2015 values). That these figures were also contained in the defendant's industrial psychologist/Ms Grove's report.

[40] He testified that he totally agrees with what is stated by defendant's expert, the Industrial psychologist Ms Grove's, and that that was confirmed by the employer.

[41] He testified that according to the information given to him by the plaintiff, the last employment would have been petrol attendant at SASOL, and that since 1978 plaintiff was employed as a petrol attendant. That the only factual information that they could confirm was his plaintiff s last employment as petrol attendant at SASOL from 2010 to April 2012.

[42] He testified that pre-accident the plaintiff worked most of his life as a petrol attendant; that because of age and work background he cannot do certain sedentary jobs. That plaintiff has reached career ceiling, and that mostly they (industrial psychologists) agree that 45 years is one's ceiling. That looking at plaintiff s age and career path it is unlikely that there would be carrier any growth due also to the question of competition and levels of qualification. That according to information from the plaintiff his highest standard is grade 11 and nothing further/no tertiary qualification.

[45] He testified that he and Ms Grove both agree that plaintiff would retire at 65 years, that plaintiff s was 53 years old when they compiled the report.

[46] He testified that post-accident capacity, according to Ms Phasha, plaintiff will struggle to get employment save for informal trading as vendor, e.g. running a spaza shop, but that he will need an assistant. That the plaintiff can now only work in an informal sector, with an assistant that he'll have to pay, unless he gets a highly sympathetic employer. Further that according to Koch's quantum year book, 2014, self-employed persons in an informal sector is about Rl 7 400 p.a.

[47] He further testified that with a maximum income of Rl 7400 p.a., taking into consideration that he still need to pay assistant, and that he never worked in informal sector, it would be a new venture therefore typically he'd start at lower quartile of scale. He would therefore struggle, his personal earnings would be low therefore his risk would be high. He has no exposure in terms of business as he worked mostly as a petrol attendant; therefore he has no experience to run informal business therefore limited.

[48] He testified that the plaintiff was unemployed during the time of the accident and that at the

time of interview plaintiff informed him that he was still unemployed. That both industrial psychologists agree that at the time of assessment on 19 February the plaintiff was unemployed. Further they (industrial psychologists) agree that the plaintiff's ability to search for work is curtailed after the accident due to his injuries.

[49] He stated that by the concept of contingencies mentioned in his report he meant that it was quite difficult for him to indicate what will be the extent of the potential loss due to the decrease in work capacity attributable to previous injury to the knee; i.e. that it was difficult for him to say what extent the previous injury had on plaintiff's future work capacity, and deferred to legal parties to determine what should be the contingencies.

[50] Under cross examination he stated that he does not have proof that plaintiff has grade 11, nor does he have plaintiff's salary advice. Further that based on information furnished by the plaintiff, the only validated information he and Ms Grove have is that the plaintiff worked at Sasol as a petrol attendant.

[51] He conceded that due to plaintiff s history of being dismissed plaintiff will have difficulty to compete in the work market for employment, that however despite having been dismissed previously he seems to be able to again find employment as a petrol attendant.

[52] He conceded that the plaintiff lied to him by saying that he was dismissed because his mother was sick, that that differs from what he was informed by employer. Further that the information given to him by the plaintiff differs with what he told other experts, e.g. Dr Khan.

[53] He stated that seeing that the plaintiff has been dismissed 3 times, his chances of getting employment at petrol station were very slim. That in applying contingency, the court should take into account that the plaintiff would struggle to get another employment.

[53] He stated that his pre-existing condition/previous knee injury could also preclude him from doing the same job, that it has most likely pre-accident reduced his physical working capacity; that appropriate apportionment and contingencies be applied.

[54] Pertaining to informal sector he stated that with the development of informal sector/ running spaza shops there are various ways of sourcing out products and working together with other

entrepreneurs. That there are various ways of doing business.

[55] Under re-examination he confirmed that based on information he received from the employer the plaintiff s last dismissal in April 2012 was due to intoxication.

[56] He stated that he got information from the plaintiff, and from other experts as well as from plaintiff s last employer.

[57] The next witness to testify was Dr Imran Ahmad Khan, the Orthopaedic surgeon. His expertise and qualifications were not disputed.

[58] He confirmed the contents of his medico legal report. He testified that he examined the plaintiff on 22 August 2013, that the plaintiff s age at the time was 51 years old.

[59] He testified that there is a 5% chance of plaintiff developing a complete impingement syndrome on the right shoulder. Further that the plaintiff has develop post trauma osteoarthritis on the left ankle, which is joint arthritis caused by trauma.

[60] He testified that plaintiff s ankle joints were swollen both inside and outside. That after examination of the plaintiff he found that the chronic pain on the right shoulder was due to impingement syndrome, and on the left ankle it was due to an old fractures and previous surgery, and development of osteoarthritis of the left ankle; i.e. the pain was due to the right shoulder pathology and the left ankle pathology.

[61] He testified that prior to compiling his report; he had the RAF 1 form as well as the hospital records at his disposal. He testified that the plaintiff informed him during the assessment that he used to work as petrol station attendant, and that he was not working at the time of the accident; further that he was not working at the time of the assessment due to painful left ankle and right shoulder.

[62] Further that the plaintiff informed him that he was unable to stand for more than an hour and cannot walk for more than 500 metres. That in capacity is due to a left ankle post trauma osteoarthritis.

[63] He testified that at the time of the assessment of the plaintiff his feeling was that if further treatment can be provided to the plaintiff there is a possibility that he may continue his work as petrol attendant; but that looking at plaintiff s pathology and the condition that should have been the job of the occupational therapist because his examination was for short period of time. That he cannot tell 100% until the occupational therapist has assessed the patient. He testified that his opinion in this regard was not conclusive, that it was merely his personal feeling at the time.

[64] He testified that during the assessment the plaintiff presented with residual pain in his right shoulder and left ankle. That the left ankle pain is associated with inability to walk and stand for pro-longed period. That clinical and radiological examination indicates that he has mild impingement syndrome of the right shoulder and post-trauma osteoarthritis of the left ankle with swelling and pain. Further that the left talo-navicular joint has some changes on ex-rays but the injury is not confirmed in hospital records.

[65] That on information furnished by the plaintiff, at the time of the accident, plaintiff was not employed, although he used to do piece jobs; that he was unable to perform his work at the time due to present incapacity. He testified that the occupational therapist should assess the plaintiff s work ability. He testified that the plaintiff will need surgery/arthrodesis for the left ankle in the near future to improve his painful condition. Further that he will need consecutive treatment for a pro-longed period.

[66] He testified that he did not concern himself with small little trivial injuries that plaintiff may previously have had.

[67] He confirmed the contents of the joint minutes between himself and the defendant's orthopaedic surgeon, Dr Gantz. He confirmed that he and Dr Gantz agree on all aspects regarding the history, the accident, injuries sustained, treatment received and past medical history. Further that they agree that plaintiff is presenting with painful right shoulder and left ankle and that he is unable to stand for a pro-longed period.

[68] He testified that they agree that plaintiff is suffering from a painful right shoulder with reduced function; that according to him (Dr Khan) this is due to the right shoulder impeachment syndrome. And that their opinion (orthopaedic surges) is that the plaintiff is also suffering from post- traumatic osteoarthritis of the left ankle. They both agree that he has almost 9% whole

person impairment due to his current problems.

[69] He testified that they both agree that plaintiff will not be able to carry out heavy physical work in future that requires long hours standing or walking. That they both agree that plaintiff will need both medical and surgical treatment in future to improve his condition as suggested in their respective report. He confirmed that he and the defendant's orthopaedic surgeon did not differ anywhere.

[70] Under cross examination, he stated that the RAF 1 form did not indicate an injury to the shoulder; that most lightly this information was presented to him by the patient/plaintiff. He confirmed that there is no documented nexus between the motor accident in question and the shoulder injury. He further stated that the hospital records and/or RAF 1 form did not make a note of the old fracture of the side of the foot- left talo-navicular joint; that this fracture (of the side of the foot- left talo-navicular joint) might have been pre-accident.

[71] He stated that the plaintiff did not mention any previous knee injury to him. He testified that if the plaintiff had a pre-existing condition (e.g. knee injury) and then had a super impost second condition (ankle injury) this would have made him more disabled.

[72] He stated that during the assessment the plaintiff had informed him that he was doing piece jobs, that plaintiff did not elaborate on that. He stated that due to ankle the left pain, swelling the osteoarthritis was intense enough; there is a possibility that the plaintiff may not be able to perform heavy physical work in future that requires long hours of standing and walking. He stated that the arthrodesis of the ankle will improve the plaintiff s pain.

[73] Under re-examination he stated that he is sure that when he examined the plaintiff he must have gone through the knee examination, and that he could not find any pathology, that his colleague as well i.e. the defendant's orthopaedic surgeon could not find any knee pathology on examination. He further stated that plaintiff s ankle and injuries and the pain must have been contributing to the plaintiff s incapacity, that in the event the plaintiff does not secure employment within the petrol filling industry he might find himself prejudiced in occupations falling within the medium to heavy physical work that for that reason he does not agree with the defendant's occupational therapist, Mrs Zondo but the plaintiff s age could most lightly have negatively contributed to the plaintiff not securing employment within the petrol filing industry.

[74] On questions by the court; he stated that on examining the plaintiff independently, leaving out all other pathologists and just concentrating on the left ankle fracture, the plaintiff has got significant pain and pathology. He stated that the procedure that the plaintiff will be undergoing is not the removal of screws; that the plaintiff has to undergo what is called arthrodesis of the joints to alleviate his ankle pain.

[75] That concluded the evidence for the plaintiff. The defendant made an application for absolution from the instance, and such application was refused.

[76] The defendant led the evidence of Mabongi Zondo, the occupational therapist. Her expertise and qualifications were not in dispute. She confirmed the contents of her medico legal report.

[77] She testified that the purpose of her report is to determine the functional capacity of the claimant/plaintiff in terms of his occupational functioning, activities of daily living, leisure, work or play. She testified that in preparing her report she insight to Dr Khan's and Ms Phasha's reports as well as to the RAF 1 form.

[78] She testified that in assessing the plaintiff, the assessment tools she used were valpar 201which is a dynamic strength evaluation as well as mobility evaluation. That she also conducted subjective questionnaires; that these are pain questionnaires in which a claimant is expected to indicate his pain level and to descript the type of pain that he experiences at the side of the injury.

[79] She confirmed the medical history of the plaintiff as contained in the medical records.

[80] She testified that the plaintiff was asked to indicate the problems or limitations which he is currently experiencing and which he could relate to the accident, and that the only limitation or concern that he indicated to her is that he was unable to secure employment because of difficulties with extensive standing. That the plaintiff did not indicate if he had applied or actually looked for other employment post the accident.

[81] She stated that the plaintiff resides in a one room Zink house in Mamelodi, and stays with his wife, who is a domestic worker in Pretoria. That the plaintiff s wife comes home over the

weekends and that during the week the plaintiff is all by himself, he does his domestic household and his wife helps over the weekend.

[82] She stated that when the plaintiff came for assessment he was mobilising on his own, that he was not assisted by a walking stick or a walking frame, that he displayed functional range of motion of both the upper and lower limbs and neck and back, that he could stand and walk by himself without assistance. Further that he could kneel bend crouch and squat.

[83] She testified that the plaintiff was polite and co-operative throughout the assessment and he did not appear to have or shown any signs of symptom magnification. She testified that the plaintiff wore a bandage on the right hand and that when she asked him what had happened to his right hand, plaintiff indicated that he had been attacked by thugs just as he got off a taxi that the thugs had slit the palm of his hand and he wore a bandage around it. She further testified that the plaintiff never mentioned anything to her about the left knee injury due to an attack by thugs.

[84] She testified that on her physical observations of the plaintiff, plaintiff had a seven centimetre rail track scar on the left ankle; and that he had an 11 centimetre rail track scar on the lateral aspect of the left ankle, indicating that he had an open reduction and internal fixation on the left ankle. She testified that the plaintiff presented with full range motion of both upper limbs, he had an active range of motion further that plaintiff had an active range of motion of the lower limbs/legs i.e. he could move the hip, the knees, the ankle and foot. That he was found to have functional range of motion and that means that he can move his limbs in any direction that he wished. That however when she compared the left ankle to the right ankle she noted that the left ankle joint had slight limitation when compared to the right. That there were no indications of pain and discomfort on the neck, back and pelvis.

[85] She testified that the plaintiff was able to sit with no complaints of pain or discomfort for approximately 3 hours and was able to stand in an upright position with no asymmetry of the shoulder, hips or knees. That the plaintiff reported poor walking endurance of 1 kilometre, i.e. that the plaintiff informed her that he could walk for approximately 1 kilometre. She testified that the plaintiff walks without the assistance of crushes or a limp; that he walks with ease and he is able to squad lift and carry weights from the floor with ease. He is able to assume a kneeling position without difficulty.

[86] She explained that a valpar test entails the claimant lifting weights in a pulling movement using both upper limbs; that the plaintiff was found to can manage to handle the light to medium loads when required to push pull

[87] She testified that she also conducted the mobility aspects of evaluation that this entails the claimant balancing with each leg alternatively he is expected to walk forward and backwards to walk with his hills and toes, maintain squatting position 20 times, climb stair cases, kneel, crawl, stoop, bend and crouch for 20 seconds. That the plaintiff performed well in the dynamic posture position and that his only minor concern was with his left leg balance which was unstable when he was performing the task.

[88] On pain modality she testified that the test measures the general level of pain and that the plaintiff indicated level 2 pain on the left ankle and that he was not taking any pain medication for the ankle pain, that to her (Zondo) this indicates that the pain is not that severe i.e. the plaintiff is not experiencing excruciating severe pain that is functionally limiting. She stated that due to the limitation in the left ankle joint, the plaintiff would benefit from occupational therapy intervention for joint hygiene principles to enhance participation in everyday activities and to prevent future deterioration of the ankle joint, also with the use of exertive devices. Further that plaintiff would benefit from an orthopaedic intervention, someone who could look at possible padding of his shoes because he complained of extensive pain due to extensive standing.

[89] She testified that with orthopaedic and surgical intervention plaintiff symptoms and pain can be managed, and that if his shoes could be padded it could improve on his endurance in terms of standing. She testified that the medical records did not indicate a shoulder injury. She further testified that when she considered the plaintiff s pain level at the time of her evaluation and Dr Khan's recommendations, she thought that plaintiff can manage his pain with pain killers or anti-inflammatory should he develop osteoarthritis.

[90] She testified that on her findings the plaintiff will still be managing his position as a petrol attendant or light physical job if he uses medication. That there are a lot of people who have osteoarthritis who are still working and who are using pain medication/anti-inflammatory to manage osteoarthritis. And that to some extend they might need to go for occupational therapy to teach them of methods on how to participate in tasks without aggravating pain on the joints. She testified that in terms of the mobility and strength the plaintiff will be able to participate in an

occupation of a petrol attendant until his retirement age.

[91] She testified that with general mobility the plaintiff was found to be able to walk without assistance and at ease but he reported difficulties with walking endurance, if he was walking for approximately 1 hour, he reported pain and fatigue on the left ankle and required to rest.

[92] Further that the plaintiff complained of occasional discomfort when carrying heavy loads.

[93] She testified that when accident occurred, the plaintiff was unemployed; that during the evaluation he was still unemployed. That the plaintiff never indicated to her that he was dismissed due to drinking habits. She further testified that plaintiff never provided her with any educational qualifications. She further testified that the plaintiff informed that he was previously dismissed at his place of employment because his mother was sick and he had to go look after his mother; and that he informed her that he resigned at his last employment at SASOL because his mother was ill.

[94] She confirmed that there are discrepancies in the employment history that the plaintiff gave to the various experts including her.

[95] She stated that she considers the plaintiff to retain the capabilities to participate in his previous occupation or any occupation falling within light physical work demands until normal retirement age. That however, due to his age, his chances of securing occupation as a petrol attendant may have been compromised by his age and as a consequence of the motor vehicle accident; the plaintiff might find himself prejudiced from occupation falling within medium to heavy physical demands. That therefore the plaintiff is considered an unequal competitor in the open labour market.

[96] She testified that she does not agree with Ms Phasha, the plaintiff s occupational therapist's opinion that the plaintiff should refrain from doing light physical work as a petrol attendant. That based on her (Zondo) evaluation, the plaintiff is able to walk without assistance and that with recommended intervention and appropriate treatment, and he can participate in petrol attendant work. She testified that plaintiff could be taught that when he is seated, that he had a foot stool to elevate his ankle so that it dies not bare weight; and that when standing, plaintiff should be cautious if standing for pro-longed period to shift his body weight from left to right.

[97] Under cross-examination, she stated that she defers to an industrial psychologist pertaining to plaintiff s earning capacity because the industrial psychologist comments on financial scope and levels; i.e. the industrial psychologist is better qualified to comment on loss of earnings.

[98] She reiterated that the plaintiff must be taught ankle hygiene, which requires that when sitting down he should always have a foot stool to elevate his ankle.

[99] She stated that, she is satisfied that at some point in his life the plaintiff did work as petrol attendant. That in her opinion the plaintiff can still do the job of a petrol attendant. She stated that the employer does not provide assistive devices like a foot stool to petrol attendance; further that an employee is required to request an accommodation by his employer should he feel that it would enhance his participation in the work place.

[100] She stated that should the plaintiff be employed as a petrol attendant and he feel that the hygiene principled that he has been taught are not helping, he should request his employer to allow him to bring a foot stool to work so that he could use that during the lunch breaks. She stated that should the plaintiff not have the foot stool, he would have to apply the hygiene principles that he would have been taught during the therapy sessions. She stated that as a petrol attendant the plaintiff could shift his body weight during /in between rest breaks.

[101] She confirmed the contends of the joined minutes between herself and Ms Phasha. She stated that though prove was not provided to her that plaintiff had achieved grade 11, she was satisfied that he had achieved grade 11. She stated that pertaining to obtaining collateral information, they usually request clients to come to the assessments to bring along their CV's, but that in 98% of the cases they never do; that notwithstanding, they still do proceed with the assessments even without the CV's.

[102] She confirmed that the plaintiff is best suited for sedentary and light occupations. She stated that she disagrees with Dr Khan's opinion that the plaintiff is not fit for jobs requiring pro-longed walking and standing. That in her opinion the plaintiff can is fit for such jobs taking into consideration the recommended intervention.

[103] She confirmed that the job of a petrol attendant requires pro-longed walking and standing.

She stated that to some extent she disagrees with Dr Khan that due the prognosis of the left ankle and its effects on plaintiff's work capacity, he (Khan) considers his ankle injury as causing serious long term impairment or loss of body functioning. She stated that without occupational therapy intervention, without removal of the internal fixation, without conservative management of the orthopaedic surgeon it would cause serious long term impairment but however with conservative management and pain medication and padding or cautioning of his shoe to maintain alignment it would not cause long term impairment. She stated that she accepts Dr Khan's opinion to that to alleviate plaintiff s ankle pain; he/plaintiff would have to undergo arthrodesis.

[104] She stated that the plaintiff is an unequal competitor in the labour market having regard to his age, the injury sustained and the limited work experience. And that if he was to secure an occupation it would have to be limited to sedentary to light. That the plaintiff is unequal competitor to occupations falling within medium to heavy category. She stated that if the plaintiff were not lucky to have an employer that would accommodate him, his chances in the labour market were minimal. She stated that considering the rate of unemployment currently in the country, there are chances that the plaintiff can be unemployed until his retirement age.

[l05] Under re-examination, she stated that she took what the plaintiff told her that he had grade 11 qualification. Further that there were discrepancies in the evidence the plaintiff gave to experts.

[106] She stated that there is no duty on an employer to assist an employee to apply principles to help him cope with his work. That it is the employee's responsibility to make the employer aware of how he could be accommodated at work.

[107] That concluded the evidence of the defendant.

[108] The defendant did not to call its other experts, the orthopaedic surgeon, Dr Gantz and the industrial psychologist Ms Grove, despite their reports having been provided to the court at the commencement of the proceedings.

[109] It is significant to note, from the extract of the joint minutes of the parties' respective experts, set out below, that the defendant's own experts, especially the orthopaedic surgeon and the industrial psychologist, agree to a great extent, if not completely, with the plaintiff s expert

witnesses.

[110] What follows are the extracts from the respective joint minutes:

Joint minutes of the **orthopaedic surgeons** Dr DE Gantz and Dr I A Khan, dated 11 August 2015:-

> *"1. Both doctors agree regarding history if accident, injuries sustained, treatment received, social history, occupational history and past medical history.*
>
> *2. Both doctors agree that he* is *presenting with painful right shoulder and left ankle and he* is *unable to stand for prolonged period.*
>
> *3. Both doctors agree that he* is *suffering from painful right hand shoulder with reduced function. Dr Khan suggests that it* is *due to right shoulder impingement syndrome. He* is *also suffering from post-trauma osteoarthritis of ankle according to both doctors' opinion.*
>
> *4. Both doctors agree that he has almost 9% whole person impairment due to his current problems.*
>
> *5. Both doctors agree that <u>he will not be able to carry out heavy physical work in future that requires long hours standing or walking</u>* [my underlining]
>
> *6. Both doctors agree that he will need both medical and surgical treatments in future to improve his condition as suggested in respective reports.* "

Joint minutes of the **occupational therapists** Ms A Phasha and Ms M Zondo, dated 07 August 2015

" ……..

4 WORK ABILITY

We note *his age and that he achieved grade 11 as his highest level of education. He previously worked as a General assistant and Petrol attendant from 1986 to 20I 0. At the time of accident under discussion, he reportedly was unemployed and this was the case at the time of both consultants.*

We further note *from the report of Dr Khan that the client has already developed osteoarthritis of the left ankle due to the fracture sustained and it will reportedly get worse in future. The left talo-navicular joint is also developing osteoarthritis. It must be noted that osteoarthritis is a progressive disease and that prolonged/constant use of body structure that has arthritis exacerbates pain in the joints and also exacerbates degeneration of the joints. He thus needs to preserve the affected joints. On the basis, Ms* ***Phasha*** *advises that he should refrain from performing medium, heavy and very heavy work so as to facilitate joint hygiene and preserve the affected joints. Furthermore, he should refrain from performing tasks requiring working at levels above head, prolonged walking and walking on uneven terrain, maintaining crouching and squatting positions as this aggravates pain to his left ankle and right shoulder.*

It is agreed that *he is best suited (Or sedentary and light occupations with restrictions indicated above by Ms Phasha.* [my underlining]

Ms Phasha *notes that although he was unemployed at the time of accident, he has always relied on his physical capacity to generate income. With this compromised and with disease progression, he will not be suited for most work that his skill qualifies him for, that is work requiring manual labour /physical demanding as well as good mobility and agility skills including his previous jobs as General assistant and Petrol Attendant. Furthermore, at the time that he undergoes surgery, his physical capacity will farther be reduced. Even with recommended procedure and rehabilitation, he is not expected to regain his premorbid status. His employment options have thus been significantly reduced and given his previous work experience, he would most probably remain unemployment for most of his life.*

Ms Zondo *takes note that he is 52 years unemployed at the time of accident, and holds a significant work history as a petrol attendant. The accident has limited his vocational potential to sedentary to light physical work demands. Occupation as a petrol attendant*

fall under light physical work demand. His occupational prospects of securing an occupation in the open market are further compromised by his age. Ms Zondo considers him an unequal competitor in the open labour market or occupations falling within medium to heavy physical demands. He however, if lucky, could secure an occupation falling within light to sedentary work demands in the open labour market with a sympathetic employer who would allow him an opportunity to alternate between sitting and standing alternatively within the workplace.

***Ms Phasha** agree that a job of a Petrol Attendant falls within light category of work however requires prolonged positional tolerance and mobility skills making him unsuited for this job.*

***We defer** to Industrial Psychological opinion with regard to the impact of the accident on his realistic employment prospects and his earning capacity.* "

Joint minutes of the **industrial psychologists** Dr W Pretorius/Ms L Coetzer (WP/LC) and M Grove (MG), dated 07 August 2015:

" ……

2 ***Pre-Accident: "But for the accident"***

2.1. ***We agree to defer** to his personal background, education and work history as per our respective reports. **We agree that** considering his work history that he worked as a petrol attendant for most of his working life. He for periods also worked as a petrol station cashier.*

2.2. ***We note** that he was dismissed in April 2012 due to being intoxicated on duty at the SASOL Petrol Station in Kilner Park. He was thus unemployed at the time of the accident.*

2.3. ***We agree** that it be accepted that he had reached his career ceiling in his job as petrol attendant. Further progression is not foreseen and he would probably have continued working as a petrol attendant (cashier at the petrol station) for the remainder of his working life. Mr S. could not present proof of income for his earnings at the time of*

the accident. It reported to both parties that he earned a basic salary of R2000 plus +- R300 in tips fortnightly at the time. Ms Lee Wessels (Manager/Accountant) at the SASOL Service Station Kilner Park reported that the current rate per hour for a petrol attendant is R20.87 and as a cashier at a rate of R22.90 per hour. Accepting that a petrol attendant and cashier must work a minimum of 45 hours per week. His minimum earnings as petrol attendant would equate to basic earnings of R939.45 per week. Manually calculated this equals about R3756 per month (4.33 weeks per month) and about R45 079.20 p.a and as a cashier equating to about Rl 030.50 per week or R4465.16 per month (R53 581.92 p.a). ***We agree*** *to defer to the legal teams in respect of quantification of possible overtime and gratuities earnings.* ***We agree*** *that his likely earnings would have been somewhere between these annual earnings of R45 079.20 and R53 581. 92 per annum (2015 values).*

2.4. ***We agree*** *to the application of inflationary increases to retirement age of 65 years.*

2.5. ***We agree*** *that considering his work history some periods of unemployment was likely during his career.* ***We also take note*** *of possible pre-existing pathology and its potential impact on his pre-accident earnings.*

3. POST-ACCIDENT:

3.1. ***We note*** *that Mr S. was unemployed at the time of the accident and he is still unemployed.*

3.2. ***We take note*** *of the opinions of the medical experts as discussed in our respective reports.* ***We note*** *specifically from the expert reports:*

3.2.1. *Dr Khan (Orthopaedic Surgeon): "This patient has almost 7% of whole person incapacity due to right shoulder impingement syndrome and left ankle post trauma osteoarthritis with limited movements. He is unable to perform this work at present due to present incapacities. Future treatment can improve his condition and he has 70% possibility to continue working in his previous job. " "With his current problem he will be able to function as petrol attendant. His condition can improve with future treatment and can be able to continue his work*

or at least light duties until age of retirement. "

3.2.2. *Dr Gantz (Orthopaedic surgeon) stated that the combined WPI is 9%. In view of the guarded prognosis of the left ankle and its effect on his work capacity Dr Gantz considers his ankle injury as causing serious long term impairment or loss of body function. "From an orthopaedic perspective he is not fit for jobs requiring prolonged walking and standing.* "

3.2.3. *Ms A Pasha (Occupational therapist) indicated (as reported by WP/LC): "Though he was unemployed at the time of the accident, note is taken that the claimant has always relied on his physical capacity for work. With this compromised and with disease progression, he will not be suited for most work that his skill qualifies for him for, that is work ... requiring manual labour/physically demanding as well as good mobility agility skill including his previous jobs as a General assistant and Petrol Attendant, Furthermore, at the time that he undergoes recommended surgery, his physical capacity will further be reduced. Even with recommended procedure and rehabilitation, he is not expected to regain his premorbid status. His employment options have thus been significantly reduced and given his previous work experience, he would most probably remain unemployed for most of his life. This can be attributed to the accident under discussion".*

3.2.4. *Ms Zondo (Occupational therapist) indicated (as per reported by MG): "Mr S. has a long history of working as a petrol attendant. Occupation due to difficulties with extensive standing following the motor vehicle accident. It is my opinion that in spite of the injuries sustained, with the recommended interventions. Mr S. retains the capacity to participate in his previous occupation as a petrol attendant till normal retirement age.* "

3.3. *We **agree** that he will likely be able to work as an accommodated cashier or even sympathetically employed petrol attendant in future. [with earnings as agreed in paragraph 2.3 of this minute or less]. Mr S. is now suited for light capacity work and as a result, he suffers from curtailed career choices and his job freedom has been affected. He is a vulnerable employee who is at risk of being negatively affected in his employment situation, probably being dependent on an understanding employer and*

adaptations/accommodations in the work place. He is *less competitive in the open labour market when compared to his uninjured peers and its follows that he* is *at a high risk of continuing to suffered extended periods of unemployment. His work performance will be negatively impacted, influencing his risk for loss of earnings due to not working overtime (or even normal working hours), risk for not receiving increases or bonuses, disciplinary actions or dismissals. He faces an increased risk for unemployment and accepting employment at an earnings level lower than expected. We agree his ability to compete for employment, retain employment and grow in earnings as expected has been curtailed.* [My underlining]

3.4. **We agree** from a past loss of earnings perspective that Mr S. was unemployed at the time of the accident and **his ability to search for work was curtailed after the accident until present, apparently due to his injuries. This implies a past loss of earnings.** We defer to the view of the medical experts regarding a reasonable time allowed for recuperation in light of the injuries sustained. His earnings at the time may be used as base to calculate the loss. **We agree** unemployed periods from the date may also be partly related to (a) his pre-existing left knee pathology and (b) the general labour market conditions (high unemployment).

3.5. **We agree** from a future loss of earnings perspective that:

3.5.1. Appropriate (WP/LC: significant) higher contingencies be applied considering the increased risk for loss of future earnings due to accident related factors.

3.5.2. The risk for earlier than expected retirement be deferred to the appropriate medical experts.

3.5.3. Future sick leave associated with the recommended treatment could constitute a loss of income i.e. forfeited income when his sick leave exhausted/forfeiting overtime and allowances (if applicable).

3.5.4. **We defer** to the appropriate experts regarding appointment, if any, considering the impact of possible pre-existing pathology in his left knee and the pathology resulting from the accident under review.

4. Undertaking

(Conduct, inclusive of psycho-legal activities, pertaining to Psychologists as set by the Professional Board of Psychology of the HPSSA - January 2004)

4.1. **We declare** that we were not influenced by any external sources by whatever means (telephonic consultations, written instructions, comments to or approval of the joint minute) other than the relevant expert opinions, collateral information and labour market analysis in compiling the joint minutes.

4.2. **We** hereby declare that the aforementioned minute represents our professional opinion with regard to Mr S.'s pre- and post- morbid earnings capacity.

[111] With regard to the plaintiff s future employability, it is significant that the experts agree, as appears from the joint minutes of the orthopaedic surgeons, the occupational therapists and the industrial psychologists, extract of which are set out here above, that the plaintiff will not be able to carry out heavy physical work in future that required long hours standing or walking; he is best suited for sedentary and light occupations.

[112] The industrial psychologists, as appears from the joint minutes, significantly agreed that as a result of the accident

> *"Mr S. is now suited for light capacity work, as a result, he suffers from curtailed career choices and his job freedom has been affected. He is a vulnerable employee who is at risk of being negatively affected in his employment situation, probably being dependent on an understanding employer and adaptations/accommodations in the work place. He is less competitive in the open labour market when compared to his uninjured peers and its follows that he is at a high risk of continuing to suffered extended periods of unemployment. His work performance will be negatively impacted, influencing his risk for loss of earnings due to not working overtime (or even normal working hours), risk for not receiving increases or bonuses, disciplinary actions or dismissals. He faces an increased risk for unemployment and accepting employment at an earnings level lower than expected. We agree his ability to compete for employment, retain employment and grow in earnings as expected has been curtailed.* "

[113] Based on facts, as well as the views expressed by the experts, which were largely common

cause, the pertinent question, arose as to what award would be fair and adequate compensation for the plaintiff in respect of his loss of earnings and earning capacity. Counsel for the defendant submitted that the court should not find that the plaintiff has suffered any loss of earnings because the plaintiff did not testify; that hence all that the experts stated in their report was hearsay and should thus be disregarded.

[114] I may state that it happens many a times that plaintiffs do not testify and that parties agree that reports filed by the experts in terms of Rule 36(9)(a) will be accepted as evidence before court. At the commencement of the proceedings defendant's counsel informed the court that the plaintiff had objected to the late filing of Dr Gantz, defendant's orthopaedic surgeon's medico-legal report, and Ms Grove, the defendant's industrial psychologist's medico-legal report.

[115] On the court enquiring from the plaintiff s counsel what the position was, the court was informed that the plaintiff no longer objected to the said reports and they were handed u by agreement between the parties. This matter took three (3) days in court, and obviously I had the opportunity to read all the expert reports, I even questioned the respective counsel on some or other aspects of the respective reports. After making an effort to have the reports mentioned above admitted into court defendant's counsel realising that these reports are in fact favourable to the plaintiff s case now says the court should simply ignore these reports as the authors thereof had not testified. Obviously Dr Gantz and Ms Grove (defendant's experts) were not called to testify because their reports are favourable to the plaintiff s case. The question is why the defendant went through all the trouble of having the reports admitted only to later want the court to ignore/disregard same?

[116] It is clear that the plaintiff does not dispute the contents of the reports of the defendant's orthopaedic surgeon and industrial psychologist, hence at the commencement of the proceedings as already mentioned, it was indicated by plaintiff s counsel that plaintiff no longer objected to defendant's late filing of these experts' reports..

[117] In their joint minutes, as mentioned above, the respective experts, the defendant's orthopaedic surgeon and industrial psychologist completely agree with the plaintiff s orthopaedic surgeon and industrial psychologist on, for example, plaintiff employable compromise.

[118] From the medico legal report it appears that the defendant's industrial psychologist, Ms M

Grove checked and/or followed up/confirmed on collateral information with Ms Wessels, an accountant/supervisor at SASOL Service Station, Kilnerpark, plaintiff s last place of employment that the plaintiff was indeed once in the employment as a petrol attendant at SASOL. Plaintiff s industrial psychologist, Dr Pretorius confirmed employment of plaintiff at Sasol with Wessels in the presence of the defendant's industrial psychologist.

[119] I find it very opportunistic for the defendant to say that since the plaintiff did not testify, the court should not accept that he was at any stage employed. Surprisingly, there was much emphasis on the cross examination of all the plaintiff's witnesses (industrial psychologist, occupational therapist and orthopaedic surgeon); as well as defendant's occupational therapist, that the plaintiff was dismissed at SASOL because of intoxication at work. Surely the fact that he was dismissed clearly shows that he was at some stage employed at SASOL [as a petrol attendant]. Basically the defendant in anyway accepts this fact [that the plaintiff was employed at Sasol] for as long as it shows a negative aspect, i.e. dismissal of the plaintiff; but otherwise it/defendant wants the court not to accept that plaintiff was never employed as long as it suits the defendant. I need to mention that the defendant went to the extent of refuting the plaintiff's salary advices and actuarial calculations based on these, which would have shown that at some stage the plaintiff was indeed employed. It is not clear to this court why the plaintiff's legal team did not pursue these. I will thus not delve into those salary advices and actuarial calculations.

[120] It may be so that plaintiff did not testify to confirm, amongst others, that he was once employed as a petrol attendant at SASOL, but on probabilities, this court finds that at some stage, in fact about two (2) months prior to the accident he was employed at SASOL service station, Kilnerpark as a petrol attendant. The two industrial psychologists confirmed this collateral information with Ms Wessels who is part of the management at SASOL. I have no reason not to believe Dr Pretorius in this regard. The fact that Ms Wessels was not called as witness does not detract from the fact that she did confirm to both plaintiff and defendant's industrial psychologists that the plaintiff was indeed employed at SASOL until he was dismissed in April 2012, about two months prior to the accident in question herein, and they had no reason not to believe her. The defendant was overly difficult and technical, and unreasonably so in my view. It is very unfortunate that defendant's counsel seemed to personalise this matter, which is not expected of an officer of the court who is supposed to assist the court in coming to a fair and just decision. On more than one occasion I had to ask counsel to calm down because he would be so worked up and/or livid while cross examining plaintiff s witnesses; hence I say he seemed to

have personalised the matter, because otherwise there was no reason why he had to be so livid during the proceedings.

[121] The fact that the plaintiff was dismissed, may be twice or thrice, is not a foregone conclusion that he would never be employed again; as clearly stated by Dr Pretorius in his evidence, that despite plaintiff s previous dismissal he seems to have been able to again find employment as a petrol attendant. On facts that the defendant wanted to rely on that, from the record it shows that the plaintiff was dismissed at least thrice this clearly indicates that even after such dismissal somehow he managed to find himself another job somewhere else. Uninjured he on a balance of probabilities stood a better chance to find another employment be it as a petrol attendant or some or other unskilled labour.

[122] As much as there are inconsistencies in the various reports of the experts on when, where or why he was dismissed; these are factors that the court would take into consideration in applying contingencies. Interestingly he did disclose to the defendant's industrial psychologist, Ms Grove that he was dismissed at Sasol for intoxication.

[123] As to whether plaintiff passed grade 11 or grade 12, this has no impact on the kind of work he did. In fact the report of Marlize Grove, the defendant's industrial psychologist clears this up, so his highest standard passed would be grade 11 since he attempted but did not pass grade 12. Surely as a petrol attendant one does not necessarily need specific qualifications and one really does not need an expert to confirm what standard of education is required to work as a petrol attendant. This is one of those jobs that fall under 'labourer' in my view, and I do not think that there are specific qualifications required to work as a petrol attendant. As already stated, surely even a person who did not go very far at school can be employed as a petrol attendant, as long as he or she can read and write.

[124] It is so that all the experts agree that the plaintiff is suited for light work category. It maybe so that the work of a petrol attendant falls under light work however, one has to examine it further, on what the job really entails. Surely court can take judicial notice. A petrol attendant stands walks from one point to the other for most part of his/her duties. I have never ever seen a petrol attendant sitting down around the foyer at filling stations.

[125] This brings to Ms Zondo's evidence that with recommended intervention and appropriate

treatment plaintiff is still suited for the work of a petrol attendant. That the plaintiff will have to get occupational therapy training to learn to do body weight shifting to alleviate pressure on his left foot while on duty, and would also have to get permission from his employer, who'll have to accommodate him by allowing him to bring a foot stool to work, so that he can frequently/occasionally rest his left ankle/foot during rest breaks, to preserve ankle hygiene. Further that plaintiff should get orthopaedic intervention by having his left shoe padded so that he can endure standing for a long period of time as a petrol attendant.

[126] By merely suggesting what's set out in her evidence shows that she appreciates the difficult position the plaintiff finds himself in due to the injury to his left ankle, which is undisputedly an injury he sustained during the accident in question herein. Clearly what she suggests is very cumbersome. The plaintiff would first have to undergo occupational training, then have his shoe padded, then get a sympathetic employer who will allow him to bring a foot stool to work; this she/Zondo, who mentions in her report that the plaintiff's mode of transport are taxis, expects that a person like the plaintiff who uses a taxi for transport, would be expected to carry a foot stool every day to work. This, in my view is not only cumbersome but also unrealistic. Surely that foot stool would in any event be used only during lunch break, which can't be more than l hour [it is a norm that lunch break is l hour, even in terms of the Basic Conditions of Employment ("BCOE")]. If one were to take into account the working hours of employees per BCOE, 8 hours less 1 hour [for lunch], it is 7 hours, at best 6 hours standing. This in my view is a long period for standing, going from petrol pump to the window to pay, which is what happens all the time all day long with petrol attendants; it entails walking around a lot. Ms Zondo's opinion/suggestion in this regard is unrealistic. Her approach to me does not seem to have been objective.

[127] As already mentioned, the defendant, strategically did not call two (2) of its experts (Dr Gantz-orthopaedic surgeon and Ms Grove-the industrial psychologist), whose opinions are favourable to the position/condition of the plaintiff, to come and testify, despite their reports having already been handed up to court by agreement between the parties. Their reports were not disputed by the plaintiff, and as appears from the joint minutes, they agree wholly with the plaintiff's experts on the disposition of the plaintiff pertaining to employment.

[128] It is also significant to mention Ms Phasha's evidence to the effect that both she and the defendant's occupational therapist have agreed that the plaintiff's functional capacity is reduced

purely due to the injuries he sustained in the accident under discussion. That the previous knee injury does not have any effect on the plaintiff's functional capacity. Dr Khan also testified that during his examination of the plaintiff, had there been any significant pathology on his knee he would have picked it up. From Ms Zondo' s evidence and suggestions on how plaintiff should handle his ankle/leg problem shows that the effect and sequelae of injury/fracture to the plaintiff's left ankle is significant and has direct impact on his inability to can endure standing/walking for extended period of time.

[129] Dr Khan clarified to the court that his mentioning that after surgical intervention plaintiff stood a 70% chance that he could go back to being a petrol attendant without any problems, was merely his personal opinion at the time, but that that was not within his expertise to comment on, and that it falls within the expertise of the occupational therapists to assess functional ability/capacity of a patient as they would conduct extensive tests to evaluate such. It is important to mention that in fact in his report he did mention that he deferred to an occupational therapist in this regard, rightly so.

[130] As stated in AA *Mutual Insurance Association Ltd v Maqula* 1978 (1) SA 805 (A)

> *"It is settled law that a trial Court has a wide discretion to award what it in the particular circumstances considers to be a fair and adequate compensation to the injured party for his bodily injuries and their sequelae.* "

[131] The legal principles applicable to the assessment of damages for loss of earnings and earning capacity have been set out on numerous occasions in the past in various case law. See *Gwaxula v Road Accident Fund* 2013 JDR 2291 (GSJ) where Moshidi J, stated that

> *"It is by now accepted that in the assessment of these kinds of damages, which cannot be assessed with any amount of mathematical accuracy the court has a wide discretion. See for example, A A Mutual Insurance Association Ltd v Maqula I 978 (!) SA 805 (A).* "

[132] Having regard to all the facts before this court I am satisfied that it has been shown, on a balance of probabilities that the plaintiff was employed as a petrol attendant for most part of his working career, more specifically at least two (two) months prior to the accident, and that he has suffered a loss of earnings and of earning capacity. It is so that there was little, factual evidence

placed before me as to the plaintiff s employment history. I accept that he was dismissed at at least one former work place. The plaintiff did not testify to tell the court about his employment history. However, the fact that he was unemployed at the time of the accident should not be held against him; see *Gwaxula v Road Accident Fund* 2013 JDR 2291 (GSJ) where Moshidi J stated the following:

> *"....each case must be assessed on its own circumstances. In my view, in the present matter, the established facts of the plaintiff's unimpressive work history. and the tact that he was unemployed at the time o(the collision, must not overly be held against him.* [my underlining] *It is indeed trite that the rate of unemployment in our country, especially among unskilled and uneducated and previously disadvantaged members of the population, was unacceptably high. The current rate of unemployed people in South Africa is at 25.6 percent. The circumstances of the plaintiff were no different. Even without the collision, he would still have found it difficult to secure employment with a Grade 11 level of education only. These factors were indeed difficult to ignore completely. See Burger v Union National South British Insurance Company [1975] 3 All SA 647 (W) at p 650:*
> *"A related aspect of the technique of assessing damages is this one; it is recognised as proper in an appropriate case, to have regard to relevant events which may occur, or relevant conditions which may arise in the future. Even when it cannot be said to have been proved, on a preponderance of probability, that they will occur or arise, justice may require that what is called a contingency allowance be made for a possibility of that kind. If, for example, there is acceptable evidence that there is a 30 per cent chance that an injury to a leg will lead to an amputation, that possibility is not ignored because 30 per cent is less than 50 percent and there is therefore no proved preponderance of probability that there will be an amputation. The contingency is allowed for by building in the damages a figure representing a percentage of that which would have been included if amputation had been a certainty. That is not a very satisfactory way of dealing with such difficulties, but no better way exists under our procedure. "*

[133] Issues to do with the plaintiff s unimpressive work history, the rate of employment in the country, are issues to be addressed on contingencies. It is so that the rate of unemployment in our country, especially among unskilled and uneducated and previously disadvantaged members of the population, is unacceptably high. According to statistics the current rate of unemployed

people in South Africa is at about 26.7%. The circumstances of the plaintiff are no different. Even without the collision, he would still have found it difficult to secure employment with a Grade 11 level of education only. These factors are indeed difficult to ignore completely. See *Burger v Union National South British Insurance Company* [1975] 3 All SA 647 (W) at p 650:

> *"A related aspect of the technique of assessing damages is this one; it is recognised as proper in an appropriate case, to have regard to relevant events which may occur, or relevant conditions which may arise in the future. Even when it cannot be said to have been proved, on a preponderance of probability, that they will occur or arise, justice may require that what is called a contingency allowance be made for a possibility of that kind. If, for example, there is acceptable evidence that there is a 30 per cent chance that an injury to a leg will lead to an amputation, that possibility is not ignored because 30 per cent is less than 50 percent and there is therefore no proved preponderance of probability that there will be an amputation. The contingency is allowed for by building in the damages a figure representing a percentage of that which would have been included if amputation had been a certainty. That is not a very satisfactory way of dealing with such difficulties, but no better way exists under our procedure."*

[134] It is now well-settled that contingencies, whether negative or positive, are an important control mechanism to adjust the loss suffered to the circumstances of the individual case in order to achieve equity and fairness to the parties. Therefore, as stated in *Nicholson v Road Accident Fund* (07/11453) [2012] ZAGP JHC 137 (30 March 2012), both favourable and adverse contingencies must be taken into account, as stated also in *Southern Insurance Association v Bailey N.O.* 1984 (1) SA 98 (A) at 117C-D:

"The generalisation that there must be a 'scaling down' for contingencies seems mistaken. All 'contingencies ' are not adverse and all 'vicissitudes are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets, and ignore the rewards of fortune. "

[135] There is no hard and fast rule regarding contingency allowances. See Koch, *The Quantum Yearbook* (2011) at 104 where the following is stated:

> *"General contingencies cover a wide range of considerations which may vary from case*

to case and may include: taxation, early death, saved travel costs, loss of employment, promotion prospects, divorce, etc. There are no fixed rules as regards general contingencies."

[136] Having due regard to all factors in the light of the particular circumstances of the matter I am of a considered view that it would be fair, just and equitable to provide for a contingency of 50 per cent in respect of past loss of income as well as future loss of income. There is in principle, in my view, no reason for distinguishing between the two categories of income for purposes of contingencies.

[137] I the result I make the following order:

A

1. The defendant shall subject to a 10% apportionment in favour of the defendant, pay to the plaintiff R300 000.00 in respects of general damages.
2. Interest on the amount in paragraph 1 above at the applicable *mora* rate, presently 10.25o/o *per annum,* calculated fourteen (14) days of the date of this judgement until date of payment.
3. The defendant is ordered to furnish to the plaintiff an undertaking in terms of section 17 (4) (a) of the Road Accident Fund Act 56 of 1996 in respect of 90% of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him, arising from the injuries sustained by him in a motor vehicle accident which occurred on 16 June 2012, after such costs have been incurred and upon proof thereof.
4. The defendant is ordered to pay the plaintiff s taxed or agreed costs on the High Court scale, as well as plaintiff s costs as far as the experts are concerned, including the costs of obtaining reports and the reasonable preparation, reservation and qualifying fees of the following experts:
    4.1. Dr Imran Khan (Orthopaedic surgeon)
    4.2. Adelaide Phasha (Occupational therapist
    4.3. Dr Willie Pretorius (Industrial psychologist)

B

1. It is declared that the defendant shall, subject to apportionment of 10% in its favour, pay to the plaintiff a sum for the past and future loss of earnings to be calculated as follows:

    1.1. The plaintiff s past loss of earnings to be calculated based on actual hourly rate for petrol attendants [in accordance with Bargaining Council wage agreement Retail Motor Industry Organisation (RMI)], as at 16 June 2012

    1.2. The plaintiff s future loss of earnings as a result of the accident to be calculated at R45 079. 20 per annum, with inflationary increases to retirement age 65years

    1.3. a contingency deduction of 50o/o is to be applied to B1.1 above

    1.4. a contingency deduction of 50% is to be applied to B 1.2 above

    1.5. The actuaries are to apply the usual assumptions to the calculations based on 1.1 to 1.4 above.

2. In the event of the parties not being able to agree on the amount to be calculated as a result of this declaration, the matter may be set down before me on a date to be arranged with my registrar. If the sum is agreed, and the plaintiff wishes to obtain judgment for the said sum, the matter may be similarly set down.

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L M MOLOPA - SETHOSA J

JUDGE OF THE HIGH COURT