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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

In the matter between:

Case No: 66933/2011

(1) REPORTABLE: YES/NO

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

(3) REVISED: YES/NO

DATE

SIGNATURE

HENDRIK JOHANNES BADENHORST

PLAINTIFF

and

THE MUNICIPALITY OF THABAZIMBI

DEFENDANT

JUDGEMENT

JOYINI AJ:

INTRODUCTION

[1] The Plaintiff has instituted action against the Defendant for damages suffered as a result of the personal injuries sustained in an incident (“the incident”), that occurred on 6 January 2011 at Vander Bijl Street, Thabazimbi.

[2] At the time of the incident, the Defendant's tractor with a lawnmower was driven by the Defendant's employee who was on duty and as such, acting within the scope of his employment.

[3] The Plaintiff has complied with the requirements of the institution of the Legal Proceedings Against Certain Organs of State¹, by giving notice of the claim to the Defendant on 9 June 2011.

PARTIES

[4] The Plaintiff is Hendrik Johannes Bardenhorst, an adult male person born on 7 February 1963, who resides at B[...] 5[...], Thabazimbi.

[5] The Defendant is the Municipality of Thabazimbi, a municipality properly created in terms of the laws of the Republic of South Africa with its principal place of business at the Municipal Buildings, Rietbok Street 7, Thabazimbi.

BACKGROUND FACTS

[6] The Plaintiff was driving in his vehicle on the 6th day of January 2011, when suddenly a piece of rock was flung up by a municipal worker's grass cutting trailer and penetrated his right eye, causing permanent blindness of his right eye. At the time of the incident, he was a very successful professional hunter with his own hunting safari business. He catered mainly for American and some European clients, who all paid him in US dollars and Euros. Most hunting safaris booked with him was trophy hunts, which generated higher income.

[7] After the incident, he tried to carry on with the hunting business and even attempted to switch mainly to bow hunting, but he soon realised that he cannot safely act as hunter even in that type of hunting safari. He earned some income during the years 2011 and 2012 but was without income from 2013, when he actively started seeking alternative employment. We will get to the details of his post incident employment later. What was

¹ Act 40 of 2002.

clear from the evidence, was that he did not sit back and accept his disability but did his utmost to remain employed through all the difficulties he experienced with the several jobs he had over the years. He certainly limited his damages in favour of the Defendant in this matter.

[8] At the commencement of the proceedings, the parties informed the Court that the issue of liability was settled at 100% in favour of the Plaintiff and the Court Order to that effect is on Caselines 024-2.

[9] The general damages were also finalised on the 3rd of March 2020, when an order was made for the payment of R 336,000.00 for general damages plus interest at the mora interest rate of 10% per annum from date of service of summons (12/12/2011) to date of final payment².

ISSUES FOR DETERMINATION

[10] The Court is called upon to determine the quantum and in particular, the issues of past and future medical and related expenses, as well as past and future loss of earnings.

DEFENDANT'S APPLICATION FOR ABSOLUTION FROM THE INSTANCE

[11] The Counsel for the Defendant submitted that the absolution from the instance³ should be granted with costs on an attorney and own client's scale. The Counsel for the Defendant argued that the evidence presented before the Honourable Court by the Plaintiff and also on behalf of the Plaintiff was not pleaded in the amended particulars of claim. He further argued that the Plaintiff did not plead material facts of the alleged future medical expenses in the amount of R851 272.75 and the said amount was not quantified and/or calculated by an Actuary. He submitted that

² Caselines 024-4 and 024-5.

³ Caselines HOAD4, HOAD9, HOAD10, HOAD11, HOAD70.

litigation by ambush should be discouraged and the step taken by the Plaintiff amounts to abuse of the Court process.

[12] The Counsel for the Defendant further submitted that there is no copy of the written judgment on merits and it is not clear as to how the alleged incident had occurred. The Counsel argued that the Court is faced with two contradictory versions of how the incident occurred *i.e.* the version of the Plaintiff as stated in other medico legal reports and the version as stated by Dr van der Merwe in all of his reports that he had signed and to be read together with his supporting affidavit with regard to the history of the incident.

[13] The Counsel for the Defendant submitted that it is the general rule that every pleading must contain a clear and concise statement of the material facts upon which the pleader relies for his/her claim, defence or answer to any pleadings, as the case may be and with sufficient particularity to enable the opposite party to reply thereto. The Counsel for the Defendant humbly requested the Court to consider the following principles as stated in the authorities below and he said these principles are applicable in the present matter.

[14] In *Motswai v Road Accident Fund*⁴, the Court held that *“The requirement of signature of particulars of claim reflects the importance of both the document and the signature. That the signatory must either be an advocate or an attorney with a certain degree of expertise highlights the value to be ascribed to the signature. By appending one’s signature to a pleading, the attorney or advocate confirms that he/she has been scrupulous in preparing the pleading”* (paragraph [30] at page 9).

[15] In *Fisher and another v Ramahlele and Others*⁵, the Supreme Court of Appeal held as follows: *“[13] Turning then to the nature of civil litigation in our adversarial system it is for the parties, either in the pleadings or affidavits, which serve the*

⁴ 2013 (3) SA 8 (GSJ).

⁵ 2014 (4) SA 614 (SCA).

function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for 'it is impermissible for a party to rely on a constitutional complaint that was not pleaded'" (paragraph [13] at page 620).

[16] The Counsel for the Defendant requested the Court to consider the principles of absolution as stated in the authorities below and he said these principles are applicable in the present matter.

[17] In *MacCarthy Ltd v Absa Bank Ltd*⁶, the Court held that it is trite that the test to be applied by a Court when absolution is sought at the end of the Plaintiff's case is whether there is evidence upon which a reasonable person might (not should) find for the Plaintiff (paragraph [21] at page 328H).

[18] In *De Klerk v Absa Bank Ltd and Other*⁷, the Court held that the correct approach to an absolution application is conveniently set out by Harms JA in *Gordon Lloyd Page & Associate v Rivera and Another* 2001 (1) SA 88 (SCA) at 92E-93A: '[2] *The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409 G-H in these terms: "... (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff."

[19] The Court held that absolution at the end of a Plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a Court should order it in the interests of justice (paragraph [10] page 323G).

⁶ 2010 (2) SA 321 (SCA).

⁷ 2003 (4) SA 315 (SCA).

Therefore, the Defendant prays for an order of the absolution with costs on an attorney and client scale and that include the cost of the application in terms of Rule 38 (2) of the Uniform Rules of Court ('the Rules').

[20] The Counsel for the Plaintiff, in his reply to the Defendant's application for absolution from the instance, referred the Court to Rule 39(6) which provides as follows: "*At the close of the case for the plaintiff, the defendant may apply for absolution from the instance...*". The Counsel for the Plaintiff argued that this is a recourse available to the Defendant before leading evidence in response to the Plaintiff's case and therefore the argument that the Court should grant absolution from the instance is thus, with respect, misguided and incorrect in law.

Applicable laws and rules to the Defendant's application for absolution from the instance

[21] Rule 39(6)⁸ provides that absolution from the instance may be raised at the close of the Plaintiff's case. Absolution from the instance is a judgment that may be given either at the end of a case, or *extempore* immediately after the close of the Plaintiff's case. Absolution may also be granted at the end of the case if neither the Plaintiff nor the Defendant have put forward sufficient evidence to secure judgment in their favour.

[22] The Plaintiff has to make out a *prima facie* case to survive absolution. In reaching a conclusion whether absolution should be granted, it is not required of a court to critically look at all the evidence, as would be required of a Court at the end of a trial in order to deliver a judgement. The onus on the Court is less stringent, as there should only be evidence on which a Court could or might find for the Plaintiff. The mind involved herein is not of a *bonus pater familias* – reasonable person, but that of a Judge who heard the evidence⁹.

⁸ Uniform Rules of the High Court.

⁹ *Gordon Lloyd Page & Associates v Rivera and Another 2001 (1) SA 88 (SCA)* at 92E-93A.

[23] The rule of absolution from the instance owes its origin from the English law, where the civil courts required the Plaintiff to show that there was a *scintilla of evidence* against the Defendant to avoid his or her claim from being dismissed¹⁰. The word ‘absolution’ means an act of freeing from blame and releasing from consequences. The term ‘instance’ refers to a particular case. Thus, what the Defendant seeks is to be freed from blame in relation to the case before Court. In South African law, the decree of absolution from the instance equates an order granted to dismiss the Plaintiff’s claim on the basis that no order can be made.

[24] In simple terms, an absolution from the instance implies insufficiency or absence of testimony. It is akin to a section 174 of the Criminal Procedure Act, 1977, application. Section 174 provides the following: “*If, at the close of the case for the prosecution at any trial, the Court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty*”.

[25] The question now is whether there is evidence related to the elements of the Plaintiff’s claim upon which this Court could or might find for the Plaintiff? It is common cause that the Defendant’s application for absolution from the instance should be granted if the Plaintiff does not put forward sufficient evidence to secure judgment in his favour. The Plaintiff has to make out a *prima facie* case to survive absolution. In this regard, the Court is called upon to proceed and determine the past and future medical and related expenses as well as past and future loss of earnings.

MEDICO-LEGAL EXPERTS AND THEIR REPORTS/OPINIONS/EVIDENCE

[26] The Plaintiff was assessed by a number of Medical Experts. They filed medico-legal reports containing their assessment of the Plaintiff’s injuries and *sequelae*, as well as opinions by the experts thereon for purposes of establishing the Plaintiff’s claim for compensation.

¹⁰ *Ferrand v Bingley Township District Local Board* (8 T.LR) 71.

[27] The Parties further informed the Court that the presentation of their respective cases was going to be done through presenting certain medico-legal reports of a number of experts in addition to adducing viva voce evidence. Let me take this opportunity to thank all the Experts for assisting the Court with their reports and evidence. Leading expert evidence is not only important for a Plaintiff to strengthen and prove his case but likewise for a Defendant to contest and prove the contrary.

[28] There are three joint minutes by the Ophthalmologists; the Occupational Therapists; and the Industrial Psychologists. This one was only done during the course of the trial and after the Plaintiff's Industrial Psychologist had already testified. The Plaintiff requested the Defendant to instruct its Industrial Psychologist to prepare a joint minute with the Plaintiff's Industrial Psychologist as far back as 13 May 2021¹¹ and again 23 October 2023¹². The Defendant's Industrial Psychologist only complied on the 9th of November 2023 (4 days into the hearing).

PLAINTIFF'S EVIDENCE

Mr HJ Badenhorst (Plaintiff) and proof of his past medical costs as well as his earning capacity prior to the incident and his post-incident earnings

[29] Mr Badenhorst confirmed that he is the Plaintiff in the action and that he was injured due to the incident of 6 January 2011¹³ relevant to this matter. He confirmed the fact that the merits were decided by a court and that the general damages were also finalised earlier. He also requires the Court to consider his past and future medical expenses and past- and future loss of earnings.

[30] He then went on to confirm the extent of the injury suffered. He confirmed that he has no vision in his right eye (only light perception) and that there is a "blind spot" to his right where he cannot see any objects. He further confirmed that when he bends over to work on something below him or tie his shoes, the pressure on his right eye builds up

¹¹ Caselines 022-92.

¹² Caselines 022-1121, paragraph 6.1.

¹³ Caselines 003-13, paragraph 4, particulars of claim.

and if he does this too long, he gets headaches.

[31] He lost all depth perception and struggles to walk over uneven terrain. He has to negotiate steps very carefully and struggles to walk in the bush. He has tripped over obstacles several times. He also bumped his employer's bakkie a few times, as he cannot judge distance of objects and also miss objects in his "blind spot".

[32] He struggles to drive in cloudy and rainy conditions as the white of the clouds is too bright for him. He easily can miss a white vehicle on the road and also struggles to see the white line on the road. He particularly struggles to drive at night as vehicle's head lights would blind him so he cannot see anything. If he had to drive at night he would remain close to the yellow line or follow other cars' tail lights.

[33] He also struggles to look into bright light, for instance, an open window to the outside and a computer screen. When he works in front of a computer screen for long it gives him a headache and even a migraine. Florescence lights also gives him headaches due to its brightness.

[34] After the incident, he was unconscious for a short time and was taken by someone to his local doctor at Thabazimbi. This doctor stabilised him and he was then referred to the Eye Institute next to Unitas Hospital in Pretoria. Dr Bridgens saw him first and he was later seen by Dr P van der Merwe. The vision in his eye deteriorated and eventually he lost total vision in his right eye.

[35] Mr Badenhorst was then referred to the index of medical vouchers and the vouchers uploaded to Caselines 023A-1. He confirmed that all the vouchers are relevant to treatment received due to the injury suffered to his right eye, except the invoices which relate to treatment of an injured leg (ligaments) which he injured when he misjudged steps and fell¹⁴. It is however clear that the loss of depth perception was the cause of this injury.

¹⁴ Caselines 023A-23 to 023A-27.

[36] In relation to the question as to whether this particular event that caused damages to the Plaintiff, could have been foreseen by the Defendant, the remoteness thereof might be considered to be too far for it to have been foreseen. For that reason, the Counsel for the Plaintiff submitted that an amount of R 635.60 plus R 18,660.28 (Total – R 19,295.88) should be deducted from the Plaintiff's total medical and hospital expenses. The Plaintiff should therefore be compensated for past medical and hospital expenses in the amount of R 64,975.21. The Counsel for the Plaintiff also said, *"If my memory serves me correct, the Defendant indicated that it had already contributed towards the payment of one of the surgeries of the Plaintiff. I submit that upon proof of such payment, it can be deducted from the above amount."* The Defendant did not submit the proof of payment to the Court.

[37] Mr Badenhorst confirmed that he was strong and fit at the time of the incident with no physical medical conditions. He was able to fulfil all his duties as a professional hunter. He confirmed that he obtained a Higher Education Diploma in 1985 and after completing his military service in 1987, he was employed as a teacher during 1988 to 1989. He wanted to farm and was waiting for his opening, which came later in the year 1989 when he went to the farm to start farming. He was involved with some domestic hunting during the years 1990 to 1992.

[38] During 1992 he obtained his professional Hunter qualification at Steenbokpan. Thereafter, he immediately started his "Professional Hunting Safaris" business called Lyon Safaris. He was referred to Caselines 023B-1 which he confirmed his business card used during that time. The business was operated from his lodge called *Lyon Lodge*.

[39] He was further referred to Caselines 023B-2 to 023B-24. He confirmed that it is copies of his passports and copies of several pages of same, where it can be seen that he travelled extensively to the neighbouring countries. He testified that some of the trophy hunting was done in Mozambique, Zimbabwe and Tanzania and also the USA,

where he promoted his business and attended hunting expos and conventions¹⁵. He primarily catered for clients from the USA and some from Europe.

[40] He was then referred to Caselines 023B-27 to 023B-45 and confirmed that they are brochures he used to promote his business. Prices charged during the year 2000 can be found on Caselines 023B-29 to 023B-32 and prices for the year 2004 can be found on Caselines 023B-40 to 023B-45.

[41] He further confirmed that he could trace some of the quotes and invoices for the overseas client, which can be found on Caselines 023B-46 and further. This is not a complete list of quotes, but represent what he could find when asked for it by his attorneys many years later. He testified that these quotes/invoices were prepared from a little book he kept with him in the bush. It was used to indicate what was hunted and prices when he was not at the office. In this regard, the Counsel for the Plaintiff submitted that these quotations merely serve to indicate to the Court that there was a professional hunting business that did operate with overseas clients as testified.

[42] Mr Badenhorst confirmed that he had an accountant/auditor who prepared financial statements for his business and also prepared his tax returns. His name is Mr Jan Davel. He also had a bookkeeper, who would sort, store and record all the transactions and source documents of the business to be sent to the accountant. This gentleman was Mr Adam Groenewald.

[43] Mr Badenhorst confirmed that he only used one account for himself as well as the business. His business was a sole proprietor type of business and therefore he used the same account to pay his personal expenses. It would seem that he basically lived off the business account. This was a FNB account. The Counsel for the Plaintiff submitted that this behaviour is not unique to Mr Badenhorst. It is common practice for sole proprietors to live off the income of their businesses from the one bank account.

¹⁵ Caselines 023B-25 and 023B-26.

[44] Mr Badenhorst said that he did not pay himself a salary and therefore there is no way that one can determine his earnings from merely referring to an item on the expenses list of the business. He said it was important to establish a factual way to show how much he earned from his business. He said it was decided, after consultation with the chartered accountant of his business Mr Davel, to use the available financial statements to identify what amount per month was in fact available to the Plaintiff to live off as a type of salary, which was termed by the Plaintiff as “Disposable Income”.

[45] Mr Badenhorst further said that he had another account in the USA where deposits would be paid into and from which some of the expenses in relation to the attending of expos in the US would be paid from. The account Wells Fargo Bank in Grapevine Texas was shared with his agent, Mr Bill Turner, in the USA who also did the USA bookings. Sometime after the incident, the said agent passed away. The witness had no way of getting access to his bank statements there and thus could not provide any paper trail of the account’s transactions. It was explained that this piece of evidence would not impact the calculation of his pre-morbid earnings and merely serves to inform the Court of the existence of such an account.

[46] Mr Badenhorst was referred to Caselines 023C-1 (the calculation of disposable income), Caselines 023C-14 (tax returns from 2006 to 2011), Caselines 023C-30 (Annual Financial Statements for the years 2006 to 2011) and Caselines 023C-82. He confirmed these documents to be what they purport to be.

[47] The Plaintiff was referred to Caselines 023C-1 and asked what that represent. He confirmed that a calculation was done with the assistance of the accountant to determine his disposable income from the approved financial statements for the years 2006 to 2010. As he understood it, the calculation of disposable income was done by using the net profit of the business¹⁶. It was explained that the net profit is the revenue of the business for a year, less the cost of sales (gross profit), less the expenses paid out through that year and adding back the expenses paid out which were personal

¹⁶ Caselines 023C-3.

expenses.

[48] He explained that by adding back the personal expenses paid by the business, the amount would reasonably reflect what amount was available to him to live off.

[49] He also confirmed that there are tax returns reflecting the acceptance of the financial statements by SARS for those years on Caselines 023C-14 and further.

[50] He was referred to Caselines 023C-82. He confirmed that this is a letter from his previous bookkeeper, indicating the business' income (revenue) for the period mentioned in the "summary"/opsomming on Caselines 023C-83 (2008 – 2013). Mr Badenhorst explained that it has been a long time since he last spoke with Mr Groenewald (the bookkeeper). When he asked around as to where he can find him, he was informed that he passed away.

[51] He confirmed that he was treated by Dr P van der Merwe. Due to the injury suffered he could not continue his work as a professional hunter and had to close down the business in 2012, after attempting to change to only bow hunting. He found that he could not identify the animals properly or track them when they are not killed by the client with the first shot.

[52] He tried to secure alternative employment and only secured employment (sympathetic one) from February 2014 and received his first salary in April 2014¹⁷. His full payment history at Mammoet Game Traders is reflected in the letter on Caselines 023E-1 and he confirmed the correctness thereof. He received his last salary during January 2015. He was dismissed as he could not fulfil all the required tasks of his position. In this regard, the Court was referred to the letter from Mammoet dated 13 August 2015 (Caselines 023E-2). The main reasons for his dismissal seem to be the following: *"gesigsgebrek het die gevolg dat hy nie instaat is om met die nodige veiligheid n voertuig kan bestuur nie."* – his loss of sight resulted in the fact that he is

¹⁷ Caselines 023E-1.

unable to safely drive a vehicle. “*Mnr. Badenhorst se werk vereis dat hy met kliente per epos moet kommunikeer. Selfs hier bevind hy probleme met die lig wat die skerm uitstraal. Hy kry gereeld erge hoofpyne waartydens hy in n donker vertrek moet gaan lê*” – Mr Badenhorst’s work requires him to communicate with clients via emails. Even here he experiences difficulties with the light of the screen. He regularly gets severe headaches whereafter he has to go and lie down in a dark room. “*Weens sy gebrek werk hy stadig*” – Due to his disability, he works slow.

[53] From February 2015, he was unemployed until January 2016, when he was again sympathetically employed by his brother-in law (Mr GJ Jordaan) as a farm manager (Caselines 023E-6). His salary is confirmed from Caselines 023E-6 to 023E-11. He was employed by Mr GJ Jordaan until December 2019 (Caselines 023E-7) when Mr Jordaan sold his farm. Mr Badenhorst was not retained by the new owner.

[54] The neighbouring farmer, who knew Mr Badenhorst from the time he worked for Mr Jordaan, offered him a job as farm manager for Marulapi Hunting Safaris (Caselines 023E-5). He was employed as such from January 2020. Proof of his salary can be found on Caselines 023E-12 to 023E-26. Mr Badenhorst testified that a week before the trial he was verbally informed by his employer that he is dismissed with effect end of October 2023. He told his Counsel about this development on the Friday before the trial (3 November 2023) during his consultation in preparation for the hearing. His attorney requested him to get a letter from his employer to confirm this, which was only received during that weekend and was written in Afrikaans.

[55] According to the Counsel for the Plaintiff, the letter was translated for the Court and Defendant’s benefit. Both documents were uploaded to Caselines 023E-40 to 023E-41. The Defendant objected against the admission of this letter as evidence due to the fact that it was not discovered. From the evidence of the Plaintiff and the submissions by his Counsel, it is clear that the document only came into existence on the weekend before the trial started. There was no time to discover it. Although the Plaintiff submits that the document may be allowed, he decided not to push the issue, as the evidence under

oath already confirmed the fact that Mr Badenhorst had lost his job and is currently unemployed. The Counsel for the Plaintiff submitted that without any evidence to the contrary, this evidence should stand.

[56] During the objection against the said letter, the Counsel for the Defendant stated that the evidence led by Mr Badenhorst as to his dismissal is hearsay evidence. The Counsel for the Plaintiff argued that this argument is clearly wrong as it is evidence of a discussion that took place between the employer and the witness directly. This argument is thus misplaced and should be rejected.

[57] Mr Badenhorst further testified that he struggles to read. He used to love reading. He also needs help with basic home maintenance and garden work. Prior to the incident, he had no issues with home maintenance and garden work.

[58] He further testified that he had consulted with several experts for purposes of the trial, including Ms Santie Gropp, Ms Suzanne Schlebusch, Dr van der Merwe and another person, whose name he cannot remember. He currently feels very frustrated with his condition and the effect it has on his daily activities and work. He also visibly struggled with the glare of the computer screen during the two and a half days of giving evidence.

[59] The Counsel for Defendant submitted to the Plaintiff in cross-examination that some of his evidence (*the facta probantia*) was not pleaded¹⁸. The Counsel for the Plaintiff objected to this statement and it was mentioned to the Court that it is a well-known fact that evidence must not be pleaded. The Defendant objects against the absence in the pleadings of the evidence being led to prove the facts in the pleadings, which is quite absurd. It would be impossible to plead every single piece of evidence that will be given in a case when the particulars of claim are prepared, even if one felt obliged to do so. He further argued that the purpose of pleadings is that a party must define its cause of action to inform the other party of the case it must meet and of the relief sought against

¹⁸ Caselines HOAD4 to HOAD6, HOAD9 to HOAD12, HOAD14 to HOAD15, HOAD70.

it. He referred the Court to Amler's Precedents and Pleadings, Ninth Edition – Harms [LexisNexis], page 1) and Rule 18. He further argued that pleadings are accordingly about the facts from which legal conclusions may be drawn and not about law. Facts (the *facta probanda*), and not evidence (the *facta probantia*), must be pleaded. The Court was also referred to *Moaki v Reckitt & Colman (Africa) Ltd [1968] 3 All SA 242 (A)* and *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing. [2001] 2 All SA 319 (T)*). He submitted that the particulars of claim (as amended) contained sufficient information as to the material facts the Plaintiff will rely upon (*facta probanda*) to enable the Defendant to reply thereto. If it was not the case, the Defendant had the remedy of Rule 21, Rule 23, Rule 30, as well as Rule 35(3). He concluded by saying that the argument, that the Plaintiff did not plead all the facts testified to in his oral evidence is, with respect, misguided and incorrect in law.

[60] When the Plaintiff was asked during cross-examination by the Counsel for the Defendant as to where the hospital records are, he replied that he had given all the documents he had to his legal representative. He did not confirm whether part of “all the documents” included the hospital records. The Defendant's Counsel profusely objected to the fact that the records were not discovered. The current attorney working on the matter confirmed to the Counsel for the Plaintiff that this is not evidence but merely a statement from the bar that there are no records in the Plaintiff's file. It is uncertain whether any copies of records were handed to the previous attorneys, but at the time of discovery, the Plaintiff's current attorneys were not in possession of any hospital records.

[61] The Counsel for the Plaintiff argued that if the Defendant suspected there to be hospital records, it should have employed the process provided for in Rule 35(3) or subpoenaed the records from hospital, as it was done with the bank statements. The Defendant also had the provisions of Rule 21(2) at its disposal in order to request further particulars. The Defendant cannot remain silent about its desire to have access to the hospital records until the trial day and then blame the Plaintiff for not requesting same from hospital or providing same to the Defendant.

[62] The Counsel for the Defendant had stated that Dr van der Merwe had hospital records. In fact, Dr van der Merwe testified that he had his clinical notes which were also available on the practice's computer and that they were not requested by anyone. According to the Defendant's Counsel the Defendant did not get a fair trial in terms of Section 34 of the Constitution as "... *the defendant went to trial without having sight of the hospital records; clinical notes and findings and other documents relating to this matter which according to the evidence of the plaintiff same was given to his legal representatives*"¹⁹. The Counsel for the Plaintiff submitted that parties and the Court had at their disposal many medico-legal reports by both the Plaintiff's and Defendant's experts, who all examined the Plaintiff in person and thus personally established the extent and severity of his injuries. Surely these experts can provide far better opinions through personal examination than relying on hospital records only to establish the injuries. In fact, two of the experts brought out joint minutes with similar findings (ophthalmologists and occupational therapists). It is clear that it did not suite the Defendant that its own expert agreed with the Plaintiff's expert and thus the Defendant refused to agree to the submission of the Ophthalmologists' joint minutes and even went as far as to try to discredit the joint minutes. The Counsel for the Plaintiff asked the question, "*If the findings of the Plaintiff's Ophthalmologist were incorrect and should be rejected, why does the Defendant not call its own expert to rebut the evidence of the Plaintiff's expert? Surely the Court should draw an adverse conclusion from the Defendant's unwillingness to call its own expert in this regard.*"

[63] The Counsel for the Defendant had many questions about proof of payment of the medical expenses. Mr Badenhorst confirmed several times during cross-examination that he paid most of the expenses and some of his family members may have paid some of the costs initially when he was still suffering from a lot of pain and discomfort, but that he had paid them back afterwards. There was no proof of payment, but for a few credit card slips. In this regard, the Counsel for the Plaintiff argued that it is trite law that a Plaintiff will be entitled to claim for medical expenses as soon as he becomes

¹⁹ Caselines HOAD7 to HOAD9, HOAD16, HOAD24 to HOAD27, HOAD43.

legally liable to pay same. It will also be within a Plaintiff's rights to claim for medical expenses, even if a medical aid pays it on his behalf²⁰. It is also possible for a Plaintiff to make arrangements with a medical service provider, like a hospital, to hold over payment of its account until the medical costs are recovered from a wrongdoer. It is thus clear that the Plaintiff can claim medical expenses without the need to prove payment had already been effected by him. Plaintiff did however conclusively testify that he had no medical aid at the time as he cancelled his membership at Discovery Health prior to the incident. His divorce was in 2006 and he cancelled his medical aid shortly thereafter.

[64] The Counsel for the Defendant put it to the witness that there was a comment by the Clinical Psychologist in her report that he was short-sighted before the incident, but did not wear glasses. Mr Badenhorst confirmed that he was short-sighted but wore contact lenses. During re-examination he confirmed that this did not bother or restrict him at all with his functions and duties as a professional hunter. He was otherwise healthy and strong. He stated that wearing glasses is normal and not a health issue. Short-sightedness is a natural and common condition that is easily corrected with glasses, contact lenses and even laser eye surgery.

[65] The Counsel for the Defendant asked why did the Plaintiff exit the country through Lebombo border post? The Counsel referred to the stamp in the Plaintiff's passport that indicated he left the country after the incident. Mr Badenhorst explained that he had equipment in some of the neighbouring countries like Zimbabwe, where he used to take some clients for trophy hunting and had to make arrangements for the equipment to be returned to South Africa.

[66] The Counsel for the Defendant asked why did two business names appear on some quotes? Mr Badenhorst confirmed that some clients would be accommodated in Tanzania or Zimbabwe at other lodges, in which case he would mention the said lodge on the quote, so that the client does not get confused when they arrive at this other

²⁰ *Discovery Health v. RAF judgment and Morné Van Heerden v RAF, Case No. 845/2021 - Eastern Cape Division, Gqeberha.*

lodge. He wanted the client to have all the information before-hand. The other lodge's price would then be included to avoid any nasty surprise for the client.

[67] The Counsel for the Defendant asked why did the Plaintiff's signature not appear on the Annual Financial Statements (AFS)? Mr Badenhorst referred to his initial that appeared at the bottom of the page. He said that he was asked to initial the document at the bottom at some stage. He could not say why his full signature did not appear where his name appeared on the document. It became apparent later during the evidence of Mr Davel (the chartered accountant) that these were computer generated copies of the original documents. When the Plaintiff's attorney requested the AFS's, they no longer had the originals and printed these from their computers where copies were stored. This should not pose any problem as it was later confirmed by both the Plaintiff's accountant and the Defendant's expert witness (accountant/auditor) that the official SARS documents reflected the same amounts as was contained in the AFS's.

[68] The Counsel for the Defendant asked the witness to confirm that he was 60 years old and qualify as a pensioner. He agreed. Later in re-examination he clarified his answer by stating that he would qualify for certain specials at some stores and as such qualify as a pensioner. Regarding the retirement age of professional hunters, he confirmed that there is not a specific age. A person will continue to act as a professional hunter as long as his health allows it. Some people may even be professional hunters after the age of 65. He also knows of a farm manager who is still actively employed as a farm manager at the age of 70. During re-examination, Mr Badenhorst further confirmed that a professional hunter (and specifically a hunting safari business with US clients) earns much more than a farm manager. He was recently told that some hunting safari businesses in the area earns an income of approximately R 13 million and has a profit of R 5,5 million per year.

[69] The Counsel for the Plaintiff submitted that, on the basis of what has been stated above, the evidence of the Plaintiff stands uncontested and should be accepted as proof of his past medical costs as well as his earning capacity prior to the incident and his

post-incident earnings.

Dr. P van der Merwe (Ophthalmologist) for the Plaintiff

[70] Dr Van der Merwe's evidence was led via Teams, after the Court refused an application in terms of Rule 38(2) to accept his evidence by way of affidavit, when the Defendant profusely objected thereto.

[71] He placed his qualifications as a specialist in the field of ophthalmology (eye specialist) and his years of experience, 24 years as specialist, on record. He also confirmed that the three reports on Caselines²¹ were compiled by him and the information therein is true and correct. His reports stand uncontested and should therefore be accepted as conclusive proof of the injuries suffered and after effects thereof for the Plaintiff.

[72] He also confirmed that he prepared the joint minutes with the Defendant's expert (Dr Makakase), wherein they agreed on the extend of the injuries suffered by the Plaintiff and his prognoses. The findings of Dr van der Merwe is further confirmed by the joint minutes.

[73] Dr van der Merwe was also the treating doctor with his partner, Dr Bridgens. Through his evidence the following was confirmed: The right eye was severely injured due to blunt force trauma; the Plaintiff was bleeding from the eye and part of the iris was dislodged; because of this blunt force trauma, the optic nerve was damaged (glaucoma), resulting in the Plaintiff being practically blind in his right eye, where he can only perceive light. His injury is like misfiring of the neurological signals to his brain. He also had increased pressure in the eye (intra-ocular pressure), which had to be alleviated through surgery. The Plaintiff in fact had two surgeries. The Plaintiff's eye is light sensitive and it will irritate him and may cause headaches. The Plaintiff's condition

²¹ Caselines 018-1, 018-12, 018-15, 021-2

is permanent and will not improve. He had dialysis (tear in the retina) and hyphema (blood collecting in the anterior chamber of the eye) on the right (Caselines 018-3). The right eye's pupil is fixed and dilated, due to the trauma (Caselines 018-13). He lost his depth perception (Caselines 018-13).

[74] During cross-examination by the Counsel for the Defendant the following came up: The description of how the incident occurred on his report states that “*Mr Badenhorst had an injury, while he was working on the tractor when a slasher whipped up a stone that hit him on his right eye*”²². This is different from the evidence that he was hit with a piece of stone in his vehicle when he was driving. The witness confirmed that according to his notes it was reported that the Plaintiff was injured when a piece of stone was whipped up by a grass cutter when he was driving. He explained to the Court that this passage in his report could be a typing error by the person typing his report. The Counsel for the Plaintiff argued that the merits of the case were already established during the merits trial that the Plaintiff was driving in his vehicle on the 6th day of January 2011, when suddenly a piece of rock was flung up by a municipal worker's grass cutting trailer and penetrated his right eye, causing permanent blindness of his right eye. He further argued that the fact that the history of events was typed incorrectly in the first report, does not diminish the report on the injuries at all and this was satisfactorily explained by the witness and no adverse conclusion can be made because of this discrepancy.

[75] As the report mention on page one that “*Documents available: No documents available*” (Caselines 018-1), he was asked by the Counsel for the Defendant whether he had no documents to refer to. The witness confirmed that this only meant there was no other documents of other experts or medical professionals made available to him. He had his own notes to work off. He also confirmed that their practice's notes were available to him on the computer. The Defendant's Counsel then objected that the notes of the witness were not made available or discovered. The Plaintiff's Counsel argued that the witness had satisfactorily explained what was meant with “*no documents*”

²² Caselines 018-2.

available". Furthermore, his private notes made for purposes of his report is privileged and need not be discovered. The Plaintiff was not in possession of these notes and could therefore not discover them.

[76] As the invoice of the witness' practice references "Dr Bridgen" as the treating doctor²³, the witness testified that he had treated him. The witness explained that Dr Bridgens is his partner in the practice. They all use the same practice number. She saw the Plaintiff first when he came in and later the witness also examined the Plaintiff and treated him further. The patient was registered on their system as being seen by Dr Bridgen.

[77] The witness was told that one of the invoices also refers to radiology. The witness was however not referred to the particular invoice by the Counsel. He said that he did not request it. It could have been for a scan requested in 2019 to check on why he was experiencing pain. It was not related to his eye injury as such.

[78] The Counsel for the Plaintiff argued that no issues could be found with his reports that would detract from the validity of his findings. In fact, it was never put to the witness that his findings and opinions were incorrect or unreasonable. His evidence thus stands uncontested. This begs the question why his reports and the joint minutes were not accepted by the Defendant and why the Plaintiff was forced to lead the expert's evidence, at great expense to the Plaintiff. This insistence for him to testify makes no sense where the Defendant's own expert came to the very same conclusions. It is my view that the costs of this witness should be awarded on an attorney and client scale to compensate the Plaintiff for the costs of both the Rule 38(2) application and the need for the expert to testify during the hearing, so that the Plaintiff is not out of pocket due to the clear obstructive behaviour of the Defendant.

[79] The Counsel for the Defendant referred to affidavit on Caselines HOAD22, paragraph 51 that was prepared in case the Court allowed evidence to be led by way of

²³ Caselines 023A-8.

affidavit in terms of Rule 38(2). The Counsel for the Plaintiff argued that due to the fact that the application was not granted, the affidavit was not admitted as evidence. Therefore, the affidavit referred to by the Defendant's Counsel is not before the Court, as it was not admitted as evidence and also not proved by any witness. No reference to this affidavit is thus admissible and as such, it should be disregarded by the Court.

[80] The Counsel for the Plaintiff argued that the Counsel for the Defendant has attempted to discredit the joint minutes because "*the joint minutes does not reflect what was recorded or reflected in the hospital records; clinical notes and findings; operations notes at theater and the findings before and after the operations of the plaintiff*"²⁴. The Counsel for the Plaintiff further argued that the two specialists examined the Plaintiff in order to come to their conclusions, based on both doctors' medical expertise. The records can only assist with the history of previous treatment. Dr van der Merwe's evidence on his personal findings of the Plaintiff's injuries and treatment is based on his personal observations as the treating specialist and the doctor who performed the surgeries. There is no better evidence as to the injuries, treatment and after effects than that.

[81] The Counsel for the Defendant submitted that Dr Van der Merwe was not a credible witness. He argued that during cross examination, he had blamed the alleged incorrect version of incident to the secretary despite the fact that the first report bears his signature and all of his reports contains same averments as to how the alleged incident had occurred on the 06th day of January 2011.

Ms Santie Gropp (Occupational Therapist) for the Plaintiff

[82] The Plaintiff's Occupational Therapist testified and was cross-examined. Her evidence was of a very formal nature as her reports²⁵ were confirmed under oath and her expertise confirmed. She prepared 4 reports over a nine-year period (one initial report and 3 addendums/updated reports). This witness' evidence was of a very high

²⁴ Caselines HOAD25, paragraph 60.

²⁵ Caselines 018-18 to 018-105

quality and no contradictions or improbabilities were note. It is important to note that a joint minute was brought out by the witness and the Defendant's expert Occupational Therapist, Ms Moagi (Caselines 021-3) as far back as September 2018. It is also important to note that the two experts basically did not disagree on anything (except the need for driving assistance). The Counsel for the Plaintiff argued that this begs the question why the Defendant refused to accept this expert's reports and for it to be used as evidence without the need to call the witness to testify (at major cost to the Plaintiff and wasting court time), where one would have expected them to limit the triable issues.

[83] The witness, Ms Gropp, was referred to Caselines 018-92. She confirmed that some home maintenance and gardening tasks could be performed by the Plaintiff but many of the tasks he could do prior to the incident, he cannot manage anymore. He would require domestic and garden assistance. She confirmed the costs of assistance on Caselines 018-103 and 018-104. In this regard, the Court was also referred to the particulars of claim, Caselines 003-17, paragraph 10.4.4.

[84] Ms Gropp testified that it was clear that the Plaintiff was an unsafe driver and he reported to have been involved in several small accidents since the incident. He cannot see well at night, in rainy conditions or when the light is very bright. Due to his loss of depth perception he cannot judge distances and he has a blind spot to his right side. She believes that he should not drive and most probably would not pass a renewal of his driving licence. The Court was referred to her report on this issue on Caselines 018-104, paragraph 123, where it is recommended that an amount of R 2,000 per month be allowed for his transport requirements.

[85] She said the Plaintiff will never be able to return to this form of income generating activity again (that is being a professional hunter)²⁶. During the witness' last assessment of the Plaintiff in 2023, she commented on Caselines 018-104, paragraph 125 as follows: *"His career path since his accident has been unstable and at the time of the current assessment the client's last 2 jobs were to manage two game farms, one for his*

²⁶ Caselines 018-104, paragraph 124.

sister, and the current one. His employment on his sister's farm was terminated when they sold the farm. He reported that he experienced several difficulties and limitations in both jobs, and it appears that his current job could be at risk". She also said on Caselines 018-105, paragraph 128, "...Badenhorst will, due to his visual difficulties in future, face repeated challenges in procuring employment and has become unequal and compromised contender for employment in the open labour market. He will have to find jobs that are 'customised' for him and will always have to rely on the employer's agreement to making accommodations for the client so that he can cope with his work".

[86] She was asked if the Plaintiff had lost his employment now, what would his chances be to regain meaningful employment in future. She replied that he will not regain employment in his current profession and furthermore it is improbable that he will regain employment in any other type of employment. This is so due to his age, his lack of experience in any other type of work, other than hunting and managing a game farm. When it was put to the witness (Ms Gropp) that the Plaintiff in fact lost his employment, it did not come as a surprise to her (the witness).

[87] The witness indicated in her report that the costs of adaptive equipment and a number of sessions with an occupational therapist should be provided for. The Court was referred to Caselines 018-101, paragraph 2.1 and 2.2 and Caselines 018-102, paragraph 3 for the costs of future treatment and adaptive equipment.

[88] The Court was referred to the evidence from the joint minutes by the experts on Caselines 021-3 to 021-9 and to the following agreements, which are *ad idem* facts between the Plaintiff and Defendant by way of their joint expert opinions:

(a) Caselines 021-4, *"The client requires occupational therapy intervention to assist him with adjustments of task execution methods in the area of activity of daily living, to learn techniques for blind and partially sighted persons, for guidance in terms of adjustments of the home/work environment to make it suitable for a partially sighted/blind person, and the selection and use of correct assistive devices"*.

(b) - *“6 hours of Occupational Therapy”*.

- *“Included should be a work place visit when needed”*.

- *“We agree that cost of therapy is ± 700.00 per hour including VAT.*

The home/work visits will incur an additional fee of R475-00 per visit to cover the travelling time of the therapist. AA rates are recommended for the distance covered by the therapist. It should be noted that prices are no longer fixed and may vary from one therapist to another”.

(c) Special and adapted equipment: *“The writers agree Mr Badenhorst will require equipment to assist him with his independence in personal care and hygiene, eating, mobility, and clothing”*. The costs as agreed can be found on Caselines 021-5, paragraphs 3.2 and 3.3.

(d) Assistance: *“Badenhorst experiences various limitations in execution of his personal and instrumental ADL as well as performing home maintenance tasks. He will be able to regain some of his independence skills in ADL once he has had independence training and with using the recommended assistive devices but will always be limited with regards to certain tasks, in particular where, visual skills are essential and for safety reasons”* –

Caselines 021-6. *“domestic assistance for 8 hours a week, if the client becomes responsible for his own home management.”*. The Defendant’s expert recommended that: *“... Mr. Badenhorst be reimbursed for all his accident-related transport costs and driver assistance that will be linked to estimated night driving if any.”*

(e) Loss of earning capacity: *“Mr Badenhorst will have to make use of the recommended adjusted equipment for visually impaired persons and depend on his*

assistant for some of his work tasks” – Caselines 021-8, “Mr Badenhorst is considered unsuitable for occupations requiring frequent climbing on heights, traversing uneven terrain and frequently negotiating stairs”. “Badenhorst will, due to his visual difficulties in future face repeated challenges in procuring employment and has become unequal and compromised contender for employment in the open labour market. Regarding work ability considering residual functional and physical capacity as a job seeker he will have to find jobs that are 'customised' for him and will always have to rely on the employer's agreement to making accommodations for the client so that he can cope with his work.” – Caselines 021-9. “... due to his visual difficulties Mr Badenhorst will be best suited for sedentary to light activities where the necessary mobility accommodations have been made.”

[89] The Counsel for the Defendant asked Ms Gropp during cross-examination as to why did she not do physical testing? Ms Grobb testified that the Plaintiff's injury (eye injury) did not necessitate physical testing. There was no physical disability regarding his strength. She said she only observed his behaviour in relation to his sight for instance whether he can sit down. His visual loss was relevant.

[90] She was asked if she did drive with the Plaintiff to test his inability to drive? Ms Gropp confirmed that this is outside the scope of her testing. It can be tested by a specialist related to driving ability. The history from Mr Badenhorst that he struggles to drive does however fit his injury. It is also clear from the fact that his eyes are sensitive to light and the loss of depth perception with the blind spot, that he would have difficulties driving.

[91] She was asked if she went to the farm to look into the challenges and key responsibilities at work on Caselines 018-86 and 018-94 respectively? Ms Gropp said it is not necessary for her assessment purposes to go out to the farm. It would not make any difference to her findings.

[92] She was also asked, “Why did you not test his ability to use binoculars?” She

responded that testing his eyes is outside her field of expertise. This is something for an eye specialist.

Ms Suzanne Schlebusch (Industrial Psychologist) for the Plaintiff

[93] The witness (Ms Suzanne Schlebusch) placed her qualifications and experience on record. She is an expert Industrial Psychologist. She testified to confirm her several reports²⁷. In evidence-in-chief, she was asked whether she attempted to bring out joint minutes with her counterpart (Ms Matla). She confirmed that the first time she discussed joint minutes with Ms Matla was around 2020, before the previous trial date. She sent a draft of the joint minutes through, but never received any reply from Ms Matla. She also attempted to prepare joint minutes for this hearing and in particular phoned Ms Matla on Monday (when she presumably received instructions to proceed with joint minutes). She sent through a draft joint minute on Monday, but up to date of her evidence, Ms Matla had not replied.

[94] She confirmed that throughout the compilation of her several reports, she had confirmed his employment since the incident through collateral phone calls to the employers and obtaining copies of his several payslips. The Court was referred to her several reports considering the Plaintiff's past earnings post-morbid. The Court was also referred to Caselines 023E-1 to 023E-41. It was also agreed in the joint minutes as follows: (Caselines 021-11 to 021-12) "*... that Mr Badenhorst attempted to resume his employment as Professional Hunter post-injury however, due to the sequelae of the injury, he was unable to resume his occupation*". Further it was also agreed between the experts that: "*Mr Badenhorst has been involved in various employment opportunities since his injury. We take note that some appear to be sympathetic of nature*".

[95] She then confirmed that: "*... Badenhorst reported that he is very dependent on his farm workers and noted the following difficulties:*

²⁷ Caselines 018- 106, 018-126, 018-143, 018-155, 018-159 and 018-166

- a. He reported that he requires assistance when driving on the farm when monitoring the animals. He is unable to observe with binoculars whilst driving.*
- b. He is unable to catch calves when they are required to be marked.*
- c. He has difficulty to see at night when he is required to shoot foxes and requires the assistance of a farm worker to shoot the foxes.*
- d. He has difficulties to service the machinery of the farm and his employer is required to hire assistance. He reported that this is his responsibility.*
- e. He has difficulty to operate the TLB and the forklift.*
- f. He has bumped the farm trucks on several occasions when he is unable to see an object or a structure in his blind field of vision”²⁸.*

[96] She further referred to her report on Caselines 018-171 where she stated: *“His unstable career since the incident signifies his vulnerability and given the permanent nature of his injury, his situation is unlikely to alter in future. Mr Badenhorst is dependent on a sympathetic employer as he requires assistance and job accommodation from his employer.”*

[97] When informed that the Plaintiff lost his job, she confirmed that it is highly unlikely that he will be able to secure alternative employment at his age (60 years old). He should be regarded as unemployable for the future. She confirmed with the employer that he was in fact dismissed. The Court was also referred to the joint minutes on Caselines 021-12, paragraph 2.2.3, *“...Collateral information obtained from Ms Nel (HR Manager) on 6 November 2023 confirmed that Mr Badenhorst was dismissed at the end of October 2023 as he was unable to execute his inherent work requirements as farm manager... Based on the collateral information, Mr Badenhorst is currently unemployed with no form of income.”*

[98] She testified that he earned far less after the incident than what a professional

²⁸ Caselines 018-170.

hunter could earn (just a hunter, not a safari business, which will make even more), as a professional hunter usually earns R 1,500 per day.

[99] Ms Schlebusch testified that the best indicator of a person's earning capacity is his past earnings. The Court was referred to Caselines 021-11 (Joint Minutes), paragraphs 1.2.1 and 1.2.2. She deferred to factual information, but reported that she was informed that his calculated disposable income was as per Caselines 018-161 of her report.

[100] The two experts also agreed that he would have earned (if the incident did not occur) pre-morbid as follows:²⁹ *"...that he was likely to continue in his self-employed capacity as Professional Hunter, earning in line with his income at the time – disposable income (with inflationary related increases), until retirement age"*. They continued and agreed: *" ... that it was expected that he would have worked until normal retirement age of at least 65 years, depending on his health. As self-employed individual, he could have worked beyond the age of 65 years, depending on his health"*.

[101] Lastly both experts agreed that *"... he suffered a past loss of income due to the sequelae of the injury sustained... It seems likely that he will not be able to obtain an alternative opportunity in future, thus suffering a complete loss of income... We agree future loss of income will emanate from the difference between his pre-and post-accident earning scenarios."*³⁰.

[102] The Counsel for the Defendant asked her, *"Why did you not mention in your reports that a professional hunter earns R 1,500 per day?"* Ms Schlebusch replied that he was not a professional hunter anymore and it is more reliable to take his pre-morbid earnings and use that as a base for calculating pre-morbid earning capacity. Furthermore, the Plaintiff was both the hunting safari business owner and the professional hunter. She also confirmed in re-examination that the total earnings of a professional hunter ranges from R 38,402 .00 per month (+- R 460,824 per year) to R

²⁹ Caselines 021-11.

³⁰ Caselines 021-13.

73,646.00 per month (R 883,752 per year).

[103] The Counsel for the Defendant asked her, “*Why did you say he was accommodated in his employment?*” Ms Schlebusch testified that he was clearly accommodated by all his previous employers. The Occupational Therapist also indicated in her report that he was accommodated. In other words, the employer allowed him special treatment to cover for his disabilities and shortcomings.

[104] The Counsel for the Defendant also asked her, “*You said in your report that the Plaintiff earned a commission in the hunting season of 3 months only. Is the hunting season thus only 3 months?*” Ms Schlebusch explained that she referred to that specific farm where the hunting season was limited to 3 months. It is not a universal period for all farms in the region.

[105] It was put to the witness that the Defendant’s Industrial Psychologist did not complete the joint minute because she first had to do an addendum on the new information received over the weekend. Ms Schlebusch replied in re-examination that she was able to amend her report with the new information that came through over the weekend on Monday, before sending the draft joint minute to Ms Matla.

[106] The Counsel for the Defendant on Caselines HOAD66, paragraph 188, submitted that the evidence of this witness did not assist the Court as “*...her basis and/or disposable taxable income of the alleged loss of earnings and/or loss of income as stated in the joint minutes are incorrect and contrary to the evidence Mr Davel and furthermore, the basis of the alleged disposable taxable income are incorrect and contrary to the taxable income as per the IT 34’s FROM SARS.*” The witness reported on the disposable income as reflected in the disposable income calculation. The final figures as testified to by Mr Davel were different as Mr Davel explained that in order to establish the correct amount that was available to the Plaintiff, one should add back the depreciation. She did not calculate the amounts herself and merely reported on what was given to her from the statement. As such, there is no contradiction therein.

[107] The Counsel for the Defendant on Caselines HOAD67, paragraph 189 referred the Court to a typing error on the face of the report regarding the date of assessment and the date of the report. The Court was referred to Caselines 018-159 where the date of the follow up evaluation was stated as 4 June 2018 and the date of the addendum report as 15 June 2017. It was shown to the Court that these two dates were clearly switched by mistake. It is conceivable that when an expert dictates a report and during proof-reading, something like this may be overlooked. The Counsel for the Plaintiff asked, *“The real question is, does this mistake detract in any way from the value of her opinion and evidence. My submission is that it certainly does not.”*

[108] The Counsel for the Defendant raised the issue of the seasonable hunting period on Caselines HOAD67, paragraph 190. The issue of the seasonable hunting period was clearly explained by the witness when she confirmed that the three-month period only applied to that specific farm at that time. The Plaintiff also testified that for plain wild animals, the hunting period is seasonal but trophy hunting can occur throughout the year.

Mr Jan Davel (Accountant) for the Plaintiff³¹

[109] Mr Jan Davel is a qualified Chartered Accountant. He was in fact the appointed auditor/accountant for Lyon Safaris (the Plaintiff’s previous trophy hunting business). His practice is in Thabazimbi. Mr Davel confirmed that he prepared the Annual Financial Statements (AFS) for Lyon Safaris for the years 2006 to 2011 (Caselines 023C-30). He confirmed the correctness thereof and that he also prepared the tax returns that can be found on Caselines 023C-14. He further testified that there were no queries or rejections from SARS pertaining to the lodged tax returns.

[110] Mr Davel confirmed that he assisted with the preparation of the disposable income calculations that can be found on Caselines 023C-1. He stated that he had a discussion

³¹ Caselines 018-185 to 018-264

with the Plaintiff's attorney and the Plaintiff in order to discuss how best a calculation can be done to show how much money was available for the personal spending of the Plaintiff.

[111] He confirmed that the Plaintiff's business was a sole proprietor and the Plaintiff only had one account for business and personal use. This is not uncommon with sole proprietors. This was a FNB account. Due to this it was important for purposes of determining the Plaintiff's disposable income to identify the personal expenses from the income-and-expenses statement. He made some suggestions as to the split of some expenses into personal and business expenses and in some instances the Plaintiff indicated which percentage of an expense was for personal and for business use.

[112] Mr Davel further explained that what was done, was that the net profit was taken for each year and the total of personal expenses paid from the account was added to the net profit (Caselines 023C-2 at the bottom of the page). This result was then indicated at the bottom of the page as the disposable income. The results of each year can be found on Caselines 023C-1.

[113] Mr Davel then explained that the expense of "depreciation" that was deducted as an expense for each year, is in fact a tax incentive and not an actual cash expense. It should thus not be deducted from the gross profit (as money did not actually flow out of the bank account). For this reason, he stated that the amount of the "depreciation" for each year should be added back to the result of disposable income in order to correctly reflect the amount that was available for the Plaintiff to spend (i.e. an indication of his earnings).

[114] Mr Davel did a calculation of the true amount available for the Plaintiff each year by adding back the depreciation amount. The result for each year was:

2006: - R 419,586.50

2007: - R 365,365.88

2008: - R 452,323.96

2009: - R 643,699.32

2010: - R 533,033.20

[115] The Counsel for the Defendant asked him, "*Why was the pages of the Disposable Income report not signed?*" Mr Davel replied that there is no reason to sign it. There was similarly no reason to do it under his letter head or under his firm's stamp. Mr Davel later clarified that he did not prepare the document itself. The office of Mr Theron did (the Plaintiff's attorney). He was consulted in anticipation for the preparation of the document. The concept was discussed with him and then it was done by the attorney's office. He did check the correctness thereof after it was prepared and confirmed it to be correct.

[116] The Counsel for the Defendant asked him, "*Does your profession's rules allow you to prepare documents without signing it?*" Mr Davel replied, yes, they do.

[117] The Counsel for the Defendant asked him, "*Why did you add back the disposable income when testifying yesterday?*" He replied that Mr Theron (the Counsel for the Plaintiff) asked him to calculate the amount with the depreciation added back.

[118] The Counsel for the Defendant asked him, "*Is it correct to add back the depreciation? if so, why?*" Mr Davel said it is correct to add back the depreciation because depreciation is not a cash outflow, but only an accounting entry as a tax deductible.

[119] The Counsel for the Defendant asked him, "*Why is the Annual Financial Statements (AFS) not signed?*" He responded that when he was requested to send the reports to the attorney, he did not have the originals anymore. The originals were handed back to the client. They stored computer copies of the documents, which were then provided to the attorney.

[120] The Counsel for the Defendant asked him, *“Why is your initial at the bottom of the reports?”* He answered that he was asked at some stage to confirm the documents by initialing it at the bottom of the page around 2020/2021.

[121] The Counsel for the Plaintiff argued that, *“It would appear from the initials at the bottom of the pages that it formed part of an affidavit at some stage and the attorney uploaded those pages that were initialled by the deponent. This however does not detract from the correctness of these reports as they were confirmed to be correct under oath and was confirmed to correspond with the official tax returns.”*

[122] The Counsel for the Defendant asked him, *“Why does an expense appear in the statement as “salaries” on Caselines 023C-34 if the Plaintiff did not take any salaries?”* Mr Davel explained that this item on the statement was salaries paid to employees of the Plaintiff.

[123] The Counsel for the Defendant asked him, *“Why did you divide the bank charges into 50% for personal expenses?”* Mr Davel testified that because the bank account was used for both business and personal purposes it is the most reasonable way to divide it. One can also go through each transaction in order to determine what volume of transactions were for personal and business and then do an apportionment, but it is impractical. He believed that the 50/50 split is the most reasonable way to divide it.

[124] The Counsel for the Defendant asked him, *“Why did the 50% split of this expense not appear on the Annual Financial Statements (AFS)?”* His answer was that the AFS was prepared for tax purposes and it was not deemed necessary to split it there.

[125] The Counsel for the Defendant asked him, *“Why were the personal expenses not identified on Annual Financial Statements for SARS?”* Mr Davel said that in terms of the SARS rules they were allowed as tax deductibles.

[126] The Counsel for the Defendant asked him, *“Why was the disposable income*

prepared?” Mr Davel said it was prepared as a document for the Court’s purposes as a means to show the basis of the claim for loss of earnings.

[127] The Counsel for the Defendant put to Mr Davel that the IT34 taxable income should be regarded as the disposable income. Mr Davel did not agree and said, *“The correct amount available to the Plaintiff as disposable income is the amounts as calculated and testified to by him.”*

[128] The Counsel for the Defendant put to Mr Davel that the Defendant’s accountant would say that personal expenses could not be tested or proven. Mr Davel said yes.

[129] The Counsel for the Defendant put to Mr Davel that the Plaintiff can only spend from taxable profit and his personal expenses were more than that profit. Mr Davel did not agree with the statement.

[130] The Counsel for the Defendant, on Caselines HOAD68, paragraph 194 argued for a finding that the witness, Mr Davel, was not credible. The Counsel for the Plaintiff argued that this is baseless as the adding back of the depreciation was explained earlier and the correctness of this approach was confirmed by Mr Mamosebo (the Defendant’s expert).

Mr Izaak Minnaar (Actuary) for the Plaintiff³²

[131] Mr Izaak Minnaar is a qualified actuary. He placed on record his qualifications and years of experience. The Court was informed that Mr Minnaar prepared many reports over the years from 2015 to 2023. The results of these reports will differ due to the time periods that are used on the different occasions. Actuary calculations need to be updated every time a new trial date is allocated. Mr Minnaar confirmed that the reports were prepared by him and that they are correct calculations per the assumptions provided to him. He confirmed that an actuary is tasked with the proper calculation of

³² Caselines 018-290 to 018-324.

past and future earnings in matters like this one. These calculations will be done based on earning information provided by the client, referred to as earnings assumptions. The actuary does not have an investigative role, in other words he does not verify the correctness of the earnings assumptions given to him. He confirmed that he was asked to do a re-calculation of the loss of earnings suffered by the Plaintiff based on evidence that was led during the trial by the Plaintiff's accountant. These figures can be found on Caselines 018-324. He further confirmed that the contingencies applied are for illustrative purposes and remain the prerogative of the parties and the Court.

[132] The Counsel for the Defendant asked him, *"Were you given financial statements or any other supporting documents for purposes of the earnings?"* Mr Minnaar answered no.

[133] The Counsel for the Defendant asked him, *"Should you not supposed to receive the Industrial Psychologist (IP) report to calculate the loss of earnings. Is the calculation not based on the IP opinion?"* Mr Minnaar answered that it is not necessarily based on the IP opinion and report, but it could be.

[134] The Counsel for the Defendant asked him, *"Did you get proof that the Plaintiff earned in US dollars?"* He answered no, he is not a forensic accountant. That is the job of a forensic accountant.

[135] The Counsel for the Defendant asked him about the differences in the reports and it was put to him that this witness Mr Sauer (Defendant's actuary) will say that the difference between his report and Mr Minnaar's report is based on two reasons: (1) they used different income assumptions and (2) they used different contingency deductions. Mr Minnaar confirmed that that will be the reason for the difference. He went on to say that contingencies are used for illustrative purposes and it is up to the Court or the parties (if settlement is reached). Furthermore, he had a look at the report of Mr Sauer and can confirm that they use the same actuarial basis for their calculations. Thus, the calculations for both were done correctly, but based on different earning assumptions.

[136] After the Plaintiff placed on record that he accepts the expert report and findings by the Defendant's Ophthalmologist as discovered by the Defendant, the Plaintiff closed his case.

DEFENDANT'S EVIDENCE

Ms VD Matla (Industrial Psychologist) for the Defendant

[137] Ms Matla is a qualified Industrial Psychologist (IP) and she placed her qualifications and years of experience on record. She referred to her reports³³. The Plaintiff's injuries are confirmed in her report as penetrating injury of the right eye with secondary glaucoma and permanent visual loss of the eye.

[138] She testified that she struggled to get hold of Mr Jordaan telephonically (Plaintiff's 2nd employer after the incident) in order to collaterally confirm his employment. She did however receive written proof of his income dated 31 October 2016³⁴.

[139] She testified that she did not complete the joint minutes as she wanted to collaborate with her colleague around the loss of his employment in order to finalise her addendum report. She asked for a letter confirming that he lost his job, which was provided on the 8th of November 2023. She finalised the joint minutes on the 8th of November 2023 and sent them the following day, on the 9th.

[140] During cross-examination, Ms Matla was asked why she did not cooperate to complete joint minutes during 2020, she replied that she was instructed by her instructing attorney to halt with the compilation of joint minutes. It was never done after

³³ Caselines 020-13 and 020-88

³⁴ Caselines 020-92 and 020-105.

that (3 years ago). No explanation was given for this and the Counsel for Defendant failed to clarify this issue.

[141] She testified that she tried to phone the Plaintiff on several occasions to verify his earnings and qualifications and to get telephone numbers of his employers. She also sent an “SMS” message. Ronel from the Plaintiff’s office then phoned her and asked that all queries be directed to his attorney. The witness did not mention whether she then requested the information from the attorney. When asked whether she requested the information by email, during cross-examination, she could not remember and said she would have to check. It is also strange that this information was not obtained during the interview and examination of the Plaintiff at the witness’s rooms. It seems to be basic information that should be obtained at the consultation.

[142] During cross-examination, Ms Matla was asked whether she phoned the employer on Monday, 6 November 2023, when she was informed that Plaintiff had lost his employment, so that she can confirm it collaterally? She replied that she did not have an opportunity to do so. The Counsel for the Plaintiff questioned how it is possible that she did not have an opportunity to phone the employer for three days (at which stage she received the letter from her colleague). The explanation seems to be very unlikely.

[143] Ms Matla was able to confirm the employment of the Plaintiff at Marulapi Hunting Safaris with the employer telephonically (Caselines 020-20, paragraph 2.2.8) from 2020 to date. She told the Court that when she compiled her second report, she had not received the required collateral information she requested for the first report.

[144] With reference to Appendix A of her report³⁵, it is clear that she received written confirmation of the Plaintiff’s earnings at Mammoet Game traders as well as the reasons for his dismissal (Caselines 020-30). In Appendix D of her report from Caselines 020-34 and further she also received full details of the Plaintiff’s employment from Mr Jordaan for the full period when he worked there. The written confirmation of Mr

³⁵ Caselines 020-29).

Badenhorst's employment at Marulapi is contained in Appendix C. All the payslips up to the end of September 2023 was also provided to the Defendant's attorney during October 2023. It is thus clear that the witness and also the attorney for the Defendant had all the proof of income they needed pertaining to the post incident earnings of the Plaintiff. There can be no doubt as to what the Plaintiff's earnings was post-morbid. The Court was referred to the full details of these earnings summarised by the Plaintiff's actuary on Caselines 018-326, paragraph (b).

[145] Ms Matla was asked what is it that she and the Plaintiff's Industrial Psychologist disagreed on in cross-examination with reference to the joint minutes. She testified that firstly on Caselines 021-12 the last portion of the last paragraph – *"SS notes that, his services were terminated, and he secured employment as a Farm Manager at GJ Jordaan Farm (brother-in-law) until the farm was sold in 2019. PM note that, he got a better offer as a Farm Manager at GJ Jordaan Farm until the farm was sold in 2019."* Note that SS stands for Suzanne Schlebusch and PM for Pat Matla. Ms Matla said this would be due to different information received. It is important to note that evidence was led by both the Plaintiff and other witnesses (and a letter from Mammoet, confirming why he was fired was attached to the witness's report) that he lost his employment at Mammoet because of several issues the employer had with his shortcomings. Ms Matla actually mentioned in her report that he "got fired" – as the reason for leaving the employ of Mammoet – see the schedule on Caselines 020-19, paragraph 2.2.1. Secondly, on Caselines 021-11, paragraph 1.2.3 and 1.2.4 – *"SS notes the disposable taxable income noted below, which should be used for quantification purposes... PM refers to the reports of Financial Experts and Actuaries for the disposable taxable income, which should be used for the quantification purposes"*. This in fact does not contradict the evidence of the Plaintiff, as the Plaintiff did provide the Court with the evidence of an accountant who confirmed the amounts that should be used as the money available to the Plaintiff as "disposable income" – as such an indicator as to the Plaintiff's earning capacity.

[146] Although the question as to what would constitute post-morbid earnings falls squarely within the expertise of an Industrial Psychologist, Ms Matla said in cross-examination that she cannot give an opinion as to what constitutes post-morbid earnings and she defers to legal experts.

[147] The Counsel for the Plaintiff submitted that Ms Matla did not lead any evidence that goes against the evidence by the Plaintiff's Industrial Psychologist. In some cases, she merely did not give an opinion and referred the issue to other experts. He referred the Court to Caselines HOA32 to HOA33 for a short discussion of the two small differences between the two experts. The first indicated difference was clearly due to a mistake by Ms Matla, as her report mentioned that the Plaintiff resigned due to a better opportunity, whereas she stipulated in the same report later that he lost his employment as he "*got fired*". The second difference was merely that she did not want to opine as to what income should be used pre-morbid and referred the issue to the relevant experts. Ms Matla had received confirmation of all the Plaintiff's post-morbid employment particulars including salary and reasons for leaving by the time of her second report. Thus, even though the Defendant's Counsel wants to make a large issue about the initial struggle to obtain collateral info telephonically, all the employment details were provided in writing to her and to the Defendant's attorneys. He referred the Court to Caselines HOA30 to HOA33. Ms Matla also confirmed in her report that the Plaintiff is a disadvantaged job seeker, which will fit with the evidence that he was fired from his job and will at his age and with his limited experience, not secure any employment in future.

[148] The Counsel for the Plaintiff submitted that the evidence of Ms Matla was not of a very good quality and certainly did not rebut any portion of the evidence by Ms Schlebusch.

Mr Johan Sauer (Actuary) for the Defendant

[149] Mr Sauer is an Actuary and placed his qualifications and years of experience on record. He confirmed that he prepared two reports³⁶. In his reports, he used the average

³⁶ Caselines 020-4 and 020-115

of the last 5 years earnings (as provided to him) before the incident (2006-2010) as the basis for the Plaintiff's pre-morbid earnings.

[150] Mr Sauer confirmed that his role as actuary is not an investigative role. He then read out portions of his report - the calculations table. He confirms that there is a big difference between his calculations and that of Mr Minnaar, because the earnings assumptions are totally different. He then went on to opine that the re-classification of the expenses by the Plaintiff is problematic for him as this would mean that the reported profit as per the Annual Financial Statements (AFS) was not correct. He also stated that the taxable net profit as per the tax returns should be taken as the Plaintiff's disposable income. The Counsel for the Plaintiff then objected to the evidence being led, as the witness was giving evidence beyond his expertise as actuary. The Counsel emphasized that the witness was called as an actuary expert and not an accountant or industrial psychologist. The evidence he gave fell outside the sphere of expertise of an actuary. The Court confirmed the objection.

[151] According to Mr Sauer, the Plaintiff in fact will earn a better salary post incident than he would have as professional hunter and business owner (Caselines 020-4). During cross examination, it was put to the witness that there was evidence on record that a professional hunter earned a much better salary than a farm manager. His postulation does not make any sense. Mr Sauer refused to make a concession that it is in fact improbable. It was put that his postulation and result are even more improbable if one considers that the Plaintiff had long periods of unemployment after the incident.

[152] When asked in cross-examination what an actuary's purpose is, he said to calculate income on the assumptions provided, but that these figures must make sense to him. It was put to him that the function of an actuary is not to question the earning figures given to him, but to merely provide a calculation. Mr Sauer refused to agree and stated that in his training he was also taught "*how to calculate the right figures*". This statement however did not explain why he would get involved in the investigative role,

which he himself confirmed he should not be involved with. Mr Sauer added that it was his prerogative to decide whether or not to use an average of the past earnings and which amounts of past earnings. The Counsel for the Plaintiff do not agree with the witness on this issue. As Counsel, he submitted that he has been involved with actuarial reports and calculations for more than 20 years and the role of an actuary has always been to provide actuarial calculations to postulations and assumptions provided to it. The actuary is not an expert as to what the postulation should be or what income figures should be used. These aspects of a claim fall within the expertise of Industrial Psychologists, Occupational Therapists and Accountants.

[153] When asked whether his calculations would be the same as that of Mr Minnaar if the Plaintiff's attorney had provided him with the instructions and figures, he initially refused to agree and avoided answering the question. When pressed for an answer, he eventually agreed and said the figures would be basically the same, with a possible very small difference. Their actuarial basis for calculations is the same.

[154] Mr Sauer was asked whether the Defendant's attorney informed him that evidence was presented to indicate that the Plaintiff lost his job and that he should do an alternative calculation, he replied – no, he was not informed.

[155] It was put to Mr Sauer that the Court is concerned with the Plaintiff's earning potential or what his actual earnings was and not whether he complied with tax laws and regulations. He did not disagree.

[156] Mr Sauer testified that he felt the contingencies used by him in his report was the correct contingencies. When asked who's prerogative the contingencies were, he agreed that it was the prerogative of the Court and the parties.

[157] The Counsel for the Plaintiff submitted that Mr Sauer did calculations on the same actuarial basis as the Plaintiff's expert (Mr Minnaar) and should the instruction have come from the Plaintiff, the calculations would have been the same as that of Mr

Minnaar. Therefore, the witness did not contradict the expert evidence of Mr Minnaar with the calculations done by him.

Mr Klaas Mamosebo (Accountant) for the Defendant³⁷

[158] Mr Mamosebo placed his qualifications and experience on record. He was initially instructed to “... *prepare annual financial statements for 5 years i.e 2006, 2007, 2008, 2009, 2010.*” Mr Mamosebo however qualified the report and said that accurate and complete calculations could not be done due to an absence of information. They had only bank statements to work from. The Counsel for the Plaintiff submitted that this instruction to the expert was an exercise in futility. A second report was however done in 2023, based on the Annual Financial Statements (AFS) prepared by the Plaintiff’s accountant.

[159] Mr Mamosebo stated that they could do a better analysis from the AFS of the Plaintiff’s accountant. He used the bank statements to prepare detail ledgers. He admitted that they could not do a proper analysis as a number of transactions could not be allocated.

[160] When asked what the appropriate procedure is to calculate the Plaintiff’s disposable income, he stated that it is the result from deducting all the expenses and tax payable from the profit. When referred to the Plaintiff’s calculation of disposable income, he acknowledged the principle of personal expenses, but stated that the source of personal expenses was unclear. He stated that if the personal expenses are separated, there was an under-declaration of expenses.

[161] Mr Mamosebo was asked how depreciation should be treated? He confirmed that it is a non-cash expense and can be deemed as cash available. It is basically a tax deductible. This statement by the witness confirms the evidence by Mr Davel, where it was confirmed that the depreciation should be added back to the disposable income calculation, as he did in his evidence, as it is cash available to the Plaintiff.

³⁷ Caselines 020-10, 020-118.

[162] According to Mr Mamosebo, there was a single declaration of income for the Plaintiff in the 2010 financial year (Caselines 023C-25) as commission earned from his business. During cross-examination he admitted it is probably commission earned from another source and not as salary from his business as there is no transaction out of the bank account of the business that reflects the payment of this commission. It is my view of the Counsel for the Plaintiff that this amount of R 108,480 should actually be added to his disposable earnings in 2010. The Counsel said the Plaintiff will however concede that this was a once-off transaction and could – conservatively - be ignored for purposes of calculating the earning potential of the Plaintiff.

[163] Mr Mamosebo then went on to confirm that the original Annual Financial Statements (AFS) must be signed. The Counsel for the Plaintiff put it to the witness that Mr Davel testified that the originals were unavailable and the copies uploaded on Caselines are computer generated copies. Mr Mamosebo could not argue with that.

[164] When asked whether the split of bank charges 50/50 was correct, he confirmed that it is common for a sole proprietor to use only one account for business and personal affairs. Certain expenses will then be allocated as personal expenses. If one has the source document for every transaction it is technically possible to allocate a % of bank charges to personal expenses based on the volume of personal transactions. It is clear from the evidence of Mr Davel that the source documents were not available anymore when this matter was referred to him for AFS and reports. Therefore, the apportionment of 50% to each is reasonable.

[165] He stated that if the Plaintiff wants to allocate certain expenses to personal expenses, the Plaintiff wants to revise the information lodged with SARS. He also stated that he could not verify the source of the first three years of revenue, as SARS did not at that time require details of revenue.

[166] Mr Mamosebo then discussed the figures in his report on Caselines 020-11 and confirmed that the figures/profit in the Plaintiff's Annual Financial Statements (AFS) corresponded with the figures in the tax returns. He then referred to the comparative calculations between the AFS's revenue and the bank statements' income. He stated that the first year showed a big difference, with a negative figure for the second and fourth years (Caselines 020-12). He then concluded in his report that due to the differences in these calculations he recommends that the taxable income as per the tax returns be used as the Plaintiff's disposable income.

[167] Mr Mamosebo's second report's findings also falls apart due to the following factors as was put to him (the witness) during cross-examination: His calculations for the 2006 year are substantially flawed due to the fact that he only worked with bank statements that started on 15 August 2005. The full financial year runs from 1 March 2005. He missed 5 and ½ months' worth of transactions. This will explain why there was such a big difference between his figure from the bank statements and the AFS figures. He could not verify all transactions on the bank statements. He did not account for VAT. His revenue for the year 2007 (Caselines 020-12) includes a VAT credit of R 166,878.24 and should not form part of revenue – see also Caselines 020-141. There is no ledger in his report for the year 2007-2008.

[168] When asked who would be in a better position to prepare Annual Financial Statements (AFS); the accountant who had all the necessary source documents and the information was fresh in 2006, or himself who was asked 16 years later with limited information and no source documents. Mr Mamosebo avoided answering the question. After repeatedly being asked to answer the question he had to concede it was the Plaintiff's accountant.

[169] When it was put to Mr Mamosebo how Mr Davel calculated the Plaintiff's disposable income, he agreed with it, but said it had to be proven what part was personal expenses. It was then explained to the witness that the Plaintiff and Mr Davel testified about which part of expenses was personal. He could not dispute it.

[170] Finally Mr Mamosebo was asked to confirm that the Plaintiff did not draw any profit from the business for the full 6 years period and also did not take a salary. He confirmed it is indeed so. It was then put to the witness that it is impossible for him to have had the lifestyle he had and to travel extensively overseas (as was clear from his passport) with no income at all. It is blatantly clear that he lived from the business's account. This is exactly the Plaintiff's case. He could not dispute this.

[171] The Counsel for the Defendant submitted that the Accountant, the Defendant's expert, was not provided with all the required documentation to finalise his report (Caselines HOAD44 and further). At the time the reports were prepared by the Defendant's Accountant (Mr Mamosebo), during March 2020 and October 2023, no request was made for any documentation from the Plaintiff. The belated notice in terms of Rule 35(3), served on the 23rd of October 2023 did not allow enough time to properly respond (this request comes more than three years after the first report was done, when it was stated by the expert that he did not have all the required documentation). The period within which to respond ended on the 6th of November 2023, when the trial already commenced. Having served the notice 12 years after receiving the summons, the Defendant cannot complain that the receipts and source documents for a period 2005 to 2011 (going on 18 years after the fact) is lost or destroyed. The Plaintiff did not know in 2005 he would have to keep source documents after his accountant had completed the financial statements. The argument by Defendant's Counsel that no proof exists for the assets of the business will not detract from the evidence by the Plaintiff and the accountant that the financial statements prepared between 2005 and 2011 is correct. Therefore, the only evidence before the Court in relation to the financial affairs of the Plaintiff's business is the confirmed financial statements as supplemented by the oral evidence regarding the portion of expenses that were private. Apart from denying the evidence by the Plaintiff and Mr Davel, there was no contradicting evidence led and it is therefore the submission of the Counsel for the Plaintiff that the evidence by the Plaintiff's witnesses must stand. The two reports by the Defendant's expert (Mr Mamosebo) were shown to be of no value. He agreed in cross-examination (and it was

stated as such in the first report) that the first report is inaccurate due to the lack of proper information. The second report was found to be very unreliable as argued in the Counsel for the Plaintiff's heads of argument on Caselines HOA36 to HOA37, paragraph (x).

[172] On the one hand the Defendant argues that the taxable income as per the tax returns should be regarded as the disposable income (cash available to spend) but on the other hand the Defendant agrees and points out that the Plaintiff earned a commission of R 108,840.00 during 2009 (Caselines HOAD50, par 142). The correct amount is R106,149 on Caselines 023C-22. He then conveniently ignores this fact when referring to the taxable income of R95,156 only for that year. The Counsel for the Plaintiff argued that the fact of the matter is that the Court needs to logically apply its mind in order to arrive at a probable earning capacity for the Plaintiff.

[173] The Counsel for the Plaintiff submitted that the argument of the Defendant is neither logical nor probable for the following reasons: Taxable income is the result of gross income less all expenses paid, but also less depreciation (a tax incentive) and all other allowable tax deductions, that are not related to actual monies paid out. Therefore, it will give a far smaller result due to deductions that were either not business expenses or physically paid expenses at all. For the five-year period (2005 to 2010) the Plaintiff drew no profit and took no salary as was confirmed by Mr Mamosebo (and is clear from the financial statements). It is therefore only logical that he lived off the business account. If he was not living off the business account, he would have taken drawings from the profit. Mr Mamosebo testified that it is not uncommon for sole proprietors to only have one bank account for both business and personal use. By using taxable income as the amount of disposable income, the result would be absurd in the sense that it would then suggest that the Plaintiff was earning a higher salary as a farm manager than his pre-morbid occupation as business owner and professional hunter with overseas customers that pays in dollars and Euros.

[174] The Counsel for the Plaintiff further submitted that the evidence led by the Plaintiff and Mr Davel in relation to the calculation of the Plaintiff's disposable income is logical and very probable for the following reasons: There was a separate account in the USA that received deposits from clients, which is not factored in the calculation of disposable income due to the unavailability of details from that account. The income per year in this account could have been anything between \$ 500 to \$10,000 for all we know. The Defendant is not asking the Court to add any amount from this account to his calculations, but the fact that the account existed cannot be ignored. The Plaintiff testified that according to other business owners in the area such a business as his prior to the incident now makes profits in the region of R 5,5 million (Caselines HOA16). Ms Schlebusch confirmed that a professional hunter (not a safari business owner) currently earns between R460,824 to R883,752 per year (Caselines HOA24). The calculation of disposable income as the private expenses paid by the business with the amount of depreciation added back plus the net profit, makes absolute sense and is a logical method. Mr Mamosebo in fact confirmed that depreciation is a non-cash item and a tax concession/deductible that does not represent an actual expense. The figures arrived at falls far below the current profit of similar businesses and also is comparable to what a professional hunter in someone else's employ can earn.

[175] The Counsel for the Plaintiff further submitted that the evidence of Mr Mamosebo (Caselines HOAD44 and further) did not contradict the evidence by Mr Davel. Mr Davel testified factually as to the Plaintiff's business's financial statements and financial position. He added to his evidence of these historical reports that he assisted the Plaintiff's attorney to make a calculation for the Court's benefit and to present during the trial of what amount would constitute the Plaintiff's disposable income for the five-year period before the incident. The logic behind his calculation could not be faulted by Mr Mamosebo in principle, but for his objection that the split of expenses between business and private, should have been reported as such to SARS. This objection is for another forum to decide upon. This Court is tasked with the duty to determine what the actual earning capacity was of the Plaintiff pre-incident.

PLAINTIFF'S RESPONSE TO SOME ISSUES RAISED BY THE DEFENDANT

[176] The Counsel for the Plaintiff is of the view that the Counsel for the Defendant attempts to re-open issues that were dealt with at the merits trial such as general damages and the issue of interest on the damages (Caselines paragraph 17, HOAD8). The aspect of the proper service of the Section 3(4) notice was also dealt with during the merits trial. It was found that the Plaintiff complied with all the requirements in order for the Court to find that the Defendant is 100% liable for the Plaintiff's proven damages. The Defendant in fact already settled the general damages on this basis. It is thus unclear why the Defendant's Counsel would enquire at this late stage as to the existence of a Section 3(4) notice.

[177] The Counsel for the Defendant asks for a copy of the written judgment. There is no written judgment as the Court gave judgment at the conclusion of the merits trial *ex tempore*. The order of this judgment is available on Caselines 024-2.

[178] The Counsel for the Plaintiff is of the view that the Defendant's Counsel also attempts to re-open the argument in relation to the issue of interest payment³⁸. As stated in the Plaintiff's heads of argument³⁹, the matter of interest was decided and the Court gave judgment. The Defendant applied for leave to appeal this judgment, which was refused. The Defendant did not take it any further. It is clear that this issue is *res iudicata* (judicata). The Defendant's Counsel goes further to state that the said judgment is not *stare decisis* – *"It is submitted that the Honourable Court it is not bound by the Court order and does not have to follow it. The Court order it is not stare decisis."* The Plaintiff's Counsel argued, *"With the greatest of respect, my learned friend does not apply these terms correctly in his argument. Stare decisis refers to other previously decided cases (judgments in other matters) which need to be followed by equal or lower courts under the same division. The Latin phrase "res iudicata ius facit inter partes" means a suit adjudged is binding upon the parties. Therefore, once a judgment is*

³⁸ Caselines HOAD42, paragraph 115 and further.

³⁹ Caselines HOA2 – par 1.4.

handed down on an issue, the other party cannot re-open the issue for evidence or argument. Review or appeal is the only possible process to follow, which the Defendant attempted, but was unsuccessful.”

[179] The Counsel for the Defendant, in some parts of his heads of argument, has requested the Court to expunge some parts of the Plaintiff’s heads of argument. This request is somewhat strange as the heads of argument are not evidence. The Court may listen to any argument by the parties’ Counsel and decide which part of such arguments are helpful and which are not.

[180] The Counsel for the Defendant, Caselines HOAD41, paragraph 112, said *“It is submitted that the plaintiff had failed to take the Honourable Court to his confidence as to when the initial attorneys of record their services were terminated; refer the Honourable Court to the Notice of substitution and/or appointment of attorneys.”* Plaintiff’s response: At the time the current attorneys took over the matter, no firm of attorneys were on record for the Defendant. The Defendant failed to respond to the summons. Therefore, there was no need to do a notice of substitution and appointment as attorney of record as there was no-one on record to give notice to.

[181] The Counsel for the Defendant, Caselines HOAD58, paragraph 169 and further said that the cases referred to by the Plaintiff are not relevant and as such, they should not be considered. Plaintiff’s response: The argument that the cases referred to by the Plaintiff are not relevant and therefore should not be considered is flawed for the following reasons:

(a) *Esso Standard SA (PTY)LTD v Katz 1981 (1) SA 964 (A)*. The following principles laid down in this case is directly relevant to our matter: *“It has long been established that in some types of cases damages are difficult to estimate and the fact that they cannot be assessed with certainty or precision will not relieve the wrongdoer of the necessity of paying damages for his breach of duty.”* – in the current case the loss is also difficult to estimate. *“The plaintiff led the best possible evidence which he was able*

to do to enable the trial Court to assess the loss, and did not leave the trial Court to guess the extent of the loss". Our Plaintiff prepared a statement for the Court's assistance which was based on formal and accepted financial statements. Mr Badenhorst even went further than the plaintiff in the cited case by using proper financial statements for his calculations. *"In the present case it might be said with some justification that the plaintiff should have sought the assistance of an accountant. He failed to do so, but it does not follow that he should be non-suited"*. – Mr Badenhorst *in casu* did seek the assistance of his accountant as the Court of Appeal suggested a Plaintiff in such a situation should do.

(b) *Discovery Health v. RAF* judgment and *Morné Van Heerden v RAF*, Case No. 845/2021 - *Eastern Cape Division, Gqeberha*. The fact that in the cited case the medical aid had paid on behalf of the Plaintiff, does not detract from the principle that was laid down in the cited case that even if a medical aid pays the medical expenses (which means the Plaintiff did not provide proof of payment by himself) the wrongdoer (Defendant) is still under duty to compensate the Plaintiff for these medical costs. Another example of such a situation (where there is no medical aid) is when a Plaintiff makes arrangements with a hospital to pay the account after he successfully recovered the amount from the wrongdoer or Defendant. Then the fact that he had not paid it yet, does not disqualify him from claiming the amount from the Defendant.

(c) *Discovery Health (Pty) Ltd V RAF And Min of Transport* - (Case No. 2022-016179): Although this was an urgent application, the principle was laid down just the same that it is unthinkable to require a claimant (in our case the Plaintiff) to first pay the expenses before it can be claimed (paragraph [37] of the judgment).

[182] The Counsel for the Defendant, Caselines HOAD64, paragraph 168, said, *"It is submitted that Dr Bridgens whom it is alleged had treated the plaintiff during the two operations was not called to testify on behalf of the plaintiff..."*. Plaintiff's response: Counsel is mistaken with this statement. The expert (Dr van der Merwe) testified that Dr Bridgens saw the Plaintiff first but he (Dr vd Merwe) then saw Plaintiff on the same day

and further treated the Plaintiff. For that reason, their practice recorded on the system that the treating doctor was Dr Bridgens. Therefore, it would have made no sense to call Dr Bridgens.

[183] The Counsel for the Defendant, Caselines HOAD69, paragraph 197, raised the issue of the date of the Plaintiff's dismissal. Plaintiff's response: It makes no difference what date the employer put on the termination letter. The evidence is that the Plaintiff was only informed of his dismissal on or about the 30th of October 2023. It is further clear from the evidence by the Plaintiff, Ms Gropp and Ms Schlebusch that the employer was not satisfied with the problems the Plaintiff had due to his disabilities and his employment had been at risk for some time. There can be no doubt that his dismissal was related to his injury. If the Defendant wanted to know more about the other reasons he should have asked the witness/Plaintiff.

[184] The Counsel for the Defendant, Caselines HOAD69, paragraph 198, raised the issue of the unfair labour practice. Plaintiff's response: Whether the actions of the employer amounts to unfair labour practice is an enquiry for another forum. This Court does not have a mandate to establish it and is limited to the issues in dispute in this hearing.

[185] The Counsel for the Plaintiff submitted that it is clear from the above that the evidence given by the witnesses called by the Plaintiff should be accepted as there are no grounds to reject any of it. Further no evidence was produced by the Defendant that contradicted the factual evidence of the Plaintiff's witnesses. The difference in calculation between the two actuaries was due to different instructions. The Defendant's assumptions regarding earning capacity were irrational and blatantly incorrect, if one has regard to the facts of the case.

CONCLUSION

[186] A Court's approach to expert testimony was neatly summarised in *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA). Howie J writing for the court stated- "[36] . . . 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* [1997] UKHL 46; [1998] AC 232 (HL (E)). With the relevant dicta in the speech of Lord Browne-Wilkinson we respectfully agree. Summarised, they are to the following effect. [37] The Court is not bound to absolve a defendant from liability for allegedly negligent medical treatment or diagnosis just because evidence of expert opinion, albeit genuinely held, is that the treatment or diagnosis in issue accorded with sound medical practice. The Court must be satisfied that such opinion has a logical basis, in other words, that the expert has considered comparative risks and benefits and has reached 'a defensible conclusion' (at 241G-242B). . . . [40] 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 were invited to express 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 per cent 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 *Dingly v The Chief Constable, Strathclyde Police* 200 SC (HL) 77 and the warning given at 89D-E that '(o)ne 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" (Emphasis added).

[187] In *Southern Insurance Association Ltd v Bailey* NO⁴⁰, Nicholas JA said: *“In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an “informed guess”, it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge’s “gut feeling” (to use the words of appellant’s counsel) as to what is fair and reasonable is nothing more than a blind guess. (cf Goldie v City Council of Johannesburg⁴¹)”*.

[188] According to the well-established position in our law, the Courts need to be mindful of the current situation of the Plaintiff and exercise a measure of common sense and judicious discretion in avoiding an award that would amount to a windfall to which the Plaintiff would not be entitled. The purpose of a claim such as this is to compensate the Plaintiff for loss that he has suffered or will suffer and not to make an award that amounts to largesse. The Plaintiff, however, must first discharge the onus on him to prove the loss.

[189] In considering the issues of past and future medical and related expenses, as well as past and future loss of earnings, it is also important to note that the Court is bound to ensure that its decision is fair not only to the Plaintiff, but also to the Defendant. In this regard, I have considered all the expert evidence and arguments from both Counsel.

[190] It appears from the case law that determining the issues of past and future medical and related expenses, as well as past and future loss of earnings is in the main, a speculative exercise. This is so because, some claimants may heal and be rehabilitated back to their pre-accident position while other’s positions may degenerate well beyond the actuarial abstractions, postulations and predictions by other experts. However, the Court is enjoined to make a decision regardless.

⁴⁰ 1984 (1) SA 98 (A) at [114] at 114C-D.

⁴¹ 1948 (2) SA 913 (W) at 920.

[191] It needs to be mentioned that the Plaintiff appeared to be a very honest witness who testified to the best of his abilities and memory, without ever changing his evidence or refusing to answer any question. His evidence stood firm under cross examination and there were no contradictions of note. The Defendant's Counsel had stated that the Plaintiff testified about facts not pleaded. The Defendant's Counsel could not elicit any contradictions during cross-examination. The evidence that another account existed in the US and the Plaintiff's inability to get records of this account was explained by the Plaintiff. The fact that he could not produce any proof of the account is to his own disadvantage and does not reflect negatively on his credibility. The evidence in relation to his injuries correlated with the reports and evidence by the experts. He was indeed a very honest and open witness and as such, I hereby accept his evidence without any reservation.

[192] Ms Gropp was a very good witness that had no motive to mislead the Court. The cross-examination did not provide any reason to doubt her evidence. There is no part of this witness's evidence that seemed to be unrealistic, improbable or illogical. She did not contradict herself or any of the other expert witnesses. The most important part is that the Defendant did not call its own Occupational therapist and as a result the evidence of this witness stands uncontested.

[193] Ms Suzanne Schlebusch was a good witness that had testified honestly, giving her opinion on the issues within her field of expertise. The cross-examination of this witness did not diminish her evidence in any way. She remained steadfast in her opinions as stated in her several reports and her evidence was predominantly corroborated by the agreements between her and the Defendant's expert (Ms Matla) as contained in the belated joint minutes. I have no difficulty in accepting her evidence.

[194] Mr Jan Davel (Accountant) for the Plaintiff gave factual evidence and notwithstanding severe cross-examination, his evidence remained intact and beyond criticism. The cross-examination by the Defendant's Counsel did not diminish the evidence of this witness. It was clear that the witness only testified about the issues

within his knowledge and he was truthful. His evidence was of a good quality and I have no difficulty in accepting it.

[195] It became clear that Mr Izaak Minnaar (Actuary) for the Plaintiff is a highly qualified and experienced Actuary who has many years of experience in compiling expert reports for litigants. His evidence was of a formal nature and his evidence was straight to the point and limited to his field of expertise. His evidence was of a high quality and without any contradictions and should stand. It is also clear from his evidence that the actuary is limited to the earnings assumptions given to him. It is for the Court to decide which assumptions are proven. There is no substantial difference between the manner in which the calculations are done.

[196] It is clear from the above that the evidence given by the witnesses called by the Plaintiff should be accepted as there are no grounds to reject it. Furthermore, no evidence was produced by the Defendant that contradicted the factual evidence of the Plaintiff's witnesses. The difference in calculation between the two actuaries was due to different instructions. The Defendant's assumptions regarding earning capacity were irrational and blatantly incorrect, if one has regard to the facts of the case.

[197] In this instant case and having taken into account the postulations and predictions by the Experts who examined the Plaintiff, and the actuary's predictions, and the previous Court decisions, I conclude that the evidence led by the Plaintiff and his witnesses is credible and as such, the Plaintiff has discharged the onus on him to prove the loss on a preponderance of probabilities.

QUANTIFICATION OF PAST MEDICAL EXPENSES

[198] The medical vouchers (consisting of invoices and statements) were discovered many years ago, in order to allow the Defendant to scrutinise them and to indicate to the Plaintiff which vouchers it disputed with the reasons for same. In this regard, the Court was referred to Caselines 005-83 which is the Plaintiff's discovery affidavit, served on the Defendant on 25 August 2016.

[199] The Defendant decided not to inform the Plaintiff whether they have any issues with any specific voucher, but rather to hold the view that the Plaintiff should provide proof of payment. No evidence was led by the Defendant to indicate that any of the vouchers were not injury related. In fact, the Plaintiff, of his own accord, conceded that two of the vouchers relate to a leg injury when he missed a step and fell down some stairs. The Plaintiff is willing to have these two amounts deducted from the total of his medical vouchers. Apart from these two vouchers the Plaintiff confirmed under oath that the remaining vouchers were accident related.

[200] In relation to the question as to whether this particular event that caused damages to the Plaintiff, could have been foreseen by the Defendant, the remoteness thereof might be considered to be too far for it to have been foreseen. For that reason, the Counsel for the Plaintiff submitted that an amount of R 635.60 plus R 18,660.28 (Total: R 19,295.88) should be deducted from the Plaintiff's total medical and hospital expenses. The Plaintiff should therefore be compensated for past medical and hospital expenses in the amount of R 64,975.21. The Counsel for the Plaintiff also said, *"If my memory serves me correct, the Defendant indicated that it had already contributed towards the payment of one of the surgeries of the Plaintiff. I submit that upon proof of such payment, it can be deducted from the above amount."* The Defendant did not submit the proof of payment.

[201] The Defendant's contention that there must first be proof of payment, before a medical expense can be claimed, is incorrect and misplaced. The Plaintiff did confirm that he did not have a medical aid at the time of the incident.

[202] The Plaintiff has proved past medical expenses on a balance of probabilities in the amount of R 64,975.21.

QUANTIFICATION OF FUTURE MEDICAL AND RELATED EXPENSES

[203] The Court was referred to the need for domestic and driver assistance by Ms Gropp (Occupational Therapist) during her evidence. The costs were discussed both in her report and the joint minutes by both Occupational Therapists.

[204] The Court was further referred to the required future medical treatment and costs as well as the need for special and adapted equipment for the Plaintiff by Ms Gropp. These requirements and the costs are discussed in her report as well as the joint minutes.

[205] The future medical and related expenses are calculated as follows:

* Future occupational therapy and low vision specialist:

- total of 20 hours of occupational therapy @ R 900 per hour = R 18,000

- consultation/advice from a low vision specialist @ R 1,000 = R 1,000

Total cost – R 19,000

* Special adapted equipment (using a life expectancy of 15 years – currently 60 years old – see Robert Koch Life Table 4):

- Talking wrist watch (lifespan of 5 years) @ R850 = R 2,550

- Talking timer (lifespan of 5 years) @ R 300 = R 900

- Elastic shoelaces (lifespan of 1 year) @ R90 = R 1,350

- Hi-mark (Spot-a-line) x2 tubes (lifespan of 1 year) @ R800 = R 12,000

- Liquid Level Indicator (lifespan of 2 years) @ R656.26 = R 4,921.95

- Kettle Tipper (lifespan once) @ R380 = R 380
- Shoe horn and sock aid (lifespan of 5 years) @ R350 = R 1,050
- Leg lifter (lifespan of 2 years) @ R400 = R 3,000
- Orcam, OrCam MyEye (upgraded - 3 years) @ R57,500 = R 287,500

Total costs – R 313,651.95

* Domestic helper and general assistant (using a life expectancy of 15 years – currently 60 years old):

- 8 hours of domestic assistance per week (52 weeks/year = 416 hours per year) @ the minimum wage of domestic workers (R 25.42/hour) is R 10,574.72 per year X15 = R 158,620.80

- Line 123 (Caselines 018-104) – cost of an assistant with driver's licence at a cost of R 2,000 per month (R 24,000 per year for 15 years) = R 360,000.00

Total cost – R 518,620.80

The total award for future medical and related expenses, calculated as the sum of the above should be: R 851,272.75

QUANTIFICATION OF PAST AND FUTURE LOSS OF EARNINGS

[206] It is trite that an expert witness should state the facts or assumptions on which his opinion is based.⁴² The approach to the nature of expert evidence is clearly set out in the matter of *Price Waterhouse Coopers Inc and others v National Potato Co-operative*

⁴² *Schneider NO and Another v AA and Another* 2010 (5) SA 203 (WCC) at 211E-I.

*Ltd*⁴³, where the SCA quotes with approval the following statement of the court a quo: “... an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.”⁴⁴

[207] The legal principles and tools to assess the reliability and credibility of the expert's opinion is quoted with approval by Wallis JA from the matter of *Widdrington (Estate of) c. Wightman*⁴⁵, as follows: “[326] Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist. [327] As long as there is some admissible evidence on which the expert's testimony is based it cannot be ignored; but it follows that the more an expert relies on facts not in evidence, the weight given to his opinion will diminish.[328] An opinion based on facts not in evidence has no value for the Court.....”

[208] The loss of past and future earnings is calculated as the difference between the earnings of the Plaintiff, had the incident not occurred (pre-morbid earnings) and his earnings, now that the incident had occurred (post-morbid earnings). In order to do this, the Plaintiff needs to prove on a balance of probabilities two things: What was the Plaintiff's most likely pre-morbid earnings, in other words, what was his earning capacity, and what did the Plaintiff actually earn after the incident to date of trial (past earnings) and what will he probably earn from the trial date to retirement (future earnings).

[209] The Court is only allowed to adjudicate on the issues required in terms of the pleadings. In this case, what the quantum of the Plaintiff's damages is in relation to the

⁴³ 2015 2 All SA 403 (SCA)

⁴⁴ At 440 (97)

⁴⁵ 2011 QCCS 1788

past and future loss of earnings. In this regard, it is very important to point out that the Court is thus not asked to investigate whether the Plaintiff had reported his business's income correctly to SARS in terms of tax legislation. The Court is limited to establish what the Plaintiff's actual earning capacity was.

[210] The Defendant did not plead any particular manner with which the Plaintiff's earnings should be calculated. When the Plaintiff then adduce evidence that proves on a balance of probabilities that the Plaintiff earned a particular income, the Defendant must accept it.

[211] The Court was shown what tariffs the Plaintiff charged his US customers in the brochures on Caselines 023B-40 (2004). A basic tariff of \$350 per day per hunter amounts to R 6,440 per day (with an exchange rate of R 18,40 / \$1). This is in 2004 value. The Counsel for the Plaintiff submitted that the current value of this amount is around R 18,000 per day per client. If he had 1 client for 3 days of the week for 40 weeks in a year, he would generate an income of approximately R 2,160,000 per year in current value. This is very conservative as he could take two to three clients per trip.

[212] The Plaintiff testified that he recently received information as to what some of the hunting safaris in his area earns. They currently earn revenue of up to R 13,000,000 per year with a profit of up to R 5,500,000 per year. This is the potential earnings of a Hunting Safari business like the Plaintiff's.

[213] Ms Schlebusch testified that a professional hunter (not the business owner) currently earns from R 460,824 to R 883,752 per year. The average of these two amounts are R 672,288 per year.

[214] The Plaintiff could have argued that the Court should take the average of the above amounts and consider it the earning capacity of the Plaintiff. Under certain circumstances it would have been the best evidence to establish the loss.

[215] The Plaintiff, however, followed the principles laid down in the matter of *Esso Standard SA (PTY)LTD v Katz 1981 (1) SA 964 (A)*. In the above-mentioned case, the Court of Appeal stated the following: *"It has long been established that in some types of cases damages are difficult to estimate and the fact that they cannot be assessed with certainty or precision will not relieve the wrongdoer of the necessity of paying damages for his breach of duty. Whether or not a plaintiff should be non-suited depends on whether he has adduced all the evidence reasonably available to him at the trial."* The Court went further to state: *"The plaintiff led the best possible evidence which he was able to do to enable the trial Court to assess the loss, and did not leave the trial Court to guess the extent of the loss"*. In this cited case, the Plaintiff prepared a calculation schedule for the Court's purposes to indicate the loss he had suffered. There was no other way to establish his loss. The Court *a quo* accepted the schedule as the best evidence and gave judgment in relation thereto. Although the Court of appeal reduced the award to some extent, it also relied on and accepted this schedule prepared by the Plaintiff. In this regard, the Court said *"In the present case it might be said with some justification that the plaintiff should have sought the assistance of an accountant. He failed to do so, but it does not follow that he should be non-suited"*. Mr Badenhorst in the present case also provided the Court with a calculation schedule, but went further and obtained the help of his accountant. His accountant (Mr Davel) testified to confirm the correctness of these figures.

[216] As stated above, the Plaintiff chose to use his true income for the 5 years preceding the incident as an indicator of his earning potential. Unfortunately, he ran the business as a sole proprietor and used the one account for business and personal expenses. It is also clear from the evidence that he did not take a salary or draw from the profit of the business. The only logical inference (as he also confirmed under oath) is that he lived out of the one account, by paying his personal expenses from this account. It is thus imperative that the Court considers which portion of the expenses paid out of this one account was in fact personal expenses, so that it can be established what amount he had available to spend every month. This figure will necessarily be very conservative as it does not account for the income from his US account (he has no

documentation to substantiate same for reasons explained in his evidence) and also does not provide for all cash transactions that could have taken place (like tips from US clients).

[217] The Plaintiff prepared a “disposable income” calculation with the assistance of his accountant. Mr Davel then came to Court and testified how it is calculated and that the amount of “depreciation” should be added back, which he did and gave the figures to Court under oath. The Defendant did not lead any evidence to contradict the percentages that were allocated to personal expenses in these calculations and in fact did not put it to the witnesses that the apportionment, as calculated and testified to, was incorrect. The Defendant’s only objection was that the apportionment of personal and business income should have been declared to SARS. This objection does not take away from the fact that the apportionment applied will indicate the correct earnings of the Plaintiff at that time. The Defendant’s Accountant in fact agreed that the amount of “depreciation” was not a cash outflow expense and should be added back. He also confirmed that the apportionment of personal and business expenses is an accepted principle with sole proprietors that use one account. The Counsel for the Plaintiff submitted that the Plaintiff had proven on a balance of probabilities that his pre-morbid earnings were as testified to by Mr Davel (again this is a conservative figure with the available evidence). Therefore, the calculations done by Mr Minnaar in his final report on Caselines 018-325 and 018-329 have been accepted and used by the Court.

[218] The Plaintiff confirmed his earnings and several employments since the accident under oath. The Plaintiff further presented as evidence several letters from employers and salary slips (Caselines 023E1 and further), which was not disputed by the Defendant. His earnings since the accident to the 31st of October 2023 is thus proven without any contradiction.

[219] The Plaintiff was informed a week before the trial that his services were terminated from 31 October 2023. He obtained a belated letter from his employer, which the Defendant objected to. The fact that he had lost his job was however properly

proven before this Court by way of the Plaintiff's verbal evidence under oath that he was directly informed as such by the employer and the confirmation by Ms Schlebusch that she had confirmed it with the employer collaterally with a phone call to the employer. This fact is thus undisputed. Both Ms Gropp and Ms Schlebusch testified that it is highly unlikely that the Plaintiff will now (at his age and with his limited experience) find alternative employment and should be regarded as unemployable. This evidence stands uncontested as the Industrial Psychologist of the Defendant did not voice her opinion in evidence regarding the possibility of the Plaintiff regaining employment now that he has been dismissed at this age. The Court can thus accept that the Plaintiff will remain unemployed to age 65. Therefore, the calculation by Mr Minnaar on Caselines 018-326 and 018-329 have been used by the Court to calculate his loss of earnings.

[220] The Defendant's actuary calculations should be rejected for the following reasons: Mr Sauer did not allow for the fact that the Plaintiff lost his job from 31 October 2023. His figures do not take into account that the expense of "depreciation" should be added back to the net profit. This was agreed between the Plaintiff's Accountant and the Defendant's Accountant. Mr Sauer received incorrect earning assumptions, based on the idea that the Plaintiff earned the net taxable profit per IT34A, which could not be correct as it ignores the fact that the Plaintiff never drew from the profit (as confirmed by Mr Mamosebo) but lived from the one business account and it also ignores the depreciation amount that should be added back. Thus, the calculations and report by Mr Sauer were not of assistance to the Court.

[221] The Plaintiff's loss of past and future earnings is thus as follows (Caselines 018-329):

Past loss of earnings: R 5,112,915.00 (a 5% contingency applied)

Future loss of earnings: (R 2,572,720.00) the actuary applied a 15 % contingency that would have been correct in his first report. Many years has now passed and we need to consider that the Plaintiff only had 5 years of employment left after the trial date. With

the recommendation by Robert J Koch of a ½ percentage per year of employment, this figure should be reduced to 2.5%. The future loss has been calculated with only a 5% contingency deduction as follows:

* Pre-morbid future earnings	-	R 3,026,730.00
Less 5% contingency	-	- R 151,336.50
Total pre-morbid earnings	-	R 2,875,393.50
Future loss of earnings:		R 2,875,393.50 (a 5% contingency applied)

[222] Having had the Counsel for the parties, the Plaintiff is awarded the following amounts:

1. Past Medical Expenses	R 64,975.21
2. Future Medical Expenses	R 851,272.75
3. Past Loss of Earnings	R 5,112,915.00
4. Future Loss of Earnings	R 2,875,393.50
TOTAL DAMAGES SUFFERED	R 8,904,556.46

Interest shall run from 12/12/2011 (per the previous Court Order) at 10% per annum to date of full payment.

HAS THE OCCASION ARISEN FOR THE COURT TO MAKE AN ORDER GRANTING ABSOLUTION FROM THE INSTANCE IN THE INTEREST OF JUSTICE AS REQUESTED BY THE DEFENDANT?

[223] The Court's consideration of the Defendant's application for absolution from the instance is now on final stages. As a reminder of where the process is, let me quote what I said in paragraph 25 above: "[25] *The question now is whether there is evidence related to the elements of the Plaintiff's claim upon which this Court could or might find for the Plaintiff? It is common cause that the Defendant's application for absolution from the instance should be granted if the Plaintiff does not put forward sufficient evidence to secure judgment in his favour. The Plaintiff has to make out a prima facie case to survive absolution. In this regard, the Court is called upon to proceed and determine the*

past and future medical and related expenses as well as past and future loss of earnings.”

[224] It is now common cause that the Court proceeded and determined the past and future medical and related expenses as well as past and future loss of earnings. The Court's finding is that the Plaintiff appeared to be a very honest witness who testified to the best of his abilities and memory, without ever changing his evidence or refusing to answer any question. His evidence stood firm under cross examination and there were no contradictions of note. The Defendant's Counsel had stated that the Plaintiff testified about facts not pleaded. The Defendant's Counsel could not elicit any contradictions during cross-examination. The evidence that another account existed in the US and the Plaintiff's inability to get records of this account was explained by the Plaintiff. The fact that he could not produce any proof of the account is to his own disadvantage and does not reflect negatively on his credibility. The evidence in relation to his injuries correlated with the reports and evidence by the experts. He was indeed a very honest and open witness and as such, the Court accepted his evidence without any reservation.

[225] In addition to the Court's finding above, the evidence given by the witnesses called by the Plaintiff has been accepted by the Court as there are no grounds to reject it. Furthermore, no credible evidence was produced by the Defendant that contradicted the factual evidence of the Plaintiff's witnesses. All the issues raised by the Defendant were explained away. The difference in calculation between the two actuaries was due to different instructions. The Defendant's assumptions regarding earning capacity were irrational and blatantly incorrect, if one has regard to the facts of the case.

[226] In this instant case and having taken into account the Plaintiff's evidence, postulations and predictions by the Experts who examined the Plaintiff, and the actuary's predictions, and the previous Court decisions, the Court has concluded that the evidence led by the Plaintiff and his witnesses is credible and as such, the Plaintiff has discharged the onus on him to prove the loss on a preponderance of probabilities.

Principles and requirements that a Court faced with an absolution application ought to consider

[227] The principles and requirements that a Court faced with an absolution application ought to consider are now entrenched. As to those principles and requirements, it would be wise to refrain from inventing the wheel, as it were. The test for absolution from the instance has been settled by the authorities. The principles and approaches have been followed in several cases. They were approved by the Supreme Court in *Stier and Another v Henke* 2012 (1) NR 370 (SC). There, the Supreme Court stated: “[4] At 92F-G, Harms JA in *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA) referred to the formulation of the test to be applied by a trial court when absolution is applied at the end of an appellant's (a plaintiff's) case as appears in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409 G-H:

“ . . . when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, or ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T).) ”

[228] Another important principle that the Court determining an absolution application should consider is this. The clause ‘applying its mind reasonably’, used by Harms JA in *Claude Neon Lights (SA) Ltd* ‘requires the court not to consider the evidence *in vacuo* but to consider the evidence in relation to the pleadings and in relation to the requirements of the law applicable to the particular case.’ (*Bidoli v Ellistron t/a Ellistron Truck & Plant* 2002 NR 451 at 453G)’ Harms JA went on to explain at 92H - 93A:

“This implies that a plaintiff has to make out a *prima facie* case — in the sense that there is evidence relating to all the elements of the claim — to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G- 38A; *Schmidt Bewysreg*

4 ed at 91-2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is "evidence upon which a reasonable man might find for the plaintiff" (Gascoyne (*loc cit*)) — a test which had its origin in jury trials when the "reasonable man" was a reasonable member of the jury (Ruto Flour Mills). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another "reasonable" person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interest of justice. . . ."

Conclusion on the Defendant's application for absolution from the instance

[229] Thus, at the close of the Plaintiffs' case, having considered the evidence in relation to the pleadings and in relation to the requirements of the law applicable to the case, I conclude that the Plaintiff has made out more than just a *prima facie* case upon which a Court applying its mind reasonably could or might find for the Plaintiff⁴⁶. The evidence led, *in casu*, by the Plaintiff and his witnesses is credible and therefore, the Plaintiff has discharged the onus on him to prove the loss on a preponderance of probabilities.

[230] I have taken into account all the foregoing reasoning and conclusions. I have also kept in my mind's eye the judicial counsel that a Court ought to be cautiously reluctant to grant an order of absolution from the instance at the close of Plaintiff's case, unless the occasion has arisen. If the occasion has arisen, the Court should grant absolution from the instance in the interest of justice⁴⁷. However, *in casu* the occasion has not arisen for the Court to make an order granting absolution from the instance in the interest of justice. I conclude that the Plaintiff has passed the mark set by the Supreme

⁴⁶ *Stier and Another v Henke* 2012 (1) NR 370 (SC) paras 4.

⁴⁷ *Etienne Erasmus v Gary Erhard Wiechmann and Fule Injunction Repairs & Spares* [2013] NAHCMD 214 (24 July 2013).

Court in *Stier v Henke*, which is that for the Plaintiff to survive absolution, the Plaintiff must make out a *prima facie* case upon which a court could find for the Plaintiff. The Plaintiff *in casu* has made out more than just a *prima facie* case. The Plaintiff has discharged the onus on him to prove the loss on a preponderance of probabilities. The Plaintiff has therefore survived absolution. That being the case, quintessentially the Defendant's application for absolution from the instance is bound to fail.

[231] In the results, the following ruling is made:

1. The Defendant's application for absolution from the instance is not granted.

[232] Consequently, the following order is made:

1. The Defendant is ordered to pay the Plaintiff a sum of R 8,904,556.46 (eight million nine hundred and four thousand five hundred and fifty-six rand forty-six cents), in respect of the Plaintiff's claim for the past and future medical and related expenses, as well as past and future loss of earnings, within 30 (thirty) days of this order. The aforementioned sum is calculated as follows (breakdown):

1.1 Past Medical Expenses	R 64,975.21
1.2 Future Medical Expenses	R 851,272.75
1.3 Past Loss of Earnings	R 5,112,915.00
1.4 Future Loss of Earnings	R 2,875,393.50
TOTAL DAMAGES SUFFERED	R 8,904,556.46

Interest shall run from 12/12/2011 (per the previous Court Order) at 10% per annum to date of full payment.

LEGAL COSTS

Plaintiff's argument that the Court should consider awarding costs on attorney and client scale against the Defendant for the following reasons:

[233] The Plaintiff was an obstructive litigant from the start. On the first day of trial it already asked for a postponement, which was granted by his Lordship Ledwaba DJP with costs on an attorney and client scale.

[234] On the 2nd day of trial the Defendant was not ready to proceed on the quantum issue as it had not instructed any of its own experts.

[235] The Defendant objected to an amendment by the Plaintiff where the Plaintiff had merely amended its claimed amount to account for the updated actuary report. This resulted in the trial day having to be utilised for the hearing of the opposed application for amendment, which application was granted after the presiding judge confirmed the Defendant's basis for its objection was ill-conceived.

[236] The Defendant refused to engage in the limiting of triable issues. It refused to allow the joint minutes between experts to be allowed as evidence and forced the Plaintiff to call three expert witnesses where there were basically agreements on all the major issues.

[237] The Defendant opposed an application for the Plaintiff's Ophthalmologist's affidavit and report to be used as evidence, when it knew that its own expert agreed with the Plaintiff's expert findings and there was no real dispute regarding his evidence.

[238] All of the above caused an enormous waste of Court time and recourses to the expense of the judicial system and the Plaintiff. The Plaintiff should not be out of pocket due to the clear obstructive behaviour of the Defendant.

Defendant's counter-argument

[239] The Counsel for the Defendant counter-argued that it is common cause that the Plaintiff's legal representatives addressed a letter dated the 01st day of November 2023, to the Defendant's attorneys and the relevant paragraph read as follows: '*We will not be*

withdrawing our Rule 38 (2) application although our expert is available to testify. There are joint minutes where both the Ophthalmologist agree and by our expert testifying are we wasting money as well as the Court's time. We will also be asking for a de bonis propriis costs order for the application'.

[240] The Counsel for the Defendant submitted that the costs follow the result and the Plaintiff should pay the costs of the interlocutory application on an attorney and client scale.

[241] The Counsel for the Defendant further submitted that should Dr van der Merwe not being called to testify, the Honourable Court and the Defendant's legal representatives would not have known that there are hospital records; clinical notes and findings; copies of operations documents which were never shared with the Defendant's experts.

Applicable legal principles to legal costs

[242] On general principles, the following was held in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1996] ZACC 27; 1996 (2) SA 621 (CC) Para 3 (footnotes omitted): *"The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings. I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by their*

nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation.”

[243] As Howie JA (as he then was) said in *Price Waterhouse Meyernel v Thoroughbred Breeders' Association of South Africa* 2003 (3) SA 54 (SCA) ([2002] 4 All SA 723) at para 18: “A costs order – it is trite to say – is intended to indemnify the winner (subject to the limitations of the party and party costs scale) to the extent that it is out of pocket as a result of pursuing the litigation to a successful conclusion. It follows that what the winner has to show - and the Taxing Master has to be satisfied about – is that the item in the bill are costs in the true sense, that is to say, expenses which actually leave the winner out of pocket.”

[244] Matters of costs are always important and sometimes complex and difficult to determine. In leaving a Judge a discretion, the law contemplates that he should take into consideration the circumstances of each case. He must carefully weigh the various issues in the case, the conduct of the parties, and any other circumstances which may have a bearing upon the question of costs, and then make such order as to costs as would be fair and just between the parties.

[245] As the starting point the Court must determine whether any costs are payable to any of the parties. Once the court has decided that costs are payable it has to decide who of the parties is entitled to costs. This exercise cannot be embarked on capriciously or by chance, there should be sound legal principles upon which the decision is based.

[246] The idea behind granting a costs order in favour of a successful party is to indemnify it for its expense in ‘having been forced to litigate’. Further, a balance must be struck ‘to afford the innocent party adequate indemnification within reasonable bounds’. In order to achieve the necessary balance, the individual circumstances of each case must be taken into account.

[247] A Court exercising a wide discretion may choose from all the options at its disposal and award a cost order that it considers just in the circumstances of the case at hand. The Court has to, *inter alia*, consider the conduct of the parties during the actual litigation process, all other matters that lead up to and occasioned the litigation and whether there were attempts to settle the matter before and during the litigation. The extent to which a party raised, pursued or contested a particular issue and whether it was reasonable for that party to pursue that issue.

[248] The Court's approach is to look first at who the successful party is. I believe that the principle that costs should follow the result is fair too. In the end, the exercise of the Court's discretion on costs, is an exercise to determine what is fair, an enquiry in which substantial success carries significant weight. Substantial success is often described as the general, although not an inflexible rule. It is not easily departed from, as in general, the purpose of a costs award is to indemnify the successful party.

[249] In general application of the guidelines that Courts follow, once I find that the Plaintiff is substantially successful, the question is if fairness dictates that the Plaintiff should be awarded costs or deprived of costs. I am not persuaded by the argument advanced by the Counsel for the Defendant. I am persuaded by the argument advanced by the Counsel for the Plaintiff. The Plaintiff is substantially successful in his claim. In my view, the Plaintiff has won hands down *in casu*. The Plaintiff is substantially successful and therefore entitled to a cost order in his favour.

[250] In the results, the following Cost Order is made:

1. The legal costs are awarded in Plaintiff's favour on a party and party scale.

T E JOYINI
ACTING JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

Counsel for the Plaintiff: Mr HW Theron
Instructed by: HW Theron Attorneys Inc.
Counsel for the Defendant: Adv TC Kwindu
Instructed by: JL Raphiri Attorneys Inc.

Date of Hearing: 6,7,8,9,10, and 13 November 2023
Date of Judgment: 18 December 2023

This Judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by e-mail to the Attorneys of record of the parties. The deemed date and time for the delivery is 18th of December 2023 at 10h00.