THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES/ NO

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

(3) REVISED.

(4) Signature: Date: 26/04/2021

CASE NO: 82531/2017

JAY DE POTGIETER **PLAINTIFF**

AND

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

N V KHUMALO J

I. INTRODUCTION

[1] The Plaintiff, a 21 year old aircraft sheet metal engineer assistant, instituted an action against the Road Accident Fund ("RAF") pursuant to the provisions of s17 of the Road Accident Fund Act, 56 of 1996 as amended ("the RAF Act"), claiming

damages for injuries he sustained in a motor vehicle accident that occurred on 10 September 2016 at the corner of Park and Hill Street in Arcadia.

[2] According to his particulars of claim, he was a passenger in a Maroon Honda whose driver and registration number were unknown to him, when a motor vehicle also with unknown registration numbers skipped a red robot at an intersection and collided with the Honda.

[3] In reply to Plaintiff's request for further particulars the Defendant confirmed that the accident was of a single motor vehicle, (that is the Honda) whose driver was Pieter Wagenaar. The particulars of claim were however never amended.

[4] The Plaintiff who was 18 years old and a scholar when the accident occurred, sustained a fracture on the right ankle and also on the left radius (the wrist).

[5] At the beginning of the trial the parties indicated that the merits and the Defendant's degree of liability were settled at 100% in favour of the Plaintiff.

[6] The parties also confirmed that the Defendant undertook to provide the Plaintiff with a s17(4)(a) undertaking covering 100% of the Plaintiff's future medical expenses.

[7] The issue and quantum of general damages was referred to the Health Professional Council of South Africa ("HPCSA") for determination and was accordingly postponed *sine die*.

[8] Consequently the only issue for determination on trial was damages for past and future loss of earnings for which the Plaintiff had in his particulars of claim claimed amounts of R200 000.00 and R400 000.00, respectively. The amounts were not amended until date of trial.

[9] The Defendant has specifically pleaded that the Plaintiff's claim for past and future loss of earnings and interference with earning capacity is subject to the provisions of s 17 (4) (c) and s 17(4A) of the RAF Act.

[10] At the judicial case management conference for trial readiness held on 14 February 2020, the parties agreed that the issues in dispute were to be determined by the court solely on the contents of the various opposing experts' reports and the joint minutes. The reports that were filed on record on behalf of the Plaintiff at the time, were those of, inter alia, Dr J P Marin an Orthopaedic Surgeon, Dr N Du Plessis an Educational Psychologist, N Arm an Educational Therapist, Amanda Rennie an Industrial Psychologist, L Grootboom a Clinical psychologist and J Sauer an Actuarial Scientist.

[11] The Defendant was to file reports by Dr Ngobeni an Orthopaedic Surgeon, Dr Methi an Educational Psychologist, T Matsepe an Occupational Therapist and O Sechudi an Industrial Psychologist. It was confirmed at the time that the Plaintiff had attended all the scheduled consultations with the mentioned experts. The joint minutes compiled by the experts were also going to be filed as part of the reports.

[12] The parties further agreed to the admission of these reports in evidence but not to the correctness thereof.

II. THE DISPUTE

[13] The issue to be decided was whether as a result of the injuries sustained the Plaintiff's capacity to earn was diminished, and if so, the extent thereof. The Plaintiff carried the onus of proof.

[14] I was advised that in dealing with the issue, the trial was now to proceed only on the reports filed by the Plaintiff as the Defendant failed to file any expert reports.

[15] The amounts claimed for the loss of earnings were said to have been calculated based on the contingency of the Plaintiff's loss of earning capacity and necessity for early retirement or alternatively as a globular amount based on the fact that the Plaintiff is unable to attain the pre-accident earning capacity due to the injuries sustained by him.

lll. SUBMISSIONS BY THE PLAINTIFF

[16] Ms Strydom on her submission on behalf of the Plaintiff pointed out in relation to the sequelae consequent to the injuries sustained by the Plaintiff, that the left distal radius (wrist) hairline fracture and pilon fracture on the right ankle, necessitated an open reduction and internal fixation. She highlighted that **Dr Marin** reported that presently the Plaintiff is still experiencing pain on his wrist and relative weakness in his left arm. The x–ray report showed a mild cortical irregularity at the lateral aspect of the distal left radius that may be related to a previous injury as well as a small soft tissue calcification at the tip of the ulnar styloid suggestive of a small osteophyte or osseous fragment also from a previous injury. He was also still experiencing pain in his ankle, exacerbated by inclement weather as well as prolonged standing or walking. The x-ray indicated plates and screws still in situ and the screws also traversing the right medial malleolus which therefore poses a difficulty for the Plaintiff walking up and down the flight of stairs, whilst experiencing an occasional stiffness in the ankle joint. The mild sclerosis of the distal tibia articular surface may suggest early degenerative change with possibility of the degeneration of his ankle progressing to end stage osteoarthritis. In such circumstances provision is made for an ankle arthrodesis. It was also noted that he walks with an uneven gait and had reported having lost sensation when he sits down.

[17] Strydom noted that Marin determined from the sequelae that the accident and the accompanying injuries will not have a detrimental effect on the Plaintiff's life expectancy but he would not be able to work to the normal retirement age of 65 even if accommodated in a permanent light duty/sedentary working environment which she recommends, provision must still be made for a five-year early retirement. If not accommodated, she advised that he should not perform physical labour. Marin noted that his productivity and working ability have been negatively impacted by the accident. She pointed out that with the recommended treatment the Plaintiff's productivity will improve, however as the degeneration in the right ankle progresses the productivity will decrease again. She therefore recommended Plaintiff to be accommodated in a permanent light duty/sedentary working environment as determined by the Occupational Therapists, N Arm. Marin also opined that the Plaintiff's decreased

physical wellbeing causing participation restrictions, pain and suffering, diminished vocational ability and financial loss.

[18] Strydom noted further that according to **N Arm**, the Plaintiff received surgical treatment and was discharged after two weeks with a wheel chair. He used it for two weeks and used bilateral crutches for two months. The expert's assessment show that he is able to carry up to low range medium work demands. His occupation as a general worker assisting aircraft sheet metal engineers falls within the light mid- range of medium work. From a physical perspective, he does not possess a total fit for his current occupation requiring some form of reasonable accommodation to thrive. He presents with exertional and postural limitations related to the injuries, requiring extensive reasonable accommodation to meet his significantly diminished residual functioning, particularly when considering the anticipated progress of the degenerative changes already present at such young age (21 years). This may prejudice him against his current and other prospective employers. Arm therefore concluded that it is unlikely that Plaintiff could work until full retirement in a spectrum of work beyond and above lower ranges of medium work.

[19] On Plaintiff's likelihood of reaching his pre-accident educable potential, Strydom referred to N Du Plessis' assessment report, (Educational Psychologist) that when considering the Plaintiff's current level of cognitive ability, it is apparent that on the premorbid level he may have presented with a suggested average cognitive potential, based on Lezak's opinion as well as his developmental history and family educational history. On assessment the Plaintiff was said to present with notable psycho emotional, social and behavioural difficulties, which will inadvertently hamper his cognitive performance and ability to cope with the demands and expectation of formal education. Du Plessis had further suspected a correlation between the onset of these psycho emotional, social and behavioural difficulties at the time of the accident and concluded that the accident in question has resulted in the Plaintiff struggling at a psychological level. Although it was also considered likely that the accident may have rather exacerbated an underlying difficulty that would typically be attached to the trauma of parental divorce. Du Plessis observed that the Plaintiff's cognitive performance appears to be poorer in comparison to a suggested pre-accident potential (No school reports or any other documentary evidence), likely to be negatively

influenced by the post-accident exacerbation of psychological difficulties thus hampering his ability to reach his pre-accident learning potential. His cognitive functioning and academic performance may additionally be negatively impacted by the physical restrictions and pain as they will serve as distracting factors that will untimely hinder his ability to concentrate adequately. Overall, he concluded that Plaintiff does not present with sufficient scholastic and cognitive ability to cope with the demands and expectations of any academic related learning demands.

[20] Du Plessis took note that the FCE findings indicate that the Plaintiff was able to carry up to Lower range Medium Work Demands. He therefore is of the opinion that if the Plaintiff does not maintain his present employment, he could be seen as an unfair competitor when applying for employment in the open labour market as a result of the injuries he sustained. (This is in contrast with the fact that he did find a job immediately after matric following the accident and notwithstanding the sequelae alleged). A measure of normality setting in.

[21] On the report of M Rennie, the Industrial Psychologist, Strydom noted that her postulation was in line with the Educational Psychologist's report that the Plaintiff will require extensive reasonable accommodation to meet his significantly diminished residual functioning, particularly when considering the anticipated progression of the degenerative changes already present at such a young age. This may prejudice him against his present employer and other prospective employers, especially taking into consideration that he is an unskilled labourer. Ongoing that may tend to make him psychologically more vulnerable, and probably less able to retain the drive, perseverance and concentration, which would make it difficult as a job incumbent to meet the job requirements and therefore impact on his performance. She concluded that from a physical perspective the Plaintiff does not possess a total fit for his current occupation. Future absenteeism from work to attend to recommended medical treatment will as well affect his work productivity and his physical endurance will be reduced particularly when pain is triggered.

[22] Furthermore Rennie reported on the pre-accident employment prospects that the Plaintiff was likely to complete Grade 12 and to have continued to complete a higher certificate level of education (NQF5), entering the labour market at

approximately Patterson Job Grade A3, with a potential to develop to approximately grade C1/C2 (skilled employment) by approximately age 45 which would have been his career ceiling and retired at age 65. On post- accident employment prospects Rennie reported that the employers complain about the Plaintiff taking regular breaks. She confirmed that Plaintiff's employment is sympathetic and that he is being accommodated. Rennie has also alleged that the Plaintiff told her that standing at a table to build helicopters parts requires bending and stretching as well as climbing up and down. He experiences pain and discomfort whilst performing these tasks and also whilst driving. He is allowed to sit when he experiences too much pain and not suited to any physical requirements for his current role. Rennie indicated that the Clinical Psychologist, Grootboom mentioned the combination of Plaintiff's emotional and physical difficulties which renders him a vulnerable employee who may find it difficult to secure and or maintain gainful employment in future should he have to leave his current employment for any reason. His work endurance and habits will be negatively affected when pain is triggered and he is at risk of experiencing despondency, fluctuating motivation and commitment in the work environment. He therefore will continue to require work place accommodation or a sympathetic employer. She postulates that Plaintiff will retain his current employment in an accommodated work role with his current sympathetic employer, should he however not retain his current employment he is likely to experience extended periods of unemployment and retire five years early. He is not likely to develop beyond the current level of median semi - skilled employment and only inflationary increases would apply.

[23] Ms Strydom finally submitted, based on the report of Ms Grootboom, that the Plaintiff completed Grade 1 to 12 without any failure. He passed Grade 12 after two months of absence following the accident although with a significant drop in his marks (no proof or record of any of his scholastic performance provided). She noted the post-traumatic stress disorder, helplessness and mildly elevated levels of depression which affect his functioning and interpersonal relationships. Also that it seems physical challenges and pain are having a significant impact on his well-being psychologically, the impact of the accident having impeding optimal psychological functioning. Plaintiff is said to have reported self- esteem changes, over anxiety levels which may be attributable to disconnection from himself and his emotion which often leads to underreporting of especially depressive symptoms. She opined that severely

depressed people are often detached from their emotions and may experience an overwhelming sense of hopelessness. Projective tests are said to indicate a strong tendency towards aggression and destructive behaviour in terms of verbal outbursts and continuous fighting with other people, likely to have a negative impact on his motivation, efficiency and productivity in the workplace and may further affect his relationships with co-workers and employers. The combination and extent of his emotional and physical difficulties rendering him a vulnerable employee in the open labour market in terms of securing and or maintaining gainful employment in future, should he have to leave his current employment.

[24] Finally Ms Strydom referred to the following calculations and contingencies by J Sauer, the Actuarial, which were based on the Industrial Psychologist addendum report:

	Premorbid	**Post accident**	**Total**	**Loss**
Past Earnings	R256 325	211 575	44 750	
Contingency 5%/5%				
Total past Loss	R243 509	200 997	42 512	
Future Earnings	5 424 690	1 867 761	3 556 929	
Contingency 20%/40%				
Total Loss	R4 339 752	1 120 656	3 219 096	
Total loss of earnings			**3 261 608**	

The contingencies applied on the calculations are of a spread of 20% between the pre and post morbid. Strydom suggested that 25 % contingency be applied on the proposed pre- accident amount and on the post-morbid be lowered to 35%, proposing a 10 % spread instead of the alternative 30 % spread proposed by the Defendant.

IV. THE DEFENDANT'S SUBMIISSIONS

[25] Mr Lebea on behalf of the Defendant addressed the issue of the loss of earnings by first referring to the matter of Southern Insurance Association v Bailey NO 1984 (1) All SA 98 at 113 (G). He pointed out that Marin's report on the employability of the Plaintiff which suggests an early retirement age, that is 5 years earlier, due to

the injuries and the sequelae, notwithstanding being accommodated in a permanent light duty position, is speculative. He argued that even the reporting on his education as well, stating that taking into account his family's educational background, none of them is certificated beyond Matric, except for the father who has a fitter and turner certificate. He argued that if Plaintiff's potential genetic pre-disposition is taken into account, he is not affected educationally. In other words, Plaintiff is where he is supposed to be.

[26] Mr Lebea further pointed out that the reports indicate that the injury has affected the Plaintiff's productivity and therefore his employment. His ankle due to his standing endurance being affected. However, Plaintiff managed to get employment after the accident with all the alleged challenges. The likelihood of unemployment therefore not a given. The Defendant therefore with reference to *Burger v Union National South British Insurance Co* 1975 (4) SA 72 (W) 75D-G suggests an amount of R800 000.00 or a premorbid contingency of 15%/ 30%, which is a spread of 15 %. He suggests that his capacity is to be limited to 10% disenfranchisement. He said he should be considered for reaching his ceiling at most at 48 due to the ankle problem as per the Occupational Therapist report.

V. FURTHER CONSIDERATIONS

[27] Further to the submissions by the parties, going through the reports the following was further noted that Plaintiff comes from an average cognitive and academic background. Arm reported that based on Plaintiff's educational and vocational history, his premorbid vocational potential appeared to meet the requirements of work that falls within the light medium and unskilled. Rennie, referencing Du Plessis, the Educational Psychologist's postulation, reported that it is likely the Plaintiff would have completed Grade 12 (maybe with NFQ5) and entered the job market at Paterson Job Grade A3, developing through semi-skilled employment, which is likely to have been his career ceiling by approximately 45. Further on the pre-accident earnings**,** juxtaposed against the fact that at the time of accident he was a scholar, it was further reported that he, at some stage post-accident, was unemployed for three (3) months during which he was not remunerated. That period of unemployment is then considered and calculated as a post-accident

previous actual loss. The likely earnings had the accident not occurred were based on projection that he would have likely reached a ceiling by approximately age 45 and a retirement age of 65 years, as indicated by Rennie on consideration of Marin's report.

[28] On post-accident earnings**,** he was reported to be earning a basic salary of R6 262.63 per month, R75 151.56 per year, as per payslip dated 03 March 2019, which is just below the median for semi-skilled employment. He is responsible for performing repairs and maintenance on metal body components also for grinding and smoothing metal surfaces. He was found to still maintain the ability to meet the demands of light to lower ranges of medium work, 8 hour day/40 hours per week. It was recommended that he be compensated for the loss during the time he would be receiving and continuing to receive the recommended medical treatment. Also to be taken into account that his highest level of education was now going to be NQF4 instead of NQF5 and was no longer going to be able to continue to develop his skills, to Paterson C1/C2 (skilled employment) but as a vulnerable employee requiring accommodation who would remain on median semi-skilled employment (non-corporate sector) (R82 000.00) instead of a natural progression from Paterson Job Grade B to skilled employment at C (R326 000 basic salary until 45 being the ceiling retiring at age 65). It is therefore proposed that considering all these a higher post-accident contingency should be applied. The future loss is then addressed by considering the difference between pre-and post- accident earnings.

[29] It is also of significant importance to note that factors unrelated to the accident were reported to have also contributed to the despondency of the Plaintiff including traumatic experience of his parent's divorce which happened when he was 16 years old whereupon he was separated from them to go and stay with his aunt (mother's sister, her husband (uncle) and their children with no therapy or counselling provided for the trauma, a situation that was most likely exacerbated by the accident in question.

[30] At time of accident he had no employment history. He on January 2017, straight after matric landed a job as a general worker (Aircraft Sheet Metal Preparation) at ADT Heli-Work. He had no prior training but received it on the job. Notwithstanding coming out of an accident with the stated challenges, he was successful in his training and no shortcomings mentioned to have been a hindrance. He is said to have remained on

that job until to date with the exception of the three months from October to December 2019 (two and a half years from date Plaintiff was hired) when according to Rennie's statement (apparently informed by Plaintiff's employer with no records provided) Plaintiff was fired and after the three months rehired on the same terms and position.

[31] In addition, Plaintiff has been reported to suffer from a stress disorder and elevated depression which affects his functioning noted by Du Plessis to have left the Plaintiff a psychologically vulnerable individual at risk for the development of more serious psychiatric problems if left untreated. It was also noted that his psycho emotional and behavioural history prior to the accident was not reported, although a psycho emotional history as per traumatic experience as a result of his parents' divorce reported. Du Plessis also noted Plaintiff to present with border line and or poorly developed verbal and performance ability with a working memory that is also poorly developed. Plaintiff's processing speed has been indicated as falling in the below average range. Du Plessis has however also reported that Plaintiff does not present with delays in processing incoming information, but does appear to struggle keeping this information in his short term memory. Plaintiff also does not present with any functional impairments that are typically attached to people exposed to traumatic brain injury. He presents with a mild post -traumatic stress disorder and very low anxiety levels. His career options and tertiary study may be limited by his reading, mathematical and writing ability which is significantly behind for his age. This is also not accident related.

[32] I have further, taken into consideration the reporting by the Industrial Psychologist that Plaintiff did not receive any formal training but on the job training, acquiring his technical skills as an aircraft sheet metal worker (therefore semi-skilled) even though it is alleged that he had to stand on a table to build helicopter parts which requires bending and stretching as well as climbing up and down whilst experiencing pain and discomfort performing those tasks. Rennie referred in her report to a telephone call with the Plaintiff's employer whereupon the latter indicated that the Plaintiff acquired the skills successfully, with no difficulties identified and his work thereafter satisfactory. Difficulties were only related to repeated pain in his right ankle as his work requires him to stand for 8 hours a day which he is said to be unable to do and finds it extremely difficult. His ankle becomes swollen. On the other hand, Rennie

reported on the relationship Plaintiff has with his co-worker that she was informed that he gets on well with his team.

VII. LEGAL FRAMEWOORK

[33] A matter of diminished capacity to earn is a factual issue in any way, whilst the extent thereof will depend on the judge's discretion of what is fair under the circumstance of each case. See *Sandler v Wholesale* Coal *Suppliers Ltd* 1941 AD 194 at 199.

[34] As a result mindful of the fact that the Plaintiff bears the onus to provide sufficient proof of the loss, it is trite that a court has a wide discretion in assessing quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right. It is literally speculative, as emphasized in *Southern Insurance Association v Bailey NO* 1984 (1) All SA 98 at 113 (G) by Nicholas JA that:

> "Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate of the present value of loss"

[35] Contingencies are the "hazards of life that normally beset the lives and circumstances of ordinary people, Corbert & Buchanan, The Quantum of Damages, Vol II 360 at 367.1 and should therefore, "by its very nature, be a process of subjective impression or estimation rather than objective calculation; see *Shield Ins. Co. Ltd v Booysen* 1979 (3) SA 953 (A) at 965G-H. Contingencies for which allowance should be made, would usually include the following:

> (a) the possibility of illness which would have occurred in any event;
> (b) inflation or deflation of the value of money in future; and
> (c) other risks of life such as accidents or even death, which would have

become a reality, sooner or later, in any event; see Corbett & Buchanan, The Quantum of Damages, Vol I at 514

[36] In *Burger v Union National South British Insurance Co* 1975 4 SA 72 (W) 75D-G. 21 Colman J explains, as quoted with consent by Corbett JA in Blyth v Van den Heever 1980 1 SA 191 (A) 225, that:

> "how the court should take account of an uncertain future event in the assessment of future loss: 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 per cent and there is therefore no proved preponderance of probability that there will be an amputation. The contingency is allowed for by including in the damages a figure representing a percentage of that which would have. That is not a very satisfactory way of dealing with such difficulties, but no better way exists under our procedure."

in instances where the loss is difficult to prove (eg uncertain future loss) the measure of proof is lighter and the plaintiff needs only to prove the degree of probability that the uncertain loss will ensue. Robert Koch 22 refers to this technique of damages assessment in the case of uncertain loss as the "value of a chance".

[37] In *Southern* at 113 H – 114 E in the already quoted judgment of Nicholas JA, the learned judge of appeal also poignantly stated the following at 116G- 117A:

> "Where the method of actuarial computation is adopted, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations". He has "a large discretion to award what he considers right" *(per* Holmes JA in *Legal Assurance* Co *Ltd v Boles* 1963 (1) SA 608 (A) at 614F).

[25] exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the plaintiff may in the result have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. See *Van der Plaats v South African Mutual Fire and General Insurance* Co *Ltd* 1980 (3) SA 105 (A) at 114 - 5. The rate of the discount cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case."(my emphasis)

VIII. ANALYSIS

[38] Quantifying a claim for a diminished capacity to earn, the actuarial calculation is based on the realistic assumptions by the experts regarding the future, made reliant upon actual facts and the sequelae of the injuries as proven (or to be proven). Actual facts are therefore crucial if the conjectures and recommendations made by the experts including the actuary are to be fair and just.

[39] In *casu*, all having been considered, the report of termination of Plaintiff's employment from October 2019 to December 2019 due to him no longer meeting the physical requirements of the job and of not being remunerated during that period should not be regarded as a loss, as there is neither a document nor any evidence attested to, authenticating those allegations. The Actuary in his calculations regarded that to be a past loss of earnings suffered. Past loss is actual loss and is to be properly proven with no justification to be speculated. It is of concern that the employer who is the driver of the vehicle in which the Plaintiff was a passenger at the time of the accident, Plaintiff's uncle and husband to Plaintiff caregiver was not asked to provide proof or a written statement under oath on Plaintiff's alleged period of unemployment and loss. The exercise must at all costs not be allowed to seem to be all fictional, which might end up not being fair and just to the other party.

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[40] Despite having been involved in an accident three months earlier and still recuperating, it is reported that on his employment the Plaintiff successfully underwent

training. If the job entails what was referred to by Marin standing and going up and down the stairs, the training clearly posed physical and mental challenges requiring the same endurance and performance as the work to be performed in that position, which he overcame. In that case the fact that after training (which happened soon after the accident) his services were retained, disturbs the narrative of underperformance long after sustaining the injuries that could have gravely impacted on his performance employment.

[41] It is also unlikely that notwithstanding being regarded to be unfit for the job's physical requirements, the Plaintiff was in January 2020 offered the same position, under the same capacity, conditions and remuneration in which he continues to be employed to date, except for confirming that in the work context his employment is sympathetic and accommodative. The employer who is the uncle and driver could have attested to all that or submitted documentation in that regard for verification. The Plaintiff himself seems not to have said anything about being laid off. I am therefore not satisfied with the reporting by Rennie on this issue. It is however noted that Plaintiff confirmed being allowed to sit when he experiences too much pain. The contingency for his possible un-employability as a semi=skilled job seeker based on the evidence that the plaintiff lost his job for the three months and was employed again to the same job in the same capacity and salary are therefore to be high.

[42] Furthermore, on the past loss of earnings there is no evidence of pre-accident employment since the plaintiff was a learner and not earning any income. The plaintiff's pre-injury earnings are therefore assumed to be zero.

[43] On the post morbid loss, what needs to be considered is what will possibly prejudice and limit his employment opportunities in terms of the type of work, work environment and employer potential. Arm, the Occupational therapist reported that Plaintiff maintains the ability to meet the demands of the medium work after assessing his dynamic strength, having lost moderate amenities of life. Plaintiff having reported pain and decreased right ankle weight endurance and increased right limping gait, she pointed out that he will struggle with any activity that requires the handling of heavier

loads beyond 10kg, experiencing pain and discomfort. His productivity will decrease even though it might have at some stage increased with the recommended treatment, due to the degeneration in his ankle joint that might progress to end-stage osteoarthritis. In the consideration of contingencies to be applied an allowance should therefore be made for an increase in the patient's productivity with the recommended treatment which is rather not permanent as well as the setting in of the degeneration that will supposedly result in the decrease in his productivity requiring an extensive reasonable accommodation from employer.

[44] Marin had however further opined that from a physical perspective it appears the injuries Plaintiff sustained and the sequelae thereof had a restrictive impact on his functioning when compared to previous levels of functioning. There is no information regarding previous level of functioning but the Plaintiff revealed to Marin that he had previous rugby injuries on the right lower leg, but as to what impact they had on his quality of life prior to the accident, it was not specified. The previous rugby injury was also reported to Rennie. The uncertain scenario is a factor for consideration on the contingency to be allowed. Additionally, existence of previous injuries on his left arm noted on the x-ray report, said to may have caused a mild cortical irregularity at the lateral aspect of the distal left radius as well as a small osteophyte or osseous fragment, that according to Arm, Plaintiff reported no pain experience on his left wrist.

[45] The Plaintiff's psychological and emotional difficulties were identified as likely to impact on interpersonal relationships in the work context, and on his ability to retain employment in the long term in the labour market. He was therefore said to likely experience extended periods of unemployment. His future employment was therefore regarded as curtailed as a result of the injuries. The significance of factors unrelated to the accident reported to have also contributed to the despondency of the Plaintiff, should be noted, for which contingency allowance should be made. Specially the traumatic experience of his parent's divorce whereupon he was separated from them to go and stay with his aunt and uncle, one and a half years before the accident, with no therapy or counselling provided for the trauma. It means he may have presented with pre-existing psycho-emotional difficulties most likely to have been exacerbated by the accident.

[46] On the Defendant's submissions that on his education it should be taken into account his family's educational background, none of them is certificated beyond Matric, except for the father who has a fitter and turner certificate. The parents were reported to Du Plessis on date of assessment on 23 July 2019 to be both employed, the father as a Fitter and Turner. However, on the same date Plaintiff reported to Grootboom that his father, a boiler maker, was unemployed. His mother whose highest education level was reported to be a Grade 12 in other reports Plaintiff reported to Grootboom to be Grade 11. On 15 March 2019 he told Rennie his father's occupation was unknown. It is therefore reasonable to expect him not to have gone beyond Grade 12 as argued.

[47] Having taken into account all the *sequelae* and all the other realistic consequent effect on the future employability of the Plaintiff including the abovementioned concerns, it is evident that he would likely be affected on the semi- skilled open labour market, as an unequal competitor who is to be accommodated in a light duty and sedentary working environment, albeit slightly having acquired technical skills in his present employment, not much different from his premorbid potential. The chances of premature retirement being moderate, also early retirement a possibility not a given. Even though the shown resilience and experience might improve his chances to gain future employment despite the discomfort of pain, I also take note of the high unemployment rate in South Africa as a serious factor that nothing is guaranteed.

[48] Whether contingencies should be applied, and in what percentage, is directly linked with the amount that a court considers just in respect of compensation. Having regard to all the circumstances of this matter in my view it would be just and fair that a contingency factor be applied on the calculations by Sauer, in respect of post - accident future loss of income be lowered as recommended, however to a percentage of 30 % and on the pre morbid increased to 35%.

[49] I therefore conclude that applying such contingencies the amount of R2 218 615.80 would therefore be a fair and reasonable amount to be awarded for the total loss of future earnings.

[50] In the result the following order is made:

1. The Defendant is to pay a sum of R2 218 615.00 (Two Million Two Hundrend and Eighteen Thousand, Six Hundrend and Fifteen Rand) for the Plaintiff's future loss of earnings.

2. The Draft Order marked X is incorporated into this order and made an order of court.

N V KHUMALO

JUDGE OF THE HIGH COURT OF SA
GAUTENG DIVISION, PRETORIA

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