IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGHT COURT, CAPE TOWN)

CASE NO: 5857/06

In the matter between:

COUGHLAN NO
In his capacity as Curator ad Litem to
MARC ATHOL GORDON BLACKBEARD **Plaintiff**

and

THE ROAD ACCIDENT FUND **Defendant**

JUDGMENT DELIVERED ON 4 SEPTEMBER 2009

HJ ERASMUS, J

Introduction

[1] On the 25th of March 2005 Marc Athol Gordon Blackbeard ("the patient" or "Marc") was travelling on a motorcycle up the Helshoogte Pass near Stellenbosch, Western Cape, when he was involved in a collision with a motor vehicle. He sustained serious bodily injuries, including a closed head injury and severe orthopaedic injuries. The nature and *sequelae* of these injuries have been dealt with extensively in the medico legal reports filed of record. At the time of his injury the patient was employed in a family business.

The family business

[2] Mr Gordon Blackbeard (hereafter "Blackbeard"), the patient's father, and his brother Brian Blackbeard own (through family trusts) and operate a number of companies which for convenience may be called the "Atlantis Group". The companies in the Atlantis Group, of which the two brothers are the directors, are:

Atlantis Corporation (Pty) Ltd

Atlantis Manufacturing Management Services (Pty) Ltd

Atlantis Marine Products (Pty) Ltd

Atlantis Electronic Systems (Pty) Ltd

The two trusts each have a 15% interest in Ferromarine Africa (Pty) Ltd, Ferromarine Cape (Pty) Ltd, Yacht Port SA (Pty) Ltd and Yacht Port Holdings (Pty) Ltd.

The Atlantis Group operates within a "high tech" environment and has benefited from contracts awarded in the "Counter Trade Industrial Programs" which require that certain foreign imports to South Africa must be accompanied by local foreign investment. In recent years, the Atlantis Group has, for example, been involved, with other entities, in the development of an Offshore Oil Rig Component capacity at Saldanha Bay with reciprocal capacity at Cape Town harbour. Another example is its involvement, along with the German firm MAN Ferrostaal, in the development of a 10m by 15m yacht lift at Saldanha Bay.

[3] Blackbeard joined the SA Navy at the age of 18 and served for thirteen years as an officer. He retired in 1981 at the rank of Lieutenant

Commander. While in the Navy, he obtained an engineering diploma and a degree in Military Science. He then joined Barlow Electronic Systems as Group Marketing Director. He served on the board of twelve companies in the group. He studied for an advanced executive diploma at Unisa. After sixteen years with Barlow Electronic Systems, he left and formed the Atlantis Group. Blackbeard's brother Brian also has a naval background. He served in the Navy for about nineteen years and attained the rank of Commander. He thereafter joined his brother in the establishment of the Atlantis Group. He has a diploma in engineering.

[4] At the time of the accident, the patient was employed within the Atlantis Group. The nature of his employment before and at the time of the accident, and his future prospects within the Atlantis Group, are major issues before the Court and were explored in detail at the trial.

The issues

[5] Prior to the action, the parties reached an agreement, the terms of which were recorded as follows:

> 1. The parties have settled the claim in respect of General Damages in the amount of R500 000-00 (pre-apportionment).
>
> 2. Defendant will provide Plaintiff with a certificate for the patient in terms of Section 17(4)(a) of the Road Accident Fund Act, no 56 of 1996, as amended, limited to 70%.
>
> 3. Past medicals have been settled between the parties in the sum of R722 653-57. An interim payment of R481 755-03 has been made and it is agreed that a balance of R24 102-47 (post apportionment) is payable by Defendant.

4. The parties agree that their respective expert reports are admitted, save for the reports of:

a. Donovan Shaw

b. Piet Crous

c. Eric de Kroon

d. Philip Kempen

e. Trevor Foster

f. Nilen Kambaran

g. Alex Munro

h. Barend Labuschagne

i. Daniel Myburgh

j. Dave Oswald

5. The notional value of the patient's future injured earning capacity has been agreed at between R1 000-00 and R3 000-00 per month, as reported on by Crous and Shaw. The parties are not in agreement as to:

a. The likelihood of the patient generating the earnings aforesaid;
b. The nature of the earnings (whether the same is indeed deductible, as opposed to earnings which are gratuitous in nature);
c. What contingency deduction, if at all, is applicable?

6. Past and future uninjured earnings are not agreed and this Honourable Court will be asked, *inter alia,* to make a finding as to:

a. The likely pre-morbid career path of the patient;

b. The likely pre-morbid earnings the patient would have generated;
c. What contingency deduction, is any, is applicable to such pre-morbid earnings?

7. Past and future injured earnings are not agreed and this Honourable Court will be asked, *inter alia*, to make a finding as to:

a. The likely post-morbid career path of the patient, if any;
b. The post morbid earnings the patient has generated in the past and what he will likely generate in the future, if at all;
c. What contingence deduction, if any, is applicable to such post-morbid earnings?

8. The parties have agreed on the actuarial methodology to be applied for the calculation of the loss of earnings, as set out in the reports of Kambaran and Munro.

9. The parties request that this Honourable Court give such directives as may be necessary for the calculations to be made.

10. The parties agree that Plaintiff's claims are subject to an apportionment of 70% in favour of Plaintiff.

[6] The key issues to be determined are, therefore, the patient's projected career path in the uninjured state, and the extent of his residual earning capacity.

[7] At a trial lasting 15 days, the plaintiff called the following witnesses:

1. Mr Gordon Blackbeard, the patient's father;

2. Dr Gowans, a marine engineer;

3. Dr Taylor, an engineer;

4. Mr Eric De Kroon, a forensic accountant;

5. Mr Bernard Labuschagne, a forensic computer specialist; and

6. Mr Donovan Shaw, an industrial psychologist.

The defendant called the following witnesses:

1. Mr David Oswald, a forensic computer expert;

2. Mr Trevor Foster, a forensic accountant; and

3. Mr Piet Crous, an industrial psychologist.

At the trial, the plaintiff was represented by Mr McClarty SC and Mr Eagles; the defendant was represented by Mr Potgieter SC and Mr Boopchand.

Fraud and bias

[8] The trial was characterised by sharp attacks of a very serious nature on the general acceptability and veracity of the evidence of some of the witnesses. The defendant alleges that Mr Gordon Blackbeard ("Blackbeard"), the patient's father, was the author of a fraudulent scheme of Machiavellian proportions, a scheme which not only involved the fabrication of false documentation, but also furnishing experts with incorrect material and undermining the independence of the experts. Serious allegations of bias were made against three of the expert

witnesses; namely, the two industrial psychologists, Mr Donovan Shaw ("Shaw") and Mr Piet Crous ("Crous"), and the forensic accountant Mr Trevor Foster ("Foster"). The allegations need to be dealt with at the outset. I shall deal first with the attack on the veracity and acceptability of the evidence of Blackbeard, and thereafter with the allegations that the expert witnesses Shaw, Crous and Foster were biased.

Blackbeard

The alleged fraudulent scheme

[9] The defendant alleges that Blackbeard devised a fraudulent scheme in order to create a false picture of the patient's level of employment and earnings before the accident. In particular two letters, a letter dated 1 October 2004, and a letter dated 1 March 2005, are alleged to have been created after the collision date despite purporting to have existed before then. In the letter dated 1 October 2004 the patient is appointed IT Manager: RSA Offshore Oil & Gas Due Diligence as from the 1st October 2004, and in the letter dated 1 March 2005 the patient is appointed Project Co-ordinator: RSA Oil & Gas Project with effect from 1 March 2005.

[10] The defendant adduced the evidence of Mr David Oswald ("Oswald"), a forensic computer expert who concluded that the two letters in question were created after the collision date. Oswald's opinion is based on "meta data" he had obtained from the current computer system. By his own admission, he was not able to have access to the original computer whereon the documents were created. The plaintiff's computer forensic expert, Mr Barend Labuschagne ("Labuschagne"),

who also did not have access to the original computer,[1] stressed that there was no reliable source as to the true creation date of a document, other than the data to be found on the original computer upon which a document is created. In the absence of having access to the original computer, there was no basis upon which a reliable opinion could be formed as to a creation date. Oswald conceded that Labuschagne's opinion relating to the original computer was indeed sound. He further conceded that there were other plausible explanations for the meta data changing from the original creation date.

[11] The letter dated 1 October 2004, addressed to the patient, reads, in part, as follows:

> We have the pleasure of appointing you as IT Manager: RSA Offshore Oil & Gas Due Diligence in our company as from the 1st October 2004.
>
> We require your total workload commitment for the IT Support for the RSA Oil & Gas Project, which is contracted for 4 months at present.
>
> For this commitment we will remunerate you with an additional project allowance of R4 500 per milestone payment achieved – which is currently related to milestones 2 to 5 inclusive.
>
> ……
>
> Your remuneration package for this period shall comprise of a basic salary and project allowance structured as follows: a basic salary of R6 500.00 (six thousand five hundred rand) and R3 250.00 (three thousand two hundred and fifty rand) travel allowance. The company shall also pay your petrol (R750), cellphone (R500) and entertainment (R500) expenses.

[1] The reason for the unavailability of the original computer seems to have been due to the fact that the computer systems and computer hardware at Atlantis had in the meantime been updated.

The remuneration package is then set out in tabular form, the total package being R11 500.00

From the collateral evidence, including Mr Francois Visagie's memo dated 2 November 2004 addressed to Blackbeard, it is apparent that the patient was as a fact working in an IT role in the Oil & Gas Project as at November 2004. De Kroon's analysis of the salary journals and bank statements show that the patient was in fact paid R11 500.00 after 1 October 2004. The bank statements of the company further reflect that the patient was indeed paid certain "milestone" amounts as referred to in the letter.

[12] The letter dated 1 March 2005, also addressed to the patient, reads, in part, as follows:

> We have the pleasure of appointing you as Project Co-ordinator: RSA Offshore Oil & Gas Project in our company as from the 1st March 2005.
>
> For this commitment you will be remunerated accordingly, see Paragraph 4 of this letter for structure of new remuneration schedule.
>
> ……
>
> Your remuneration package for Project Co-ordinator shall comprise of a basic salary and project allowance structured as follows: a basic salary of R12 000.00 (Twelve Thousand Rand) and R4 000.00 (Four Thousand Rand) travel allowance. The company shall also pay your petrol (R1 000), cellphone (R500) and entertainment (R500) expenses.

The remuneration package is then set out in tabular form, the total package being R18 00.00

It is common cause between the parties that the letter was created subsequent to the date of the accident. Blackbeard testified that the day prior to the collision, he had held a meeting with his fellow director and brother, Brian Blackbeard, and the patient, to discuss the patient's future and a promotion together with an increase in salary. This was agreed upon and an instruction was given to Ms Lia de Lange to attend to the necessary. Subsequently, the patient was injured, and in the ensuing stressful time, the letter was only completed on 8 April 2005. Blackbeard further testified that the promotion and salary increase were implemented *ex post facto* in terms of the decision made prior to the injury.

[13] Blackbeard said in evidence that it was initially believed that the patient would return to work and that the true extent of his injuries became apparent only as time went by:

> We put Mark on a three month medical leave period from the time of the accident because we believed in those three months he would be able to recover. We believed his injuries were his back and his leg. We had no idea that his head injury was so severe. So he was placed on medical leave for a three-month period until August and at that stage – at the end of August was the first time we actually realised the seriousness of his injury and that he would take a little bit longer. We were told by the doctors, specifically Dr Frans Hugo, that injuries of that nature could take up to a year to recover, so our idea was that we would then give Mark the necessary time and within that time he would return back to the company to his work.

The minutes of a shareholders' meeting held on 9 April 2005, and signed by Blackbeard and his brother Brian, reads as follows:

> It is recorded that Marc Blackbeard sustained severe injuries in a vehicle accident on 25 March 2005. He will utilise more than the 14 days sick leave entitlement per his appointment conditions.

> It is further recorded that he will be granted a three month period of sick leave at full salary benefits to end June 2005. Temporary staff will be contracted to conduct his Project Management tasks in his absence.
>
> The situation will be reviewed in July 2005 dependant on his recuperation.

[14] The allegation that the letter dated 1 March 2005, and the promotion reflected therein, form part of a fraudulent scheme to create a false impression of the patient's level of employment and earnings before the accident, proceeds from the premise (i) that within 14 days of the accident, while his son was still in Intensive Care in hospital and the nature and full extent of his injuries still undetermined, Blackbeard started to devise a fraudulent scheme with a view to future litigation, and (ii) that Blackbeard's brother, Brian, was part of the scheme. Foster conceded that Mr Brian Blackbeard would not have assisted with any fraud.

[15] The existence of such a fraudulent scheme is not supported by the collateral evidence. Two temporary staff members were appointed as replacements for the patient pending his recovery and return to work. Their combined salaries were similar to the amount paid to the patient. The Atlantis Group was obliged to pay the patient a salary pending his recovery and return to work in accordance with the terms of the letter of appointment, and did in fact do so. After the patient's recovery and return, which were foreseen in the weeks immediately following the accident, he would in law be entitled to continued employment and remuneration in accordance with the letter.

[16] The defendant has, in my view, not shown that the balance of probabilities favour the contention that the two letters were contrived to reflect a situation, which did not in fact pertain.

The alleged false curriculum vitae

[17] The defendant contends that there are incorrect and inconsistent references to positions held by the patient in information various to various entities.[2] One of these was a *curriculum vitae* prepared with the aim in mind of securing a low level job for the patient in his injured state. The suggestion by defendant is that these incorrect references are an indication of an attempt on the part of Blackbeard to create a false career path for the patient, for the purposes of sustaining a loss of earnings claim.

The defendant's contentions cannot be upheld. Blackbeard gave access to the documents (including the *curriculum vitae* concerned) of the Atlantis Group to an array of experts. Had it been his intention to commit a fraud or to mislead the Court, he would not have given various supporting documents wherein different terminology is used for the positions held by the patient. The differing description of posts held is probably due to loose language arising from the fact that the Atlantis Group does not, like the civil service,[3] have a rigid hierarchy of positions, each with an accurate job description. Moreover, it is clear form Blackbeard's evidence that the patient from 1 October 2004 to 1 March 2005 the patient held two positions:

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[2] Foster in one of his reports refers to an "unexpected or possibly unusual variation in the title and earnings of Plaintiff … evident from documents done post accident", citing as examples the reference to the plaintiff in the Road Accident Form 1 as an "information technology expert", in company minutes as a "project manager", and elsewhere as a "project co-ordinator".

[3] Foster refers to the Atlantis Group as "a small family business".

> Mark had two appointments. The one was a project specialist, which was ongoing. Then he received the additional responsibilities of IT co-ordinator, and that is where his focus was, on those two activities.

This ties in with what Blackbeard said when asked why he had placed the patient in a Project Management Course:

> ..... our company develops new business. Every new business we treat as a project, so the basic requirement is to be able to manage projects, no matter how large or how small they are. Every business opportunity is operated and conducted as a separate project. So he needed to be capable to be able to work in the project domain.

Moreover, if the low level job had been secured, the job and concomitant earnings, if sustainable, would reduce the very claim for damages which, the defendant suggests, Blackbeard was attempting to falsify or bolster.

Undue influencing of expert witnesses

[18] The defendant further alleges that Blackbeard has unduly influenced "some of the experts". In its Heads of Argument the contention is stated as follows:

> The father's hand in "orchestrating" this claim is omnipresent. The father has overwhelmed some of the experts involved in this aspect of the claim with information that has not been entirely correct in material respects. The father has not stood back and allowed all the experts the opportunity to analyse the information placed at their disposal and provide their independent opinions to the Court. He has asserted his vision for the Patient's career path in the uninjured state, a task that is usually reserved for the appropriate experts.

This is an extremely serious allegation, not only against Blackbeard, but also against the professional standing and integrity of the expert witnesses

concerned. The allegation seems to relate to the experts consulted in regard to the claim for loss of earnings which form the focus of the case before me. The experts are not named, with the result that all the experts consulted in this regard are tainted by the allegation. Blackbeard is a man of strong personality who promoted his son's case with vigour, but there is no evidence that he "overwhelmed" any of the experts, or that any of the experts sacrificed their professional independence and integrity in the face of pressure from him.

The expert testimony

[19] As indicated above, serious allegations of bias were made against three of the expert witnesses; namely, the two industrial psychologists, Shaw and Crous, and the forensic accountant Foster.

[20] It is perhaps necessary to re-iterate at the outset, in the words of Kotzé J (as he then was),[4] that –

> The prime function of an expert seems to me to be to guide the court to a question falling within his specialized field.

In *Slavin's Packaging Ltd v Anglo African Shipping Co Ltd*[5] Esselen J said:

> In the experience of the Court it is frequently the case that however objective the witness in a particular field tries to be in his assessment, when he is consulted by either of the parties, is such that he almost invariably, perhaps even subconsciously, tends to favour the case of the party who calls him.

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[4] In *S v Gouws* 1967 (4) SA 527 (E) at 528D.

[5] 1989 (1) SA 337 (W) at 345I.

Though this may be the practical reality, I would endorse, with respect, the following statement of Claassen J in *S v Huma and Another (1)*:[6]

> In passing, I may mention the purpose of expert testimony. The value of an expert is not to espouse and further the cause of a particular party, but to assist the Court in coming to a proper decision on technical and scientific matters. It should therefore at all times be remembered that an expert is primarily there to assist the Court and not necessarily to further the cause of any particular litigant. An expert witness who espouses the cause of his particular client to such an extent that he loses objectivity in fact undermines his client's case. His credibility will then be questioned.

[21] *Shaw*. The essence of the attack on Shaw is that he had in effect surrendered his professional independence and allowed himself to be misled and overwhelmed by Blackbeard. As I have indicated, there is no evidence to support this allegation and I have no reason to doubt the professional integrity of Shaw. Though he favoured the case of the plaintiff, he did not do it in a manner and to an extent that undermined his objectivity and professionalism.

[22] *Crous*. As regards Crous, his opinion may be flawed in that it is based upon inadequate information, but the allegations that he was "disingenuous", and that he was "a self-serving recalcitrant, evasive and argumentative witness", and that his evidence is not worthy of being termed "expert" are not justified. Valid criticism is his unwillingness to reconsider his opinion in the light of facts not known to him at the time when he compiled his report, and more particularly his unwillingness to give consideration to the information concerning the patient's overall

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6 1995 (2) SACR 407 (W) at 410j to 411a, also reported as *S v Huma and Another* 1996 (1) SA 232 W). See also Zeffertt & Paizes *The South African Law of Evidence* 2nd ed 330.

performance as testified to by Dr Gowans and Dr Taylor. In this respect, he might have been wrong, even wrong-headed, but his scepticism as to the value of that evidence is an opinion honestly held.

[23] *Foster*. While I have no reason to doubt the expertise of Foster, the evaluation of his evidence caused me, for two reasons, much difficulty and concern. The first relates to the manner of presentation of his expert reports and his evidence; the second concerns the allegations of bias made against him.

[24] Foster is a man of many words. His expert reports are lengthy and muddled. The length of his reports is, partly at least, due to his expressed desire not to leave anything out. This resulted, as he admitted, in the inclusion of irrelevant material and material beyond his expertise. His oral evidence is characterised by the length and rambling nature of his answers. This deluge of words, both written and spoken, is not conducive to clarity and understanding.

[25] As far as the allegations of bias are concerned, the conclusion is unfortunately inescapable that strong bias pervades his reports and his evidence. The few examples that follow are illustrative of the nature and tone of all his reports and of his testimony in Court.

[26] The financial statements of the Atlantis Group, including the financial statements for the 2008 financial year, were placed before the Court. The analysis of the financial statements by Mr Eric de Kroon ("De Kroon"), a forensic auditor called as an expert witness by the plaintiff, was also placed before the Court. De Kroon said that the auditors of the Atlantis Group informed him that for the past ten years they could not recall any serious accounting, audit or taxation issues which may have

given cause for concern. De Kroon added that he had inspected all tax returns, both of the Atlantis Group and of Blackbeard, "to ensure agreement with the financial statements, and found to be correct".

[27] Foster was given access to the financial statements and to the auditors of Atlantis Group, prior to and during the trial. In his evidence in Court, he called into question the veracity and reliability of the financial statements. At the trial, Blackbeard was not cross-examined on Foster's concerns regarding financial statements, nor was it suggested to De Kroon in cross-examination that his financial analysis was based on unreliable financial statements. Foster further endeavoured to cast doubt on the reliability of the financial statements on the ground that the statements for the 2008 financial year were in draft form, and that financial statements often change from draft to the final form signed off by the auditors. Part of his cross-examination in this regard affords a good example of the general tenor of his evidence:

> *Mr McClarty*: Are you suggesting that the financial statements aren't reliable? – In part yes, and in part no.
>
> *Court*: Why do you say that? – M'Lord, as I explained the 2008 figures are not signed. They're not nec … they can't be regarded as audited financial statements.
>
> And the previous ones, 2007, 2002 are they reliable? – Yes, the one – the earlier ones they're reliable in the sense – greater sense of reliability if one considers that in itself because they are audited and signed, yes. But in regard to an appreciation of what figures, I've been presented in how one gets to this incline and particular items inside 2008 which affect that steep incline, the 2008 is the one that's not certain, not signed, not reliable. So if you want to

> say that look these figures show that, yes, I agree they do. But that they are reliable, not necessarily on analysis, critical analysis.
>
> *Mr McClarty*: What's not reliable? Which one is not reliable? – 2008 is not reliable in the sense it's not the best available evidence in relation to for instance if it was signed and audited as ….

Despite the fact that he had at all times free and unfettered access to the auditors, Foster made no effort to determine from the auditors whether significant changes were foreseen between the draft and final form of the financial statements. Blackbeard was not given an opportunity to respond to any of Foster's concerns, Foster's excuse being that he was not in Court when Blackbeard gave evidence. It is trite law that if a party wishes to lead evidence to contradict an opposing witness, he or she should cross-examine the witness upon the facts which he or she intends to prove in contradiction, so as to give the witness an opportunity for explanation.[7]

[28] The following example further illustrates of the approach of Foster. According to De Kroon's analysis, the financial statements show a consistent rise in profits across the 2002 to 2008 financial years, except for a R5 000.00 drop in 2004. This led Foster to conclude:

> The feasibility of plaintiff's father's earnings parameter is established from recent or market related earnings levels, but with high risk of continuation, in my view, and with a precedent internally of income declined from year to year inter alia also from tax risk exposure, default in at least one direct incident which ought to have been straightforward, is evident, and submission of return(s) was in default at the date of site visit.

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[7] Zeffertt & Paizes *The South African Law of Evidence* 2nd ed 912—913.

Thus a small drop in profit in a single year is in his report converted to "a precedent internally of income declined from year to year". The "tax risk exposure" relates, as explained by De Kroon, to an accrual which, due to uncertainty as to the precise classification thereof for tax purposes, the directors and the auditors decided to include as a capital gain in the tax return. The "tax risk" is that SARS may decide to treat the accrual as income, which would attract tax at a somewhat higher rate. The suggestion that there was default in submission of tax returns is not borne out by De Kroon, and was not canvassed in cross-examination with Blackbeard.

[29] Foster's attempt to undermine the veracity of Blackbeard's sales forecast illustrates another facet of his evidence. Foster had access to the contracts which the Atlantis Group had concluded and on which the sales forecast is largely based. He chose not to read them. In his evidence, he suggested that the situation was affected by "exit clauses" and the following ensued:

> *Foster*: ….. I think it is absurd to suggest that because the contract says these figures are going to come from the contract, to ignore commercial reality that there are exit clauses, performance – if there is no performance … (intervention)
>
> *Mr McClarty*: Are there exit clauses Mr Foster? – I don't know.
>
> So how can you mention … how can you say there are exit clauses when you haven't seen the contracts? – Well, I'm not saying that with a view of certainty, I'm saying generally with contracts if they're going into the future, the income will not necessarily obtained because of certain factors I was given an example of.

This evidence falls rather strangely on the ear in view of the statement in one of his reports that according to Blackbeard, "if the Arms Deal had to collapse, these arrangements are not reversible".

[30] Foster's reports and evidence is replete with unfounded, gratuitous remarks and asides. By way of example, reference may be made to a report dated 9 December 2004 prepared by the patient as Project Manager: AMMS (Pty) Ltd on a Technical Interface visit to Junghans Feinwerktechnik in Germany. Of this report, Foster says in one of his reports:

> [A report so far produced apparently done by Plaintiff, one, dated 2004, as "project manager" in AMMS (weapons), may be found on further enquiry by other field experts to have necessarily had input from Plaintiff's father, in my view.][8]

This is a gratuitous comment for which there is no supporting evidence.

[31] A similar gratuitous comment is made in relation to an alleged valuation of his business by Blackbeard (the relevance of the valuation escapes me). Foster says that:

> In the current economic climate, inter alia, these values would not necessarily obtain, or on appropriate valuation.

[32] Foster's bias is evident on virtually every page of his reports, and throughout his evidence in Court. No further examples need be given. From perusal of his reports and his evidence, it is apparent that in his espousal of the cause of his client, he lost objectivity to the extent that his

[8] The use of square brackets is frequent in Foster's reports, the significance of which is not clear to me.

credibility, and hence the reliability of his evidence, stand to be questioned. In contrast, the evidence of De Kroon is fair and balanced, and I prefer the evidence of De Kroon whenever there is a difference of opinion and approach between him and Foster.

The financial future of the Atlantis Group

[33] The financial position of all the companies within the Atlantis Group was the subject of detailed analysis. The conclusions of Foster and De Kroon are markedly different. It is not necessary for purposes of this judgment to dwell on their differences. Suffice to say that in my view it has been shown that the Atlantis Group is a well-managed group which operates within a specialized, high technology field of endeavour. It is an established business with established networks and with an established international client base. Foster is of the view that the current word-wide financial crisis will affect the Atlantis Group. De Kroon acknowledged that the group may suffer some effects of the global recession, but adds that the arms trade is a niche industry that could be different from the rest of the economy. Perhaps both Foster and De Kroon are correct: the group will not escape the present economic crisis, but the arms trade is an arcane industry that sometimes seems to have a life of its own. The arms trade may also be influenced by political issues, both national and international, which may not affect “ordinary” economics. On these matters, which are beyond the expertise of the forensic accountants, no expert evidence was placed before the Court. In the circumstances, the Court can deal with the uncertainties in no other way that by taking them into consideration when deciding upon the percentage deduction to be made for contingencies.

The patient: formal qualifications

[34] The patient matriculated in 1996 at the Jeppe Boys High School. In 1997 he was enrolled at the Witwatersrand Technicon (University of Johannesburg) for a National Diploma in Marketing. He passed four of the six subjects, his pass marks varying from 63% to 78%. In one subject he was granted a supplementary examination, and apparently did not sit for the examination in the sixth subject. He did not proceed to the second year of study. During 1998 he completed basic military training at the Air Force Gymnasium. He thereafter completed the Junior NCO Development Course and was promoted to Corporal as from 1 August 2000. He completed an apprenticeship and on 1 January 2001 he received an Artisan Certificate from the Air Force as an Aircraft Weapons Electro-Mechanician. He joined the Defence Flying Club and obtained his private pilot's licence on 19 June 2000. In 2001 he complied with the requirements for the programme in Practical Project Management (12 months course) at Unisa. During April and May 2002 he completed courses and received certificates in Computer Architecture and Computer Networks.

The patient: work record and experience

[35] The patient left the Air Force in March 2001 and joined the Atlantis Group as from 1 April 2001. His initial earnings amounted to R5 500.00 per month. He served a period of probation and from 2001 served as a project specialist on various projects, one example being the submarine stability verification trials with Dr Gowans referred to below. He was also involved in two projects with Junghans Feinwerktechnik of Germany. He was appointed Project Specialist on 8 March 2002 at a total

monthly remuneration of R7 000.00 per month. On 1 October 2004 he was appointed as IT Manager: RSA Offshore Oil & Gas Due Diligence at a total monthly remuneration of 11 500.00 per month. He was appointed Project Co-ordinator of the RSA Offshore Oil & Gas Project as from the 1st March 2005 at a total remuneration of R18 000.00 per month.

Projected career and earnings in uninjured state

[36] The career path projected by the plaintiff for the patient is that he would within the family business have attained the post of project manager by 2007, general manager and director by 2010, junior executive director by 2015 and executive director by 2020. The defendant contends that the plaintiff's career projection is overstated and inconsistent with the patient's abilities as objectively measured. The defendant projects a career path using the Paterson job grading system. At the time of the accident, the patient is placed in the Paterson C1 job grading band. Two years after the accident, he progresses to the C2 grade, and after 3 to 5 years to the C3 level. The final job attainment is at a D1 level after a further 4 to 6 years. The patient would remain at this level to the age of retirement, any further progression being too uncertain to project.

[37] The defendant contends that the yardstick against which the plaintiff's case for the patient's career progression through the ranks to the top position of manager director has to be weighed, is provided by the key personnel employed by the Atlantis Group. The defendant says that this would include Blackbeard, his brother Brian, Mr J van Rhyn, Mr P Rogers, Mr Gower and Mr Visagie. The calibre of these people, the defendant says, points to the background, the level of experience, the technical knowledge and academic qualifications required. The

conclusion is that the patient does not measure up to the requirements as he does not have the requisite experience, military background, technical experience and academic qualifications.

[38] The defendant's approach is for several reasons fundamentally flawed. The first is that the defendant is not comparing apples with apples. The comparison of the patient with Mr Van Rhyn and Mr Rogers illustrates the point. At the time of the accident in 2005, the patient was 28 years old; he was qualified as an artisan in a relevant field; he was computer literate, having passed a number of courses, and he had a Project Management Diploma from Unisa. From 2001 he had worked at Atlantis Group in various capacities.

Mr Van Rhyn was born 4 April 1965; he obtained a B.Eng (Electronic Engineering) degree from Stellenbosch University in 1989. In 1994, when he was 29 years of age, he obtained an M.Sc (Electronic Engineering) from University College, London. In 2000, when he was 35 years of age, he obtained a B. Comm (Hons) (Business Management) from Unisa. At an age comparable to that of the patient, he was a junior project engineer in the Navy with a B.Sc degree in electronic engineering. His managerial career in the private sector took off in 1997 (at age 32) when he became manager special projects at Nasionale Media Ltd. He now serves, as a highly skilled and well-paid technical expert, on contract as Project Manager in the Atlantis Group.

Mr Peter Rogers was born on 28 March 1959; he is now 50 years of age. In 1984 at age 25 he obtained a Diploma in Electrical Engineering and various Programming and PLC Courses. At an age comparable to that of patient, he was a weapons technician in the SA Navy (1977 to 1980), and

a trainee technician with ESCOM (1980 to 1986). From 1999, from age 40, he was proprietor of Ilva Technologies CC and from 2005 to 2007 (from age 46 to 48) he was Account and Project manager of Realconnect (Pty) Ltd. At age twenty-eight the patient in fact "looks better" than Mr Rogers did at the same age!

[39] A further factor which renders the approach adopted by the defendant flawed, is the fact that the patient was working, and would follow a career, within the family business. This factor was recognised by both Shaw and Crous. The patient was the designated heir of the family business; he was being groomed to take over after his father's and his uncle's retirement. He was fast tracked for promotion and exposed to opportunities he would otherwise not have had, or would have waited far longer to receive in the case of an ordinary employee. He was to be mentored by his father for at least another five years, and his uncle for a further fifteen years. During this time he would obtain the necessary knowledge to run the company; he was being taught the "recipe". Blackbeard said in evidence:

> The framework which we planned it around was the key dates of 2010 to 2012 when Mark would take over – when I would retire and Mark would take over as general manager of the Ordinance Division. The other date we also needed to plan in was my brother's retirement. So, by then we needed to have Mark fully operational as director in the company. I've no doubt in 15 years of mentorship my son would have had between my brother and myself that he would be in such a position to be able to do that.

[40] On the defendant's approach, the patient's qualities testified to by Dr Gowans and Dr Taylor are not given due weight. The patient was briefly exposed to Dr Gowans, a marine consulting engineer, during tests

in a submarine manoeuvring and stability project which Dr Gowans conducted on contract with the Atlantis Group in the wind tunnel of the CSIR in Pretoria. Dr Gowans said in evidence that he was impressed by the manner in which the patient interacted with the scientists and technicians involved, and the manner in which he managed the logistics of the project.

[41] Dr Taylor was similarly impressed during work which his company did on contract for the Atlantis Group. Dr Taylor is an engineer who employs a large number of people with technical qualifications:

> I employ a diversity of university graduates so out of 100 employees 60 to 70 of technical qualification of one form and about 20 to 30 would be formal graduates, BSc, MSc level and then I have people who have national high diplomas and BTech degrees from the Technikons and then I also have some who are skilled technologists, people who are qualified instrumentation technicians and that type of thing …

Dr Taylor made the interesting, and indeed important observation, that highly qualified and skilled engineers and scientists who are particularly good at detailed engineering solutions, often do not have the leadership qualities to run a business; in his words, "they are not necessarily good at communication, sales and human interaction". Dr Taylor pointed out that he is the only qualified engineer on the board of his company, the other three being a draughtswoman, and two instrumentation technicians.

[42] Dr Frances Hemp estimated the patient's pre-morbid intelligence "in the above average to superior range". This view is supported by Shaw and by Renée de Wit (a clinical psychologist consulted by the defendant) who found that "cognitively, some abilities are still in the above average

to superior range and it is evident that he must have had very quick information processing premorbidly".

[43] The patient from an early age showed leadership and interpersonal skills. Thus, when barely in his twenties, he was made commodore of the Loch Vaal Club. In the Air Force he was made a corporal. Shaw referred to these two positions as constituting the "building blocks" of leadership. The evidence of Dr Gowans and of Dr Taylor in regard to the patient's leadership qualities is considered above.

[44] The defendant submits that the patient had not found his niche in life at the time of the accident, and that there was no guarantee that he would have persisted with his employment in the Atlantis Group. It is correct that prior to his employment at the Atlantis Group, the patient's early career shows some lack of focus: he did not continue with his study for a marketing diploma and his ambition to become a professional pilot remained unfulfilled. Such uncertainty and vacillation is surely not unusual in the case of young people in their early twenties. There was indeed no guarantee that the patient would have continued with his employment at the Atlantis Group, but at the time of the accident he had been employed in the Group for a period of about four years, he had done well and was in a privileged position under the mentorship of his father, with a career taking him into management mapped out for him.

[45] In my view, it is apparent from the foregoing that the defendant's projected career path which takes the patient, who was at the time of the accident in the Paterson C1 job grading band, no further than the Paterson D 1 level, is unrealistic and not in accordance with the evidence. In my view, the career path projected by Shaw is, with one qualification, more

realistic. Shaw's projection takes the patient from junior executive director (D4/5 on the Paterson job grading band to be attained by 20015) into the Paterson E1 job grading band as executive director by 2020. In my view, the upward step from junior executive director to executive director is a progression too uncertain to project.

Pre-morbid loss of earnings

[46] The patient was paid his salary up and until June 2005; the loss of earnings calculation should therefore commence with effect from 1 July 2005.

[47] He would have retired at age sixty-five.

[48] The plaintiff submitted that a profit share component is to be brought into the calculation of loss of earnings. The submission derives from Blackbeard's evidence that the son would receive 30% of his (Blackbeard's) shares on his retirement, entitling to 30% of the profits. This would increase to 50% upon the demise of either Blackbeard or his wife, and 100% when they had both passed away. The acquisition of a shareholding is not dependent upon the patient fulfilling any management position within the Group; he is a member of the family and the shares may (will?) in any event accrue to him.

[49] Shaw suggested that the cost to company figures should be utilised for the purposes of comparing the actual earnings and projected income against the industry norms as represented by the Peromnes scale. On that approach, the following career path must be accepted as the basis for the computation of the patient's loss of earnings:

(i) Project Co-ordinator from 1 March 2005 at R216 000.00 per annum.

(ii) Project Manager from 1 March 2007 at R325 000.00 per annum.

(iii) General Manager from 1 March 2010 at R650 000.00 per annum.

(iv) Junior Executive Director from 1 March 2015 at 1 250 000.00 per annum.

Post-morbid earnings

[50] The notional value of the patient's future injured earning capacity has been agreed at between R1 000-00 and R3 000-00 per month. The parties are not in agreement as to the likelihood of the patient generating such earnings, and whether any such earnings would be deductible, as opposed to earnings which are gratuitous in nature.

[51] The patient's post-injury positions of employment, where he earned income in a minimal amount, were created especially for him and he was unable to sustain them. This outcome was consistent with the evidence of the experts of both parties, in particular that of the clinical psychologists Renée De Wit and Francis Hemp, and the occupational therapists Thea Coetzer and Joan Andrews. Thus Ms Coetzer says that she agrees with the views of Joan Andrews and Frances Hemp that the patient –

> ….. is not going to be able to work in any setting other than some form of sheltered employment and such a position is going to be difficult to procure to suit his profile.

[52] Upon a conspectus of the evidence, I am satisfied that it is highly improbable that the patient will receive earnings generated by his labour and that such income as he may receive will be gratuitous.

Contingencies

[53] Mr McClarty submitted that a contingency deduction of 5% from the past loss of earnings be made, and that 12% be deducted from the future uninjured earnings component. Mr Potgieter submitted that if the loss of earnings model of Shaw is accepted, the contingency deductions should be 10-15% for past loss of earnings, and 40-50% in respect of future earnings.

[54] The amount of discount for contingencies cannot be assessed on any logical basis: "the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case".[9] Factors which, in my view, are to be taken into consideration include the increased margin of error by reason of the length of time (thirty-five years) over which the patient will be compensated. The fortunes of life are not always adverse, and account should be taken of the fact that the patient was in an established career path, subject to the mentorship of his father and uncle, in an established business with established networks and an international client base. However, the Atlantis Group does business within an environment which may in the longer term be sensitive to developments

[9] *Southern Insurance Association Ltd v Bailey NO* 1984 (1) 98 (A) at116H—117A; see further the authorities cited by Visser Potgieter *Law of Damages* 2nd ed 130 fn103.

in technology and perhaps even international politics. This may be within the realm of speculation, but these uncertainties are in my view to be accounted for by way of an appropriate deduction for contingencies.

[55] There are no future injured earnings except, possibly, earnings of a gratuitous nature and therefore not deductible. Similarly, the small amounts the patient earned in his post morbid state should also not be deducted for the same reasons.

[56] Considering all these factors, I am of the view that contingency deductions of 10% from the past loss of earnings, and 25% from future uninjured earnings would not be unreasonable in the circumstances.

Conclusion

[57] In terms of the agreement between the parties as set out in paragraph [5] above, the plaintiff's claims are subject to an apportionment of 70% in favour of the plaintiff. In regard to general damages, I have made provision in my order for the apportionment. In regard to the payment of past medical expenses, I have made provision in my order for both the apportionment and for an interim payment that has been made.

[58] I make the following order:

1. The defendant is ordered to pay the plaintiff 70% of the damages suffered by the plaintiff as a result of the accident which is the subject matter of this action.

2. The actuaries are to calculate the damages arising from past and future loss of earnings in accordance with the actuarial methodology agreed upon and in accordance with the directions in this order

4. If a party does not accept the calculation of the actuaries, either party may set the matter down for further hearing on a date to be arranged with the Registrar.

5. The directions with regard to the calculation of damages in respect of past and future loss of earnings are as follows:

   (i) The calculation is to be based upon the assumptions contained in paragraphs [46] to [49].
   (ii) The loss of earnings calculation should commence with effect from 1 July 2005.
   (iii) The plaintiff's earnings in the uninjured state would have been as set out above in paragraph [49].
   (iv) The plaintiff in the uninjured state would have retired at the age of sixty-five.
   (v) A contingency of 10% is to be applied to past lost of earnings.
   (vi) A contingency of 25% is to be applied to future loss of earnings.

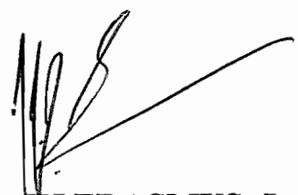
6. The defendant is ordered to pay the plaintiff the amount of R350 000.00 as general damages [ie R500 000.00 less 30%].

7. The defendant is ordered to pay the plaintiff an amount of R24 102.47 in respect of past medical expenses [ie R722 653.57 less 3% = R505 857.49, less an interim payment of R481 735.03].

8. The defendant is directed to furnish the plaintiff with an undertaking in terms of sec 17(4)(a) of the Road Accident Fund Act 56 of 1996 for 70% of the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service or

supplying of goods to the plaintiff as a result of any bodily or psychological injuries sustained by him in the accident which is the subject matter of this action.

9. The defendant is ordered to pay the Plaintiff's costs of suit, including the reasonable qualifying expenses of all the experts in respect of whom Rule 36 notices were filed and the costs occasioned by the employment of two counsel.



HJ ERASMUS, J