IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

CBBhoola

_____ 1st September 2021

SIGNATURE **DATE**

CASE NO: 99483/2015

In the matter between:

SB GWENTSHU **PLAINTIFF**

and

THE ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

BHOOLA AJ

INTRODUCTION

[1] The plaintiff, Mr. Gwentshu Sibusisio Boyboy, sued the defendant in his personal capacity, in terms of the *Road Accident Fund Act 56 of 1996 (Act)*, for damages sustained by him. This arose from a motor vehicle collision which occurred on the 22nd February 2014 near the intersection of Broad and Smith Streets, Durban, KwaZulu Natal.

[2] At all material times of the motor collision, the defendant was one of the two drivers involved in the motor collision.

[3] On the 31st May 2021, the matter came before me. The matter stood down until the 1st June 2021 for settlement negotiations between the plaintiff and the defendant. On the 1st of June 2021, there was no appearance on behalf of the defendant. The defendant was initially represented, however, the defendant terminated its mandate with their panel of attorneys due to a policy decision for the defendant to deal with the claims and litigation arising therefrom internally without the assistance of the panel of attorneys. The defendant's attorneys did not file a formal notice of withdrawal despite a notice of set down in this matter being served upon them. They simply made no appearance in court.

[4] The plaintiff requested to testify by way of affidavit in support of his claim under Rule 39(1) and 38(2) of the Uniform Rules. The acceptance of evidence in this manner is congruent with an approach to balance the disposal of cases against minimizing the danger of spreading Coronavirus (Covid-19). I accordingly granted an order for the matter to proceed by way of affidavits. There was no representation or evidence presented by the defendant[1] and I ordered that the matter proceeded by way of default in terms of Uniform Rule 39(1).

[5] In terms of an order granted on the 15th March 2017 and the pre-trial conference held on the 27th January 2020, the defendant conceded 50% liability in favour of the plaintiff's proven or agreed damages, which was subsequently accepted by the plaintiff.

[1] *Madibeng Local Municipality v Public Investment Corporation Ltd 2018 (6) SA 55 (SCA) PER Plasket AJA (Ponnan JA, Wallis JA, Willis JA, and Makgoka AJA concurring), para 26 (page 60 G-H:*

[6] A few days before the hearing of the matter, on the 26th May 2021, the plaintiff filed an amendment to its pleadings under Rule 28(1) of the Uniform Rules of Court. The amendment effectively inflated the quantum from R 1 000 000.00 (one million rands) to R3 176 114.58 (three million one hundred and seventy six thousand one hundred and fourteen rand and fifty eight cents). At first glance, the filing appears premature, as the amended pages forming the subject matter of the application were filed simultaneously on the day the application was issued. Exacerbating the situation is the fact that, at the time at which the amendment was made, the plaintiff was fully aware that there is no communication with the defendant, thus limiting, if not obliterating any chance of an objection by the defendant to object.

[7] Although litigation in an aforesaid manner is frowned upon, for the sake of being fair, and just to both parties, in the interest of justice, I condoned the late filing of and allowed the amendment, since the application was served on the defendant and the issue of merits had become settled.

[8] After scrutiny of this matter, I was somewhat startled as to how this matter was prosecuted. The need for proper judicial oversight and scrutiny cannot be ignored.

[9] On perusal of the papers, I found the following :

[9.1] that the RAF1 claim form was unsigned by the plaintiff but a witness had already appended its signature to the claim form. The plaintiff is rather fortunate that failure to sign the claim form or have it signed will not in itself render the claim unenforceable and will not lead to a dismissal of the claim[2].

[9.2] Additionally, the doctor who completed the medical report on the form in 2015 was not the doctor who treated the plaintiff initially or at all. This claim form was signed a year after the motor collision occurred. My observations were that the form was signed in Pretoria whilst the plaintiff

[2] *Shield Insurance Co Ltd v Booysen 1979(3)SA 953(A)*

was residing in Kwa Zulu Natal. This then explains why the claim form was not signed by the plaintiff. The provisions of section 24(2)(a) of the Act are peremptory and must be strictly complied with. A doctor who has not treated a patient is permitted to sign such a claim form on the condition that the claim is about to prescribe and he has sight of the medical records of the claimant. In this instance if I disregard the claim form, it will be prejudicial to the plaintiff and will not be in the interest of justice. I was satisfied that the claim form was substantially complete and the medical report was consistent with the evidence before this court. This type of practice is discouraged.

[9.3] Half the plaintiff's expert's reports indicate the motor collision occurred on the 22nd February 2014 and the other half indicated that the motor collision occurred on the 22rd March 2014. The RAF1 claim form reveals the motor collision occurred on the 22nd February 2014 and the plaintiff's affidavit and the summons indicate that the motor collision occurred on the 21st March 2014. Due to the time of the motor collision being 23:45 I can understand the disparity of 21st and 22nd March 2014 . The hospital reflects plaintiff was admitted on the 22nd March 2014. I therefore accept that the motor collision occurred on 21st March 2014.

PLAINTIFF'S CASE

Plaintiff's Facts

[10] The plaintiff was born on […….]. He is accordingly 37 years of age and was about 30 years of age at the time of the motor collision. The plaintiff is the owner and manager of a business dealing with projects in the electrical field where amongst other things, he receives tenders from government. It is alleged that plaintiff is an Electrical Engineer.

[11] The plaintiff served its RAF1 claim form on the defendant on 3rd July 2015. In paragraph 5 of the claim form, the date of the accident is reflected as 22nd of February 2014 and the plaintiff was claiming in his capacity as a driver. In

paragraph 14 the plaintiff reflected he was not at work on the 22nd of February 2014 and he will advise on the number of days he was not at work. The issues relating to whether the injured received payment from work, how much and the nature of the payment was all completed with "*will advise"*. In paragraph 15 the plaintiff claimed an amount of R 5 000, 000.00 (five million rand) inclusive of all heads of damages. Paragraph 21 of the claim form which provides for "declaration and consent" which was to be signed and witnessed, was not signed by the plaintiff but a witness appended his signature to the form. Paragraph 22 which related to the medical report was completed and signed in Pretoria, by Dr.ID Vorster on the 3rd of July 2015.

[12] The plaintiff subsequently caused summons to be issued against the Road Accident Fund (Fund) on the 14th of December 2015, which was served on the defendant on the 17th of December 2015. According to the summons, the plaintiff pleaded that the motor collision occurred on the 21st of March 2014 and he sustained injuries to the head, left pneumothorax, abdominal injury, diaphragm rupture, various lacerations, abrasions and contusions, emotional shock and trauma.

[13] The defendant filed two special pleases and a plea dated the 29 of January 2016. The plea was served by the defendant on the plaintiff's attorneys on the 2nd of February 2016. Since the issues raised in the special plea had subsequently become settled, it will simply be dismissed with costs.

[14] The plaintiff in his plea denied negligence, pleaded contributory negligence in the alternative which resulted in the merits being settled 50% in favour of the plaintiff's proved or agreed damages.

[15] There was no replication filed by the plaintiff, the matter proceeded by default on the 1st of June 2021 by way of affidavits, and Plaintiff's counsel argued the matter.

MEDICO-LEGAL EVIDENCE

[16] The plaintiff's expert witnesses, who filed affidavits in support of the plaintiff's claim are comprised of the Orthopedic Surgeon – Dr. Satish Bugwandin, the Clinical Psychologists – Dr. Roper, the plastic and Reconstruction Surgeon- Dr. Pienaar, the Pulmonologist – Dr. Gernot B Irsigler, the Occupational Therapist – Dr. Cally Preiss, the industrial psychologist – Dr. De Bruyn, the consulting Actuary – Mr. Potgieter, and the Neurologist – Doctor Manesh Pillay.

[17] A perusal of the expert reports reveals that the plaintiff completed his grade 12 in 2002 and obtained a Bachelor's degree in BSc - Electrical Engineering in 2006. Additionally, he also completed various short related courses such as Government Certificate of Competence and a Wireman's License and currently is a self-employed business owner or manager.

Dr. Roper – Clinical Psychologist

[18] Dr. L Roper, a clinical Neuropsychologist consulted with the plaintiff on the 15th of February 2016 and on the 31st of August 2017. He diagnosed the plaintiff with Depressive Disorder due to Traumatic Brain injury with depressive features and Post-traumatic Stress Disorder, which is expected to harm his interpersonal and occupational functioning, as well as his quality and enjoyment of life. He concluded that neuropsychological deficits, as well as neurocognitive difficulties, are present.

Dr. Pienaar - Plastic and Reconstruction Surgeon

[19] Dr. Pienaar, the Plastic and Reconstructive Surgeon consulted with the plaintiff on 27 March 2017 and lists plaintiff's injuries as serious scarring and

disfigurement with multiple scars over his forehead over an area of 9cm x 9cm, a 3cm hypertrophic visible scar on his right chest, a 4cm scar over his left chest and a 27 cm x 4 cm scar over his abdomen. He reports that the scaring has caused behavioural changes, withdrawal, and self-consciousness. He reveals that the scarring has not only affected the plaintiff's masculinity but has also subjected the plaintiff to social rejection and stigmatization and has affected his social, sporting, and leisure activities. He was of the view, that the scarring decreased his general enjoyment of life and it has impaired his earning capacity. He recommends plastic surgery should be done but opined that there will be a 30% improvement.

Dr Pillay - Neurologist

[20] Thereafter, the plaintiff consulted with Dr. Pillay, the Neurologist, on 30 March 2017 and on 30th March 2021. He lists the plaintiff's injuries as a moderate to a severe traumatic head injury on a Glasgow Coma Scale of 12/15, cognitive impairment involving memory loss, and no physical neurological deficit. According to him, the plaintiff's injuries complained of will not affect longevity. He opines that the plaintiff has no disability preventing him from performing any actions and has no loss of amenities to life as a result of the accident. According to him, the plaintiff can take care of his own needs and requires no assistance with physical or cognitive activities. He remarks that the plaintiff is at risk of developing post-traumatic epilepsy about 17 times higher than the normal population and does not require any surgery in the future. He concludes with a finding that the plaintiff has reached maximal medical improvement. He also opined that the plaintiff's post-traumatic headaches have resolved although his cognitive impairment will be permanent given the severity of the head injury. He was initially of the view that a curator should be appointed and subsequently changed his mind.

Dr. C Priess – Occupational Therapist

[21] The plaintiff consulted with Dr. C Priess, the occupational therapist, on 4th July 2017 and he lists the plaintiff's injuries as surgical and other scarring, pain in the

head and abdomen, slightly impeded cognitive ability, and moderate emotional difficulties. Dr. Preiss reports that the plaintiff has work experience as an electrician, maintenance engineer and project management, and his own consulting business. Additionally, from a physical perspective, the claimant will be able to remain functional in his current job role. Should the plaintiff be required to seek alternative employment for any reason in the future, he will be able to perform jobs that are classified as medium to heavy work in terms of strength demands.

Dr. Bugwandin – Orthopaedic surgeon

[22] The plaintiff thereafter consulted with Dr. Bugwandin, the Orthopaedic surgeon, on 28th September 2017, who reports that the plaintiff has no orthopedic injuries.

Dr Irsigler - Pulmonologist

[23] Dr. Irsigler interviewed the plaintiff on 19th April 2018 and completed the RAF 4 form, in which he listed the plaintiff's injuries as head injury, chest wall trauma with bilateral pneumothorax, and abdominal injury. His report indicates that the chest injury has been resolved but that the plaintiff is excluded from sport or fitness exercises. Additionally, he reports the plaintiff is left with predominantly sequelae of his head injury and possible complications of Laparotomy. According to him, the plaintiff has emotional and physical distress resulting from the accident although his longevity has not been affected. As a result of the accident, Plaintiff is no longer equally competitive to comply with work requirements to the same extent as he was before the collision.

Dr De Bruyn – Industrial Psychologist

[24] On the 15th of May 2018, the plaintiff consulted with the Industrial Psychologist, Dr. De Bruyn. In his report, Dr. De Bruyn records that the plaintiff presented with a normal gait with significant visible scarring in the abdomen, that he communicated fluently in English during the assessment, and conveyed information coherently and logically.

[25] Dr. De Bruyn reports that Plaintiff further informed him that at the time of the collision he was self-employed as a business owner/ manager. His job entailed working mainly with tenders for Municipalities, Provincial Governments, and Hospitals.

[26] After considering all the expert reports alluded to above, Dr. De Bruyn concludes that the plaintiff's injuries are consistent with all the experts' findings. He reports a Whole Person Impairment (WPI) of 15% in accordance with RAF 4 form, and a maximum WPI of 19% when considering all expert reports collectively. According to Dr. De Bruyn, the plaintiff's complaints arising from the accident include physical deterioration and cognitive memory loss. He opines that the plaintiff does not suffer from any psychological or emotional complaints but cognitively, he suffers from loss of memory.

[27] Insofar as the plaintiff's qualifications and career are considered, Dr. De Bruyn bases the pre and post-motor collision career prospects as the same. In other words, the plaintiff's career trajectory and earnings remain the same before and after the motor collision. According to Dr. De Bruyn, the plaintiff commenced his consulting business in 2010 and was employed at the time of the accident. His work was almost exclusively sedentary in nature and he is expected to continue in much the same fashion until his retirement at 65 years, or beyond. After the accident, the plaintiff's business continued in his absence for three months. He was fully renumerated for the period he was not present at his business. He returned to work after six months and currently functions as a Business Owner and Manager but not in the capacity as he could before the accident.

[28] Dr. De Bruyn submits that the impact of the sequelae to the brain injury as well as the residual psychological issues creates work-related risks and hazards and recommends a higher post-morbid contingency to make provision for unquantified uncertainties. Additionally, his observations are that the impact of the motor collision on the plaintiff's career prospects is such that the plaintiff's injuries are serious, so much so that cognitive impairment will be permanent in the light of the severity of the head injury. In turn, this will result in long-term neuropsychological functioning and deterioration of psychological function. Dr. De Bruyn's report was based on the plaintiff's earnings of R90 000,00 per month. He remarks that given a recognized degree (NQF Level 07), the plaintiff could advance to earn income with Paterson Grade D1+ as his basic salary upon reaching 45.

Loss Earnings – GRS Actuary

[29] GRS Actuary, Mr. John Potgieter files an actuary report on 18 May 2021. He was instructed to base calculations on the Industrial Psychologists report of Dr. De Bruyn. It is noteworthy to state at this point that Mr. Potgieter received no proof of the plaintiff's remuneration. His calculations were based solely on the report provided to the Industrial Psychologist. Mr. Potgieter made his calculations on unqualified and unverified amounts. as informed by the plaintiff. He concludes that the plaintiff did not suffer any past loss of income and he only calculated his future income from the calculation date onwards. The Actuary commented because the plaintiff's earnings in 2019 were almost double the postulated career ceiling, he only allowed for an inflationary increase in the future.

[30] He assumed, had the accident not occurred, the plaintiff's income would have been R1 080 000 per year (R90 000 x 12, in May 2019) and in the future increasing with earnings inflation until retirement age at 65. He suggested that a higher contingency deduction is to be negotiated. He considers inflation at 5,5% per year in the future using 2021/2022 income tax tables. The result shows the actuarial calculations for future income in the amount of R14 909,239.

[31] After the matter was argued, I enquired from the plaintiff the whereabouts of the plaintiff's affidavit as I could not locate the affidavit on CaseLines. The plaintiff subsequently filed a by affidavit, relying on the provisions of Rule 38(2). Before filing the affidavit, it was served on the defendant. I permitted the plaintiff's affidavit even though it was after the plaintiff argued having due regard to Uniform Rule 38(2). It would have been futile to have the matter postponed for a mere technicality. There was nothing new introduced in the affidavit, it was non-prejudicial, formal in nature, and in the interest of justice. I allowed this simply because the merits were settled.

ISSUES IN DISPUTE

[32] The issues in dispute to be determined by this court are:

[32.1] Whether the special plea regarding non-compliance with Section 17(1A) of the Act read with Regulation 3 of the Road Accident Fund Amendment whereby the plaintiff failed to provide the RAF with an RAF-4 form should be upheld?

[32.2] Did the plaintiff discharge the onus on a preponderance of probabilities in so far as the determination of quantum for past hospital and medical expenses;

[33.3] Did the plaintiff discharge the onus on a preponderance of probabilities in so far as the determination of quantum of future hospital and medical expenses;

[33.4] Did the plaintiff discharge the onus on a preponderance of probabilities in so far as the determination of general damages; which is dependant only if the special plea is dismissed;

[33.5] Did the plaintiff discharge the onus on a preponderance of probabilities in so the determination of past and future loss of income;

LAW

Special plea in respect of non-compliance with Section 17(1A) of Act and Regulation 3 of the Road Accident Amendment Act of 2008.

[36] The defendant raised a special plea to the effect that its obligation concerning non-pecuniary loss (i.e. general damages) was consequent upon the injuries sustained by the plaintiff has to be "*serious* " and the plaintiff had to complete and submit the RAF 4 form.

[37] Since the defendant conceded liability of 50% of the plaintiff's proven or agreed damages, I do not see the relevance of restating the law relating to general damages save to say the relevant provisions are the provision in section 17(1) of the Act, paying careful attention to subsection (1A) read with Regulation 3 of the Act.

Past hospital and medical expenses

[38] A Claimant is entitled to claim all the medical and hospital expenses reasonably incurred for purposes of effecting a cure, or all reasonable costs incurred in mitigating the amount.[3]

[39] According to the author Klopper[4], reasonableness means that the claimant must be sufficiently compensated for the injury suffered, but conversely, this implies that an inordinately high award should not unnecessarily burden the defendant. What this means in practical terms is that the claimant must demonstrate that he acted reasonably under the prevailing circumstances in incurring such costs or submitting himself or herself to a particular medical treatment or procedure.

Future hospital and medical expenses

[40] The practice of quantifying future medical expenses has now largely fallen away as the standard procedure now is to furnish an undertaking in terms of section 17(4)(a) to cover these expenses. In terms of Section 17(4)(a) of Road Accident Fund Act, 56 of 1996 (Act) as amended,

> *"(a) includes a claim for the cost of the future accommodation of any person in a hospital or nursing home or treatment of or the rendering of a service or supplying of goods…the Fund…shall be entitled, after furnishing the third party concerned with an Undertaking to that effect or a competent court has directed the Fund or the agent to furnish such Undertaking to compensate (i) the third party in respect of the said costs after the costs have been incurred and on proof thereof; or (ii) the provider of such service or treatment directly and notwithstanding Section 19(c)(d)."*

[25] If the defendant offers the aforesaid undertaking, the court generally makes it an order of the court for completeness.

General Damages

[3] *Potgieter et al. Law of Damages 456*
[4] *Third-Party Compensation 146*

[26] General damages include a person's physical integrity, pain and suffering, emotional shock, disfigurement, a reduced life expectancy, and loss of life amenities.

[27] The case of *Hendricks v President Insurance*[5] and the authors *Visser and Potgieter* Skadevergoedingsreg (2003) 97 provide that the nature of the general damages to be awarded make quantifying the award a complex task. This is because of the personal, non-pecuniary, and subjective nature of these interests, which make it difficult to quantify, but remains recoverable.[6]

[28] To qualify as a serious injury three steps must be undertaken by the medical practitioner. Firstly, to apply the non-serious injury criteria list; secondly, the methodology is contained in the *American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guide);* and thirdly, the methodology as set out in the narrative test. In this matter, the plaintiff crossed the threshold of meeting the requirements of "*serious damages*" by the expert reports.

[29] The plaintiff in the *De Jongh*[7] matter sustained a head injury consisting of extensive fragmented fractures of the frontal skull extending into the orbits (eye sockets) and the zygomatic arches -cheekbones, as well as the jaw, causing extradural haematoma which led to unconsciousness and which had to be surgically removed. Importantly, in this matter the SCA, quoting Holmes J, also pointed out the following fundamental principle relative to the award of general damages:

> "*that the award should be fair to both sides, it must give just compensation to the plaintiff, but not pour largesse from the horn of plenty at the defendants' expense*."

[5] *1993 (3) SA 158* C
[6] *Hendricks v President Insurance* 1993 (3) SA 158 (C); Visser & Potgieter *Skadevergoedingsreg* (2003) 101105.
[7] 2005(5) SA 547

[30] In *Mashigo v Road Accident Fund*[8] Mr. Justice Davis summarises the well-known approach to general damages and the use of previous comparable awards as follows*:*

> *"[10] A claim for general or non-patrimonial damages requires an assessment of the plaintiff's pain and suffering, disfigurement, permanent disability, and loss of amenities of life and attaching a monetary value thereto. The exercise is, by its very nature; both difficult and discretionary with wide-ranging permutations. As will be illustrated herein later, it is very difficult if not impossible to find a case on all four with the one to be decided. The oft-quoted case of Southern Insurance Association v Bailey NO 1984 (1) SA 98 AD confirmed that even the Supreme Court of Appeal had difficulties in laying down rules as to how the problem of an award for general damages should be approached. The accepted approach is the "flexible one" described in Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 at 199, namely: the submissions were "The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending on the Judge's view of what is fair in all the circumstances of the case"."*
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> *[11] Of course, awards in cases that show at least some similarities or comparisons are useful guides, taking into account the current value of such awards to accommodate the decreasing value of money. See inter alia: SA Eagle Insurance Co v Hartley [1990] ZASCA 106; 1990 (4) SA 833 (A) at 841 D and the practical work of The Quantum Yearbook by Robert J Koch which includes tables of general damages awards annually updated to cater for inflation.*
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> *[12] In respect of the issue of comparable cases and the guidance provided thereby, the Supreme Court of Appeal has stated in Protea Assurance co Ltd v Lamb 1971 SA 530 at 536 A - B: "Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time, it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration".*

[31] The court in these cases has a discretion. However, this discretion is not restrained by a relentless tariff drawn from previous similar awards. When

[8] *(2120/2014) [2018] ZAGPPHC 539 (13 June 2018)*

assessing such damages the factors must be considered in totality. Naturally, courts are assisted by sufficiently comparable case law which can be used as a yardstick to assist the court in arriving at an appropriate award.

[32] Counsel referred me to several comparable cases enlisted below. However, each case must be adjudicated on its own merits within the overarching maxim of *stare decisis*. In the case Van Heerden J in *Dikeni v Road Accident Fund* [9]stated

> *"Although these cases have been of assistance, it is trite law that each case must be adjudicated upon on its own merits and no one case is factually the same as another…… previous awards only offer guidance in the assessment of general damages."*

Loss of Earnings

[33] Future loss of earnings may comprise one of two categories: Firstly, where the plaintiff is away from work to receive treatment, and secondly, whereas a result of the injury sustained in the accident the plaintiff would suffer a loss in earning capacity as he is now not able to do certain types of work.

[34] It is accepted that earning capacity may constitute an asset in a person's patrimonial estate. If loss of earnings is proven the loss may be compensated if it is quantifiable as a diminution in the value of the estate.[10] It must be noted, a physical disability that impacts the capacity to an income does not, on its own, reduce the patrimony of an injured person. It is incumbent on the plaintiff to prove that the reduction of the income-earning capacity will result in actual loss of income.[11]

[35] In quantifying such a claim an actuary is often used to make actuarial calculations based on proven facts and realistic assumptions regarding the future. The role of the actuary is to guide the court in the calculations to be made.

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[9] *2002 C&B (Vol 5) at B4 171*

[10] *Prinsloo v Road Accident Fund 2009 5 SA 406 (SECLD) at 409C-41A*

[11] *Rudman v Road Accident Fund 2003 (2) SA 234 (SCA) at para 11, Union and National Insurance Co Limited v Coetzee 1970 (1) SA 295 (A) AT 300A.*

Relying on its wide judicial discretion the court will have the final say regarding the correctness of the assumptions on which these calculations are based. The court should give detailed reasons if any assumptions or parts of the calculations made by the actuary are rejected. It must be borne in mind that the actuary depends on the report of the industrial psychologists, who in turn are dependent on the information provided by the claimant.

[36] In *Dippenaar v Shield Insurance Co Ltd*[12] where the following was said at 917A-D:

'In our law, under the lex Aquilia, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate.'

[37] The court, in the case of *Road Accident Fund v Guedes*[13] at paragraph [9] referred with approval to *The Quantum Yearbook*, by the learned author Dr. R.J. Koch, under the heading *'General Contingencies*', where it states that:

"…[when] assessing damages for loss of earnings or support, it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is the prerogative of the Court..." [my emphasis]

[38] The percentage of the contingency deduction depends upon many factors and ranges between 5% and 50%, depending upon the facts of the case[14].

[39] The importance of applying actuarial calculations and their advantages were discussed in the case of *Southern Insurance Association v Bailey NO*[15] where the court referred with approval to the case *of Hersman v Shapiro and Company*[16] *at 379* per Stratford J where the following was said:

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[12] *1979 2 SA 904 (A)*
[13] *2006 (5) SA 583 (SCA)*
[14] *. (See AA Mutual Association Ltd v Maqula 1978(1) SA 805 (A) 812, De Jongh v Gunther 1975(4) SA 78 (W) 81, 83, 84D, Goodall (supra), and Van der Plaats v SA Mutual Fire & General Insurance Co Ltd 1980(3) SA 105(A) 114-115A-D)*
[15] *1984 1 SA 98.*
[16] *1926 TPD 367.*

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

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

[40] Ultimately, the award for future loss of income must be based on good medical evidence and corroborating facts. There must be some reasonable basis for arriving at a particular figure. In the event of a mathematical approach, one has to first work out what the third party's earnings would have been but for the accident (that is if the accident had not occurred), and secondly, one has to calculate what the plaintiff's earnings are now that the collision has occurred (having regard to the accident) and the difference between these two amounts will then represent the loss.[17]

[41] In *S v Mthethwa*[18] the court, in dealing with the limitations of the opinions of experts, and with reference to *Goldie v City Council of Johannesburg*[19] stated as follows:

"The weight attached to the testimony of the psychiatric expert witness is inextricably linked to the reliability of the subject in question. Where the subject is discredited the evidence of the expert witness who had relied on what he was told by the subject would be of no value".

[22] In the same vein, in the oft-cited English decision of R v Turner [20] Lawton LJ found:

"…that the report put forward by the defendant as to his psychological condition and specifically his susceptibility to provocation contained hearsay character evidence which was inadmissible". He stated further that "[B]efore a court can assess the value of an opinion it must know the facts upon which it is based. If the expert has been misinformed about the facts or has considered irrelevant facts or has omitted to consider relevant ones, the opinion is likely to be valueless"

[17] *Potchefstroom Electronic Law Journal (PELJ) On-line version ISSN 1727-3781, PER vol.18 n.7 Potchefstroom 2015*
[18] *[2017] ZAWCHC 28 at [98*
[19] *1948 (2) SA 913 (W) at 920*
[20] *[1975] 1 All ER 70.*

[42] The principle regarding the calculation of loss of earnings is to place the claimant in the position he would have been in had the accident not occurred, because he must mitigate his damages. This is regulated by section 17(4)(c). Past loss of earnings will be the losses incurred up to the date of the trial in a litigated matter or up to the date of settlement if settled at the claim stage.

[43] In *Mlotshwa v RAF,*[21] Petersen AJ granted absolution from the instance. In this , plaintiff provided no proof of any bank statements to prove his income and he was not registered for income tax purposes with the South African Revenue Service (SARS). In this case, he quoted*Terblanche v Minister of Safety and Security and Another* at para 14 [22]- stated

> *" [18] I agree with the salutary practice proposed in the above-quoted paragraphs of Bailey. It has mustered approval in numerous judicial pronouncements and is widely accepted as the best practice available. I wish to add, however, what the learned judge said further on page 379, which is omitted in Bailey. The two sentences which follow immediately upon the quote in Bailey are apposite:*
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> *" ...It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances, the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damage suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based on it."*

APPLICATION OF LAW TO FACTS

Past Medical Expenses

[44] Counsel for the plaintiff in his heads of argument argues that under this head of damages, the award of R644 875.22 (six hundred and forty four thousand eight hundred and seventy rands and twenty two cents) is incorrect and the correct amount should be R385 190.68 (three hundred and eighty five thousand one hundred and ninety rand and sixty eight cents).

[21] *(9269/2014) [2017] ZAGPPHC 109 (29 March 2017)*
[22] *2016 (2) SA 109 (SCA)*

[45] The plaintiff's affidavit and the documentary evidence reflect an amount of R385 190. 68 (three hundred and eighty five thousand one hundred and ninety rand and sixty eight cents) for past hospital expenses. The plaintiff presented a full record of the hospital he was admitted to, all the medical expenses he incurred, supported by vouchers, and all the medication purchased for the treatment of his injuries, which was supported by vouchers. In his evidence, he confirmed that those were indeed the expenses he incurred and that he provided a schedule with vouchers. Additionally, he indicated that none of past medical expenses were incurred for any other reason than to treat the injuries he sustained resulting from the motor collision. He further, submitted that such injuries were essential, fair, and in relation to the injuries sustained in the collision. Despite the plaintiff's numerous communiqués to the defendant to settle the issue in this regard, no settlement was reached.

[46] From the perusal of the schedule, the considerable amounts are:

[46.1] R259 806,73 due to Entabeni Hospital as of 07th April 2014, where the plaintiff was in an intensive care unit for approximately sixteen days and in a general surgical ward for three days. The rest of the expenses included theatre stock charges, pharmacy stock charges, ward stock charges, ventilator, and oxygen charges.

[46.2] R45953,77 due to Drs Edington and Partners - anesthetist for the duration that the plaintiff was hospitalized.

[46.3] R11 818, 74 due to Lake Smit and Partners – the x-ray specialists as of 22nd March 2014.

[46.4] The balance of the amount claimed was in respect of various special fees, and other ancillary necessary expenses were either vouches alternatively invoices were submitted as proof of payment.

[47] From an inspection of the schedule and vouchers, it is apparent that the schedule is consistent with all the vouchers. The vouchers all refer to the period that the plaintiff was hospitalised. I accordingly find that the expenses are fair and

reasonable and the plaintiff is entitled to this head of damages and I see no reason to reject her evidence in respect of his past medical expenses, which amounts to R385 190.68(three hundred and eighty five thousand one hundred and ninety rand and sixty eight cents) . I accept that the plaintiff's version in this leg of damage is credible and reliable. Plaintiff has discharged the onus on a preponderance of probabilities.

Future Hospital and Medical Expenses

[48] There is sufficient evidence before me by the plaintiff's expert witnesses in their medico-legal expert reports to justify future hospital and medical expenses. All the experts provide details of the injuries sustained by the plaintiff in the accident and they submit specific details in respect of future hospital and medical treatment that may be required by the plaintiff.

[49] I am of the view that this head of damages should be dealt with on a basis of a statutory undertaking to be provided by the Fund to the plaintiff in terms of section 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996, as amended, and I accordingly intend granting an order to that effect. The plaintiff's version is the only version before me and there is evidence to the contrary, I accept that the plaintiff's version in this leg of damage is credible and reliable. Plaintiff has discharged the onus on a preponderance of probabilities.

General Damages

[50] I turn now to the quantum of the general damages sustained by the plaintiff. The plaintiff's counsel suggested that a sum of R1 200 000.00 (one million and two hundred rands) is fair, reasonable, and just under this head of damage. The parties, in this matter, agreed that the plaintiff was entitled to be compensated 50% of the proved or agreed general damages. What they were not agreed

about was the amount that will be fair and reasonable taking into account the injuries sustained by the plaintiff.

[51] In this matter, the plaintiff crossed the threshold of meeting the requirements of "*serious damages*" by the application of step three (*viz.* the Narrative Test).

[52] Drs Pienaar, the plastic surgeon, Dr. Irsigler, the pulmonologist, and Dr. Pillay the neurosurgeon all completed the RAF4 forms to enable the plaintiff to qualify for a claim for general damages. According to the claim forms, Dr. Pillay arrived at a narrative score of 5.3, Dr. Irsigler arrived at a narrative score of 5.1 and Dr. Pienaar arrived at a narrative score of 5.2% and a WPI of 15%.

[53] Expert witnesses unfortunately cannot assist in placing an exact value on the abovementioned losses. The damages that are to be awarded are assessed relates to a factual finding concerning the claimant's age, sex, status, culture, lifestyle, and the nature of the injury suffered as well as having regard to previous awards made for similar injures. Other factors to be considered by the court are include the degree of pain suffered, which is a subjective inquiry, whether further surgery may be expected, whether the plaintiff has debilitating scarring, is unable to fend for himself, and has a decreased life expectancy. It is at this stage of considering the nature and extent of injuries that the expert's opinion is of invaluable assistance to the court.

[54] Having regard to the comparable cases, I was referred to several cases by counsel for the plaintiff, where the claimants sustained head injuries either of a moderate degree or severe brain damage that was coupled with other severe injuries. A synopsis of each of the cases are as follows:

[54.1] *Nithiananthan & Another v Auto Protection Assurance 1963(1) QOD 172D* (2020 Quantum Year Book) in which an amount of R1 000.00 was awarded and the current value is R1 001 782.00. In this case, the plaintiff had suffered an injury to the brain, fracture of the femur, minor cuts, and abrasions which resulted in a loss of intellectual and physical condition, temporary pain but no permanent disability. He was treated for a

laceration of the forehead, a right arm fracture, left chest injury. He was admitted to the hospital for 5 days. He used over-the-counter medication. The plaintiff had no headache nor did he have epilepsy. In this case, although the injuries sustained by the plaintiff appear to be similar, the main difference is that in this case, the plaintiff experienced a severe head injury as opposed to the plaintiff before me who sustained moderate to severe injuries. Additionally, the plaintiff has not suffered any epilepsy but has a 17% risk of doing so.

[54.2] In the case of *Dyssel NO v Shield Insurance1982, 3 (C & B),* the plaintiff sustained a severe head injury and was grossly retarded and a possibility of developing epilepsy, slow speech, and could not take care of herself. an original award of R45 00,00 by the court and the present 2021 valuation of the award is R984 828,00 and in *Combrink vs Royal Exchange 1964 1 (C&B) 585,* the plaintiff sustained a severe head/ brain injury, which caused by fat embolism due to escape of marrow from fractured bones; fractures of the tibia, fibula, collar – bone, shoulder blade, radius, ulna, wrist, and thumb – all on the right side; fracture of 9 ribs on the right side and 3 on left; back scraped raw; unable to rest in hospital; leg fracture not knitting the original award was R10 000,00 and current value at R975 582,00. The comparative nature here is that the plaintiff, in this case, suffered from a serious head injury in comparison to the present case where the injuries are moderate to severe.

[54.3] In *Tobias v Road Accident Fund 2010 (6) QOD 84-65 GNP*, the plaintiff sustained moderate head injuries, a fracture of the left proximal tibia, a compound fracture of the right proximal tibia, and anterior wedge compression fractures of the 8^{lh} and 9th dorsal vertebrae. Plaintiff was award R450 000,00 and current value at R746 750,00. When one compares the injuries in this case to the facts before me the injuries are far more severe than the plaintiff before this court.

[54.5] In *Mahale v RAF (7A4) QOD 15 GNP* R520 000, 00,[23] the plaintiff sustained moderate head injuries. The injuries she sustained were bruises to her scalp, face, and a concussive head injury. The severity of the head was graded as minor by one doctor and as moderate by another. All experts agreed that the plaintiff suffered from post-traumatic headaches and generalized pain related to her neck and back injuries with a slightly increased risk of developing epilepsy and was awarded R520 000.00 which is R672 080.00 in current value.

[54.6] In *Van der Mescht v RAF 2010 (6) QOD JZ – 42*[24] *(*GSJ) The plaintiff, in that case, a female marketing executive suffered a moderate brain injury as well as a fracture of the pelvis and thoracic vertebrae. Her injuries healed well but she suffered a period of post-accident amnesia as well as neurocognitive and neuropsychological issues. The plaintiff, in that case, was awarded an amount of R400 .00 for damages. The current value amounts to R642 000.

[54.7] *In Sebatjane & Another v Federated Insurance Company Limited 1989 (4H2) QOD 1 (T)*, The plaintiff was a boy aged 7 at the time of the accident and as a result of the collision, sustained the following injuries: Traumatic blow to the abdomen causing ruptures of the spleen and the liver laparotomy performed and drain inserted Into the abdomen for removal of a large volume of accumulated blood, and blood transfusion was given. Very ill post operatively. Drain removed about 9 days after the operation. Risk of adhesions and consequential internal obstructions following laparotomy and requiring further surgery at only 5% but should this happen the consequences could be catastrophic. Nightmares and insomnia after discharge from hospital. Able to return to strenuous sport after about a year. Blow to the head and minor bruises but these are of no importance. The plaintiff sustained moderate damages of R 6000,00 the current value of R505 915.00 in 2021.

[23] *Mahale*
[24] *Van der Mescht*

Sequelae of injuries

[55] The plaintiff's injuries and the impact on the plaintiff have been discussed in detail under the heading of medico-legal records. The nature and extent of the plaintiff's injuries can be described as follows:

[55.1] The plaintiff was taken to hospital by ambulance from the scene of the accident to the hospital where he was in the Intensive Care Unit, ventilatory support, was catheterized, and his surgical management entailed laparotomy and diaphragmatic hernia repair. He was fed by tube, had his chest drained, and had various scans and physiotherapy.

[55.2] In assessing the plaintiff's general damages as well as loss of earnings, the opinions of the expert witnesses are very important. The plaintiff's Neurologist, Dr. Pillay's report provides *"his posttraumatic headaches have resolved although his cognitive impairment will be permanent, the claimant has memory impairment following the accident."* According to him, the plaintiff's injuries complained of will not affect his longevity. He opines that the plaintiff has no disability preventing him from performing any actions and has no loss of amenities to life as a result of the accident. According to him, the plaintiff can take care of his own needs and requires no assistance with physical or cognitive activities. He remarks that the plaintiff is at risk of developing post-traumatic epilepsy about 17 (seventeen) times higher than the normal population and does not require any surgery in the future. He concludes with a finding that the plaintiff has reached maximal medical improvement. He also opined that the plaintiff's post-traumatic headaches have resolved although his cognitive impairment will be permanent given the severity of the head injury. He initially believed that a curator should be appointed and subsequently changed his mind.

[55.3] The plaintiff then sought the expert opinion of the Clinical Psychologist, Dr. Roper who conducted Neuropsychological Testing, which involves numerous cognitive tests. His report concludes that the plaintiff, presented with Depressive Disorder due to traumatic Brain Injury with depressive features and a Posttraumatic Stress Disorder, which is expected to harm interpersonal and occupational functioning and the plaintiff's neuropsychological profile, would be considered stable and no further spontaneous improvement would be expected.

[55.4] Very importantly, Dr. Roper defers the final opinion regarding the head injury to the Neurosurgeon, Dr. Pillay. This means that the findings of Dr. Pillay insofar as the plaintiff's permanent cognitive impairment do not prevent him from performing any actions prevail. What this means is that we have, before the court, a plaintiff whose injuries have healed tremendously and who is not incapacitated to continue with his current employment and he is currently in the same employment.

[55.5] This then leaves me with the issue of the Plastic and Reconstructive Surgeon, Dr. Pienaar who concludes that the accident has left the plaintiff with serious permanent scarring and disfigurement which has impaired his earning capacity. I was also provided with photographs regarding the disfigurement and scarring.

[56] I also had sight of the case of *Mngomezulu v Road Accident Fund*[25] where an administrative clerk sustained a moderate head injury, classified as diffuse moderate to severe traumatic brain injury that has led to neurocognitive difficulties and neuro- behavioural problems. He also had a compound tibia-fracture closed chest injury with a lung contusion. The injuries, in this case, appear to be more severe and the court awarded an amount of R600 000.00 which in current value is R885 000.00.

[25] *2011 ZAGPH ZAC at [107)*

[57] However, before I exercise my discretion when considering the award to be made, I have had regard to the findings in the matter of *De Jongh v Du Pisanie*[26], where the Court reduced the award of the Court a *quo* from R400 000.00 to an amount of R250 000.00 for a head injury. In paragraph [65] of that judgment, the court noted the tendency to award high amounts and cautioned against it as it was not mathematically accurate. The fundamental principle is the court must ensure the award is fair to both sides.

[58] Of equal importance, is the view expressed in *Hully v Cox* 1923 AD 234 at *246* where it was stated that:

> *"We cannot allow our sympathy for the claimants in this very distressing case to influence our judgment."*

[59] I have a wide discretion to award what I consider to be fair and reasonable compensation to the plaintiff. Such discretion may be exercised with the guidance of previous awards made in comparable cases provided to me by the plaintiff. The use of comparable cases is not a hard and fast rule that should be strictly applied. Generally, two cases can never be the same, hence the need for judicial adjudicative in cases for general damages[27].

[60] Having considered all the aforementioned factors, including the nature, extent, the duration that the plaintiff was in the hospital, consequences of the injuries, as well as the impact it has had on the plaintiff's life as well as the awards previously made in almost similar comparative circumstances, especially in *Mohal*[28]*e Van der Mesch*[29] *and Mngomezulu*[30] being much more comparable, I am of the view that a fair and reasonable award for the plaintiff under this head of damages would be an amount of R800 000.00 (eight hundred thousand rands) for general damages. The plaintiff has discharged the onus on a preponderance of probabilities under this head of damages.

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[26] Ibid Footnote 5 *NO* (2004] *2 All SA 565 SCA*
[27] *RAF v Marunga 2003 (5) SA 165 (SCA) 19 G - H.*
[28] *See Ibid 25*
[29] *See Ibid 26*
[30] *See Ibid 27*

Loss of Earnings/Capacity - Past and Future

[61] Under this head of damages, the plaintiff's counsel argues for an amount of R1 490 923.90,(one million four hundred and ninety thousand nine hundred and twenty three million and ninety cents) which is in accordance with the plaintiff's amended pleadings.

[62] In determining quantum, the two important expert reports that play a key role in these calculations are the Industrial Psychologist and the Actuary. It is important to understand that Industrial Psychologists provide their expert opinions on how employees within an organisation relate to their work environment. The findings of an Industrial Psychologist are of paramount importance because the Actuary assessment is determined from this report. In compiling the report, the Industrial Psychologist relies on the findings of all other expert witnesses to postulate his opinion regarding the performance of the plaintiff in the work environment and his ability to compete in the work market. The experts in turn receive their information directly from the plaintiff.

[63] Relying on the Industrial Psychologist's report, the plaintiff's Actuary provides that the plaintiff suffered no past loss. He calculated the present value of the income and postulated that had the accident not occurred, by discounting the net projected income of R1 080 000.00 (one million and eighty thousand rands) per year back to the date of calculation at a net discount rate of 2,5% per year. He concluded that the net discount rate of 2,5% per year in conjunction with the earnings inflation described of 5,5% implies an assumed investment return of 8,1375% per year. He calculated the plaintiff's present value of the plaintiff's future income as of 31st May 2021 and reports had the accident not occurred and the future income given the accident did occur will be the same amount, which is R14 909 239.00 (fourteen million nine hundred and nine thousand two hundred and thirty-nine hundred rands).

[64] The problem I have with accepting this postulation is that it has been determined without any verified source documents. To be fully compensated, the plaintiff is burdened to prove the loss he suffered and I must have the best evidence before me. The plaintiff must ensure that the court has all necessary and relevant evidence to assist the court in arriving at a just and fair decision. The Actuary's report only forms a portion of what is required. I have established that the plaintiff is self-employed. In the ordinary course of actuarial calculations of this nature, it is expected that personal tax returns (IRP5), businesses tax returns (IRP12) from the South African Revenue Services (SARS) and copies of bank statements and payslips would be furnished by the plaintiff. He indicated in the RAF claim form that the payslips and bank statements will be provided. This information is crucial in determining the loss of earnings. The plaintiff simply has not provided any of these documents and neither has an explanation been provided as to why this information in not before me.

[65] A perusal of the plaintiff's Rule 35(9) of the Uniform Rules notices, relates to two sets of the plaintiff's financial statements for the period ending February 2014 and for the period ending from February 2014 until July 2014. These reports were dated the 19th and 25th August 2014 respectively.

[66] For the period ending 31 July 2014, the financial statements were dated 25 August 2014. It is unsigned both by the financial officer and the plaintiff. It is unaudited. No affidavit is attached to this document to explain its content. From the perusal of the statement, the business shows a net profit from February 2014 to July 2014 in the amount of R401 377.00. This information was not available to the Actuary when he postulated his calculations. During this period, two transactions took place between the plaintiff and the business. The first being for the plaintiff's salary, of R450,000,00 (four hundred and fifty thousand rands), and the other was for R108 000,00 (one hundred and eight thousand rands). Presumably, the R450 000,00 (four hundred and fifty thousand rands) reflects six months x R90 000,00 = R450 000,00 from March 2014 to July 2014 and the R108 000,00 (one hundred and eight thousand rands) reflects the amount for

year ending 2013 to 2014. This is not consistent if one juxtaposes this with what the experts were informed about the plaintiff's earnings during this period. A perusal of the detailed income statement reflects an amount of R959 911,00 (nine hundred and fifty nine thousand nine hundred and eleven rands) as employee costs and no further explanation is provided. I also note that there is no reflection of salaries as an operational expense in the financial statement and presumed that the aforesaid amount was inclusive of salaries. There was no documentary evidence provided to support the financial statements for this period.

[71] The report ending 28 February 2014 was dated 18 August 2014. This report is signed both by the financial officer and the plaintiff. The business shows a net profit for this period in the amount of R1 814 393,00 (one million eight hundred and fourteen thousand and three hundred and ninety three rands). During this period, an amount of R1 080 000,00 (one million and eighty thousand rands) was paid to the plaintiff as a salary from the business. This would mean the plaintiff earned (R90 000.00 x 12 months = R108 000.00) A perusal of the detailed income statement reflects an amount of R 3 337 735,00 (three million three hundred and thirty three thousand seven hundred and thirty five rands) as employee costs, this is also unqualified in that no supporting documents or explanation is advanced. I also note that there is no reflection of salaries as an operational expense an presume that the employee costs is inclusive of the salaries paid to the staff of plaintiff's business.

[72] In so far as the plaintiff's evidence in respect of his past earnings is concerned, I find a discrepancy and an unexplained contradiction in the plaintiff's evidence. A letter by the plaintiff's Financial Officer dated 14th August 2014 indicates the plaintiff earns a salary of R90 000.00 (ninety thousand rand) per month from [….]. The letter does not provide me with dates as to when this salary commenced and which period it ends.

[73] However, when I peruse the plaintiff's Industrial psychologists report by Mr. De Bruyn the plaintiff's salary for 2014 is reflected as approximately R70 000,00

(seventy thousand rands) and it was only in 2019, that the plaintiff earned approximately R90 000,00 (ninety thousand rands) per month. This is not in accordance with what is provided in the Financial Statement by the plaintiff's auditors. The Industrial Psychologist indicates in his report that proof is awaited. The problem I have is this information was available and not provided to the Industrial Psychologist and no explanation was advanced why the Financial Statements were not provided to the Industrial Psychologist. This will inevitably mean that the Industrial Psychologist's report contains information from the plaintiff which is not verified and unsubstantiated. There is no collateral evidence from any other source.

[74] In addition, the Industrial Psychologist's report is dated 15th May 2019 and it categorically states that the report is valid for two years and thereafter it will be reviewed by the writer. The trial was set down for 31st May 2021. The report provided to the actuary was on the 18th of May 2021. He was provided with a stale report and made calculations on a stale report. There was no addendum to the Industrial Psychologist's report.

[75] This is not the only problem that I have. There is also no evidence before this court regarding any of the plaintiff's qualifications. All the opinions expressed by the experts illustrate that they were awaiting proof of qualifications as well as proof of income.

[76] The onus rests on the plaintiff to discharge the onus. I have no evidence before me relating to plaintiff's qualifications and I do not believe that I have the best information before me regarding the plaintiff's qualifications.

[77] The difficulty I find myself in is the fact that the projections and postulates were based on the fact that the plaintiff was an Electrical Engineer in possession of a degree. No qualifications and no proof of the plaintiff belonging to any registered professional body is before me. The impact of this is that if the plaintiff cannot provide proof of his qualifications, he cannot be considered as a professional but instead as a semi-skilled or unskilled employer. This information was not available to Mr. De Bruyn when his report was compiled.

[78] This will mean the postulations provided to this court is simply inaccurate because all the expert reports, because all the reports reflect that the plaintiff as a professional who has passed grade 12 and is the holder of a BSc. Engineering degree and many certificates. Consequently, this has an impact on all the expert reports as their assumptions and opinions were based on what the plaintiff informed them. Since no collateral evidence was provided regarding the plaintiff's qualifications and the fact that Dr. De Bruyn considered the plaintiff's earnings to be associated with Paterson for persons with an NQF level 07 will not be correct. This information he obtained directly from the plaintiff himself. The plaintiff did not offer any explanation about his qualifications or earnings in his affidavit that was submitted to the court.

[79] When Dr. De Bruyn provides quantification for pre and post earnings he considers the plaintiff's earnings at the time of the accident as R70 000.00 (seventy thousand rands) and his present earnings as R90 000.00 (ninety thousand rands). According to him but for the accident, given a recognized degree NQF, he could have advanced to earn income in line with Paterson Grade D1+ basic salary, upon reaching his career ceiling and the position remains uncertain for the future. Dr. De Bruyn considered the plaintiff's qualifications as an engineer on unverified information. I have no proof before me on the qualifications and this cannot assist regarding future earnings. In as much as the Case law states that I must consider the matter with what is before me if the available evidence before me is the best evidence I do believe that this is the best evidence before me as it is riddled with inconsistencies and contradictions .[31]

[80] In fairness to the Actuary, the trial was set for 31 May 2021. The Actuary was requested on the 18th May 2021 to express an opinion. He was only provided with the Industrial Psychologists report of Mr. P De Bruyn. The Actuary made it very clear and it is plausible, that no proof was provided to him of the plaintiff's profit from the business and he performed calculations on the reported

[31] *Jerome Alphonsus Du Plessis and RAF (Case no. 878933/2016 Gauteng Division Pretoria, Mlotshwa v RAF (9269/2014) [2017] ZAGPPHC 109 (29 March 2017)*

information of Dr. de Bruyn which was unverified. Furthermore, he reports the plaintiff's earnings are unverified and his earnings in 2019 were already significantly more (almost double) than the postulated career ceiling. This calculation was based on the plaintiff's career as an Engineer and lacks any evidential foundation.

[81] When Judges consider such calculations, the award must be fair and reasonable. The SCA, in the case of *Rudman v Road Accident Fund*[32] stated at 16:

> .... *it must be remembered that in the final analysis an award cannot be based on speculation. It must have an evidential foundation.* It was further held that "*earning capacity is a complex of abilities which together make up an asset in a claimant's estate"* and the abilities must therefore be considered as a whole. One should guard against isolating the individually compromised elements of the ability to earn a living and place a monetary value on them. Instead, it was held, one should consider whether the individually compromised element brings about a "*diminution in the claimant's earning capacity as* a *whole.*

[82] I find that the opinions provided by the expert witnesses are based on uncorroborated evidence that is unsubstantiated and unsupported and is mere speculation. None of the expert witnesses has had sight of any of the Financial Statements for their consideration. I do not have any further financial documents before me to verify the content of financial statements and the plaintiff's affidavit does not explain the shortcomings in the plaintiff's case. I find it rather astonishing that the plaintiff was in possession of the Financial Statements but it was not provided to both Mr. De Bruyn and Mr. Potgieter.

[83] The onus is on the plaintiff to ensure that the court has all necessary and relevant evidence to assist the court in arriving at a just and fair decision. The plaintiff failed to provide his educational qualifications, experience, profession and earnings profile. The expert reports were based on speculation in so far as loss of earnings is concerned.

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[32] *(370/01) [2002] ZASCA 129; [2002] 4 All SCA 422 (SCA) 26*

[84] In the final analysis, an award cannot be based upon speculation. It must have on evidential foundation. The evidence before me is certainly not the best evidence before me.

[85] From the evidence that is placed before me, the injuries sustained from the motor collision did not cause any loss to the plaintiff. The evidence before me and the fact that there is no deduction for disabilities from which the plaintiff suffers or will suffer in the future in the Actuary report, will not, in my view, impair the plaintiff's capacity to do his work as he did prior to the accident. The Actuary's report on calculation for loss of support was based on a stale report by the Industrial Psychologist, and no explanation is provided as to why this was the position. The Actuary, in his report, indicated he performed calculations on the reported income but defer to factual comprehensive factual information. This was simply ignored.

[86] The plaintiff simply did not discharge the onus under this head of damage . He failed to prove that his patrimony has been diminished due to any loss of earning or earning capacity in the future resulting from his injuries and consequently has failed to prove any entitlement to be compensated under this head of damage.

[87] Similar issues regarding the onus of proof by the plaintiff was discussed in Similar issues were discussed in *Mlotshwa v Road Accident Fund*[33] and *Jerome Alphonsus Du Plessis and Road Accident Fund*[34] were Petersen JA (as he then was quoted an unreported appeal in the *Gauteng Local Division of Boy Petrus Modise v Passenger Rail Agency of South Africa, case number A5023/2013 (11 June 2014) at paragraph* [10] against the dismissal of a claim for loss of earnings and future loss of earnings, Wright J held:

'This is an unfortunate case. One suspects that the plaintiff did suffer a past loss of earnings and will suffer future loss of earnings. However, I may not allow a suspicion nor my sympathy for the plaintiff, to translate into a basis for awarding

[33] *(9269/2014) [2017] ZAGPPHC 109 (29 March 2017)*
[34] *Ibid see footnote 17*

damages where the evidence does not allow this. The variables in the equation are simply too many.'[35]

RULING

[88] With all that has been said above I make the following rulings:

[88.1] The defendant's special plea is dismissed with costs.

[88.2] In so far as past hospital expenses are concerned the plaintiff is entitled to this award.

[88.2] In so far as future hospital expenses are concerned, the defendant shall furnish the plaintiff with a 50% undertaking in terms of section 17(4)(a)of the Road Accident Fund Act, Act 56 of 1996.

[88.3] In so far as general damages are concerned I am of the view, considering all the comparative cases I have been referred to that R800 000,00 is fair and reasonable.

[88.4] In so loss of earnings are concerned, I am of the view that there is not sufficient evidence for me to find for the plaintiff on a balance of probabilities and I am of the view that absolution from the instance is the appropriate order under this head of damages..

ORDER

[89] In a result, I make the following order:-

[89.1] Plaintiff's special plea is dismissed with costs.

[89.2] The defendant shall furnish the plaintiff with a 50% undertaking in terms of section 17(4) (a) of the *Road Accident Fund Act, Act 56 of 1996 ('the Act')*, to pay the costs of future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of a service or supplying of

[35] *Jerome Alphonsus Du Plessis and Road Accident Fund unreported Case 913/18 Gauteng Division, Pretoria*

goods to him, arising out of the injuries he sustained in the motor vehicle collision which occurred on the 22 February 2014, after such costs have been incurred and upon proof thereof.

[89.3] The defendant shall pay the plaintiff the monetary amount of R 1 185 190.68 (one million one hundred and eighty five thousand rand one hundred and ninety rand and sixty eight cents only) within 180 days, which amount is made up as follows:

3.1 R385 190.68 in respect of past hospital expenses;

3.2 R800 000.00 in respect of general damages;

[89.4] Absolution from the instance is granted in respect of loss of income;

[89.5] To this total should be applied the 50/50% apportionment in respect of the liability issue, which means that the said total will be reduced by 50% resulting in the final amount of the judgment to be granted in favour of the plaintiff of R592 595. 34 (five hundred and ninety-two thousand, five hundred and ninety-five rands and thirty 34 cents)

[89.6] In the event of the aforesaid capital amount not being paid timeously, the defendant shall be liable for interest on the amount at the rate of 7% per annum calculated from the 15th calendar day after the date of the Order to the date of payment in accordance with the Prescribed Rate of Interest Act 55 of 1975, read with Section 17 (3)(a) of the Road Accident Fund Act 56 of 1996.

[89.7] The defendant is ordered to pay the plaintiff's agreed or taxed High Court costs as between party and party, such costs to include the costs of counsel's day fee for 31 May 2021 and day fee for 1st June 2021, the qualifying fees of the experts, consequent upon obtaining plaintiff's reports as well as the plaintiff's reasonable travel and accommodation costs to attend the defendant and own experts examinations.

[89.8] The amounts referred to in paragraph 5 will be paid to the Plaintiff's Durban attorneys, Mak Ameen & Co, by direct transfer into their trust account, details of which are the following:

Name: Mak Ameen & Co Bank:

Standard Bank

Account number: [….]

Branch code:

[89.9] It is further recorded that there is a valid contingency fee agreement.

_____

C. B. Bhoola

Acting Judge of the High Court of South Africa

Gauteng Division, Pretoria

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 01 September 2021.

APPEARANCES

Counsel for the Applicant	: Advocate Leon Botha
Instructed by	: Gert Nel Incorporated, Attorneys for the Plaintiff
Counsel for the Respondent	: None
Defendant	: ROAD ACCIDENT FUND
Date of Hearing	: 01 June 2021
Date of Judgment	: 01 September 2021