REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

(1)	REPORTABLE: YES / NO	
(2)	OF INTEREST TO OTHER JUDGES: YES/NO	
(3)	REVISED.	
	14/04/2016	……..
	DATE	SIGNATURE

DATE: 28/4/2016
CASE NO: 43070/2013

In the matter between:

NO-ELE NCAPAYI Plaintiff

And

THE ROAD ACCIDENT FUND Defendant

JUDGMENT

MOLOPA-SETHOSA J

[1] The Plaintiff, No-Ele Ncapayi ("plaintiff") has instituted an action against the defendant for damages arising out of a motor vehicle

collision which occurred on 10 September 2011 at Khayelitsha, Cape Town, between a motor vehicle with registration letters and number CA 5[…] ("the insured vehicle") there and then driven by one Craig Stanley ("the insured driver"), and the Plaintiff, who was a pedestrian at the time of the collision.

[2] The issue of liability has been settled on the basis that the defendant is liable to pay to the plaintiff 100% of the agreed or proven damages. When the matter came before court for hearing on the quantum of damages, the parties had reached an agreement, in terms whereof the defendant agreed:

2.1 to pay to the plaintiff 100% of the plaintiff's proven or agreed damages.

2.2 to pay the plaintiff's past hospital and medical expenses in the amount of R4 594. 60.

2.3 to provide the plaintiff with an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act, 56 of 1996("The Act") in respect of future medical and related expenses.

2.4 pay the plaintiff an amount of R700 000.00 (seven hundred thousand rand only) in respect of general damages.

[3] All the court was called upon to do was to adjudicate on the plaintiff's claims for past and future loss of earnings; more specifically as regards this issue, the only real issues are whether or not the plaintiff would have progressed at his work place from elconop 2 level to elconop3 level, and further to basic artisanship; and the contingency to be applied to his expected injured earnings.

[4] It is not in dispute that the plaintiff is employed at Goddards Electrical (Pty) Ltd ("Goddards") as a semi-skilled electrical operator. It is also not in dispute, and this appears on plaintiff's salary advice, that the plaintiff as at the time of the collision on 10 September 2011 was on job grade elconop2, which he allegedly obtained in 2004. At issue is whether had he not been involved in the accident in question herein he would have progressed to the level of elconop 3 and further to basic artisanship.

[5] The parties had agreed that the reports filed by the plaintiff's expert, Dr Jason Sagor ("Dr Sagor"), an Orthopaedic Surgeon, in terms of Rule 36(9)(a), dated 08 January 2013 will be accepted as evidence before court and that there is no need to call the said expert witness to give viva voce evidence.

[6] The report of Dr Jason Sagor is to the effect that he saw the plaintiff for the first time on 15 November 2012, approximately one year after the accident. That by that time osteoarthritis had already developed in both the knee joints. That the plaintiff has been disabled and is functionally impaired by these knee injuries. Further that the plaintiff was still working but struggled to cope with his employment demands in view of his knee symptoms and

limited mobility; that the plaintiff'should ideally be doing sedentary or semi-sedentary work.

[7] He further states that the plaintiff will require surgical intervention, including arthroscopic assessments and debridement of both knees probably in his 50's, preferably 60's; and ultimately knee replacements of both knee joints. That the debridement will cause the plaintiff to be unable to work for 3 weeks post operatively and the knee replacement procedures will each require him to be off work for 4 months post operatively. He states that the injuries to plaintiff's knees were severe and as a result he will continue to suffer permanent and serious long term impairment in terms of his working life and personal life.

[8] Dr Sagor states in his report that he saw the plaintiff for an updated report on 2 March 2015 and that his views remained as before. He restates his concerns with regards the osteoarthritis which has says have sat in; he states that the plaintiff is significantly compromised with regard to employment and especially with regard finding alternative employment in the open labour market.

[9] He is of the view that the plaintiff will not be able to work as an electrical operator beyond the age of about 58 years.

[10] The plaintiff led the evidence of Martinette Le Roux, an occupational therapist. Her qualifications were not in dispute. She confirmed the contents of her report dated 15/12/2012 and the addendum report dated 20 March 2015. She testified that she first saw the plaintiff on 23 October 2012, approximately one year after

the accident. That she interviewed the plaintiff and assessed his functional capacity. That at that stage the plaintiff was placed in an alternative position as a store man due to the plaintiff being unable to perform his former duties, which included *inter alia* crouching, kneeling, climbing ladders and scaffolding.

[11] She testified that based on her assessment of the plaintiff at that stage, she was of the opinion that the plaintiff no longer had the functional capacity to perform electrical duties. That she saw the plaintiff again on 26 February 2015 for purposes of an updated report; and that osteoarthritis had set in as expected.

[12] She testified that the plaintiff has in the meantime resumed his previous electrical duties, that he however remained unable to perform his work as before. Further that his employer has been accommodating him up to that stage, and that as an electrical operator plaintiff continued to experience marked difficulty in performing electrical work and he was no longer able to perform all of his electrical duties. That plaintiff required more assistance, was unable to work below knee level, was unable to negotiate scaffolding, and to carry heavy items. That the plaintiff mainly worked on the ground floor level.

[13] She testified that Mr Craig Kelly "(Kelly") confirmed to her that the plaintiff was no longer performing his work as before due to his shortcomings as set out above. That Kelly also reported to her that mentally the plaintiff was different after the accident, he was slow to comprehend and could not be given multiple instructions, he also worked slower than before and required supervision, whereas

before he/plaintiff could and did supervise others. Further that Kelly also reported to her that they have accommodated plaintiff extensively, and should plaintiff lose his current employment he would have significant difficulty finding alternative employment. That Kelly also reported that prior to the accident the plaintiff had the ability to progress, but that since the accident this was no longer possible.

[14] Under cross examination she confirmed that during her second assessment of the plaintiff, the plaintiff could negotiate stairs from the ground floor to the sixth (6th) floor, whereas during her first assessment he could not. That after the accident there is improvement on the plaintiff, but that however, the plaintiff is unable to perform all the duties he is required to perform, therefore he remains incapacitated. She stated that though there was some improvement on the plaintiff, that she would not call it a considerable improvement. That the plaintiff's main problem was lifting and carrying of heavy items upstairs.

[15] She stated that she had discussed the plaintiff's high blood condition with the plaintiff but that the plaintiff had told her that though he had high blood pressure he was not put on any medication for it. That on her second assessment of the plaintiff’she did not assess plaintiff on his ability to lift and carry heavy items because that might have increased the plaintiff's blood pressure. She stated that the blood pressure was not accident related.

[16] She confirmed that during her second assessment, the plaintiff had actually resumed his previous position as an electrical operator; stating that that did not mean that the plaintiff was able to perform his duties as before. She further stated that she did not find out from the plaintiff's employer what the duties of an assistant electrician are to be able to compare whether or not the plaintiff's condition is such that he was able to deal with his situation; stating that she only focussed on plaintiff's physical situation.

[17] The next witness to testify was Renee De Wit, a neuro- psychologist. Her qualifications were not disputed. She confirmed the contents of her report dated 02 December 2014. She testified that she first saw the plaintiff on 28 November 2014. That the Plaintiff reported to her that he has no memory of the accident and that his first recollections are of waking up at an uncertain time, that he has vague memories of his twelve days' admission to hospital. In her report she states that the plaintiff'said that he was still confused when he returned home, whereas his wife said that he recognised everyone at home and did not seem confused.

[18] She testified that Kelly reported to her that pre-accident the plaintiff had the ability to progress to elconop3 level and that post the accident he does not see plaintiff going to elconop3. That Kelly informed her that post accident the plaintiff was slower to understand instructions, and that plaintiff was no longer able to take charge/supervise of a group of workers whereas before he could. In her report she stated that the project manager, Urtel,

believed that the plaintiff was doing well and that there were no difficulties with the plaintiff at the workplace.

[19] She testified that on assessing the plaintiff'she found some deficits; that she found the plaintiff to be slow to understand and to perform tasks; and slow to think and respond; that this is not related to his/plaintiff's educational level, [plaintiff is said to have reached standard 5/grade 7 as his highest school qualification]. She testified that she thinks that somehow plaintiff got minor head injury which affected his cognitive abilities.

[20] Under cross examination she stated that from the neuropsychological test that she did, plaintiff might have suffered a level of head injury. She stated that she was informed by Kelly that the plaintiff had reached elconop2 level in 2004. She stated that the plaintiff's level of independence has not changed; that the plaintiff manages his finances and has some level of independence even after the accident.

[21] The next witness to testify is Craig Kelly ("Kelly"). He testified that he knew and worked with the plaintiff before and after the accident. That he is a qualified electrician and has worked for Goddards Electrical for the last 20 years, from the age of 17 years.

[22] He testified that he has known and worked with the plaintiff'since 1998. That after he/Kelly qualified as an electrician and became a foreman, and from around 2002 the plaintiff worked directly under him for extended periods of time on multiple projects. That he

came to know and experience the plaintiff as a particularly competent employee and described him as an excellent worker, who was dedicated, loyal and eager to improve himself.

[23] He further testified that in 2003/2004 the plaintiff had progressed from a general worker to elconop2 level, which is the equivalent of a semi-skilled electrician. That the plaintiff was keen to progress further, made enquiries in that regard and was nominated by him/Kelly in 2006 and 2007 for further training in elconop3, however, that plaintiff was not selected/chosen by management for elconop3. He testified that from 2006 onwards Goddards was heavily involved in numerous projects in preparation for the 2010 Soccer World Cup and that as a result production took preference and few employees were sent for further training. That after the 2010 World Cup business normalised; Goddards retrenched contract workers and started sending permanent employees for training again. Further that had it not been for the accident, plaintiff would have been sent for elconop 3 training and would have attained elconop3 by September 2012.

[24] He testified that had the accident not occurred, the plaintiff would have been nominated again for elconop III in 2012 and maybe in 2 to 2Y2 years thereafter he would have progressed to basic artisanship. That having regard to the Plaintiff's skill as an electrical worker, he would have been able to progress to the basic artisan level. That after the accident, there was a marked decline in the Plaintiff's ability to meet the requirements of his job; and that

he/Kelly accommodated the plaintiff by giving him store room duties for more than a year, but was instructed by management that the plaintiff had to go back on tools because the company could not afford the wages of a semi-skilled electrician working in a storeroom. He further testified that he has attempted to shelter the plaintiff. That however, another foreman or employer will probably not be as sympathetic to the plaintiff, due to the fact that the plaintiff no longer meets the requirements of his job.

[25] He testified that that the Plaintiff's level of education (standard 5/grade 7) would not have been an obstacle and that the plaintiff would have been accepted for such basic artisan training; that the plaintiff's age and school qualification would not have impeded his intended progression to elconop3 or basic artisan levels. He reiterated that with a grade 7 the plaintiff would have qualified and would have been accepted for training as an artisan.

[26] Under cross examination he stated that the final say in choosing someone to go for elconop 3 training was with management. He stated that when he nominated the plaintiff for elconop 3 it was not a formal thing, that he just wrote something on paper. He stated that he did not give any of the plaintiff's expert witnesses any document that showed them the policy required at Goddards for advancement/progression of employees to higher level; and or what standard of formal qualification was required. Neither did he give them any policy of the company. He stated that there is no policy on age restriction or level of education to advance to elconop 3. He stated that due to the workload at the company the plaintiff did not go for advanced/elconop 3 training between 2006

and 2011; that the company did not send anyone for training in that duration.

[27] He stated that for as long as there was workload at the workplace, there is a chance that plaintiff would not have gone to advance level. He stated that towards the end of 2011 the company reduced nearly 400 staff members, which enabled them in the following year to send employees back to school for training due to the fact that they were not as busy as they were in the past.

[28] He stated that however he does not have any written confirmation to confirm that the plaintiff would have gone to attend the elconop3 course during that time i.e. around 2012.

[29] Asked what his qualification was m relation to the plaintiff's qualifications, he stated that it was completely different, that he/Kelly was the site foreman and that he is an artisan. Asked what the requirements was to become an artisan, he stated that one would have to be a qualified electrician; that it is practical training that one does at college. Further asked what the minimum formal educational qualifications are to become qualified electricians, he stated that it is one's practical experience and theory side. He stated that the plaintiff would have been accepted for artisanship with grade 7.

[30] He stated that there were times when the plaintiff did not work with him, i.e. that plaintiff worked with other groups/teams, under other person's supervision and that he/plaintiff worked as a semi- skilled electrician. That in 2004 he lost plaintiff to some other

supervisor, plaintiff came back to work under him in 2006 until the beginning of 2011. That they were involved with projects from 2006 to 2010, and plaintiff was working under him. Between 2004 and 2006 plaintiff was no longer working with him.

[31] He stated that he does not know what criteria management uses to decide on who is going for further training.

[32] The next witness to testify was Esther Auret Besselaar, an Industrial Psychologist. Her qualifications were not disputed. She testified that she has more than 30 years' experience of assessing people as a Human Resources consultant, *inter alia* as Human Resources manager for Old Mutual.

[33] She testified that she had a site meeting at the plaintiff's place of employment which was attended by plaintiff's attorney, the project manager at Goddards Mr. Urtel ("Urtel"), Kelly, as well as a representative of Goddards HR administration, Ms Adriaanse, held on 25 March 2015. That they informed her that Plaintiff progressed from general assistant to elconop2 level; i.e. went for a trade test and was placed at elconop2 level.

[34] She confirmed the contents of her report dated 20 June 2014 as well as the addendum to her report dated on 30 March 2015. She further confirmed that she had discussions with the defendant's Industrial Psychologist Ms Linda Krause ("Krause") and that they prepared joint minutes dated 15 April 2015.

[35] She testified that had the accident not happened, the plaintiff would have continued working at elconop2 level, that there was no documentation available from the employer but that this was not unusual.

[36] She testified that given that the plaintiff would have 24 to 25 years left of his working life ((had the accident not occurred), and that plaintiff loves his job, worked with skilled people like artisans and that Goddards contributed to skills development, that plaintiff would with time, in 15 years have gone for artisanship training.

[37] She testified that according to Messrs. Urtel and Kelly, plaintiff would have probably qualified for elconop3 by end of 2012; further that Urtel and Kelly informed her that since plaintiff was already exposed to reading meters and supervising operators doing an electrician's duties, he would have reached artisanship because he had been exposed to that kind of work.

[38] She testified that the plaintiff had 40% serious orthopaedic injuries, as well as neuro-psychological deficits. That he was slower or took longer with tasks.

[39] She testified that post accident the plaintiff would no longer be considered by his employer for further training. That the plaintiff was in fact sheltered by Kelly in his current job. That pre-accident plaintiff would have retired at 65 years old and post-accident plaintiff is compromised, that his job security is at risk, especially if he can be moved to work under a different foreman. That it is unrealistic for a big company as big as Goddards that has many

workers to keep a person like the plaintiff indefinitely. That it was a big risk.

[40] She testified that if plaintiff were to lose his job at Goddards he would have to compete with able bodied persons. That the plaintiff is unsuited to his current job.

[41] Under cross-examination she stated that it is management that has the final say as to who goes for further training, [as in when the supervisor Kelly allegedly nominated the plaintiff but management did not choose him]. She stated that there is no reason to suggest that the plaintiff would have been neglected for another 25 years.

[42] She conceded that taking into account that the plaintiff had been on elconop level 2 since 2004 to 2011 when accident happened; further that the plaintiff had allegedly been nominated by his supervisor but not chosen by employer to attend elconop3 level training, that this would have an impact because the process was not guaranteed.

[43] She confirmed that the plaintiff's income since the accident had not totally stopped

[44] She disagreed with Krause's opinion that the Plaintiff would not have progressed any further. She explained that, in her view, on the available evidence, the Plaintiff had the desire, ability and opportunity to have progressed to at least basic artisan level.

[45] The next witness that testified is Alexander John Munro, a forensic actuary. His qualifications were not in dispute. He confirmed his reports dated 16 April 2015 and 17 April 2015.

[46] He testified that his calculations are based on the information which appears on the joint minutes of Besselaar and Krause (the Industrial psychologists); as well as from plaintiff's fortnightly pay slips [22 April 2014 - March 2015 pay slips]. He testified that he analysed each pay slip to get the information which confirmed the information in the joint minutes. That he set up assumptions regarding basic salary to reflect uninjured career path and injured career path as postulated by Besselaar, leaving contingencies to the court. He used the income figures and overtime percentages agreed upon by the industrial psychologists in their joint minute. He used the career progression opined by the Plaintiff's industrial psychologist in the joint minute. He stated that the statutory cap is not applicable to this claim and that the court can apply its own contingencies to the calculated amounts.

[47] He stated that 22 April 2014 to March 2015 was a long enough period for him statistically to consider an average; that it was the best information they had available from all the pay slips and IRP5 's in the past and that the data was consistent within that period, averaging about 40.5%.

[48] He calculated on three postulations:

1. First, based on Besselaar's opinion that plaintiff would have proceeded to the level of basic artisan;

2. Second, an assumption that plaintiff has a 50% chance of promotion to level of basic artisan;

3. Third, an assumption that the plaintiff would have gone to elconop 3 in September 2012, and remained there uninjured.

[49] That concluded the plaintiff's evidence. There is no counter actuarial report on behalf of the Defendant.

[50] The defendant led the evidence of Linda Joyce Krause, an Industrial Psychologist. Her qualifications were not in dispute. She confirmed that she was co-author to the joint minutes dated 15 April 2015 with plaintiff's Industrial psychologist, Ms Besselaar.

[51] She testified that she had an issue with plaintiff's career progression after the accident; that her concerns are based on plaintiff's pre accident history, that he would unlikely have proceeded to artisan level or even further, given that since 2003 to 2011 he had obtained elconop2 level, which was a 2 weeks training course. That since October 2003, until the accident in 2011 plaintiff has never attempted to further his qualifications with elconop level 3, which is a few weeks' training. That her main concern issue is that plaintiff's pre-accident history does not allow for career progression to the level of artisan, based on his qualification.

[52] She testified that the level of an artisan requires minimum N2 which is the equal of grade 11, with emphasis on mathematics and

science, with many years of experience. She testified that she does not agree that plaintiff would have progressed to artisan level with grade 7 as his highest educational qualification.

[53] She testified that in all likelihood, looking at the plaintiff's pre-accident career history she cannot foresee that plaintiff would have become an artisan, regard being had to the fact also that he has not attempted since 1997 when he started working.

[54] She testified that it is generally accepted that one reaches one's career plateau at the age of 45 years old. That taking into account that the plaintiff was 41 years old when he was involved in the accident herein, she does not see him having progressed beyond 45 years/his plateau.

[55] She testified that she disagrees with Besselaar's opinion on job security; stating that she/Krause has contacted the HR department at Goddards and spoke to Ms Adriaanse, the payroll manager, as well as with the HR consultant, Ms Riana Noord ("Noord"), who is the consultant between the bargaining council and the employees on elconop I, 2 and 3; that according to Adriaanse and Noord there was no indication that fulltime employees [like plaintiff] would be retrenched. They informed her that notices were out only in respect of contractual employees. Further that Noord informed her that the plaintiff can still apply to be trained on elconop3; that every employee can ask to be trained and the company is proactive in that regard.

[56] She testified that there was no indication that the plaintiff would be dismissed or retrenched. That according to labour laws and stipulations a person cannot be dismissed on grounds of illness.

[57] Under cross-examination she stated that a person can be dismissed for under performance if there has been warnings dealt with under labour laws.

[58] She stated that having gone through expert reports she concedes that there are limitations on the plaintiff, and that he could retire between the age of 58 and 60 years old; but that there were no disciplinary actions taken against plaintiff for under performance.

[59] She stated that the plaintiff would find it difficult to find a job in the open labour not only as a reason as of his physical health/injuries or sequelae of the accident, but also as a result of his educational level.

[60] She reiterated that pre-accident, she does not see plaintiff having progressed to artisan level.

[61] She stated that before the accident, the plaintiff had 8 years on elconop2 level; that he could have stayed on level 2 for 1 year according to employer information and could have applied for elconop3 but did not. She however conceded that plaintiff could at least have progressed to an elconop3 level.

[62] Put to her that according to Kelly plaintiff was nominated for elconop3 but due to 2010 world cup involvement he was overtaken

by events, she/Krause stated that the plaintiff got his elconop2 level in October 2003 and that he could have already attempted to do Elconop3 level in 2004.

[63] She further stated that according to Ms Noord, employees are granted opportunities, and that prior to the accident plaintiff could have progressed if he wanted to, but that plaintiff has not done anything pre-accident to advance himself. That plaintiff's pre-accident career history does not testify to the effect that he would probably have progressed to Elconop3 level.

[64] Pertaining to artisanship, she stated that she/Krause has studied the bargaining council's requirements and that she has also spoken to Ms Noord. That for plaintiff to engage in artisan studies he/plaintiff would have had to have at least N2 level or grade 11 with mathematics and science, together with a lot of experience. That with only grade 7 level of education plaintiff could not have coped with the demands of artisan studies; that she does not foresee plaintiff progressing to artisan level.

[65] She reiterated that a person reached one's career plateau at the age of 45 years old; that it was far-fetched that he/plaintiff would progress to artisan training, regard also being had to the fact that he would have required at least grade 11 or matric before doing artisan courses and also looking at his career history pre-accident.

[66] That concluded the evidence for the Defendant, and the evidence for the whole case.

[67] Counsel for the Plaintiff argued that the court should find on the probabilities that had it not been for the accident and the injuries, the Plaintiff would have progressed to the elconop3 level and thereafter to the basic artisan level, as opined by Ms Besselaar. That his earnings would have been as reflected in the actuarial report by Mr Munro.

[68] Counsel for the defendant on the other hand argued that taking into consideration that the plaintiff joined Goddards in 1997, only acquired elconop2 level in 2004, and until 2011 when he got involved in the accident herein there is no indication what stopped the plaintiff in the 8 years to advance himself to elconop 3 level, [according to Krause from the employer's information plaintiff acquired elconop2 level in October 2003]. Further that regards being had to the plaintiff highest education level, grade 7; he would not be able to advance to a higher level of basic artisanship. The defendant further submitted that the court should draw a negative inference from the fact that the plaintiff was not called to testify in his case, to confirm what was conveyed to his witnesses.

[69] It is trite that the plaintiff has to prove his case on a balance of probabilities. As already stated here above, the issue to be determined is whether or not the plaintiff would pre-accident have progressed at his work place from elconop 2 level to elconop3 level, and further to basic artisanship; and the contingency to be applied to his expected injured earnings.

[70] Briefly analysing the evidence of the various witnesses set out above, if one has regard to the evidence of Le Roux, it appears that she was reluctant to concede that there was marked improvement in the physical condition of the plaintiff. In the addendum to her report,

after the second assessment of the plaintiff'she stated in her addendum that "he remains able to negotiate stairs, reaching the sixth floor. She however failed to acknowledge this to be a significant improvement compared to the first time she assessed the plaintiff, which was only about a year after the accident, and surely with time there were improvements as appears in her report. Unfortunately Ms Le Roux did not come out as an objective witness who had come to assist the court in coming to a fair assessment of the facts. She was determined to paint a picture of a plaintiff with marked disabilities; but if plaintiff could negotiate stairs to the 6th floor it shows that there was some marked improvement in his condition, and he was not rendered as useless as his witnesses sought to portray before this court. I may just state that the plaintiff had the opportunity to confirm what Le Roux said; but he never testified in his own case, and no plausible explanation was proffered why he was not called as a witness in his own case to at least confirm what his witnesses said about him pre and post the accident. Therefore, all that was said about him was not confirmed by the plaintiff himself. An adverse inference can safely be drawn against the plaintiff on failure to call him as a witness.

[71] According to De Wit De Wit on her analysis, from what she was told by the plaintiff and Kelly amongst others, the plaintiff'seems to have suffered some head injury during the accident. However, as

appears from the hospital records, the Glasgow scale of plaintiff on admission at Tygerberg hospital on admission was 15/15. Plaintiff'seems to have been fully conscious when he was admitted to hospital after the accident. In her report she states that the plaintiff'said that he was still confused when he returned home, whereas his wife said that he/plaintiff recognised everyone at home and did not seem confused. The plaintiff has not come forward to explain to the court why he'd have no recollection of the accident; under the circumstances all the court can do is to draw an inference that plaintiff to some extent sought to exaggerate his sequelae to his experts. Kelly's evidence that plaintiff forgets tasks is very suspect, he seemed set to exaggerate plaintiff's sequelae.

[72] It is significant to note that from the evidence of De Wit, on first encounter with Kelly, he/Kelly only mentioned that plaintiff would have advanced to elconop3 level had the accident not occurred; he/Kelly did not mention artisanship at the first instance he had with to De Wit. Surely if that was the case he would have mentioned artisanship at the first occasion he had. In her report she mentions a need for the appointment of Curator Bonis for the plaintiff, however this aspect was not even touched and/or alluded to by the plaintiff's legal team.

[73] Looking at Kelly's evidence, there is no plausible explanation why since 2003/4 plaintiff was not /selected/chosen by his employer/management to go for elconop3 training despite the alleged nomination by Kelly; further there is no basis upon which Kelly substantiates why he says plaintiff would have gone for elconop3 training in September 2012. In her report dated 20 June

2014 Besselaar stated that most probably plaintiff would have continued working in elconop2 level for another 2-3 years and thereafter qualify for elconop3. Meaning that probably plaintiff would have progressed to elconop3 level in 2013 or even 2014. Kelly seems to work on speculation/thumb suck. Nothing he says is supported by any documentary proof. According to Kelly, he was not part of the decision makers who choose who to attend the course/training. There is no reason provided why plaintiff was allegedly not chosen in 2006 and 2007 after he was allegedly nominated by Kelly. Kelly stated that maybe it is because there were 500 employees from other supervisors as well to choose from. From the evidence of Besselaar the company had 100 permanent employees. It is doubtfully that the company would have sent contract/temporary employees for further training leaving behind their permanent employees. Kelly in my view does not seem to be completely candid with this court. I may just state that there are contradictions in Kelly's evidence. Under cross examination, asked why did plaintiff not go for elconop3 training between 2004 and 2011 he stated that from 2006 no employee was sent for training because they were inundated with work in preparation for the 2010 World Cup. This is inconsistent with him saying that he nominated the plaintiff for elconop3 level training in 20006 and 2007. His evidence is not reliable. From the relationship he had with the plaintiff as outlined in his evidence he cannot in my considered view be objective. He seems to have been in effort to exaggerate plaintiff's sequelae in view.

[74] Pertaining to whether plaintiff would have eventually progressed to artisan level, Kelly stated that due to the practical experience that

plaintiff had he would have progressed to artisan level. The impression created was that he would not be required to do extensive theory as well to eventually qualify for artisan level. Asked what qualifications he (Kelly) had to be an artisan he somehow dodged the question; he never told the court what qualifications he had; he simply stated that the plaintiff had extensive practical experience. That was not answering the question. If one has regard to Linda Krause's undisputed evidence that to become an artisan, one required to go through extensive theory involving maths and physics, and that artisanship levels equals N2 or Grade 11, why was Kelly not willing to assist the court in this regard since he had testified that he was an artisan. In his answer under cross-examination he did not say that he (Kelly) had extensive practical experience leading him to artisan level; he simply did not answer the question what qualifications he had. This would have enabled the court to assess if the plaintiff would have attained/progressed to the artisan level within a short space of time as alleged by Kelly and his experts.

[75] Looking at the evidence of Besselaar, when she says that plaintiff would have at some stage progressed to do basic artisanship, save for what she says she was told by Urtel who was not even called as a witness, and Kelly who the court found not to be objective, she did not tell the court what her independent investigations pertaining to what would be required basically before one could become an artisan was; as done by Krause. As already stated above, Kelly did not even answer questions on what his highest school qualification was and/or what the requirements was to become an artisan. The court has found Kelly to be dodgy on this aspect. In fact in her

initial report [20/06/2014], after her independent assessment in my view, Besselaar stated that the plaintiff would have remained on elconop3 level until his retirement age at 65 years old.

[76] On plaintiff's job security, Besselaar stated that it is unrealistic for a big company as big as Goddards that has many workers to keep a person like the plaintiff indefinitely. That it was a big risk for the plaintiff. She further stated that post-accident plaintiff is compromised and that his job security is at risk, especially if he can be moved to work under a different foreman. This was not confirmed by the company. In fact in her initial report she stated that Urtel initially informed her that he did not see anything wrong with plaintiff's performance. And there is evidence on record that post accident, the plaintiff was at some stage sent to Upington with others on a project. Surely management would not risk sending someone they did not trust would do his/her work properly outside his territory. I find her assertions to be speculative, no one from management/ the employer's side testified to this effect. Surely our country is governed by the Constitution and labour laws, an employer would not just dismiss an employee because of injuries sustained by such employee, and due processes would have to be followed if a need arose.

[77] According to Krause the plaintiff would not have progressed to artisan level because plaintiff was at an advanced age; [she accepted career plateau of people to be 45 years old]. Further, the plaintiff had attained elconop level 2 in October 2003, and up until September 2011 there was no other progression in his career

history, a lapse of 8years, therefore she contends that there were no strides to progress to elconop3. Plaintiff was therefore not a likely candidate for rapid career progression therefore would have remained at elconop2 level until his retirement. It is so that there is no concrete evidence that plaintiff made any effort in 8 years from 2003 to 2011to undergo further training, save for the conflicting evidence of Kelly which is not corroborated by management and/or documentary proof.

[78] Under cross examination Krause conceded, reluctantly so, that, especially taking into account plaintiff's career history prior to the accident, that there is a chance, though remote, that plaintiff might probably have progressed to elconop3 level, but she had no confidence that that would happen.

[79] With regards plaintiff's progression to artisan level, which is equal to N2 or grade 11 with mathematics and physics, her view is that given plaintiff's age, standard/level of education and career history, it was highly unlikely that plaintiff would have gone to basic artisanship level.

[80] She is the only expert that made an effort to investigate what the requirements would be to get to basic artisanship. She made concessions where necessary. I found her to be an objective witness.

[81] The court takes into account that plaintiff who was employed by Goddard Electrical company in June 1997 got his elconop II level in October 2003. The accident happened in September 2011, plus/minus 8years after he had obtained his elconop2 level. There is no plausible explanation why he did not progress to elconop3 level, which is said to be a 2 weeks course, between October 2003 and September 2011, save for contradictory evidence of Kelly that he (Kelly) had nominated plaintiff in 2006 and 2007 to attend the elconop3 level course. However, on his version, nomination does not necessarily guarantee/confirm that the plaintiff would indeed attend the course, as according to Kelly, the decision to appoint/choose employees to attend courses lay solely with the management. I have already dealt with Kelly's evidence and evidence pertaining to this aspect above. According to Krause, as informed by Noord, an employee can self apply to attend the course.

[82] It is so that the plaintiff sustained considerable injuries in the accident herein. Looking at his career history it is not in dispute that the plaintiff’s highest education level is grade 7. He was 41 years old when he was involved in this accident. Since his employment at Goddards in 1997, he only attained elconop2 level in October 2003, which is about 7 years from date of his employment. At the date of the accident (10/09/2011), it had been about 8 years since he had obtained his elconop2 level. Kelly says plaintiff would have progressed to elconop3 level by September 2012; as already stated above, there is no basis laid out for this assumption. This is not even a guarantee because on his own

version, he/Kelly is not the one that chooses employees to attend courses.

[83] In my view, it is highly improbable on the evidence before this court that he (plaintiff) would have progressed to basic artisan level. This has nothing to do with his intellectual capacity. Looking at his age, his career history within Goddards and how he progressed, his educational qualification/grade 7, circumstances are such that he would in all probabilities not have even attempted to progress to basic artisan level. On Besselaar's independent assessment, in her initial report, had the accident not happened, the plaintiff would have remained in elconop3 level until his retirement at the age of 65years old. The plaintiff was not even called as a witness in his own case to testify as to how he saw himself progressing, and/or to confirm what his witnesses said about him.

[84] As already stated in par [77] here above, it is so that Linda Krause conceded under cross examination that there is a chance, though remote, especially taking into account plaintiff’s career history prior to the accident, that plaintiff might probably have progressed to elconop3 level. It is only on this basis that the court accepts that on the probabilities, and on the facts there is a small chance that plaintiff might one day have progressed to elconop3 level, though doubtful in my view. I doubt that such progression would have been in September 2012 as alleged by Kelly, which differs with what Besselaar stated in her initial report; and this I say taking into consideration plaintiff’s career history prior to the accident. People in management were not called to enlighten the court why from 2003 to 2011 (despite 2 alleged nominations by Kelly) was

plaintiff not chosen to attend the course for elconop3; and/or why he was twice (2006 and 2007), as alleged by Kelly, not chosen to go for elconop3 training to advance himself. According to Krause, as informed by Noord, employees themselves apply and are encouraged to advance themselves to a higher level, and plaintiff did nothing to advance himself to elconop3 level. Unfortunately Noord was also called as a witness.

[85] Taking into consideration all the facts before this court, and on the totality of the evidence before this court, as well as the observation and concerns raised I am of the view that the best way to deal with this matter is to apply higher contingencies; [higher than the contingencies suggested by both counsel, especially on past loss of earnings]. Both parties are agreed that 50% contingency on future loss of earnings is reasonable.

[86] I have considered the submissions by both counsel as well as all the evidence before this court. In my view a contingency of 50% on the Net Value of Future loss of income and a contingency of 40o/o on the Net Value of the Past loss of income will be just and equitable in the circumstances.

[87] The award to be made is based on Munro's 3rd report dated 17 April 2015, where he calculated plaintiff’s loss of earnings based an assumption that the plaintiff would have gone to elconop3 in September 2012, and remained there uninjured. I however do not accept that plaintiff would have progressed to elconop3 level in

September 2012; hence, amongst others, a higher contingency on past loss of earnings.

[88] On all the facts before the court, the following order is made:

1. The defendant is ordered to pay to the plaintiff's attorneys the sum of Rl 518 769.60 (one million five hundred and eighteen thousand seven hundred and sixty nine rand sixty cents) only, made up as set out below, by way of a lump sum payment, details of which are set out hereunder ("the capital payment");

2. The capital payment is made up as follows:

   2.1 Past hospital and medical expenses: R4 594. 60 (four thousand five hundred and ninety four rand and sixty cents only);

   2.2 General damages: R700 000. 00 (seven hundred thousand rand only);

   2.3 Past and future loss of earnings: R8 l 4 175 eight hundred and fourteen thousand one hundred and seventy five rand only)'

3. The defendant shall furnish the plaintiff with an undertaking in terms of Section 17(4) (a) of the Road Accident Fund Act 56 of 1996 ("the undertaking"), to compensate the Plaintiff for 100% of the costs relating to 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 the plaintiff after the costs have been incurred and on

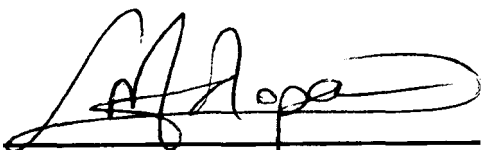
proof thereof and arising from the collision which occurred on 10 September 2011.

4. The defendant is ordered to pay the Plaintiff's taxed or agreed party and party costs on a High Court scale, which costs shall also include the costs of two (2) counsel 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. Jason Sagor (Orthopaedic Surgeon)
   4.2 Renee De Wit (Neuro Psychologist)
   4.3 Martinette Le Roux (Occupational Therapist
   4.4 Esther Auret Besselaar (Industrial Psychologist)
   4.5 Munro Consulting (Actuaries)

5. The plaintiff's attorney's trust banking account details are as follows:

Account name: **Adendorff Inc.**
Bank: **First National Bank**
Branch Name: **Adderley Street**
Branch Code: 201-409
Account number: 6[…]



L M MOLOPA - SETHOSA J
JUDGE OF THE HIGH COURT