

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 12780/15

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

21/2/2017.....
DATE

.....
SIGNATURE

In the matter between:

M N M

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

MOSHIDI, J:

INTRODUCTION

[1] The plaintiff, a 27 year old Rope Access Technician, has instituted action against the defendant for damages as a result of certain personal bodily injuries which he sustained in a motor vehicle accident on 22 February 2012.

[2] At the time of the collision, the plaintiff was a passenger in a motor vehicle bearing registration numbers VXZ [...] GP (*“the motor vehicle”*), being driven by Mr Peter Lebepe (*“the insured driver”*).

[3] The occurrence of the accident, as well as the occupation of the plaintiff at the time of accident, are not in dispute at all. In addition, at the commencement of the trial, as contained in the parties’ stated case, (Annexure “X”), the defendant had already conceded liability 100% in favour of the plaintiff.

THE STATED CASE

[4] In the stated case, the plaintiff’s claim against the defendant in all is for payment of the sum of R6 049 152,22 (six million forty nine thousand one hundred and fifty two rand and twenty two cents) which is made up as follows:

4.1 Past hospital and medical expenses = R150 691,22

4.2 Future hospital and related expenses
(in terms of section 17(4) of the Road

	Accident Fund Act) (<i>“the Act”</i>)	=	(see below)
4.3	Past loss of earnings	=	R 12 866,00
4.4	Future loss of earnings/earning capacity	=	R4 685 595,00
4.5	General damages	=	R1 200 000,00

[5] In regard to certain of the above heads of damages, the parties agreed as follows:

5.1 Past hospital and medical expenses:

The parties agreed that this issue be separated in terms of the provisions of Uniform Rule 33(4) and be postponed for later determination, if agreement cannot be reached between them;

5.2 Future hospital and medical and related expenses:

The parties agreed that an undertaking as envisaged in terms of section 17(4)(a) of the Act be provided by the defendant to compensate accident-related treatment.

[6] There was no agreement regarding both the plaintiff's loss of earnings/earning capacity, as well as plaintiff's claim for general damages. In regard to the plaintiff's loss of earnings/earning capacity, the stated case noted the following:

6.1 The parties' respective industrial psychologist differ in their assessment of any loss the plaintiff may have suffered arising from the injuries (specified below) sustained by him in the accident as well as the *sequelae* thereof. In this regard, reference is made to the joint minute between Mr W J Wessels, industrial psychologist for the plaintiff, and Ms M Kheswa, industrial psychologist for defendant, dated 17 August 2016.

6.2 The plaintiff contends that, on the basis of the agreement reached between the various witnesses, as well as the expert opinion provided by the defendant's occupational therapist, i.e. Ms E Malan, in her reported dated 23 March 2016 the plaintiff:

6.2.1 presents, from a cognitive perspective, with below average memory. That his rate of work and accuracy of work, do not meet the demands of employment in the open labour market regarding work that is more clerically orientated, and requires independent problem solving. This could influence negatively his progress in future studies for advancement in work;

6.2.2 with optimal psychological intervention, the plaintiff's decreased attention, irritability, and fears could improve. The plaintiff could however, continue to have some attention and memory difficulties for which he would require compensatory methods and he will benefit from a supportive structured environment;

6.2.3 mild limitations for neck rotation to the left and right with pain in the right side of his neck when rotating to the right, and he also has moderate limitation of lateral neck flexion to the left with pain reported in the right of his neck;

6.2.4 when walking, the plaintiff presented with some asymmetry;

6.2.5 it is possible that his grip strength in the plaintiff's right hand is not optimal;

6.2.6 the presence of a moderate depression; and

6.3 the plaintiff is compromised in an environment where sustained attention is required to enable him to complete all safety measures until the job is done, and acquired information and

rope work has to be recalled in order to apply the theory correctly and properly.

[7] The plaintiff contends that on the basis of the opinions expressed by the experts, particularly the neurosurgeons, the orthopaedic surgeons, Dr Versfeld and Mr Wessels, the plaintiff's loss of earnings be calculated as proposed by Mr Wessels in his report dated 15 August 2016, with the inclusion of a higher post-accident contingency deduction. The plaintiff relies on the actuarial calculations of Mr G Whittaker dated 1 September 2016, and in terms of which the plaintiff's loss of earnings/earning capacity calculated on this basis, amount to the sum of R2 462 022,00.

[8] In regard to general damages, the plaintiff contends that, taking into account the gravity, severity, extent, and nature of, not only the injuries which he sustained, but also the far-reaching consequences thereof, that he should be awarded general damages in the sum of R700 000,00. In the end, it was submitted on behalf of the plaintiff that judgment be granted in his favour in the sum of R3 162 022,00 together with party and party costs, including the costs of counsel and those expert witnesses (inclusive of preparation and attendance fees where applicable), in respect of whom notice was been given in terms of the provisions of Uniform Rule 36(9).

THE DEFENDANT'S SUBMISSIONS

[9] The defendant's submissions may be summarised as follows: the defendant's orthopaedic surgeon, Dr S S Mukansi, found plaintiff's back to be

clinically normal, and scored him 0% on orthopaedic injuries; the defendant's neurosurgeon, Dr A B Mazwi, noted that the plaintiff appeared to be well orientated and had no difficulties following instructions, and that his life expectancy is normal from a neurological perspective; the defendant's neuropsychologist, Dr S Fisha, noted that the plaintiff has no permanent neurocognitive deficits, and enjoys above average executive functioning; the defendant's psychiatrist, Dr M Matjane, noted that the plaintiff had no effects on future occupational capacity, and that mental status examination did not reveal any long-term injuries mental and behavioural disorder; the defendant's occupational therapist, Ms E Malan, (Ms G V Vlok), noted that the plaintiff has overall been meeting the physical demands of his job, albeit with difficulties and aggravation pain; the defendant's industrial psychologist, M Kheswa, noted the likelihood of the plaintiff developing post-traumatic epilepsy in the region of 08% as indicated by Dr Mazwi, which might impact negatively on his work as a Rope Access Technician, but also noted that epilepsy is controllable. However, the joint minute of the industrial psychologists dated 17 August 2016 conceded that Ms M Kheswa was not in possession of all the available medico-legal reports as well as the joint minutes at the time of completing her report. In regard to the plaintiff's pre-accident retirement, the joint minute agreed at 65 years, whilst post-accident was deferred to other expert opinion.

[10] Based on the above, the defendant contends that the plaintiff be awarded general damages in an amount of R500 000,00, and that in respect

of loss of income, the plaintiff should be awarded the sum of R1 504 447,00, only based on the defendant's actuarial calculations.

THE ISSUE FOR DETERMINATION

[11] The submissions made above by the parties are significantly divergent in certain respects and based on the expert opinions. The sole issue for determination is the extent of the head injury as well as the *sequelae* thereof, in particular on plaintiff's future employability in the open labour market. But first, and at the risk of repetition, some additional common cause facts.

[12] In the joint minute, the orthopaedic surgeons (Drs Versfeld and Mukansi) agreed that the plaintiff has sustained a head injury and a back injury as a result of the accident. Dr Mukansi, however, did not score the head injury, whereas Dr Versfeld did so including the effects of it. Furthermore, the joint minute of the neuropsychologists (Drs Ormond-Brown and Fisha), agreed that the plaintiff sustained a severe brain injury during the accident, and made provision for him to receive psychological treatment. The joint minute of the occupational therapists (Ms S Murcott and Ms E Malan) agreed that the plaintiff will benefit from occupational therapy in order to assist him in achieving and maintaining optimal levels of functioning in the various areas of his life, and in adjusting his various activities to accommodate his limitations from both physical and psychological perspectives. They also agreed that the plaintiff may require physiotherapy and biokinetic intervention. In regard to the plaintiff's employment, the occupational therapist noted that prior to the

accident, the plaintiff had been employed as a Rope Access Technician by Height Safety Holdings, Midrand, since 2012. This, in the said company's Height Safety Projects. In this regard, the occupational therapist agreed that the physical demands of the plaintiff's work are extensive. These include good strength, mobility, and coordination of all four limbs and of the spine, excellent balance reactions, and good stamina and endurance. His work environment, where he is still employed, is regarded as hazardous. The physical strength demands of the job fall into the medium work category. They accepted the plaintiff's assertion that he has, post-accident, overall been meeting the physical demands of his job, albeit with difficulty and aggravation of pain and symptoms on occasions. More significantly, the occupational therapists agreed that the deterioration of the plaintiff's physical abilities will, from a functional perspective, result in a reduction in his work abilities and increased difficulties in meeting the physical demands of his work as a Rope Access Technician, as that of a Sound Engineer. It was agreed that from a physical perspective, the plaintiff should be able to work as a Graphic Designer. Furthermore, as stated before, the occupational therapists noted that the plaintiff is at the risk of developing post-traumatic epilepsy, and agreed that should this eventuate, he would be unsuited to work at heights and in hazardous work environments. It was further agreed that the plaintiff's loss of the sense of smell could be an obstacle in performing work in an environment where there are hazardous gasses or a fire risk.

[13] Indeed, there are other significant agreed facts in favour of the plaintiff in the joint minute of the occupational therapists. The agreements contained

in the joint minute of the neurosurgeons (Drs G Marus and A B Mazwi) have already been dealt with previously above. These include that pre-accident, the plaintiff had no neurological problems, and that post-accident, plaintiff's life expectancy has not been compromised. It was agreed that the accident-related injuries include, moderate concussive brain injury; bi-frontal and right temporal lobe contusion; right parietal extradural (subdural) haemorrhage requiring craniotomy; fractured right parietal area going into temporal bone and base of skull fracture; damage of first cranial nerve; and multiple cutaneous abrasions. The accident related neurological disability is a severe brain injury, consisting of both focal and diffuse injuries. That after this type of brain injury, it would be expected that patients would retain some long-term cognitive impairments. It was noted by the neurosurgeons that the plaintiff currently complains about some difficulty with memory functions. It was further noted that, although following the accident (22 February 2012), the plaintiff returned to his work, but he reported to Dr Marus that he experienced problems with fatigue and memory loss. The risk of long-term epilepsy was agreed at $\pm 5\%$. To complete the picture, the agreement reached in the joint minute of the industrial psychologists (Mr Wessels and Ms Kheswa), has already been dealt with.

[14] As stated in paragraph [10] of this judgment above, the sole issues for determination by this court are, the extent of the plaintiff's head injury; the *sequelae* thereof; and the fair and just compensation in respect of loss of earnings/earning capacity, and general damages. In my view, despite the perceived divergence in the expert opinions, the stated case presented to me

falls within the purview of rules 33(1) and (2) of the Uniform Rules, and as discussed in case law such as, *Montsisi v Minister of Police* 1984 (1) SA 619 (A) at 361A-F; and *Sibeko v Minister of Police* 1984 (1) SA 792 (W) 795B; and more recently, in *Minister of Police v Mboweni* (657/2013) [2014] ZASCA 107 (5 September 2014) at paragraphs [6] to [8]. In other words, the special case should be “a written statement of facts in a litigation, agreed to by the parties, so that the court may decide these questions according to law”. See also *Nedbank Ltd v Petsana* 2009 (2) SA 189 (SCA).

COURTS’ GENERAL APPROACH TO EXPERT EVIDENCE

[15] It is also necessary at this stage to recall the general approach of courts to the evidence of expert witnesses. Part of the trite approach is that the evidence of an expert witness is required whenever his/her skill is greater than that of the court, and that whether the court can receive appreciable assistance from the opinion of the witness. See for example, *Ruto Flour Mills Ltd v Adelson* (Volume 1) 1958 (4) SA 235 (T). An expert witness is also required to lay a foundation for his/her opinion, and support their opinions with valid reasons. In *Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (E) at 569B, Addelson J said:

“In essence, the function of an expert is to assist the Court to reach a conclusion on matters on which the Court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the Court that, because of his special skill, training or experience, the reasons for the opinion which he expresses are acceptable ... The expert must either himself have knowledge or experience in the special field on which he testifies (whatever general knowledge he may also have in pure theory)

or he must rely on the knowledge or experience of others who themselves are shown to be acceptable experts in that field.” (my emphasis)

(See also *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schâdlingbekâfung* MBA 1976 (3) SA 352 (A) at 371F-H.)

APPLYING THE LEGAL PRINCIPLES

[16] With the above legal principles in mind, I proceed to assess and examine the opinions of some of the pertinent and relevant expert witnesses in the present matter. The most notable, are the expert witnesses of the defendant, in particular, the opinions of defendant’s industrial psychologist, Ms M Kheswa, and neurosurgeon, Dr A B Mazwi. The observations made below are so made fully cognisance that the defendant is not necessarily bound by the opinions of its own expert witnesses. However, in the present matter, the defendant relies wholly on these opinions.

[17] The opinions expressed by the defendant’s expert witnesses either have no foundation at all, or are not supported by the agreed facts, or are contrary to the contents of the various joint minutes. The opinion of Ms Kheswa that, post-accident, the plaintiff retains the residual capacity to work as before within his current occupation, and that the accident did not render him unemployable in the open labour market, and that “*it has only reduced his functional capacity because of pain*”, and that the plaintiff, “*is therefore assured to remain in his pre-accident capacity with inflationary increases applying until retirement at age 65*”, is not well founded, in my view. As

observed above, it is common cause that Ms M Kheswa was not in possession of all the available medico-legal reports as well as the joint minutes at the time of completing her report. These were supplied to her subsequently. The opinion is contrary to the contents of the joint minute between the defendant's neurosurgeon, Dr A B Mazwi, and plaintiff's Dr G Marus, as indicated above. The last-mentioned joint minute noted the plaintiff's injuries as set out in paragraph [11] of this judgment. The joint minute also agreed on the concomitant *sequelae* on the plaintiff's future employability. The expert opinion of Ms M Kheswa therefore is not helpful at all to the court.

[18] The same observation partly applies to the opinion of Dr Mazwi. He agreed with plaintiff's Dr Versfeld that the plaintiff indeed sustained a head injury as a result of the accident. The views of the defendant's psychiatrist, Dr Matjane, as opposed to those of plaintiff's Dr L Fine, are also contrary to those of Dr Mazwi, and the objective overall injuries and *sequelae* thereof suffered by the plaintiff. Dr Fine objectively, found that the plaintiff suffered a head injury with significant organic brain damage, and alteration in mental status, cognitive and highest integrative function; accident-traffic-travel-related anxiety disorder; and depression secondary to the effects of his injuries. The opinion of defendant's neuropsychologist, Dr Fisha, that, although the plaintiff admittedly suffered a severe brain injury in the accident, there could be no agreement on the impact of such brain injury on plaintiff's employability, is extremely difficult to be appreciated by the court. After all, Dr Fisha "*found significantly high levels of clinical depression*". It is therefore difficult to

support the opinion of Dr Fisha to the effect that there are no permanent neurocognitive defects, and that the plaintiff, “*was found having above average executive functioning*”, post-accident. The finding is contrary to the objective medical opinions, in my view. Dr Fisha, correctly deferred to the psychiatrists confirmation of a diagnosis and treatment. The psychiatrists, as indicated above, are Drs Fine and Matjane. In my view, the joint minute of the occupational therapists, Ms S Murcott and Ms E Malan, as dealt with above, presented the most objective and reliable scenario of the plaintiff’s post-accident problems, his prognosis, and future prospects of employability. I accept, without reservations, the findings of the joint minute.

[19] In addition, the parties’ respective orthopaedic surgeons also noted by agreement, the respective reports involving head injury, neck pain and lower back pain, which factors they concluded could have a negative impact on the plaintiff’s efficiency. The orthopaedic surgeons therefore agreed that considering the plaintiff’s neck and lower back problems, that the plaintiff’s residual functioning capacity, from a physical perspective, would be restricted, and that he should apply spinal hygiene and ergonomic principal in his work environment. They also agreed that the deterioration in the plaintiff’s physical abilities will, from a functional perspective, result in a reduction in his work abilities, and increasing difficulties in meeting the physical demands of his work. It is significant that plaintiff’s orthopaedic surgeon, Dr Versfeld, expressed the opinion that the plaintiff’s work ability has been largely and adversely affected by the injuries he sustained in the accident, and that he will probably become restricted to sedentary and semi-sedentary type of work, by

approximately, age 50, and may suffer a truncation of even a sedentary career, by approximately age 60. I accept this opinion, as well as the opinions expressed by the occupational therapists, as credible, and more probable, reliable, and based on the objective medical evidence before me. See, for example, *Buthelezi v Ndaba* 2013 (5) SA 437 (SCA) at paragraph [14]. The plaintiff suffered, among others, the following consequences of the injuries, as reported by the various experts: forgetfulness; loss of taste and smell; headaches; neck stiffness; back pain; and mood swings/depression. This is a finding I make based on the objective medical opinions. It follows therefore that the finding made by the defendant's orthopaedic surgeon, Dr Mukansi, to the effect that the plaintiff's back is clinically normal, cannot be sustained. It is clearly contrary to the objective evidence, and more pertinently, to that of Dr Versfeld. I deal in more detail with the full reasons for my finding in paragraphs [20] to [28] immediately below.

[20] I deem it necessary to elaborate briefly on the problematic aspects of some of the defendant's expert witnesses. I have already, in paragraph [15] of this judgment dealt with what courts traditionally expect from expert witnesses and the duty of such witnesses. To emphasise the legal principle, in *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA) at 1201 (also reported at [2002] 1 All SA 384 (SCA), two essential *dicta* appear:

"Finally, it must be borne in mind that expert scientific witnesses do tend to assess likelihood in terms of scientific certainty. Some of the witnesses in this case had to be diverted from doing so and where invited to express the prospects of an event's occurrence, as far as

they possibly could, in terms of more practical assistance to the forensic assessment of probability, for example, as a greater or lesser than fifty percent chance and so on. This essential difference between the scientific and the judicial measure of proof was aptly highlighted by the House of Lords in the Scottish case of Dingley v The Chief Constable, Strathclyde Police 200 SC (HL) 77 and the warning given at 89D-E that:

‘One cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a Judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved – instead of assessing, as a Judge must do, where the balance of probabilities lies on a review of the whole of the evidence.’

Earlier, at paragraph 36 of the same judgment the Court had said:

“..., what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. That is the thrust of the decision of the House of Lords in the medical negligence case of Bolitho v City and Hackney Health Authority (1998) AC 232 (HL) [E].”

[21] In the instant matter, I have already pointed to, not only certain shortcomings in the findings of some of the defendant’s expert witnesses, but also the contradictions in their respective opinions. These include Dr Mukansi, Dr Mazwi, Dr Fisha, Dr Matjane, and Ms Kheswa.

[22] In short, on the objective and credible evidence of the plaintiff’s expert witnesses, such as Mr Wessels, there was no pre-existing orthopaedic, functional or psychological problems that would have prevented the plaintiff from following a career in his chosen field of interest. On the other hand, the defendant’s industrial psychologist, Ms Kheswa, had limited comment. Ms Kheswa could not comment on the promotional prospects unless she had

communicated with the plaintiff's employer. This omission is rather significant, and makes it difficult to accept her assessment and opinion as balanced and objective. Ms Kheswa could also not rebut the possibility of the plaintiff having progressed along the Rope Access Technician career ladder, but only opined that there is not always rigid specification of the mechanistic nature of promotion in one's career advancement. Her opinion that, apart from qualifications, there are several factors that are considered when promotion of employees comes into play, was not helpful at all.

[23] A further shortcoming emerged when Ms Kheswa opined on the plaintiff's loss of earnings/earning capacity. She clearly had insufficient information on this aspect. This is so despite the fact that sufficient and full information on the plaintiff's past and current earnings was available to her before and during the trial. On the objective evidence, there was clearly no basis for the approach adopted by Ms Kheswa for assessing the plaintiff's potential earnings on the basis of the Paterson Scales alone, and excluding his actual income information in the face of available and actual earning information. It is trite that a mathematical approach, where readily available, to the calculation of loss of earnings/earning capacity is preferable, especially where there are sufficient reliable facts on which an actuarial calculation can be made. The omission on the part of Ms Kheswa is, once more, significant in casting doubt on her opinions.

[24] In regard to the plaintiff's post-accident earnings/earning capacity, the plaintiff's industrial psychologist, Mr Wessels, is of the view that the plaintiff

has sustained a past loss of earnings as a result of his delayed progression due to the inability to engage in the indicated skills development course. In this regard, Mr Wessels opined that the plaintiff's career progression was delayed by approximately 2 years as a result of the accident, and that his remuneration progression will therefore reflect a lag of 2 years.

[25] In addition, Mr Wessels relies on the opinion of plaintiff's orthopaedic surgeon, Dr G A Versfeld, where the latter expressed the view that:

"Resulting from the accident, the plaintiff has symptoms and disabilities that significantly affect his ability to do his normal work. He has therefore lost productive capacity. With increasing symptoms, which one can expect in future, the probability is that he will become unfit for physical components of his work by approximately 50 years of age. At this time he is likely to be restricted to sedentary, or semi-sedentary type work, and it is possible that he will become unfit for even this work by approximately 60 years of age. Pre-accident retirement age is 65 years"

In addition to the afore, the neurosurgical, occupational therapy, psychiatric and clinical psychological opinions must be considered when assessing the claim. I have already dealt with the joint minute between Dr Versfeld and his counterpart, Dr Mukansi. At the risk of repetition, both agreed that the plaintiff sustained a head injury as well as a back injury as a result of the accident. In this regard, it is once more difficult to appreciate the basis of Ms Kheswa's opinion. This opinion is also plainly in conflict with the opinion of defendant's own orthopaedic surgeon, Dr S S Mukansi. The plaintiff's calculations, as noted elsewhere in this judgment, are based on the credible, more probable and well-grounded opinion of Mr Wessels.

[26] Regrettably, the opinion of Dr Mukansi, on its own, is also contradictory, in particular when regard is had to his agreed findings with Dr Versfeld, and his opinion regarding the plaintiff's future career. Ms Kheswa proceeded to latch on to Dr Mukansi's opinion, especially where the view is expressed that the plaintiff's life expectancy has not been affected by the accident, and that he had recovered well from an orthopaedic point of view. In her favour, Ms Kheswa noted the agreement by the occupational therapists in their joint minute to the effect that the plaintiff entertained aspirations at the time of leaving school, of studying sound engineering or graphic design. However, Ms Kheswa proceeded to express herself as follows:

"Should this be the case, the physical challenges which he is currently battling with will not have much of a detrimental effect on him especially if he receive training and courses that will boost her [sic] skills in sedentary jobs like a course in Sound Engineering or Graphic. This is quite suitable especially in absence of serious intellectual/executive functioning deficit as noted by Dr M Matjane, and psychiatrists and Dr Senathi Fisher [sic] clinical psychologist."

To put it mildly, Ms Kheswa's reliance on the opinion of the defendant's orthopaedic surgeon, Dr Mukansi, is not well-founded.

[27] I have already dealt with Ms Kheswa's opinion regarding the future treatment of the plaintiff's common cause diagnosis of post-traumatic epilepsy. There is indeed more improbable in the opinion of Ms Kheswa.

[28] Finally, and again for the sake of completeness, the parties' respective neuropsychologist expert witnesses (Mr Ormond-Brown and Dr Fisha),

agreed that the plaintiff has sustained a severe brain injury in the accident. However, they disagreed in respect of the presence of cognitive deficits. In particular, Mr Ormond-Brown, for the plaintiff, expressed the opinion that the plaintiff has been left with serious neuropsychological deficits due to the brain injury, notwithstanding that he has made a better than expected recovery. He conceded that the plaintiff's ability to hold down a job has been compromised. On the other hand, the defendant's expert witness, Dr Fisha, expressed a contrary view, which in my opinion, was not well-grounded, regrettably. Mr Ormond-Brown's opinion ought to be accepted on a balance of probabilities based on the totality of the objective medical evidence. The same applies to the plaintiff's actuarial calculation, which is set out elsewhere in this judgment.

THE DEFENDANT'S ACTUARIAL CALCULATIONS

[29] I deal briefly with the defendant's actuarial calculations again. These calculations, presented on the basis of two scenarios, namely Scenarios A and B, are set out in a report by Deloitte dated 23 August 2016. I have had due and careful regard to these calculations. The calculations are flawed simply since reliance is placed on defective medical expert opinion as discussed. For example, Scenario A of the calculations (plaintiff's loss of earnings/earning capacity) takes into account only the two year lag in progression referred to by plaintiff's industrial psychologist, Mr Wessels; and it does not take into account any of the extra opinions expressed, notably those of Dr Versfeld, Mr Ormond-Brown, as well as the defendant's very own expert occupational therapist, Ms E Malan. The amount arrived at on the above

basis is the sum of R1 168 014,76. Scenario B of the defendant's calculations is equally flawed. Not surprising, the criticised opinion of Ms Kheswa, defendant's industrial psychologist, was adopted. That is that the plaintiff retains the residual capacity to work within his current occupation, and that he has not been rendered unemployable in the open labour market. Indeed, the defendant's written heads of argument, on the calculations, and consisting of some one and a half typed pages only, relied on the impugned expert opinion of Mr Kheswa. In the end, the heads of argument were not helpful at all to the court and clearly partisan. Scenario B of the defendant's calculations is further flawed since it ignores completely, not only the opinions of the plaintiff's expert witnesses, but also those of the defendant's own therapist, Ms E Malan. Scenario B also does not make provision for a probable curtailment of the plaintiff's working life, which will most probably be the case regard being had to the nature, severity and functional impact of the common cause injuries (brain injury and orthopaedic injuries involving his back and neck) sustained by the plaintiff. I conclude therefore on this aspect, that the defendant's actuarial calculations omit to reflect the reality of the plaintiff's circumstances, and that instead, the more credible calculations presented by the plaintiff's actuary, Mr Whittaker, be preferred. As reasoned elsewhere in this judgment, the defendant's expert witnesses cannot admit the serious nature of the injuries sustained by the plaintiff in the accident, and thereafter simply deny or downplay, without credible and well-grounded justification the effects thereof. It makes no proper sense at all.

SUMMATION

[30] To sum up. The finding is that the plaintiff has suffered a severe brain injury, which left him with serious neuropsychological defects due to the brain injury. The impact of such injury is probably that the plaintiff's ability to retain his job has been significantly compromised. The head injury and damage have resulted in, *inter alia*, mental status, cognition, and the highest integrative function. There is also the risk of post-traumatic epilepsy, as indicated in the medical reports. On the evidence, he will find it extremely difficult to remain competitive in the open labour market in order to retain his current job. Alternative viable options, such as, a Sound Engineer, have been suggested. In this regard, the first joint minute of the occupational therapists, not only noted that the plaintiff's aspirations when leaving school was to study Sound Engineering or Graphic Design, but also agreed that, post-accident, and from a physical perspective, he should be able to work as a Graphic Designer. The defendant formally admitted the latter in the admissions referred to in the next paragraph.

[31] It is also so that, pursuant to the plaintiff's request for admissions, the defendant in response thereto, admitted, the injuries sustained by the plaintiff as noted in the joint minute of the neurosurgeons, the severe brain injury suffered by the plaintiff as noted in the joint minute of the neurosurgeon psychologists; the same applies to the head injury noted in the joint minute of the orthopaedic surgeons, and the other joint minutes mentioned previously.

In my view, it appears that delictually speaking, it makes no sense to admit the existence of a head injury, moderate or severe, on the one hand, and on the other hand, attempt to refute the probable *sequelae* thereof. The defendant must take its victim as it found him.

THE QUANTIFICATION OF PLAINTIFF'S LOSS

[32] I turn to the quantification of the plaintiff's loss of earnings. This can never be an accurate determination for well documented reasons. The plaintiff relies on the actuarial calculations of Mr Gregory Whittaker attached to the bundles and dated 1 September 2016. In terms of these calculations, the plaintiff's total loss of earnings/earning capacity was assessed in the amount of R2 462 022,00 (two million four hundred sixty two thousand and twenty two rand).

[33] The plaintiff contends that on the basis of the opinions expressed by the experts, in particular the neurosurgeons, the orthopaedic surgeons, Dr Versfeld and Mr Wessels, the calculations, with the inclusion of a higher post-accident contingency deduction, are justified. The pre-accident earnings at the date of the accident are taken as R35 562,00 per annum (reported earnings of R2 963,50 per month); increasing to R60 000,00 per month at 1 March 2013 (upon conclusion of a Rope Access Level II Course); and increasing uniformly to earnings of R108 000,00 for the tax year ending 28 February 2016. From 1 March 2016 the earnings were valued at R180 000,00 per annum. Earnings as at 1 September 2016 were taken as R180

000,00 per annum. From 1 March 2018, the actuaries valued earnings of R189 000,00 per annum, and from 1 March 2022 earnings of R228 000,00 per annum were valued. From 1 September 2016 provision is made for inflationary increases per the inflation of earnings assumption until retirement at age 65.

[34] On the other hand, the post-accident earnings are calculated as follows: earnings at the date of the accident are taken as R35 562,00 per annum, increasing uniformly to earnings of R847 261,00 for the tax year ending 28 February 2016. Earnings from 1 March 2016 are taken as R84 950,00 per annum (equal to cumulative earnings of R35 395,87 for the 5 months from March 2016 to July 2016). Earnings as at 1 September 2016 are taken as R84 950,00 per annum. From 1 March 2018 earnings of R180 000,00 per annum were valued. From 1 September 2016, provision is made for inflationary increases per the inflation of earnings assumption until retirement age of 50.

[35] From the above, the following summary of results emerged:

Past loss

Value of income uninjured:		R 361,584
Less contingency deduction:	5.00%	<u>R 18,079</u>
		R 343,505
Value of income injured:		R 282,060
Less contingency deduction:	5.00%	<u>R 14,103</u>

R 267,957

Net past loss:

R 75,548Future loss

Value of income uninjured: R4,105,651

Less contingency deduction 10.00% R 410,565

R3,695,086

Value of income injured: R2,617,223

Less contingency deduction: 50.00% R1,308,611

R1,308,612

Net future loss:

R2,386,474

Total net loss:

R2,462,022

[36] The above total loss figure of R2 462 022,00, is countered by the defendant who proposes instead a total loss in the sum of R1 504 447,90, based on the calculations of the defendant's actuary, which applied, on pre-accident 50% on past loss and 15% on future loss deductions, and on post-accident 0% on past loss and 25% on future loss of earnings. The difference between the two contending total loss of earnings is about R960 000,00. The average is just under R2 million. However, in my view, the amount contended for by the plaintiff, based on the more probable and credible and objective information, seems to be just and equitable in the circumstances of the case.

I was tempted to apply further discretionary contingency deductions to the plaintiff's total loss sketched above, but decided against such.

THE PLAINTIFF'S GENERAL DAMAGES

[37] I deal with the plaintiff's claim for general damages. In practice, this head of damages, as well is incapable of precise assessment. This fact is mirrored in the several case law relied upon by the contending parties. The trite principle is that, each case must be decided on its own peculiar circumstances, and within the discretion of the court. Comparable past awards serve as a mere guide only. For example, the defendant's counsel, for its submissions, relied, quite correctly so in respect of the principles, on cases such as *Dragsund v Barker* 1959 (3) SA 489 (D), where Selke J said:

"In estimating the damages for pain, suffering, shock and permanent incapacity (including plaintiff's injuries and impairment of movement), I have to try to take into account a host of considerations comprising many nebulous possibilities, and including also my own estimate of the plaintiff's prospects of life and continued good health. The result must necessarily represent something very like a rather badly informed guess."

These principles still hold good in present times, but not the quantum of general damages awarded in that case. I have had due regard to all the other case law referred to in the present matter.

[38] For present purposes, I am satisfied that the plaintiff has sustained serious injuries as described above (*cf RAF v Faria* (567/13) [2014] ZASCA 65 (19 May 2014)). I have considered the gravity, severity, extent and nature

of the injuries sustained by the plaintiff. In addition, I have taken into account the far-reaching *sequelae* of such injuries. For example, the real probability of ensuing epilepsy. It was contended on behalf of the plaintiff that the sum of R700 000,00 would be just and equitable. I agree. The sum of R500 000,00 offered by the defendant bordered on the low side, and not well motivated.

[39] For the sake of completeness, and as stated elsewhere, the defendant has conceded liability as to 100% in favour of the plaintiff. The parties agreed that the issue of the plaintiff's claim for past hospital and medical expenses be separated and postponed for later adjudication. In regard to future hospital and medical and related expenses, the parties agreed that the defendant shall provide to the plaintiff an undertaking as envisaged in terms of section 17(4)(a) of the Act.

COSTS

[40] There remains the issue of costs. These ought to follow the result. No credible reason has been advanced to determine otherwise in this discretionary matter.

ORDER

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

- 41.1 The defendant shall pay to the plaintiff the sum of R2 462 022,00 (two million four hundred and sixty two thousand and twenty two rand only) in respect of the plaintiff's loss of earnings/earning capacity.
- 41.2 The defendant shall pay to the plaintiff the sum of R700 000,00 (seven hundred thousand rand only) in respect of the plaintiff's general damages.
- 41.3 The total amount payable by the defendant in respect of the above order is the sum of R3 162 022,00 (three million one hundred and sixty two thousand and twenty two rand only).
- 41.4 The costs of the action, including the costs of counsel and those expert witnesses (inclusive of preparation) and attendance fees (where applicable) and in respect of whom notice was given in terms of the provisions of Rule 36(9).
- 41.5 The plaintiff's claim for past hospital and medical expenses and related expenses is postponed *sine die* for later adjudication, if necessary.

- 41.6 The defendant shall furnish to the plaintiff an undertaking to compensate accident-related treatment as envisaged in terms of section 17(4)(a) of the Road Accident Fund Act, as amended.

D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE PLAINTIFF	C H VAN BERGEN
INSTRUCTED BY	MUNRO FLOWERS AND VERMAAK ATTORNEYS
COUNSEL FOR THE DEFENDANT	M MABONA
INSTRUCTED BY	MABUNDA ATTORNEYS
DATES OF HEARING	1 SEPTEMBER 2016 TO 6 SEPTEMBER 2016
DATE OF JUDGMENT	21 FEBRUARY 2017