<u>IN THE HIGH COURT OF SOUTH AFRICA</u>
<u>FREE STATE DIVISION, BLOEMFONTEIN</u>

Case no: 128/2018

Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO

In the matter between:

WP M	Plaintiff
and	
THE ROAD ACCIDENT FUND	Defendant
(CLAIM NO: 560/12522085/1075/0 & LINK NO: 4127045)	

<u>CORAM:</u> OPPERMAN, J

<u>HEARD ON:</u> 19 & 20 July 2022 and 29 July 2022

<u>DELIVERED ON:</u> The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 12 September 2022. The date and time for hand-down is deemed to be 12 September 2022 at 15h00

<u>JUDGMENT BY:</u> OPPERMAN, J

<u>SUMMARY:</u> Failure of the plaintiff to prove the *nexus* between the *quantum* claimed and the injury for a claim of past and future loss of income

JUDGMENT

INTRODUCTION

[1] It is trite that patrimonial damages, that is also called "special damages", allow for a claim of the monetary equivalent of the <u>actual loss</u> suffered. The claimant must be placed in the same state or situation that would have existed if it was not for the injury or damage suffered; the financial *status quo* before the injury occurred, must be restored by the order of the Court.

[2] <u>There must be a nexus between the injury and the loss and the *quantum* of the loss</u>.

[3] The restoration of what is just must be ordered; nothing more and nothing less should be ordered by a Court for effective justice to prevail. Parties must come to Court on trial with the best evidence. This is the constitutional decree to serve the administration of justice and give credence to the Rule of Law.

[4] A claim for past and future loss of income due to an unlawful act of another is an example of patrimonial damages. This very alleged loss of past and future income due

to the loss of earning capacity of the plaintiff and the *quantum* thereof, caused by the injuries sustained in a collision on 7 August 2015, serves before Court for adjudication.[1]

[5] The peculiarity of this case is that the plaintiff caused his own loss of income by resigning from his job. There is a lack of evidence on the causal link between the injuries and the loss; the resignation caused the loss not the injuries.

[6] The fact that the resignation caused the loss is common cause between the parties. The reason for the resignation is in dispute, vague and unsubstantiated. I will deal with the issue in detail hereunder. There are also the pre-existing physical impairments of the plaintiff that was not calculated in the *quantum* of the loss.

[7] The basis on which the claim was calculated by the actuaries was that the claimant had to resign in August 2017, only managed to secure lower paying jobs from October 2017 to end of 2019 and is expected to remain unemployable in the future.[2] This is not the complete reality.

[8] The above instruction by the Industrial Psychologist to the actuaries is patently wrong on the proven evidence before Court. This caused the outcome of the calculations to be mistaken.

[9] There is a real difference between earning capacity and loss of earnings. It is common cause that the plaintiff is for the most part unemployable after the incident with very little earning capacity at this point in time. It is not that he is unable to work; it is unlikely that he will obtain a job on the objective factors that prevails in the labour market area. He is limited to sedentary work with early retirement predicted to be 3 to 5 years from said sedentary work. The Industrial Psychologist found that:

In my opinion it is highly unlikely that he will obtain and sustain a sedentary position requiring some administrative capacity or skills. He is already 54 years old and it will be

[1] Paragraph 2.1 of the Heads of Argument of the Plaintiff dated 22 July 2022.
[2] See paragraph 2.1 of their report at page 189 of the Bundle: "Expert Notices".

difficult for him to reskill himself and compete with better qualified people in this market area. He only has grade 10 and technical qualification. It was not his career intention to do sedentary work. He does not fall in the equity group and it is very difficult to see where he will find suitable sedentary work.[3]

THE DISPUTE

[10] Counsel for the plaintiff argued in their Heads of Argument that the only matter to be adjudicated is the narrow issue of the contingencies to be applied in the calculations of the past and future loss of income based on the evidence of the Industrial Psychologist and the other experts.[4]

[11] In his opening statement he, in so many words, alluded to the reasons for resignation by the plaintiff to be in dispute and that Counsel for the Road Accident Fund does not accept the contingencies and basis for the calculations applied by Munro Actuaries for the plaintiff due to the erroneous scenario suggested by the Industrial Psychologist. He is correct.

[12] Counsel for the plaintiff is correct when he indicated in their Heads of Argument that the plaintiff's career paths are not in dispute. He worked for 30 years at the Department of Public Works (the Department) and resigned in 2017. He became self-employed for two years when his son resigned and the business did not continue in 2019. After the collision he was gainfully employed at the Department for two years and he ran a business for another two years afterwards. His son resigned and that is how the business ended.

[13] The issue is where does the loss of income lie and on what basis must the calculations be made. The calculations of Munro Actuaries were correct but based on an erroneous basis. <u>In fact, there is not any loss of income that can be attributed to the</u>

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[3] Paragraph 3 at (h) of his report on page 13 of the report and page 173 of the Bundle "Expert Notices" (Exhibit E).

[4] Paragraph 2 of the plaintiff's Heads of Argument dated 22 July 2022.

<u>injuries as the evidence stands. The income at the Department of Publics Works may not be used as foundation to calculate the loss of income and the business venture of the plaintiff also not.</u>

[14] The defendant argued that:

38. The Honourable Court is called upon to determine what amount of loss can be attributed to the accident in question, and which the Defendant will ultimately be liable for.

39. The Plaintiff was not referred to a Clinical Psychologist and no diagnosis of depression or other cognitive fall outs have been made. His version that he resigned due to his emotional state and that he was incapable of making an informed decision as a result thereof, should be disregarded. In all probability, the Plaintiff, employed on middle management level and therefore fully conversant with the polices of his employer by virtue of his position, elected to resign to pursue his own business endeavours. This is supported by his testimony that he advised his employer that the reason for his dismissal is to start his own business. Logic dictates that a person who resigned because of injuries sustained which prevent him from doing his work, would indicate such to his employer. If the Plaintiff truly had no other option, it would have been reflected by exhausting his sick leave, long absences from work other than recouperation after the accident and for his surgeries. It would have been reflected in steps taken by his employer for incapacity or ill-health retirement steps at the initiative of the employer. Contrary to his testimony that he assisted his son who was running a business, the Plaintiff advised the Occupational Therapist that his son was his employee, and that he had plans to continue with and grow his business.

40. Item 10 of the Code of Good Practice: Dismissal in Schedule 8 (The Code) draws a distinction between a permanent and temporary incapacity as follows: Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or

the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal.

41. Item 11 of Schedule 8 to the Code states that any person determining whether a dismissal arising from ill health or injury is unfair should consider— a) whether or not the employee is capable of performing the work; and b) if the employee is not capable— i) the extent to which the employee is able to perform the work; ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and iii) the availability of any suitable alternative work.

42. The Labour Relations Act clearly places specific duties on the employer when it relates to ill health and injury, and Government Institutions are even more regulated by collective agreements with organised labour. The Occupational Therapist indicated that the Plaintiff still has residual work capacity, and that he can perform sitting tasks for majority of the day, with standing, walking and stair climbing up to 33% of the day and elevated work, forward bend work and kneeling limited to 5% of the work day. Dr Oelofse further made provision for 3 years early retirement.

43. Had the Plaintiff therefore engage his employer on the difficulties he was facing with doing his job as a result of the injury, which in fact was an injury on duty, he might have been accommodated, and the outcome would have been very different.

44. The report of Dr Jacobs, with respect, is merely a regurgitation of other expert opinions and the version of the Plaintiff. His explanation that other scenarios cannot be considered, simply because it did not transpire in that way, does not assist the Court in fairly assessing the loss attributable to the accident in question. Dr Jacobs admitted during cross-examination, that he should have considered ill-health retirement.

45. The Plaintiff wants the Defendant to compensate him for his loss amounting to R 4 621 300.00, according to the report of Munro actuaries.

46. It is the submission of the Defendant, that it cannot be held liable for the loss suffered by a person who in no manner mitigated, but in fact exasperated his loss. The evidence which flows from the Plaintiff's own testimony in Court, cannot simply be ignored, and only be addressed by contingencies. The Defendant respectfully submit that the only fair outcome would be to instruct the Actuary Counsel to do the following calculations:

1) Had the Plaintiff follow internal remedies and the employer have accommodated him, and he continued working on the same salary and postulations and before the accident, with 3 years early retirement;

2) Had the Plaintiff's services been terminated on the basis of ill-health retirement;

52. (sic) A fair outcome would lie in the median between the above-mentioned calculations.

53. Should the Honourable Court not be inclined to make such an order, then it is important to note that Dr Oelofse apportioned only 50% of the sequelae of the cervical spine injuries as attributable to the accident. He also only attributed 50% of the sequelae of the knee injury to the accident, considering pre-accident Osteoarthritis, which was also present in the injured, right knee. The Lumber spine injury and fusion occurred prior to the accident.

54. It would then be the submission of the Defendant that much higher contingencies be applied to the uninjured scenario.

55. Dr Jacobs did not in any manner verify the Plaintiff's alleged post accident income, by requesting bank statements or tax returns. This should also be considered by the Court when applying contingencies.

[15] Contingencies shall only be applied and considered if the causal link between the injuries and the loss was proved; when the incident and loss was proven to be causally connected. The injuries were not the cause of the alleged effect of R4 621 300.00. <u>Contingencies shall not be used to fix a broken case.</u>

[16] Crucial is what the primary issue in this case is not about. It is not about the plaintiff's duty, or not, to mitigate his losses. That said; claimants may not be reckless with their fate and circumstances and expect that the Road Accident Fund must remedy the situation.

[17] Courts must apply the same diligence when adjudicating matters wherein the Road Accident Fund is a party as in other cases; the fact that the coffers may be deep does not permit that sympathy for the plaintiff must cause warped law and dubious justice. The parties, the expert witnesses and all involved must show due honour and integrity to the administration of justice when they prepare and present their case.

[18] The judgment, to give perspective to the above, will first depict the facts and evidence and thereafter the findings thereon. The law will then be portrayed followed by the conclusion.

THE FACTS

Introduction

[19] The plaintiff was 49 years old when the incident happened. He is married with two children. His wife is a dentist. Both the plaintiff and his wife are breadwinners for the household. In 2019 his 24-year-old son helped him run his handyman business and his 17-year-old son was still in school. In the meanwhile, his oldest son has started his own business. It is not known what his youngest son's circumstances are currently.

[20] At the time of the accident and *for two years afterwards*, he was gainfully employed by the Department of Public Works as a Construction Project Manager. He was on middle management level (MMS).

[21] The plaintiff, on his admission during *viva voce* evidence, resigned thoughtlessly and impulsively in 2017, two years after the incident; after 30 years of service. He realised his mistake and endeavoured to retrack the resignation but could not.

[22] His income, hereafter, dropped significantly from R586 392.00 per year in December 2015 and an estimated R687 171.00 per year in April 2017[5] to about R3000.00 to R4000.00 per month in 2017 and he ended up unemployed in 2019 and until the time of the trial in 2022.

[23] The Industrial Psychologist conceded, also during *viva voce* evidence, that the plaintiff should have considered negotiations with his employer for sedentary sympathetic duties or ill-health retirement and should not have resigned as he had given his circumstances.

[24] There is not any evidence on record that the plaintiff was forced to resign due to his injuries.

The incident & the loss of income

[25] The collision, in August 2015, occurred when the plaintiff was driving on the Dewetsdorp – Zastron road and he collided with a trailer of a vehicle that made a sudden U-turn in front of him. He drove himself to the hospital after the accident but the queue was too long and he went home.[6]

[26] He reported to his Occupational Therapist that due to the fact that it was an injury on duty, his boss required from him to attend the hospital and that he returned to the

[5] Estimation by the actuaries for the plaintiff whose evidence on this issue was admitted to be true and correct by both parties. The calculations were true and correct. See paragraph 4.1 of Exhibit E: Munro Actuaries Report. The plaintiff adduced salary slips to the Industrial Psychologist only up until 2015. It is not clear why the salary earned until 2017 was not adduced by way of the same; a salary slip.
[6] Paragraph 3.2.2 of the report by the Occupational Therapist on page 6 of the report and page 105 of the Bundle “Expert Notices” (Exhibit D).

hospital a few days later where x-rays were taken of his left knee, right shoulder and back. The diagnosis of that day is unknown. He was sent home with pain medication.

[27] His Counsel informed from the bar that he did not receive any benefits awarded in terms of the Compensation for Occupational Injuries and Diseases Amendment Act, Act 61 of 1997 for the injury sustained on duty. It was accepted by the defendant.

[28] There is not any indication that his employer was dissatisfied with his performance for two years notwithstanding his injuries and capacity to work.

[29] The plaintiff indicated a final warning against him in regards untoward conduct against a co-worker(s) by the plaintiff. This is the only evidence about it and no corroboration or detail were submitted to the Court. I will discuss this later again when I depict the evidence and give reasons for the evaluation of the evidence and the final finding.

[30] The admission of the Industrial Psychologist during *viva voce* testimony that the plaintiff should have explored his options within the Department of Public Works; his employer, and not just resigned on a whim to start a business and the evidence of all the witnesses indicate that the most likely outcome would have been that the plaintiff could have been placed on ill - health pension with all the benefits such as medical aid and pension that would have continued. He could also have negotiated for his duties to be adapted to sedentary work and he could have been employed up to the age of 62-years-old.

[31] His resignation caused an immense loss of income and benefits.

[32] A statement from the erstwhile employer in this instance would have solved the whole case. It just does not make sense that it was not forthcoming. One cannot speculate on the reasons for the fact that the employer was not called to testify or

statements adduced. The plaintiff will have to carry the consequences if findings to his detriment eventuate.

[33] At paragraph 8.1 of the report of the Industrials Psychologist (page 5 of the report and page 165 of the Bundle "Expert Notices") the plaintiff noted that: "He was satisfied with his job and his employer."

[34] The mistake that Industrial Psychologist made not to consult with the employer resulted in the situation that the Court was not privy to all the material evidence and could not rely on the calculations of Munro Actuaries. The Industrial Psychologist did not consult the erstwhile employer, did not obtain evidence on the reason for the resignation, why the resignation was not permitted to be withdrawn and what the situation would have been if the plaintiff did not resign. The only evidence available on the issue is that of the plaintiff. He is vague and inconsistent on the issue.

[35] The uninjured calculations were not supposed to be based on the income from the Department. The injuries did not cause the loss of income from the Department. The plaintiff was not forced to resign.

[36] He chose the "lower paying job" to be a business venture that he and his son started. The plaintiff was not forced to take a lower paying job. The business could have evolved successfully but the son resigned. The plaintiff reported to the experts that he wanted to expand the business. The Court did not receive any evidence on the circumstances of the business itself. The evidence is contradictory and vague as to the reason for the business not continuing. It came to a standstill because his son resigned; not because he cannot do sedentary work as he had done when his son was still working for him and keep the business going by appointing another employer or partner. No evidence was adduced by way of bank statements or other corroborating evidence as to what the real income of the plaintiff was after he resigned. It is also not clear how this income was included in the final calculations.

[37] The plaintiff joined the GEPF on 17 February 1987 and he was entitled to and paid a retirement lump sum of R3 168 790.00 that the actuary spread on an actuarially neutral basis on a monthly basis not to be allocated to a single year loss.

[38] The Orthopaedic Surgeon indicated the Plaintiff had pre-existing spondylosis of his cervical spine and only 50% of his symptoms can be attributed to the accident. He had an unspecified lumbar spine injury prior to the accident, **he has a history of backpain**, spondylosis and underwent a previous L4 – S1 fusion. Conservative treatment was prescribed for this injury. Treatment for the shoulder injury should focus on long-term rehabilitation to regain as much function as possible. From the x-rays, it is apparent that the plaintiff also had Osteoarthritis of his right knee which was not injured in the accident, he already had degeneration in his left knee prior to the accident and therefore 50% of his symptoms relating to his knee is apportioned to the accident. This was not included in the calculations of the actuaries. The Industrial Psychologist or legal representatives did not give them any instructions on this vital aspect.

[39] The statement by Counsel for the plaintiff in their Heads of Argument that the plaintiff was pain-free before the incident is not correct.[7] It did apparently increase but not to the extent that he could not do sedentary work.

THE EVOLVEMENT OF THE CASE AND THE EVIDENCE

[40] Justice delayed is justice denied. The reality is that the seven years it has taken to bring the matter to trial on the issue of loss of income weakened and complicated the evidence and justice. The question may also be asked as to why all the evidence relevant to the adjudication of the case was not collected in the seven years. I realise that Counsel for both the plaintiff and the defendant was mandated later in the proceedings.

[7] Paragraphs 6.2 and 6.3 of the Heads of Argument.

[41] The Particulars of Claim reads as follows in regard to the nature of the claims and the quantum:

7.1	Past medical and hospital expenses (As per claims schedule received from government employee medical scheme attached hereto as Annexure "B"	R313 796.42
7.2	Future medical and hospital expenses (Annexure "A")	R1 448 100.00
7.3	Past and future loss of income (The calculation of which appear from the report by Munro Forensic Actuaries dated 31 March 2021 attached hereto marked Annexure "C")	R4 621 300.00
7.4	General damages	R500 000.00
	TOTAL	**R6 883 196.42**

[42] The *quantum* and the merits of the plaintiff's claim was separated and on 25 April 2019 Mathebula, J granted judgment on the merits in favour of the plaintiff with costs. The matter again served before Mathebula, J on 15 and 16 March 2022 and he postponed to the pre-trial roll of 4 April 2022.

[43] On 4 April 2022 Daffue, J made an order by agreement between the parties which settled the plaintiff's claim for general damages (R400 000-00), future hospital and medical expenses in terms of an undertaking in terms of section 17(4)(a) for 100%

of the costs and he ordered and interim payment of R1000 000.00 (one million) in respect of the plaintiff's claim for past and future loss of earnings.

[44] It seems as if the defendant was *ad idem* to the fact that the plaintiff suffered a loss of past or future income of, at least, R1000 000.00 due to the interim payment agreed to in April 2022. The reasons for the interim payment were not made known to the Court in the instance.

[45] The plaintiff's claim for past hospital and medical expenses was also separated to be adjudicated in future. This will be after the issue of past and future loss of income was adjudicated *in casu.*

[46] The parties, during the trial that commenced on 19 & 20 July 2022 before myself, agreed that the following expert reports shall serve as evidence before Court and that the information contained therein is admitted as true and correct *but for the issues with the Actuarial Report*:

Exhibit A: Dr JJ Schutte (General Practitioner) (RAF 4)
Exhibit B: Dr LF Oelofse (Orthopaedic Surgeon)
Exhibit C: Dr LF Oelofse & Dr MB Deacon (Orthopaedic Surgeons)
Exhibit D: L van Zyl (Occupational Therapist)
Exhibit E Mr C du Plessis and Mr W Boshoff and Ms J Valentini (Munro Forensic Actuaries)
Exhibit F: Dr E Jacobs (Industrial Psychologist)
Exhibit G: Curriculum Vitae Dr E Jacobs

[47] The plaintiff and Dr Jacobs rendered *viva voce* evidence.

[48] The defendant did not adduce any evidence and closed their case as such.

[49] Counsel argued their cases on 29 July 2022 and I am indebted to them for their contributions.

[50] The evidence itself

1. In essence, the plaintiff, on his own version, caused his unemployment and resultant loss of income because he resigned recklessly. That said; it is a fact common to the litigants that he suffered from chronic pain and *sequelae* that made it difficult for him to do his job. The evidence of the plaintiff is also that he resigned because he wanted to start a business with his son. The experts indicated that he is able to do sedentary work to up until 60 to 63 years of age.

2. There is not any evidence that the plaintiff had to resign. The Industrial Psychologist's instruction to the actuaries that the plaintiff had to resign is patently wrong. (See paragraph 2.1 of their report at page 189 of the Bundle: "Expert Notices")

3. He has been employed at the Department of Public Works for almost 30 years at the time of his resignation and his reasons; or lack thereof, for not negotiating and acquiring more sympathetic work conditions or ill-health retirement at his employer are concerning. He just did not do it. He gave the reason for resignation to his employer to be to start a business.

4. On questions by the Court, he indicated that he did want to retract his resignation but the employer did not want to accept it. He could not obtain a reason for their refusal. From his evidence it is not clear if he did indeed do a proper inquiry on the issue. He was a member of the Public Servant's Association but did not call in their assistance for possible unfair labour treatment. He was vague on the issue. Again, evidence from the employer on the issue is vital.

5. The plaintiff, in the witness doc, presented as a man with little drive and interest in his fate and future. His evidence must be labelled as lacking veracity and immensely vague.

6. Although the plaintiff denied during his testimony in Court that he was ever diagnosed with depression; he clearly lied to Occupational Therapist about it.

The plaintiff phoned her the day after their consultation and informed her that he was not honest about his emotional state as he felt embarrassed. He reported that he in fact struggle with his emotions; he becomes upset about the smallest things and experience road rage. He feels depressed and has a dry mouth and also struggles with intimacy.[8] This was in June 2019 not 2017 when he resigned. The cause of the depression is uncertain and the depression could have developed after his resignation in 2017.

7. He was referred to a Clinical Psychologist but at the time of the trial he did not testify that he received any treatment and testified that he had not been diagnosed as such. As indicated, he did not impress as a person that will endeavour to improve himself and his circumstances.

8. Evidence of an expert on the psychology of the plaintiff at the time of his resignation in 2017 was not adduced by the plaintiff.

9. The evidence of the Industrial Psychologist supports the finding of the Court that the conduct of the plaintiff to resign was unacceptable in the circumstances. The Industrial Psychologist conceded that the plaintiff should have taken steps to mitigate his circumstances by implementing either his employer's assistance to be moved to sedentary duties that would accommodate the *sequalae* of his injuries or implemented the option of ill-health pension benefits. He maintained that the plaintiff is for all purposes unemployable.

10. That said; the fact that this witness as expert did not obtain evidence from the erstwhile employer before forming his opinion and instructing the actuaries is disappointing.

11. The fact that the plaintiff did not adduce the evidence of the employer; the Department of Public Works, is more so disappointing and frustrating. It is a failure of the administration of justice. <u>Litigants may not expect from Courts to speculate on their behalf or to the detriment of the taxpayer's interest when adjudicating cases of this nature. Monies in the coffers of the Road Accident</u>

[8] Paragraph 7 of the report of the Occupational Therapist at page 29 of the report and page 128 of the Bundle: "Expert Notices".

Fund must never be deemed to be easy money. Claims must be proven with diligence and integrity.

12. The fact that no evidence was adduced as to the emotional state of the plaintiff when he resigned is fatal for the plaintiff's case. The Court may not speculate on his behalf. There is not any evidence such as absenteeism from work or other factors that can assist the Court in this regard. There was not any mention to the Industrial Psychologist of any emotional impediments. The witness reported that the plaintiff was satisfied with his work and his employer.

13. The Industrial Psychologist assessed the plaintiff on 11 June 2019 and 16 October 2020 and opined at pages 13 to 14 of his report that the plaintiff would have been able to do sympathetic sedentary work. It is clear from this opinion that if the plaintiff did not resign, he could have been considered to be employed to do "sympathetic" duties at the Department of Public Works or be retired on ill-health pension.

14. The plaintiff was able to run a business for two years after his resignation and the reason why he could not proceed is either because he was not physical able to or it was because his son resigned. The plaintiff made different remarks to different experts on the issue. He even remarked that he wants to develop the business.

15. The plaintiff was part of a medical scheme, pension fund and housing and motor scheme according to the Industrial Phycologist. According to the plaintiff's payslips he earned a salary of an average of R38 000.00 and more per month. His handyman business brought it down to between R3000.00 to R4000.00 per month. The Industrial Psychologist stated that:

"Mr. M' injured career can be stipulated as the following:

a) The following guidelines were made known by the experts: (1) he is assessed as not suitable for his pre-accident job as project manager Public Works or his post-accident job as supervisor/handyman (2) he should do sedentary work only (3) early retirement is expected from sedentary work.

b) The medical experts are expecting degeneration of his injuries.

c) Early retirement of 3 years is expected from light/friendly work (Dr Oelofse and Dr Deacon)

d) We know he resigned from Public Works as a result of his injuries and also terminated his role as supervisor/handyman (also as a result of the injuries and low compensation). *(This is incorrect and contradictory to the information supplied by the plaintiff himself at different occasions. The record will show that the evidence of the plaintiff on this issue is very unstable.)*

e) Dr Oelofse and Dr Deacon is of the opinion that he should not perform any physical work.

f) He is not regarded as suitable for any physical job (including that of a supervisor/handyman).

g) The question is therefor whether he can do sedentary work.

h) In my opinion it is highly unlikely that he will obtain and sustain a sedentary position requiring some administrative capacity or skills. He is already 54 years old and it will be difficult for him to reskill himself and compete with qualified people in this market area. He only has grade 10 and technical qualification. It was not his career intention to do sedentary work. He does not fall in the equity group and it is very difficult to see where he will find suitable sedentary work.

i) Although the orthopaedic surgeons suggest 3 years early retirement a more likely scenario in my opinion is that he will remain unemployed for the remainder of his career. He may at best be able to secure a few rare occasional sympathetic jobs. This income will however be sympathetic in nature and insignificant.

16. It is important to emphasize that during October 2017 the plaintiff received a Government Employees Pension Fund pay-out of R 3 168 790.00.

17. Dr Oelofse, Orthopaedic Surgeon's evidence is that:

a) According to the plaintiff he had no loss of consciousness during or directly after the accident.

b) He was able to drive himself to the National Hospital.

c) The plaintiff experienced pain in his head with left parietal bruising, pain in the neck, pain in his lower back, pain in his right shoulder and pain in his left knee.

d) The exact diagnosis of the plaintiff on the date of the accident is not known.

e) According to the plaintiff he received conservative treatment; that is pain medication and was discharged later the same day of the collision and was given pain medication.

f) The plaintiff reported that he was booked of for approximately three months due to the incident and the injuries.

g) The plaintiff sustained injuries to his cervical spine, lumber spine, right shoulder and left knee. He suffers chronic headaches, pain and muscle spasm.

h) The plaintiff had pre-existing spondylosis of his cervical spine and only 50% of his symptoms can be attributed to the accident. He had an unspecified lumbar spine injury prior to the accident, **he has a history of backpain**, spondylosis and underwent a previous L4 – S1 fusion. Conservative treatment is prescribed for this injury.

i) Treatment for the shoulder injury should focus on long-term rehabilitation to regain as much function as possible.

j) From the x-rays, it is apparent that the plaintiff also had Osteoarthritis of his right knee which was not injured in the accident, he already had degeneration in his left knee prior to the accident and therefore 50% of his symptoms relating to his knee is apportioned to the accident.

k) If accommodated in a permanent light duty position, then provision must be made for three years early retirement. Under financial implications on page 5 of his report at 1.4 he reported that the patient was able to continue his employment. This was on 15 March 2017; the date of the examination.

l) The plaintiff attended approximately 20 to 30 physiotherapy sessions.

m) He underwent 3 surgeries as a direct result of the injuries he sustained in the accident. In March 2016, shoulder surgery; the exact nature thereof unknown. An Arthroscopy of the left knee and a second unknown surgery (possible secondary suturing/joining) of his shoulder in February 2017.

n) The plaintiff experienced severe pain after the surgeries but pain medication received in hospital offered sufficient pain relief. The pain will however prevail and increase in intensity to be chronic.

o) Dr Deacon confirms the report. The medication for the pain and discomfort may have serious side effects such and medication that will counteract or minimise the effects will be beneficial to the plaintiff.

18. The diagnosis of Dr JJ Schutte the General Practitioner is soft tissue injury of the cervical spine of pre-existing spondylosis with residual symptoms, soft tissue injury of the lumbar spine, pre-existing spondylosis with residual symptoms, injury of the right shoulder necessitating surgery with residual symptoms, multiple surgeries, rotator cuff weakness and PTOA and soft tissue injury of the left knee joint, residual symptoms and PTOA.

19. The plaintiff indicated to the Occupational Therapist on 27 September 2019 that:

a) He is married with two children. His wife (48 years old) is a dentist. His 24-year-old son helps him run his handyman business and his 17-year-old son is still in school. Both the plaintiff and his wife are breadwinners for the household. He earns very little and uses some of his pension.

b) He drove himself to the hospital after the accident but the queue was too long and he went home.

c) He reported to the therapist that the fact that it was an injury on duty, his boss required him to attend the hospital and that he returned to the hospital a few days later where x-rays were taken of his left knee, right shoulder and back. The diagnosis is unknown.

d) He was discharged the same day with pain medication and referred to a private Orthopaedic Surgeon and Physiotherapist.

e) Physiotherapy treatment was assisting with pain in his left knee. Pain in his left knee was only experienced during physical evaluation which included walking, stair climbing, kneeling and attempting to squat/crouch.

f) He does however experience pain daily. It is the narrative of the plaintiff that when he returned to work after the incident, he struggled to execute his work-related tasks particularly when he was doing inspections on building sites, with tasks such as climbing ladders and getting into a roof, using his hands above his head when inspecting ceilings and lifting heavy loads when doing tile sampling due to pain in the right shoulder. He also struggled to concentrate especially with administration work, due to daily headaches.

g) Again; this was not verified with the employer. <u>The evidence of the plaintiff lacked veracity as to his information to the experts and the Court.</u>

h) At paragraph 4.5 of the 2019-report the plaintiff reported that he plans to continue with and possibly grow his business. He reported that his son, who is his only employee, would like to emigrate, and that he would have to employ someone new when it happens. Ideally, he would like to become more involved in his business should he receive effective treatment for his neck and left shoulder. At 4.4.2 the witness reported that the plaintiff can do supervisory duties with intermittent rest breaks. He was able to sit for 2 hours and 35 minutes during the interview.

i) During assessment, the plaintiff was found to have a slight limitation when sitting, some limitation when walking and some limitation when doing standing work.

j) This witness concluded that <u>the plaintiff is currently suited for sedentary to occasional light work demands. Sitting can be performed frequently, with walking climbing and stair climbing to be limited to 33% of a work day. Elevated work, forward bend standing and kneeling should be restricted to 5% of the work day.</u> The plaintiff's pre-accident work as Construction Project Manager can be classified as predominantly light work with aspects of medium work, but not daily.

k) The plaintiff started his own business with his son, with him exercising a supervisory role which can be <u>classified as work within the sedentary to light parameters.</u>

l) The evidence shows that the plaintiff can still work.

20. From the above it is clear that by the end of 2019, two years after his resignation, the plaintiff terminated his business as supervisor/handyman because his son obtained alternative work and the plaintiff is not capable of doing the work himself. The fact that his son obtained alternative work and that he has been unemployed since December 2019 has no direct causal link to the injuries sustained in the collision of 2015. The fact remains that the plaintiff was able to work from 2017 to 2019 in a sedentary capacity.

21. Corresponding to the above, the plaintiff had the benefit of a state medical scheme that could have perpetuated if he remained in a sedentary sympathetic work environment or was placed on ill-health pension by the Department of Public Works. He could have received medical treatment that would have enhanced his ability to continue to be employed appropriately. Evidence from the employer would have been helpful.

22. His future hospital and medical expenses in terms of an undertaking in terms of section 17(4)(a) for 100% of the costs will ensure that his physical condition is contained. He is able to work.

CONCLUSION AND FINDINGS ON THE EVIDENCE ADDUCED

[51] The plaintiff failed to prove a causal link between his injuries sustained during the collision and the loss of income by resigning to start a business two years after the fact. <u>There is not a link between the injuries and the *quantum* of R 4 621 300.00</u> as it was calculated by the actuaries. <u>The *novus actus interveniens* was the thoughtless resignation of the plaintiff</u>. The income at the Department should not have been used to do the calculations on past and future loss of income.

[52] The fact remains that the plaintiff did not prove on a preponderance of probabilities, or at all, that the *quantum* of his loss of income was linked to his injuries sustained during the collision and caused by the insured driver. On the evidence before Court; he resigned from his job at the Department of Public Works freely and voluntarily; he did not have to resign as the Industrial Psychologist instructed the actuaries. His business was terminated because his son obtained alternative employment, the business was not worth the while and this has nothing to do with the injuries sustained.

[53] Due to the fact that material evidence was not adduced by the plaintiff as to the reason for his resignation and what his income status afterwards was, the Court has many obstacles to overcome before a just and equitable finding in service of the administration of justice can be made. The applicable law now becomes crucial.

THE LAW

[54] The onus is on the plaintiff to prove the loss of income and the *quantum* on a preponderance of probabilities. This means that the plaintiff must prove that he has more likely than not suffered the damage and he must also prove the amount of damages that should be awarded to compensate for that loss; as well as the cause of the damages.

[55] There must be a proven causal link between the damages claimed and the injury. The plaintiff must prove this link to exist in law and in fact. The plaintiff must prove the absence of any *novus actus interveniens*.

[56] *Novus actus interveniens* is Latin for a "new intervening act". In the *Law of Delict*, 6th Edition, Neethling stated that a *novus actus interveniens* is: "an independent event which, after the wrongdoer's act has been concluded; either caused or contributed to the consequence concerned".[9]

[57] Often this is an aspect that is overlooked or only established at a much later stage during litigation. It is essential that proper investigations are done before a case is brought to trial.

[58] In *MEC for Health, Eastern Cape v Mkhitha and Another* (1221/2015) [2016] ZASCA 176 (25 November 2016) the Supreme Court of Appeal held that:

> [13] It is trite that causation involves two distinct enquiries: factual and legal causation. Generally, the enquiry as to factual causation is whether, but for the defendant's wrongful act, the plaintiff would not have sustained the loss in question; whether a postulated cause can be identified as a causa sine qua non of the loss. The second enquiry, legal causation, is whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue; or whether the loss is too remote.
>
> [14] Whilst it is correct that the plaintiff would not been hospitalised but for the negligent driving of the insured vehicle, as regards legal causation, the evidence clearly establishes that there was a novus actus interveniens, namely the negligent treatment of the plaintiff by the medical staff at BOH after she sustained the injuries in the collision, which significantly contributed to the consequences of those injuries.

[59] It is not on the defendant to prove that the claimant did not suffer the loss or the *quantum* of the loss or that there is not a causal link to the injury suffered and the

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[9] Mashile, T: *To prove or not to prove? Novus actus interveniens in third-party claims,* December 1st, 2018 Van der Merwe v RAF (GP) (unreported case no 42358/15, 16-3-2018) (Ranchod J), De Rebus in 2018 (Dec) DR 33, https://www.derebus.org.za/to-prove-or-not-to-prove-novus-actus-interveniens-in-third-party-claims.

damages claimed. This was, rightly so, ruled to be the law in *Van der Merwe v RAF* (GP) (42358/15) [2018] ZAGPPHC 374 (16 March 2018)).

[60] In the *Van der Merwe v RAF*- case the following arguments by the plaintiff; that is in line with the arguments of the plaintiff on the mitigation of damages – argument of the defendant, in their Supplementary Heads of Argument *in casu*, was correctly dismissed:

An argument that firstly, the plaintiffs' Counsel submitted that the defendant's entire argument on this score stemmed from one passage in the industrial psychologist's medico-legal report. Secondly, the argument went, the defendant's Counsel had failed to cross-examine the plaintiff and her two experts hence the defendant could not raise the issue of a *novus actus interveniens*. Thirdly, the defendant had not raised a substantive defence of *novus actus interveniens* and had not adduced any evidence in that regard. Finally, the onus of proving a *novus actus* rested on the defendant.[10]

[61] The information of the conduct of the plaintiff was known to the parties when the trial commenced. The issues were known to the plaintiff and the onus is on them to prove the claim on all its elements. There was a discovery of expert witnesses by the defendant that raised the issues. The report of the actuary for the defendant; although not evidence before Court, was known to the plaintiff.

[62] In *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) the presiding officers that were Corbett CJ, Botha JA, Hefer JA, Smalberger JA and Friedman AJA ruled on the importance of causation in the law of delict. Causation and the question of the remoteness of damages was crucial here. An auditor was sued by a financing company for loss caused by negligent misstatements contained in a report by the auditor of a group of companies. This report was misleading: It did not give an accurate picture of the bleak financial situation of the group for which the company was providing financial facilities. The Court found that the auditor had acted negligently and unlawfully, and so established factual causation. On appeal, however, it was held that the

[10] Mashile *supra.*

company's loss was too remote for the auditor to be held liable. The judgment set out the factors relevant to determining whether or not a loss is too remote.

[63] In *Mafesa v Parity Versekeringsmaatskappy Bpk* 1968 (2) SA 603 (O) the Court held that the defendant was responsible for the damage sustained as a result of the collision, but that a fall afterwards had been caused by the plaintiff's own carelessness. The defendant was not liable for the damage caused thereby: The fall was an intervening cause which broke the causal effect of the original negligence.

[64] In *Road Accident Fund v Russell* (656/98) [2000] ZASCA 66; 2001 (2) SA 34 (SCA) [2001] 1 All SA 160 (A) (24 November 2000) it was ruled that:

> [25] The question raised by the present appeal has as yet not been considered by this Court. However, even though the deceased’s act of suicide may be said to have been deliberate, the weight of the evidence proves on the probabilities that the deceased's mind was impaired to a material degree by the brain injury and resultant depression. Consequently, his ability to make a balanced decision was deleteriously affected. Hence his act of suicide, though deliberate, did not amount to a *novus actus interveniens*. It is unnecessary for the purpose of this case to determine whether the question of *novus actus interveniens* is properly a consideration material to legal causation or, rather, factual causation and that question is accordingly left open.

[65] As recently as in April 2022 in *LM & LM obo CM and JM v Road Accident Fund* (Judgment delivered electronically on 14 April 2022, in the High Court of South Africa, Western Cape Division, Cape Town, Case No: 468/2018) it was ruled that the plaintiff did not prove that the suicide of the person injured in a collision years after the collision did not constitute a *novus actus interveniens* and the claim was denied. <u>There was not any evidence before the Court that the deceased was depressed due to the collision and that any of the alleged depression caused the suicide</u>. *In casu* the reason for his resignation and discontinuation of his business was not proven to be due to the injuries or any depression.

[66] Harms[11] concluded with reference to case law[12] that where the burden of proof is on the one party, there is no evidentiary burden on the other party to testify unless the party on whom the burden of proof rests has established a *prima facie* case. A distinction is drawn between the concept of the burden of proof and the concept of the duty of adducing evidence. The incidence of the burden of proof is a matter of substantive law. *It denotes the duty which is cast on a particular litigant of finally satisfying the Court that he is entitled to succeed on his claim or defence, as the case may be. The burden of proof never shifts.*

[67] In *Road Accident Fund v Guedes* 2006 (5) SA 583 SCA at 586H-587B the Supreme Court of Appeals ruled that it is trite that a person is entitled to be compensated to the extent that the person's patrimony has been diminished in consequence of another's negligence. The Court exercises a wide discretion when it assesses the *quantum* of damages due to loss of earning capacity, and has a large discretion to award what it considers right. Though Courts rely on actuarial computations, it still exercises a wide discretion as to what is just.[13]

[68] The Road Accident Fund of South Africa is responsible for providing appropriate cover to all road users within the borders of South Africa; rehabilitating and compensating persons injured as a result of motor vehicles in a timely and caring manner; and actively promoting the safe use of all South African roads.[14]

[69] It is not a get - rich - quick opportunity and claimants must diligently and with integrity ensure that their costs are limited and proven to be the damages caused by the incident.

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[11] Civil Procedure, *Civil Procedure in the Superior Courts*, Part B High Court, UNIFORM RULE 39 TRIAL, Conduct of Trial, Last Updated: July 2022 - SI 74 at https://www.mylexisnexis.co.za/Index.aspx 30 August 2022.

[12] *Groenewald v Minister van Justisie* 1972 (4) SA 223 (O), *Intramed (Pty) Ltd v Standard Bank of SA Ltd* 2004 (6) SA 252 (W). *Burchell v Anglin* 2010 (3) SA 48 (ECG) paragraph 20, *Munsamy* (also known as Naidu) v *Gengemma* 1954 (4) SA 468 (N); *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 (A); *HA Millard & Son (Pty) Ltd v Enzenhofer* 1968 (1) SA 330 (T), *Aegis Insurance Co Ltd v Consani NO* 1996 (4) SA 1 (A), *Macleod v Kweyiya* (365/12) [2013] ZASCA 28 (27 March 2013) at [10] and *Goliath v MEC for Health, Eastern Cape* 2015 (2) SA 97 (SCA) at [10].

[13] *Duma v Road Accident Fund* [2019] JOL 41486 (KZP).

[14] https://nationalgovernment.co.za/units/view/152/road-accident-fund-raf.

[70] I ruled in *Radebe v Road Accident Fund* [2020] JOL 46803 (FB) that the deeper dispute than numbers, turn on the evidence of the actuary that was based on the evidence of the Industrial Psychologist that was based on the evidence of the plaintiff. It is the case for the defendant that the narrative of the plaintiff cannot be trusted due to contradictions therein and evidence that was not adduced. The defendant *in casu* is correct.

[71] The indolence of plaintiffs to prove their loss of income and circumstances and a practise to settle on the word of experts alone cannot be good law. It causes prejudice to the veracity of the justice system and the experts. Courts and the Justice System are blamed for failure of justice whilst the plaintiff wants for the Court to make mammoth *quantum* orders against the fiscus that is already marred with unsubstantiated claims starved of evidence to justify the orders.

[72] In *Donough v Road Accident Fund* (8962/06) [2010] ZAGPJHC 100 Mbha, J as he then was, struggled with the same frustrations as *in casu*. He said:

> I find it totally unacceptable that the plaintiff's experts…. omitted to contact the plaintiff's employer's post-accident, to corroborate their opinions. Clearly their opinions are merely based on the say-so of the plaintiff.…To show the court's displeasure in the manner in which these experts conducted their investigations, I have decided that they should not be entitled to their full qualifying fees.

[73] It is established law that in civil trials if, in a case where the burden of proof lies on the plaintiff, the Court, after hearing all the evidence, cannot decide to its satisfaction on which side the truth lies, the proper judgment is absolution from the instance. The Court may on the evidence, also find against the plaintiff.

[74] When the Court contemplates, after having heard the evidence of the plaintiff and the evidence, if any, adduced by the defendant, whether or not to grant absolution from the instance, the question to be asked is whether a reasonable man should (or ought) to give judgment in favour of the plaintiff.

[75] Where absolution from the instance is granted after close of a defendant's case, the plaintiff may proceed afresh on its claim without first obtaining the Court's leave to do so. If, however, the plaintiff seeks to proceed again on the same papers, it is required to obtain the Court's permission to do so.

[76] If the probabilities are evenly balanced in the sense that they do not favor the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.[15]

> It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate… If, however the probabilities are evenly balanced in the sense that they do not favor the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.[16]

[77] It also is recognised practise in cases of this nature; as was recommended in the instance by both Counsel for the plaintiff and the defendant, to request a recalculation by the actuaries of the *quantum* on alternative proven scenarios. There is nothing to

[15] *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440H–I, *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie* 2003 (1) SA 11 (SCA) at 14–15, *Dreyer NO v AXZS Industries (Pty) Ltd* [2006] 3 All SA 219 (SCA) at 228c–h and *Oosthuizen v Van Heerden t/a Bush Africa Safaris* 2014 (6) SA 423 (GP) at 430F–J.
[16] *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440H–I.

refer back to the actuaries because there is not a link between the loss of income; past and future, and the *quantum* claimed. There happened a *novus actus interveniens* and the income during his employment at the Department may not be used as basis for the actuarial calculations if it is not proven that the injuries caused the resignation.

[78] The Court will always endeavor to do justice to both parties. The plaintiff may not be penalized and castigated because he, with the advantage of legal aid of esteemed and experienced Counsel, neglected to adduce evidence that will also serve the constitutional duty and purpose of the Road Accident Fund to provide appropriate cover to all road users within the borders of South Africa when such case has been proven.

[79] If the defendant asks for it and the evidence warrants it, judgment may be given in the defendant's favor. Then again, the Court is never bound to grant absolution from the instance in a case where it is deciding on the merits after hearing all the evidence, but in certain circumstances the Court has a discretion.[17]

[80] In *Damont, NO v Van Zyl* 1962 (4) SA 47 (C) at page 52 Bloch, J was faced with a similar conundrum as in this case.

> I am inclined here to do no more than give a judgment for absolution from the instance with costs as the plaintiff may possibly have other defences which might be open to him under the Prescription Act. I am not even certain as to whether the agreement between the parties has been gone into in sufficient detail to be sure in my mind that it might not be unfair to close the door finally upon the plaintiff's case. It looks to me extremely unlikely that the plaintiff can find any way of overcoming this disability of the Prescription Act but I think that the door should not be shut finally. It seems to me, therefore, that in all the circumstances the case requires no more than a judgment of H absolution from

[17] *Corbridge v Welch* (1892) 9 SC 277 at 279, *Damont NO v Van Zyl* 1962 (4) SA 47 (C) at 52, followed in *Mills Litho (Pty) Ltd v Storm Quinan t/a 'Out of the Blue'* 1987 (1) SA 781 (C) at 786I. Also see *Liberty Group Ltd v K&D Telemarketing CC* 2019 (1) SA 540 (GP) at 543G–546D, confirmed on appeal in *Liberty Group Ltd t/a Liberty Life v K&D Telemarketing CC* (unreported, SCA case no 1290/18 dated 20 April 2020).

the instance with costs. The special plea will be upheld and there will be a judgment of absolution from the instance with costs.

[81] Steynberg stated in an article based on case law: *"Fair" mathematics in assessing delictual damages*[18] at footnote 18 in the text that: "The principle applicable to the assessment of damages has as its ratio the policy that the wrongdoer should not escape liability merely because the damage(s) he caused cannot be quantified readily or accurately. The underlying premise upon which the principle rests is that the victim has, in fact, suffered damage(s) and that the wrongdoer is liable to pay compensation or a solatium."

[82] The Court must do its best with the evidence at hand. Unfortunately, the plaintiff did not adduce the best evidence. In *Hersman v Shapiro & Co* 1926 TPD 367 at 379 it was ruled that:

Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is best evidence available, the Court must use it and arrive at a conclusion based upon it. (Accentuation added)

[83] Steynberg *supra* suggests the following legal process to assess damages:

a) The Court should choose the method of assessment carefully, knowing that the method so chosen will influence the use of actuarial calculations and the manner in which contingencies will be taken into account.

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[18] Potchefstroom Electronic Law Journal (PELJ), On-line version ISSN 1727-3781, PER vol.14 n.2 Potchefstroom Jan. 2011, http://dx.doi.org/10.4314/pelj.v14i2.1 on 30 August 2022.

b) In the assessment of the contingency adjustment, the Court should take note of the objective factors present, *inter alia* logic and common knowledge, <u>the proven factual circumstances of the plaintiff,</u> the expert and other evidence, etcetera.

c) In applying subjective considerations, the Court should exercise its wide judicial discretion with caution, especially when making a specific contingency adjustment.

d) The Court should give reasons for deviating from the actuarial calculations and should refrain from making its own mathematical calculations or amending the actuarial calculations of an Actuary Counsel.

e) <u>Finally, the Court should function as the caretaker of the damage assessment process, and not operate as the bully who uses its wide discretion to simply overrule the Actuary Counsel and to usurp the whole assessment process as if it is the sole domain of the Court. The old saying that justice must be seen to be done also applies here. In assessing delictual damages, it is the duty of the Court, within its wide discretion, to ensure that both objective and subjective factors are considered in such a manner that the assessment could be regarded as an application of "fair" mathematics.</u>

CONCLUSION

[84] The plaintiff in this case did not prove the facts on which he wants for the mathematics to be done. The case may therefore be concluded with a dismissal of the claim.

[85] The second option is to order absolution from the instance with costs and with leave to the plaintiff to proceed afresh on his claim on the same papers duly amplified.

[86] The other option is a recalculation of the loss by the actuaries. The problem is that there are many unproven scenarios that might be speculated on. The outcome may still be in dispute between the parties afterwards. It is not known if the plaintiff would have been placed on sedentary and more sympathetic duties or ill-health pension and

what the effect on the plaintiff's salary would have been. Only the employer can attest to that.

[87] The reason for resignation by the plaintiff is also still speculation. Evidence as to his mental and emotional condition might alleviate the elusiveness, vagueness and ambiguity surrounding the issue.

[88] The aspect of the fact that only 50% of the *sequalae* of the injuries was due to the collision as indicated by the Orthopaedic Surgeon, also taints a just and effective finding by the Court.

[89] The plaintiff will receive constant medical treatment on the account of the Road Accident Fund and his health will be contained if he co-operates. If he was able to run a business with his son for two years, he will be able to employ somebody to help him in accordance with his future plans expressed to the experts. This causes a third scenario to be regarded.

[90] I cannot comply with Draft Order B of the plaintiff to: "Upon receipt of the actuarial calculation the parties are to approach Court to make the actuarial calculation of the plaintiff's claim for past and future loss of earning capacity an order of Court." <u>There might still exist a dispute on the *quantum* to be adjudicated due to the fact that the basis on which the calculation must be made is in shambles.</u>

[91] The plaintiff must adduce evidence that the injuries sustained during the collision caused him to resign and discontinue his business. The effect of his pre-accident physical condition on the loss of past and future income must be specified and calculated.

[92] The parties will have to pay their own costs. The issues of the case have only been realised when this case started on trial and both parties could have contributed to a more effective trial.

[93] ORDER

1. Absolution from the instance is ordered.
2. Leave is granted for the plaintiff to proceed on his claim on the same papers duly amplified should he be so inclined.
3. Each party to pay their own costs.
4. The plaintiff's claim for past medical and hospital expenses is postponed to the pre-trial roll of 24 October 2022: 14h15.

M OPPERMAN, J

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